THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

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



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| In the Matter of: | : | |
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| KENNETH L. BLACKWELL, | : | |
| | : | Board Docket No. 20-BD-019 |
| Respondent. | : | Disciplinary Docket No. 2016-D396 |
| | : | |
| A Member of the Bar of the | : | |
| District of Columbia Court of Appeals | : | |
| (Bar Registration No. 441413) | : | |

**REPORT AND RECOMMENDATION OF**
**THE AD HOC HEARING COMMITTEE**

The Office of Disciplinary Counsel ("ODC") has charged Respondent with violating Rule 3.4(c) of the District of Columbia Rules of Professional Conduct ("D.C. Rules") and the corresponding rules of Maryland (Maryland Rule 19-303.4(c)) and Virginia (Virginia Rule 3.4(d)) for failure to make child support payments ordered by Maryland and Virginia Courts and child support agencies. ODC also alleged violations of D.C. Rule 8.1(a), by knowingly making a false statement to ODC; D.C. Rule 8.4(c) and Virginia Rule 8.4(c), by engaging in dishonesty to the Virginia Division of Child Support Enforcement ("VDCSE"); and Maryland Rule 19-308.4(d), for conduct prejudicial to the administration of justice.

Respondent's defense to the child support charges rests on claims that he did not "knowingly" or "intentionally" fail to make the ordered support payments, but

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

made payments directly to the Complainant, the child's mother. He argues in mitigation that the Complainant improperly conditioned his ability to visit the child on the direct payment of child support, rather than through the Maryland or Virginia child support agencies, and created a hostile and acrimonious relationship with him, which prevented him from establishing a familial relationship with his child and between the child and his family. He also maintains that the Complainant filed her complaint with ODC to have him disbarred. His defenses to the other charges are denials predicated on technical legal arguments and his own legal theories.

The Hearing Committee first concludes that only the D.C. Rules apply. Respondent appeared *pro se*, and not as a "lawyer," in the matters that generated this current proceeding.

As to the merits, the record here is not as complete as it might be, particularly with respect to the Rule 3.4(c) charges. However, it is sufficient to establish that Respondent did not make all the required child support payments and did not make them to the child support agencies in either Maryland or Virginia. Thus, the Ad Hoc Hearing Committee finds that ODC has shown by clear and convincing evidence that Respondent has violated Rule 3.4(c).

With respect to the other charges, the Committee finds based on the hearing testimony and voluminous record, that:

(a) ODC has established by clear and convincing evidence that Respondent violated D.C. Rules 8.1(a) and 8.4(c) by knowingly making a false statement to ODC;

(b) ODC has not established a Rule 8.4(c) violation when Respondent told VDCSE that the Complainant had closed the child support case; and

(c) Respondent was not provided with sufficient notice concerning which jurisdiction's rule applied to interference with the administration of justice charge and, even if he had sufficient notice, ODC did not prove by clear and convincing evidence that Respondent had violated the applicable rule, D.C. Rule 8.4(d).

Finally, the Hearing Committee concludes that the sanction proposed by ODC is somewhat too lenient, notwithstanding extensive mitigating circumstances. Respondent's failure to recognize that he cannot stand behind technical legal rules to avoid court-ordered obligations is bothersome. He cannot, as an officer of the court, stand by arguments that he was not served or his belief that the Court or agency lacked jurisdiction. Rather, he was required to challenge those orders in Court to rely on those arguments. *See In re Clair*, Board Docket 14-BD-025, at 38 (BPR Jan. 1, 2015) ("An attorney who seeks to invoke the 'safe harbor' exception of Rule 3.4(c) for an 'open refusal' should do so expressly."), *recommendation adopted*, 148 A.3d 705 (D.C. 2016) (per curiam); *see also In re Hermina*, 907 A.2d 790, 794-95 (D.C. 2006) (per curiam) (appended Board Report). Moreover, Respondent's failure to follow the Board Rules and consistent filing of unauthorized pleadings, frequently without requesting leave, is troublesome. Accordingly, the Hearing Committee recommends that Respondent be suspended for a year with all but 90 days stayed pending three years of probation, subject to the conditions proposed by ODC with some modification.

## I. BACKGROUND

On February 6, 2020, ODC filed a Specification of Charges and Petition Instituting Formal Disciplinary Proceedings ("Specification") charging Respondent with violating the D.C. Rules listed above. The Specification was subsequently amended twice to add claims alleging violations of comparable Maryland and Virginia Rules of Professional Conduct, and a violation of Maryland Rule 19-308.4(d), for conduct prejudicial to the administration of justice.[1]

Respondent filed his Answer to the Specification on June 15, 2020. He opposed the First Amended Specification, arguing it substantially prejudiced his ability to defend against the charges.[2] Finding that ODC had not alleged any new facts in the Amended Specification, the Committee Chair denied his Opposition and granted ODC's motion to file the Amended Specification.[3] Respondent did not oppose the Second Amended Specification. Since no new facts were alleged in the Amended Specifications and Respondent did not file a new Answer, the Committee Chair deemed his Answer to the initial Specification applied to the Amended Specifications as well.[4]

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[1] The First Specification of Charges filed February 6, 2020, was followed by an Amended Specification of Charges filed on September 30, 2020, and a Second Amended Specification of Charges filed on October 19, 2020.

[2] *See Respondent's Opposition to Disciplinary Counsel's Motion for Leave to File Amended Specification of Charges*, dated October 5, 2020.

[3] *See* Hearing Committee Order, dated October 7, 2020.

[4] *See id.* at 5.

On June 26, 2020, Respondent filed a Discovery Request seeking all the documents in ODC's possession not privileged or work product. The Committee Chair granted Respondent's request in part and ordered ODC to provide "Respondent a complete set of non-privileged documents in the investigative files related to this matter, or [confirm] that arrangements have been made for inspection of the files by Respondent in the offices of Disciplinary Counsel . . . ."[5] Unhappy with ODC's production, Respondent submitted several additional pleadings seeking discovery.[6] In an Order dated December 11, 2020, the Committee Chair concluded that ODC's production of documents satisfied its obligations under Board Rule 3.1 and D.C Rule 3.8(e).[7]

An evidentiary hearing was held on December 14 and 15, 2020 before an Ad Hoc Hearing Committee (hereinafter "the Committee") consisting of Theodore D. Frank, Esquire, Chair, Dr. Robin Bell, Public Member, and Leonard J. Marsico, Esquire, Attorney Member. Jelani Lowery, Esquire, Assistant Disciplinary Counsel, represented ODC, and Respondent, Kenneth L. Blackwell, Esquire, appeared *pro se*.

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[5] *See* Hearing Committee Order, dated July 31, 2020, at 4, ¶ 8.

[6] *See Respondent's Motion to Compel Discovery*, dated August 5, 2020; *Respondent's Motion for More Definite Statement*, dated August 10, 2020; *Respondent's Reply to the Hearing Committee's July 31, 2020 Order*, dated August 12, 2020; *Respondent's Reply to the Hearing Committee's Order*, dated August 19, 2020, filed on August 21, 2020; *Respondent's Response to Disciplinary Counsel's Statement of Compliance with Board Rule 3.1*, dated August 21, 2020; *Respondent's Motion for Exculpatory Evidence*, dated November 18, 2020; *Respondent's Motion for Reconsideration of the Hearing Committee's Order*, dated December 2, 2020, filed on December 3, 2020.

[7] *See* Hearing Committee Order, dated December 11, 2020.

By Order issued on December 30, 2020, the Committee Chair established the pleading cycle for the parties' briefs and directed them to respond to several questions concerning whether the failure to pay child support was covered by D.C. Rule 3.4(c) and/or the corresponding Virginia Rule [3.4(d)]. ODC filed its Proposed Findings of Fact and Conclusions of Law and Recommendation as to Sanction on January 19, 2021 ("ODC Brief"); Respondent filed his brief on February 16, 2021 ("R. Brief") [8]; ODC's Reply Brief was filed on February 25, 2021 ("ODC Reply").[9]

Subsequent to the close of the pleading cycle, Respondent filed (i) a *Reply to Disciplinary Counsel's Post-Hearing Reply Brief ("Surreply")*, (ii) a *Motion for Leave to File Respondent's Reply to Disciplinary Counsel's Reply Brief*, (iii) a *Supplemental Motion to Dismiss*, all without a motion for leave, and (iv) a belated *Motion for Leave to File the Surreply*. ODC opposed Respondent's *Surreply* on the grounds that it was not authorized by the Board Rules. The Committee Chair struck Respondent's *Surreply*, denied his motions, directed ODC to respond to

[8] On January 28, 2021, the Chair granted *Respondent's Consent Motion for Extension of Time to File Post-hearing Brief.*

[9] In its Reply, ODC requested that the Committee adopt its Proposed Findings of Fact because Respondent's brief did not comply with the Chair's January 6, 2021 Order. ODC Reply at 1. The Committee Chair did not accept that suggestion, finding it too draconian a sanction. *See* Hearing Committee Order, dated March 12, 2021, at 2 ¶(a). ODC also maintains at several points in its Reply that Respondent had not established some of his factual claims by clear and convincing evidence. *See* ODC Reply at ¶¶ 54, 56, 59, 63, & 76. ODC does not cite any authority for this proposition, and the Committee believes it is erroneous. As the Committee reads Rule XI, the clear and convincing standard applies only to ODC; it does not apply to a respondent. (This is aside from exceptions not relevant here – namely mitigation under *In re Kersey*, 520 A.2d 321 (D.C. 1987).) Respondents need only produce such evidence as is necessary to convince the hearing committee, the Board, and the Court that ODC has not borne its burden. *Cf. In re Thorup*, 432 A.2d 1221, 1226 (D.C. 1981).

Respondent's *Supplemental Motion to Dismiss* within the times set forth in the Board Rules, and prohibited Respondent from filing any other documents without the concurrence of ODC and prior consent of the Committee Chair.[10]

Notwithstanding the ban on additional filings, on March 17, 2021, Respondent filed a *Reply to Disciplinary Counsel's Opposition to Respondent's Supplemental Motion to Dismiss*. No motion for leave was submitted. The Chair dismissed Respondent's last filing as violating his March 12, 2021 Order.[11] On March 19, 2021, Respondent filed a *Reply to the Hearing Committee's Order Dated March 19 2021* seeking reconsideration of that Order. On March 29, 2021, the Chair denied that request, but amended the March 12 Order to withdraw the requirement that Respondent obtain the consent of ODC to file additional post-hearing pleadings. Consent of the Committee Chair remained. The Committee Chair also directed the Office of Executive Attorney "to return unfiled to Respondent any post-hearing document submitted without the prior consent of the Chair, with the exception that joint motions or pleadings filed with ODC's consent may be accepted for filing."[12]

## II. FINDINGS OF FACT

Underlying Facts

1. Respondent is a member of the Bar of the District of Columbia Court of Appeals, having been admitted by motion on April 1, 1994, and assigned Bar

[10] *See* Hearing Committee Order, dated March 12, 2021, at 3-4.

[11] *See* Hearing Committee Order, dated March 19, 2021, at 2.

[12] *See* Hearing Committee Order, dated March 29, 2020, at 4.

number 441413. DX 1; DX 2 at 6; DX 4 at 1.[13] He has experience handling custody cases. Tr. 118. Respondent has not been disciplined before. Tr. 386, 384 (no aggravation offered by ODC).

2. Respondent is the father and Ms. Cinzia Allen is the mother of a minor child, D.B. D.B. was born in 2004. DX 11 at 17-18; Tr. 23-24.

3. Respondent and Ms. Allen were not married. They stopped living together in August 2004, shortly after D.B. was born. Tr. 24.

4. Respondent was a sole practitioner during the time-period covered by this proceeding. Tr. 56, 59; RX 20.[14]

5. Respondent was a resident of Maryland or the District of Columbia and has been during the relevant period of this proceeding. Tr. 184-85. Ms. Allen and D.B. were residents of Virginia throughout the same period. Tr. 122-23.

6. In August 2004, Respondent and Ms. Allen executed a "Parenting Plan," which was filed with and adopted by Virginia's 31st Judicial District Juvenile and Domestic Relations Court ("Virginia Court"). DX 9 at 1. Respondent drafted the Parenting Plan; it was signed by both parties. *Id.* at 8; Tr. 30.

[13] ODC's Exhibits will be cited as DX--; Respondent's Exhibits as RX--. The transcript will be cited as Tr.--. The following exhibits were admitted into evidence: DX 1-15, 17-39, and 40-42 (admitted after the Hearing pursuant to the Hearing Committee's Order, dated December 30, 2020); RX 1-10, and 12-19, except for pgs. 208-211 in RX 16. Tr. 277-78, 282-83, 313-15, 392-93. RX 20 is also admitted (*see* n.13).

[14] RX 20 was filed as an attachment to Respondent's Brief. With no objection by ODC, the Chair will admit it into evidence.

7. Under the Parenting Plan, Respondent and Ms. Allen were to have joint legal and physical custody of D.B. DX 9 at 3. Respondent was required to pay one-half of D.B.'s monthly expenses; the plan did not specify a dollar amount. *Id.* at 6.

8. The Court affirmed, ratified, and adopted "the 'Parenting Plan' . . . and . . . incorporate[d] all provisions therein that pertain to the custody and visitation of the child." *Id.* at 1. The custody provisions gave Respondent physical custody rights on three weekends each month, on alternating holidays, and on two weeks during the summer. *Id.* at 4. There is no mention of support obligations in the Court Order adopting the Parenting Plan.[15]

9. On June 16, 2006, Ms. Allen filed a *Motion to Review Visitation* in the Virginia Court. RX 3 at 16-17. She sought to amend Respondent's visitation rights and claimed that Respondent was not providing transportation when he visited, as required in the Parenting Plan. *Id.* at 16. In an Order adopted on August 18, 2006, the Court continued joint custody, awarded Ms. Allen primary physical custody, and required Respondent to pay for transportation associated with his visits. *Id.* at 20-21.

10. In September 2006, VDCSE sent a request to Maryland to establish a child support order under the Uniform Interstate Family Support Act. DX 11 at 1;

[15] ODC maintains that the Virginia Order required Respondent to make support payments. Tr. 69; *see* ODC Brief at 5-7, ¶¶ 5, 7, 12. Respondent disagrees and maintains that the support provision was imposed solely by Maryland. *See* R. Brief at 10, ¶¶ 8-9. ODC has not introduced any evidence or cited any legal support for its position. However, since Respondent was held in contempt by Virginia for not paying support, *see infra* FF 26, the Committee assumes that the Virginia Court required Respondent to pay support. (Findings of Fact will be cited as FF--).

DX 38 at 19-24. The request stated that Respondent owed back support; no amount was specified. DX 11 at 1-2.

11. On March 21, 2007, the Circuit Court of Prince George's County Maryland ("Maryland Court") issued an Order referring the VDCSE request to a Magistrate, setting the hearing for May 9, 2007, and requiring Respondent "to provide his three current paystubs, 2005 and 2006 W-2 tax or any other information that shows current income." DX 12 at 1. Respondent produced some documentation, but he was uncertain what he brought to the hearing. Tr. 36.

12. On May 10, 2007, the Maryland Court entered a Consent Order requiring Respondent, starting June 1, 2007, to pay Ms. Allen $156.00 per month in support. DX 13 at 1-2. Payments were to be made to the Prince George's County Office of Child Support Enforcement ("MOCSE"). *Id.* at 2-3.

13. The Court ordered Respondent to provide proof of income by the next hearing, which was scheduled for August 8, 2007, and, if not employed, the places where he had sought employment. *Id*.[16]

14. On October 2, 2007, the Maryland Court increased Respondent's child support obligation to $250 per month. DX 14 at 1. He was ordered to provide his income and tax information for 2005 and 2006 at the next hearing, which was scheduled for December 4, 2007. *Id.* at 2-3.[17]

[16] The record is silent whether the August 8th hearing was held, postponed, or cancelled.

[17] The record is unclear whether Respondent provided those documents.

15. On December 27, 2007, the Maryland Court entered a Consent Order requiring Respondent to pay $500 a month in support, assessing arrearages at $5,000, and ordering Respondent to pay an additional $50 a month until the arrearages were paid. Payments were to be made to MOCSE. DX 15 at 1-2.

16. On July 18, 2008, Ms. Allen filed a *Motion to Amend Visitation* in Virginia, requesting "supervised visitation" by Respondent at his sister's house. RX 5 at 29. She stated, *inter alia*, that Respondent had not provided her with his address, that Respondent did not provide the transportation required under the custody order, and that D.B. did not have a separate room when she visited. *Id.* A hearing was scheduled for September 4, 2008. *Id*. at 30.

17. On October 30, 2008, the Court denied Ms. Allen's request to modify the visitation requirements, continued the custody arrangements, and appointed a guardian-ad-litem. The Court continued the case to December 4, 2008. RX 5 at 37-38. There is no evidence whether that hearing was held or its results.

18. That hearing was apparently held on October 16, 2009, at which the Court continued the joint custody arrangement, designated Ms. Allen as the primary decision-maker, and required her to give Respondent notice of medical appointments. RX 5 at 41-42. Attached to the October 16th Order was a three-page "Standard Order of Visitation" (*id.* at 43) which set, *inter alia*, Respondent's visitation rights and required:

> [t]he parents [to] utilize a visitation notebook, to be . . . used to communicate information and concerns about the child between the parents, and shall travel with the child for each visitation. Each parent shall strive to make daily entries into this notebook. *Id.* at 46, ¶ 8.

Nothing in the Order explicitly required the parties to maintain records of child support payments. *See id.* at 43-46.

19. Respondent maintains that the notebooks contained information concerning the funds he gave Ms. Allen; her testimony was equivocal, indicating that it was "possibl[e]" the notebooks included records of Respondent's payments. Tr. 152. Ms. Allen testified that the notebooks were lost around 2018 when she lost the storage facility where she kept her records. Tr. 152-53.

Virginia Contempt Proceedings

20. On April 16, 2009, Ms. Allen filed a *Request for Virginia Registration of Foreign Support* in Virginia Court to register the December 27, 2007 Maryland support order. DX 17 at 1; FF 15. A hearing on the request was set for May 27, 2009. DX 18 at 1.

21. On April 22, 2009, Ms. Allen filed a *Motion for Show Cause and Rule* in the Virginia Court asking that Respondent be held in contempt for not complying with the Maryland support order. The arrearages were alleged to be $12,500. DX 19 at 1. Respondent was served personally. *Id.* at 3; DX 25 at 4. In Ms. Allen's supporting affidavit, she stated that Respondent "has purposely, willfully, and intentionally not paid any child support pursuant to the Order in the instant case." DX 19 at 7.

22. On May 27, 2009, a hearing was held on the *Show Cause* motion. DX 20. Respondent attended the hearing. Tr. 47. The Virginia Court continued the

matter to July 8, 2009, to allow Respondent to file papers regarding the court's jurisdiction. DX 20.

23. On July 8, 2009, the Virginia Court held that it had jurisdiction and registered the Maryland support order. It set October 16, 2009, for a further hearing on "related matters." DX 21 at 1-2. Respondent did not appear on July 8 because he did not receive notice of a hearing and did not know until October 16, 2009, that the support order had been registered. Tr. 47, 50; *see also* DX 20 (Summary of Proceedings but no attached order) and RX 14 at 196-97.

24. Respondent believed that the support order was registered for enforcement only and argues, citing Va. Code § 20-88.68(C), that the support order could not be modified since Maryland was the issuing state. That section provides that a Virginia tribunal "shall recognize and enforce, but may not modify, a registered order if the issuing tribunal had jurisdiction." Tr. 47, 50-51; RX 14 at 196-97.[18]

25. On October 23, 2009, Respondent filed a *Motion for Re-hearing* of the October 16th order, arguing that he had no notice that the October 16 hearing would involve issues related to support. DX 24.

26. At a hearing on December 9, 2009, the Virginia Court held Respondent in contempt without allowing him to present evidence or witnesses. Tr. 77-79. The court sentenced him to 90 days in jail, set a purge charge of $3,000, and set an appeal

[18] ODC has not introduced any evidence that might establish whether Maryland maintained jurisdiction over the December 27, 2007 support order once it was registered in Virginia.

bond of $16,000. DX 25 at 5. The size of the appeal bond effectively precluded him from appealing. Tr. 325, 375-76.

27. Respondent challenges the legality of the December 9, 2009 Order on the grounds that he was not given adequate notice or the opportunity to present evidence. Tr. 53-55, R. Brief at 19 ¶ 41. However, he did not appeal the contempt citation. Tr. 375-76.

28. On December 11, 2009, Respondent's brother paid the $3,000 purge charge to VDCSE. Respondent was released from jail. DX 26, DX 38 at 102; Tr. 64. The $3,000 was credited to Respondent's support obligations. DX 33 at 4.

Maryland Proceedings

29. In September 2009, MOCSE filed a *Petition for Contempt* with the Maryland Court. DX 27 at 2. Respondent was ordered to appear on November 12, 2009, to explain why he should not be found in contempt and/or not be incarcerated. *Id.* at 3-5.

30. On November 12, 2009, Respondent appeared and requested the Magistrate Judge to modify the support order. DX 28 at 2. He was advised that he needed to file a motion.[19] Respondent was unemployed at the time and the

[19] The transcript shows that there was a lengthy discussion on whether the motion should be filed in Maryland or Virginia. The Court believed it should have been filed in Virginia, while Respondent maintains that the support order had been issued in Maryland. DX 28 at 2-4; *see also* n.21*, infra.* As far as this record shows, Respondent did not file a motion in either jurisdiction.

Magistrate referred him to Arbor -- a Maryland program that assists people in finding employment. *Id.*[20]

31. On March 12, 2010, the Magistrate held a further hearing on the contempt motion. DX 31. Respondent told the Magistrate that he was unemployed and could not make the required payments. He advised the Magistrate that he had been incarcerated by Virginia, *id.* at 4, but maintained that Virginia had not issued an order relating to support and did not have jurisdiction over his support obligations. *Id.* at 2-4.[21] He requested that the Magistrate refer him again to the Arbor program; she refused. *Id.* at 12-13.

32. During the hearing, the Magistrate made it clear that Respondent was obligated to pay child support and that his limited financial resources did not excuse him from meeting that obligation. The Magistrate further rejected Respondent's interactions with D.B. during visitations as a substitute for financial support. *Id.* at 11-12. She set a hearing on the contempt citation before the Maryland Circuit Court for May 26, 2010. Respondent paid $100 to the court that day, March 12. *Id.* at 10, 13; DX 39 at 4.

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[20] A further contempt hearing was scheduled for January 29, 2010, before the Magistrate. DX 30. Respondent did not appear but faxed a letter to the court, supported by a doctor's letter, stating that he had back problems. *Id.* at 2. The Magistrate rescheduled the hearing to February 5, 2010. There is no evidence in the record whether the February 5th hearing was held or postponed. In rescheduling the hearing, the Court noted that Respondent had never paid child support. *Id*.

[21] The Magistrate explained to Respondent that since Ms. Allen had registered the Maryland Order in Virginia, Virginia had the ability to modify custody, visitation, or child support, whereas Maryland could only address support. *Id.* at 5-8. Respondent asserts that the Court was incorrect. *See* R. Brief at 20.

33. On May 26, 2010, Respondent told the Maryland Circuit Court that he had been making payments directly to Ms. Allen. DX 33 at 12. He had no documents to support that claim. *Id*. The Court advised Respondent that he would get credit with MOCSE or VDCSE for payments made directly to Ms. Allen only if he submitted a notarized statement from Ms. Allen certifying the specific amounts paid. *Id.* at 21. He requested that the Court again refer him to the Arbor program, which it did. *Id.* at 24.[22]

34. Over the following five months, Respondent made no child support payments to MOCSE or VDCSE. DX 39 at 4. He made some payments to Ms. Allen during that period, although the amount is in dispute. Tr. 84-85. Neither Respondent nor Ms. Allen had records of those payments. Tr. 55-57.

35. On October 8, 2010, Ms. Allen filed a *Request for Case Closure* form with VDCSE. DX 34 at 5; *see also id.* at 6-9. She stated that the parties had reached an "amicable resolution" of the support issues. *Id.* at 1. She agreed to the filing after Respondent begged her and told her "he would just pay directly to me so he would not lose his license to practice law." Tr. 132. She also did not want Respondent to be sent to jail. Tr. 223-24.

[22] In its brief, ODC argues Respondent was dishonest when he told the Maryland Court that he was not subject to any other child support order. ODC Brief at 11 n.2. The Committee finds that ODC did not establish that allegation by clear and convincing evidence. Although Respondent told the Maryland Court he was not subject to another child support order, he later acknowledged that there was a support order issued by the State of Washington. He asserted that there was a question about paternity and contended the order was issued without his being in attendance. DX 33 at 22-23. ODC did not submit any evidence to rebut his testimony, and the Maryland Court did not address the issue. *Id.* at 23. ODC has not relied on this statement to support any of the charges in this matter.

36. On October 12, 2010, VDCSE closed Ms. Allen's case and notified MOCSE. DX 38 at 142-43. It requested that Maryland not terminate the support order so that Ms. Allen could reopen the case at a later date, if necessary. DX 35 at 4; DX 38 at 143. VDCSE advised MOCSE that Respondent owed $18,250 in child support. *See* DX 39 at 4 (10/12/10 closed case entry row (TOT BAL column)).[23] That figure did not reflect any payments Respondent made directly to Ms. Allen. DX 39.

37. On November 17, 2010, Respondent and Ms. Allen filed a *Joint Motion to Dismiss* in the Maryland Circuit Court requesting that the matter be closed. They submitted copies of documents from VDCSE showing it had closed the matter in Virginia. DX 34.

38. On November 24, 2010, the Maryland Circuit Court held a hearing to consider the *Motion to Dismiss*. Respondent did not appear. DX 35. In an Order dated December 7, 2010, the Maryland Court dismissed the contempt proceedings, required Respondent to make payments directly to Ms. Allen, left the child support order in effect (as VDCSE requested), and closed the child support proceeding. DX 36.

39. After the Maryland and Virginia child support cases were dismissed in 2010, Respondent made periodic child support payments directly to Ms. Allen, but

[23] That figure includes $120 per month in fees assessed by VDCSE, starting in December 2009. DX 39 at 4. (FEES column).

did not pay the full $550 per month. He said that he paid what he could. Tr. 92, 133. Over time his payments "became less and less and less." Tr. 134.

Virginia Proceedings – Part II

40. On May 29, 2014, Ms. Allen contacted VDCSE to reactivate her child support case. DX 38 at 156; Tr. 134-37. On June 16, 2014, VDCSE did so. DX 38 at 157.

41. Starting in June 2014, VDCSE mailed "Change in Payee" notices to Respondent, directing him to send the child support payments to VDCSE. DX 37. The notice advised him that Ms. Allen was receiving VDCSE support and he should start making payments to it. DX 38 at 161-63.[24] VDCSE also requested verification of the status of Respondent's employment. *See id.* at 181. Respondent testified that he never received these notices, and ODC has admitted that it did not establish that he had. Tr. 96-97, 102, 271.

42. VDCSE's records indicated that, as of September 4, 2014, Respondent was $36,520 in arrears. DX 38 at 178-181; DX 39 at 4.[25]

43. During September and October 2014, VDCSE made several attempts to reach Respondent by email and by regular mail. DX 38 at 178-187. Respondent

[24] Respondent objects to this exhibit and DX 37 on the grounds there is no testimonial support for its accuracy, his address was extracted, and he was never served with it, as required under Virginia law. Tr. 95-97, 313-14; *see also Respondent's Motion for Reconsideration Regarding the Admissibility and Authenticity of Disciplinary Counsel's Exhibits Numbered 37 And 38*, dated Dec. 21, 2020. In that Motion, Respondent argued, *inter alia*, that the exhibits were hearsay. *Id.* at 4-6. The Chair overruled his objections at the hearing as the Board Rules allow the use of official records without supporting testimony. Tr. at 277-82; 314-15. *See also* Conclusions of Law ¶¶ 14-17, *infra,* for a fuller discussion of the issue.

[25] That amount includes the fees assessed by VDCSE. *See* n.23, *supra*.

maintains that he never received the mail. Tr. 96-97, 325-26; *see also* RX 10 at 114. Ms. Allen testified that VDCSE had trouble serving Respondent and that mail was returned to VDCSE. Tr. 170, 241; *see also, e.g.*, DX 38 at 172, 177, 181-83.

44. VDCSE records show that a VDCSE staff member left two voice mail messages for Respondent on August 12, 2014, concerning a "delinquency." DX 38 at 175-76. There is no evidence of what else, if anything, was said in the voice mail.

45. On September 17, 2014, a VDCSE staff member sent Respondent an email. DX 38 at 185. The staff member spoke to Respondent on October 20, 2014. The October call notes state that Respondent told VDCSE that he would begin making payments to them. DX 38 at 192. Ms. Allen testified that she was advised by VDCSE that they had spoken to Respondent. Tr. 138-40, 241. No payments were made through VDCSE after that call. DX 39 at 3.

46. On June 20, 2016, a VDCSE staff member called Respondent to ascertain why he was not paying support. Respondent stated that he had an agreement with Ms. Allen to close the case. DX 38 at 220. The staff member advised him that Ms. Allen told her that she did not want to close the case. Respondent got "very angry" and accused Virginia of "being racist". *Id.* The staff member contacted Ms. Allen again and she confirmed that she did not want to close the case. *Id.* at 221.

47. Respondent maintains that for VDCSE to commence enforcement proceedings, it was required to serve him by certified mail. DX 38 at 165, 168-69, 171, 182-83; *see* RX 16 at 206 (Va. Code, § 20-60.5 (A)(2) ("[T]he notice of change

in payment shall be served by certified mail, return receipt requested, and shall contain (i) the name of the payee . . . , (ii) the name of the obligor, (iii) the amount of the periodic support payment, the due dates of such payments and arrearages . . . .")). There is no evidence that it had done so as of June 20, 2016. ODC has conceded the point. Tr. 271.

Respondent's Payment of Child Support

48. Except for the funds remitted by the Virginia and Maryland courts, amounting to $3,100, Respondent did not make child support payments to either the Maryland or Virginia agencies. DX 2 at 7; DX 4 at 2; *see also* DX 28 at 2; DX 39 at 4; Tr. 44-46. Respondent testified that since he was not employed, it was not possible for him to make regular monthly payments. Tr. 56. He periodically gave cash to Ms. Allen when he could. Tr. 127-28; Tr. 155-57; RX 10 at 132. Frequently, the amount was $200 and typically the funds were given around D.B.'s birthday, the end of school in June, and Christmas. Tr. 141-42, 177.

49. Respondent maintains that he sent Ms. Allen $1,500 in April 2013 and sent Ms. Allen an unspecified amount of money in May 2013. RX 10 at 141. He testified he made $6,500 in child support payments to Ms. Allen in 2016, Tr. 351-52, 367-370, and paid $5,000 to D.B.'s school. Respondent kept no records of these payments or of the other amounts he paid or when he paid them. Tr. 345, 367, 372-73.

50. In addition to these payments, Respondent's sister, Gwendolyn Benton, delivered money to Ms. Allen on at least three occasions, "during times that D.B.

was preparing for school and maybe Christmas." Tr. 317-18. Ms. Benton testified that those three payments totaled $2,000. Tr. 319. She did not remember when she gave Ms. Allen the funds. Tr. 317. ODC did not cross-examine Ms. Benton, Tr. 322, and the Committee finds her testimony credible.

51. Ms. Allen estimated that from June 2007 through December 14, 2020 (the date she testified at the disciplinary hearing), Respondent had made child support payments directly to her totaling $10,000. Tr. 140-43. Respondent did not provide his own estimate of the total amount he paid to Ms. Allen in child support during that period. Tr. 93-94.

52. Respondent's failure to pay the required child support adversely affected Ms. Allen and D.B. She had to replace her car after an accident and did not have the funds to make new car payments. She lost her apartment, and she and D.B. became homeless, "bouncing from friends to friends," Tr. 144, until she was able to find transitional housing in 2019. RX 10 at 114.

53. Respondent admitted that he had failed to make the child support payments to either VDCSE or MOCSE, as required under the terms of the child support orders. He also admitted that he had not paid the total required. Tr. 110-17, 201, 237-38. Based on the record, the Committee finds that, while Respondent made some child support payments to Ms. Allen, ODC has established by clear and convincing evidence that Respondent did not pay Ms. Allen the full amount of child support required and that he did not make the required payments to either MOCSE or VDCSE.

Relations between Respondent and Ms. Allen

54. After a positive start, the relationship between Respondent and Ms. Allen deteriorated materially. RX 1; RX 2. The mutual animosity was reflected in their testimony during the hearing. The record is also replete with evidence of Ms. Allen's annoyance with Respondent's failure to pay child support and his concerns about her care for D.B. and her hostility to him.

55. On July 16, 2004, Ms. Allen filed a *Motion for Temporary Custody* in the Virginia Court alleging she believed that Respondent was relocating to Boston and that he would take the child with him. RX 2 at 5. Respondent never moved to Boston and remained in the Washington, D.C. area throughout the relevant period. Tr. 184-85.

56. In September 2005, Respondent wrote to Ms. Allen expressing concern about his difficulties in communicating with her about D.B. and expressing fear that she was turning D.B. against him. RX 19 at 233-35.

57. On December 10, 2007, Ms. Allen filed a *Motion to Amend Visitation* with the Virginia Court. She requested that all D.B.'s visits with Respondent stop "until father gets his life together." She alleged that he was living in an unstable environment and complained that he was not providing transportation for D.B.'s visits, as required under the custody Order. RX 4 at 25. The *Motion* was dismissed on February 21, 2008, as no one appeared. *Id.* at 27.

58. On December 19, 2007, Respondent wrote to Ms. Allen expressing his frustration that she had to have things "her way" and to complain that he had

difficulty in talking to her as she lost her temper. He contended she was not allowing D.B. to speak to him by telephone, and she was denying him the opportunity to visit with D.B. He explained, in an apparent response to Ms. Allen's concerns over money, that it also cost him money to visit with D.B. He explained that he used his money to rent a car to visit D.B. and pay for food. RX 19 at 236-37. He also complained about the lax supervision of the babysitter in a September 4, 2007 letter to Ms. Allen. *Id.* at 235.

59. In July 2008, Ms. Allen filed a motion in the Virginia Court requesting that Respondent's visitations be supervised because he was not arranging for transportation, had failed to give Ms. Allen his address, and was sleeping with D.B. in his bed, as well as expressing her concern as to D.B.'s well-being. RX 5 at 29.

60. On December 18, 2008, Respondent filed a *Motion For Pendente Lite Relief to Amend Visitation* in the Virginia Court. He sought revision of an August 2006 visitation Order to reinstate his visitation rights on weekends, holidays, and birthdays.[26] He alleged that Ms. Allen denied him the ability to visit with D.B. on her birthdays or holidays, and that she did not allow him to visit with D.B. from August 2008 to October 18, 2008, when he was able to obtain assistance from the police to visit with D.B. RX 5 at 32-34. He also requested revision of the visitation provisions that required him to provide transportation as he did not have a car and was dependent on public transportation. *Id.* at 35. There is no evidence as to the disposition of this Motion.

[26] Neither party introduced a copy of the Order.

61. On January 31, 2014, Ms. Allen filed a complaint with the D.C. Child and Family Services Agency alleging that Respondent was physically and sexually abusing D.B. The agency investigated the complaint and concluded that the charges were unfounded. RX 6 at 48.

62. On May 23, 2014, Ms. Allen filed another motion in the Virginia Court to "stop visitation until [Respondent] undergoes counseling," to limit his visitation rights to every other Saturday, to prohibit over-nights, and to require supervised visitation limited to the Woodbridge, Virginia area. She also requested that the child be exchanged at a police station. RX 7 at 51. The record is silent as to the disposition of this motion.

63. Between July 2009 and August 2019, Respondent wrote to Ms. Allen complaining about the manner she was raising D.B., her refusal to allow him to visit, her efforts to turn D.B. against him, her animosity toward him, and her conditioning his ability to visit with D.B. on the payment of support. In a 2014 email, Respondent repeated his concern over D.B.'s "psychological, physical and spiritual development" in addition to his lack of access. RX 10 at 141. He expressed concern about D.B.'s absences from school and her weight and lack of exercise. RX 10 at 122, 128, 129, 137, 139, 145; RX 19 at 239. He testified that D.B. was 25 pounds overweight in 2009 and weighed in excess of 200 pounds in 2019.[27] Tr. 336-38. In his opinion, Ms. Allen was more interested in money than in his visiting with his child. Tr. 30-31, 341.

[27] D.B. would have been four or five in 2009 and 14 or 15 in 2019.

64. Respondent testified at length as to his efforts to maintain a relationship with D.B. and to establish a relationship with his family. *See* Tr. 330-348. In his view, those efforts were frustrated by Ms. Allen, who alienated D.B. from Respondent. Tr. 338. His claim was supported by Ms. Benton, who testified that she had not visited with D.B. since 2018 and that Ms. Allen was reluctant to talk with her "because of her feelings that she wanted no part of any connections or communications receiving any money." Tr. 320. Eventually, Ms. Allen asked Ms. Benton not to contact her. *Id.* Ms. Benton stated that she felt alienated from D.B. She stated that when Respondent had custody of D.B., the family participated in events with D.B. Tr. 321-22.

65. Ms. Allen's emails to Respondent expressed concerns that he was not civil to her, and about his harassment and disrespect for her. They also reflected her concerns about money, the difficulty in scheduling visits, and his failure to pay fees, which jeopardized her credit. RX 10 at 126, 129, 130, 134, 139-40, 144. The tone of several of the emails was relatively hostile and became more aggressive over time. *See, e.g.*, *id.* at 114, 125. At times, she indicated that D.B. did not want to see Respondent. *Id.* at 125-26, 129, 134. And, while she testified that she wanted Respondent to make his payment to VDCSE, Tr. 137, 159, other evidence indicated that she wanted to be paid directly: "I hope [you] can bring some money when [you] come, hopefully before Saturday." RX 10 at 135; Tr. 343.

Disciplinary Counsel's Investigation

66. In October 2016, Ms. Allen filed a complaint with ODC alleging that Respondent had ignored court-ordered child support and was about $50,000 in arrears. DX 5. ODC forwarded the complaint to Respondent for his response. DX 40.

67. On December 29, 2016, Respondent responded that he had never evaded or ignored court orders or willfully failed to make child support payments, "[t]he allegations made by Ms. Allen are false, without legal foundation and meritless." DX 6.

68. On February 9, 2017, ODC sent a follow-up inquiry, asking, *inter alia*, (a) "You state that you never 'willfully failed to make child support payment pursuant to any court order.' If you have not 'willfully' failed to make court-ordered child support payments, do you agree that you have failed, however, to make the court ordered support payments," and (b) to "explain why Ms. Allen's allegation are 'unfounded' and 'meritless.'" DX 7.

69. On February 21, 2017, Respondent replied "no" to the first question, and, in response to the second, reiterated his blanket denial without further explanation. DX 8.

Credibility

70. Both Respondent and Ms. Allen testified. Neither distinguished themselves. Respondent's responses to ODC's questions were contentious, disputing the basis of ODC's question, and providing extensive testimony that went

well beyond the question. *See, e.g.*, Tr. 30-31, 39, 41, 43-44, 46, 49-50, 52-54, 65, 69, 106-08, 108-09. He was admonished by the Chair to respond to the question and not attempt to make his case in responding to the questions. *E.g.*, Tr. 32-36, 86, 89, 110. Several of his responses showed that he was relying on technical legal arguments in denying ODC factual allegations. *See* Tr. 30-31, 102. Much of his testimony was inconsistent with the documentary evidence and contradictory, *e.g.*, he admitted that he did not make all the required payments but stated that Ms. Allen made sure he met the annual support requirements. *See* Tr. 351-56.

71. Ms. Allen was openly hostile to Respondent when questioned by him and had a somewhat selective memory, remembering Respondent's failure to make payments better than payments he may have made. *See* Tr. 125, 131-32 153-95, 190-99. Respondent argues that her statements are not credible since she filed several documents that were false and improperly accused him of wrongful conduct. These include the July 16, 2004 motion arguing that Respondent was about to leave for Boston, FF 55, her 2009 affidavit when she stated that Respondent had not paid anything in child support, FF 21,[28] and her submission of a claim of physical and sexual abuse of D.B., which was held to be unfounded. FF 61.

[28] Her claim that Respondent was $12,500 in arrears is also dubious. The order requiring him to pay $550 per month had been in effect for almost 16 months at the time the affidavit was sworn to. At $550 per month, the total due would have been $8,800. Adding the months when a lower payment was due would bring the total of $10,024. The $12,500 figure appears to have been taken from the VDCSE records, *see* DX 39 at 4, but Ms. Allen knew that those records were inaccurate as his direct payments were not included.

## III. CONCLUSIONS OF LAW

A. Applicable Disciplinary Rules

1. In its December 30, 2020 Order, the Committee directed the parties to address which of the potentially applicable Rules of Professional Conduct – Maryland's, Virginia's, or the District of Columbia's – apply in this matter. Respondent is a member of the D.C. Bar and his alleged misconduct derives largely from his failure to comply with support orders issued by Maryland and/or Virginia child support agencies or courts. ODC argues that, assuming VDCSE and MOCSE are tribunals, Maryland Rule 19-303.4(c) applies for Respondent's conduct from June 1, 2007 through December 7, 2010, and Virginia Rule 3.4(d) from April 2009 through December 2009. It also argues that the D.C. Rules apply to the alleged Rule 8.1(a) and Rule 8.4(c) violations for submitting a false statement to ODC, and Virginia Rule 8.4(c) applies to the false statements made to the Virginia authorities. ODC Brief at 19-22. Respondent generally agrees with ODC recommendations as to the applicable rules. R. Brief at 32.

2. The Committee concludes that this proceeding is governed solely by the D.C. Rules. D.C. Rule 8.5, which governs choice of law issues in disciplinary proceedings, provides:

> (a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction where the lawyer is admitted for the same conduct.

> (b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the Rules of Professional Conduct to be applied shall be as follows:
>
> > (1) For conduct in connection with a matter pending before a tribunal, the rules to be applied shall be the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise, and
> >
> > (2) For any other conduct,
> >
> > > (i) If the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction . . . .

3. The Comments to Rule 8.5 do not directly address the issue of whether a lawyer is subject to the Rules of Professional Conduct of another jurisdiction when the lawyer appears as a party and not as a lawyer representing others. But the opening sentences of Rule 8.5 state that the D.C. Rules may be applied where a D.C. lawyer is "subject to the disciplinary authority of both this jurisdiction and another jurisdiction where the lawyer is admitted for the same conduct." *See* D.C. Rule 8.5(a). Comment [2] explains that the rule is designed to address situations in which a "lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court" with different rules.

4. Respondent was not acting as a lawyer in either Maryland or Virginia. In both jurisdictions, where he was a derelict father, he proceeded *pro se.* He is not a member of either the Maryland or Virginia bars and did not seek admission to appear in either the Maryland or Virginia courts. He was acting in the same manner as any non-lawyer might in the same situation. Respondent's participation as a *pro se* defendant did not make him subject to the disciplinary rules of either Maryland

or Virginia merely because he was a member of the D.C. Bar.[29] As far as those jurisdictions were concerned, he was only a father appearing on his own behalf who happened to be a self-employed attorney. Consequently, his obligations under the Rules of Professional Conduct derive solely by virtue of his membership in the D.C. Bar.[30] *See In re Pelkey*, 962 A.2d 268, 277-78, 280 (D.C. 2008) (applying D.C. Rules to respondent for misconduct occurring in California where he was not admitted and did not seek *pro hac vice* admission); *In re Confidential*, 664 A.2d 364, 367 (D.C. 1995) (ethical rule applied "only to transactions having a reasonable relationship to an attorney's conduct in his professional capacity").

B. Respondent's Motions to Dismiss[31]

(1) The Initial Motion

5. On August 7, 2020, Respondent filed a *Motion to Dismiss* arguing, *inter alia*, the Specification did not raise any justiciable ethical violation, and did not provide adequate notice of the underlying facts supporting the charges. He also denied that he made a false statement to ODC, arguing that the statement was a truthful response to an ambiguous question. With the exception of the claims with

[29] The Committee is not aware of any Rule of Professional Conduct that requires an attorney to seek admission *pro hoc vice* when appearing in a foreign jurisdiction *pro se.* Indeed, a finding that Respondent was subject to the Maryland or Virginia disciplinary rules would also raise questions whether Respondent was engaged in the unlawful practice of law as he did not seek admission *pro hac vice.*

[30] The Committee notes that there is no material difference between Rule 3.4(c) in the three jurisdictions. ODC agrees. *See* ODC Brief at 21.

[31] Under Board Rule 7.16, the Hearing Committee's role in considering the Motion to Dismiss is limited to making findings of fact and making a recommendation to the Board. *See In re Stanton*, 470 A.2d 281, 285 (D.C. 1983) (per curiam) (appended Board Report).

respect to notice, they are basically the same as Respondent's legal defenses to the charges and the Committee addresses them below.

6. With respect to Respondent's claim of lack of notice, the Court of Appeals has held that "the specification of charges . . . [must] fairly put [the] respondent on notice of the . . . charges against him." *In re Austin*, 858 A.2d 969, 976 (D.C. 2004) (citing *In re Hager*, 812 A.2d 904, 917 n. 14 (D.C. 2002)). In evaluating whether sufficient notice has been provided, the Court has held that:

> we look not only to the Specification of Charges, but also to subsequent filings by [Disciplinary] Counsel to determine whether a respondent had sufficient notice of the charges. *See* [*Austin*, 858 A.2d at 970, 976] (holding that respondent charged with Rule 8.4(c) dishonesty had received sufficient notice that he was also charged with fraud where [Disciplinary] Counsel's post-hearing brief added details to the pre-hearing charges, and "respondent did not object to the facts as stated by [Disciplinary] Counsel or file any exception with the Board".

*In re Kanu*, 5 A.3d 1, 7 (D.C. 2010).

7. Although the Specification could have been more specific, particularly with respect to which events supported each alleged Rule violation, the Specification gave Respondent sufficient notice of the basis of the charges. He was a party to the various court proceedings noted in the Specification and was aware, before the Specification was served, that he was subject to a VDCSE order to make child support payments. *See* FF 26-28, 34-36. Accordingly, the Committee recommends that the Board deny Respondent's *Motion to Dismiss*.

(2) The Supplemental Motion

8. On March 8, 2021, Respondent filed a *Supplemental Motion to Dismiss*, arguing that he was prejudiced by the three-year delay between the filing of Ms. Allen's complaint and the Specification. He claims that, because of that delay, Ms. Allen's loss of the "visitation notebook"[32] precluded him from establishing the total amount of child support he paid.

9. ODC did not address the delay argument. However, Respondent has not borne the evidentiary burden to support a motion to dismiss for delay. The Court has made it clear that a delay in the filing of a Specification of Charges warrants dismissal only where it has caused sufficient prejudice to raise due process questions. *In re Saint-Louis*, 147 A.3d 1135, 1148 (D.C. 2016); *see also In re Ponds*, 888 A.2d 234, 244 (D.C. 2005); *In re Schneider*, 553 A.2d 206, 212 (D.C. 1989). It may, however, mitigate the sanction. Here, Respondent has not shown that the delay in the filing of the specification deprived him of his due process rights. Respondent was well aware that Ms. Allen was not satisfied with his support payments long before she filed the complaint.

10. ODC opposes Respondent's motion to dismiss due to the alleged absence of the visitation notebooks. It argues any lack of evidence of the amount he paid resulted from Respondent's refusal to make the payments through the Virginia and Maryland child support agencies, and his failure to keep his own records. It

[32] Respondent also questions, without any evidence, the accuracy of Ms. Allen's statement that the notebook was lost. *See Supplement to Motion to Dismiss* at 3.

contends that the evidence does not support his claim that the visitation notebooks included data on payments. It also faults Respondent for not advising ODC that the notebook existed during ODC's investigation.[33]

11. ODC's arguments are persuasive. Respondent knew that except for the period of time when the Court allowed him to make payments directly to Ms. Allen, he was required to make his child support through the child support agencies. He elected not to; even if he could not make the full monthly payments on a regular basis, as he maintains, he could still have made what partial payment he could through the child support agencies, as he now recognizes. *See* R. Brief at 45. Further, as a lawyer experienced in custody matters (FF 1), he should have known that if he was not complying with the required payment procedures, he should, in his own defense, keep a record of his payments. He cannot shift the burden of his defense to Ms. Allen.

12. The Committee also agrees with ODC that the testimony supporting claim the notebooks contained data as to his payments is thin. Ms. Allen testified that they "possibl[y]" might have included that data. FF 19. Even if they contained the record of his payments, that does not justify the dismissal of the Specification. At most, it establishes a failure of proof of the exact amount that he was in arrears after 2009, an argument that goes only to the severity of his violations of the applicable orders. Respondent has admitted, and the Committee has found, that he

[33] *See* ODC *Opposition to Respondent's Supplemental Motion to Dismiss* at 2.

did not contribute the full child support payment required under the Maryland and Virginia Court orders.

13. For the reasons set forth above, the Committee recommends that the Board deny Respondent's *Supplemental Motion to Dismiss*.

C. Respondent's Motion for Reconsideration of the Chair's Evidentiary Ruling

14. On December 21, 2020, Respondent filed a *Motion for Reconsideration Regarding the Admissibility and Authenticity of Disciplinary Counsel's Exhibits Numbered 37 and 38*. Respondent contests the Chair's ruling accepting for filing ODC's Exhibits 37 and 38. Tr. 277-283 (admitting DX 37), 313-15 (admitting DX 38). Respondent argues that the information is hearsay as the exhibits were submitted for the truth of the information contained without any foundation that might permit their admittance under an exception for hearsay. He also argues that testimony was required to establish that they were official documents and that ODC's Supplemental Exhibits, submitted at the request of the Chair, do not cure this evidentiary flaw. Finally, he contends that his inability to cross-examine a supporting witness substantially prejudiced him.

15. In deciding to admit the exhibit, the Chair relied on the Board Rules which establish a relaxed standard for the admission of evidence. *In re Slaughter*, 929 A.2d 433, 444-45 (D.C. 2007); *Settles v. United States*, 570 A.2d 307 (D.C. 1990) (per curiam). Board Rule 11.3 provides that non-cumulative evidence which is relevant and not privileged shall be received by the Committee and given such weight as the Committee deems appropriate. Committees "should be guided, but

[are] not bound, by formal rules of evidence." *In re Mitrano*, 952 A.2d 901, 919 (D.C. 2008) (appended Board Report). The "[a]uthenticity of . . . documents [can] be established by circumstantial evidence." *Slaughter*, 929 A.2d at 444.[34] In addition, hearsay is admissible under Rule 11.3, although the Committee must weigh the evidence to determine its credibility and value. *In re Kennedy*, 605 A.2d 600, 603 (D.C. 1992) (per curiam); *In re Shillaire*, 549 A.2d 336, 343 (D.C. 1988) ("The only legitimate issue as to [hearsay evidence] relates to the weight that should be accorded to it.").

16. The exhibits in question, while redacted to some extent, are clearly VDCSE documents. Each of the documents bears the logo of the Virginia Department of Social Services, are consistent from one to the next, and reflect information relevant to Respondent's payment *vel non* of child support and VDCSE's efforts to obtain payment. His address and other apparently confidential information, such as telephone numbers, are redacted, but the material shows no signs that it was altered. Further, the notes are corroborated by other documentary evidence and testimony submitted in this disciplinary hearing. They accurately reflect the Maryland Court proceedings, including a statement in the transcript of the November 24, 2010 hearing in Maryland. *Compare* DX 38 at 143, 145, *with* DX 35 at 5. Moreover, he has not questioned the accuracy of the contents of the documents.

[34] *See Settles*, 570 A.2d at 309 ("Proof of the authenticity of the writing need not be established by direct testimony but may be established by the nature and contents of the writing combined with the location of its discovery.").

17. It would have been better for ODC to have offered a witness validating the exhibits, as several of the documents contain short-hand notations that are not entirely obvious. However, the Committee finds that ODC has demonstrated that it made a reasonable effort to do so. It subpoenaed an employee of the VDCSE, DX 41 at 13, and was precluded from enforcing the subpoena under Virginia law. *Id.* at 2-4. ODC's inability to obtain a supporting witness does not warrant rejecting the exhibits under these circumstances, although ambiguities in the exhibits and the lack of a witness bears on the weight to be accorded them. *See* Conclusions of Law ¶ 49 *infra*. For these reasons, *Respondent's Motion for Reconsideration* of *the Chair's Evidentiary Ruling* is denied.

D. The Rule 3.4(c) Charge

18. Neither the Court of Appeals nor the Board on Professional Responsibility has addressed whether disciplinary charges can be based on an attorney's failure to pay court-ordered child support. Rule 3.4(c) provides that "A lawyer shall not . . . [k]nowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists."[35]

19. There is no indication in the D.C. Rules or the Comments whether Rule 3.4(c) was intended to apply to court orders unrelated to the practice of law. The Committee is therefore without guidance on the propriety of imposing disciplinary

[35] Rule 1.0(n) defines a tribunal as a "court, an arbitrator in a binding arbitration proceeding . . . or other body acting in an adjudicative capacity." ODC maintains that VDCSE is a tribunal within the meaning of Rule 3.4(c). ODC Brief at 20-21. Respondent agrees, R. Brief at 32, as does the Committee.

sanctions for a licensed attorney's failure to pay child support. The disciplinary rules were designed to "provide a framework for the ethical practice of law."[36] But, Ms. Allen filed the complaint to force Respondent to pay child support, not to sanction conduct committed by an attorney representing a party in a court of law. Tr. 123. As all lawyers, including Respondent, are subject to the same range of enforcement mechanisms as non-lawyers, the Committee questions the need to add discipline as an additional enforcement mechanism.

20. Disciplinary systems are also ill suited to address issues surrounding deteriorating relations between the parents, such as arose in this case. The factors typically considered in mitigation in disciplinary proceedings are far different than those that might be applicable in child support cases. Further, disciplinary systems are ill equipped to balance the competing claims that Respondent failed to pay required support and that Ms. Allen withheld visitation in an effort to force Respondent to pay support. Family courts, and related entities, were created to address these issues and have the expertise to address them. Attorney disciplinary systems do not.

21. Finally, it is difficult to see the difference under the D.C. Rules between the failure to pay child support and the failure to pay a civil judgment in a malpractice or other tort case, or in contract litigation. In all these cases, the attorney has presumably not obeyed an order of the Court as well.

[36] *See* District of Columbia Rules of Professional Conduct: Scope at [2].

22. However, ODC has pointed the Committee to several cases in other jurisdictions where lawyers have been sanctioned for failure to pay child support.[37] In addition, the Court of Appeals has imposed reciprocal discipline in cases involving foreign sanctions for not paying child support.[38] Since D.C. Bar Rule XI authorizes imposing reciprocal discipline only where the misconduct in another jurisdiction constitutes misconduct in the District of Columbia, *see* Rule XI, §11(c)(5), the Committee feels constrained to conclude that discipline can be imposed for the failure to pay child support.[39] Thus, we turn to the question of whether ODC has established a violation of that Rule by clear and convincing evidence.

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[37] *See Disciplinary Counsel's Pre-Hearing Memorandum*, dated Sept. 28, 2020, Appendix of Cases. The States in which sanctions were imposed include Colorado, Kentucky, Louisiana, Massachusetts, New Hampshire, and New York. In some of those cases, the respondent had been found guilty of a criminal offense or conduct amounting to such. ODC has not alleged a Rule 8.4(b) violation or otherwise predicated its claims on a criminal offense.

[38] *See In re Ramacciotti*, 683 A.2d 139 (D.C. 1996) (appended Board Report); *In re Sibley*, 990 A.2d 483 (D.C. 2010); *In re Giacomazza*, 113 A.3d 1083 (D.C. 2015) (per curiam); *In re Richardson*, Bar Docket No. 2003-D259 (Letter of Informal Admonition September 7, 2004). *Giacomazza* involved alleged violations of Rules 8.4(a) and 8.4(d); a Rule 3.4(c) violation was not charged. In *Ramacciotti*, the respondent was charged with a Rule 3.4(c) violation in addition to Rules 8.4(b) and 8.4(d). *Sibley* involved a charge based on Florida's rule which made a willful failure to pay child support misconduct. It also involved charges that the respondent engaged frivolous and vexatious litigation. There is no analysis in those decisions of the issues of concern to the Committee.

[39] Title IV-D of the Social Security Act requires states to establish procedures for suspending, under certain conditions, professional, driver's, and recreational licenses for failure to pay child support. As such, it appears to make suspension of a professional license for non-payment of child support federal policy. D.C. Code § 46-225.01 implements that policy for the District of Columbia. Although ODC cited that provision, it has not specifically relied on it here. Moreover, the Committee finds it inapplicable as the procedures set forth in that section were not followed. In all events, that provision refers child support cases to the Board and thus, leaves the appropriate treatment of these matter to the Court.

E. Respondent Violated D.C. Rule 3.4(c)

23. The basic facts in this proceeding are not complex, nor are they really in dispute. Respondent was ordered by the Maryland Court to pay Ms. Allen child support of $500 a month plus $50 to cover arrearages. FF 15. The Maryland Order was registered in Virginia. FF 23.

24. Respondent knew he had to make those court ordered payments. He consented to the Maryland Order, FF 15, and he admitted during the Maryland March 12, 2010, show cause hearing that he was obligated to pay child support. Indeed, the Maryland Court made his obligation to pay child support abundantly clear. FF 32-32. He was also held in contempt in Virginia for not making those payments. FF 26.

25. Respondent did not make those payments on a regular basis to either the Maryland or Virginia child support agencies. Instead, he made limited payments on an irregular basis directly to Ms. Allen. Typically, they were made in cash, and as he admitted did not equal the amount required under the orders. While ODC may not have established the precise amount of the shortfall, it has shown that the payments did not equal to the amount he was obligated to pay, as he admitted. FF 39.[40]

[40] ODC, ultimately, has the burden to prove that the respondent violated the Rules. But within this context, the burden shifts to the respondent once ODC makes a prima facia case. It would then be up to ODC to rebut the respondent's evidence. Here, ODC has established a prima facia case, and it was up to Respondent to rebut it. *See In re Szymkowicz*, 195 A.3d 785, 789 (D.C. 2018) (per curiam). He did not do so.

26. Respondent argues, however, that ODC did not establish by clear and convincing evidence that he "willfully and intentionally" failed to pay the required support. R. Brief at 34. As defense, he relies, *inter alia*, on the payments he made directly to Ms. Allen and his commitment to D.B.'s welfare, notwithstanding Ms. Allen's efforts to alienate her from him, as a defense. He maintains that Ms. Allen's testimony as to the amount of his payments is not credible and contends that his payments equaled the full amount due each year. He also challenges her credibility and blames her failure to keep the visitation notebooks for his inability to establish the amount he paid. He argues that establishing a "knowing or intentional" failure to make the payment turns on his ability to pay. Finally, he maintains that he was not obligated to make payments to VDCSE because he was never served with any notice requiring him to do so.[41] *Id.* at 34-39.

27. None of these arguments succeed. The principal problem with his position is that ODC does not have to establish that Respondent did not make all the payments. It is sufficient that it established by clear and convincing evidence that Respondent substantially did not fulfill his court-imposed obligations. FF 11, 12, 14-15, 26. Partial compliance with a court order may bear on ODC's decision whether to charge a violation or may mitigate the sanction for violating the court orders, but paying only a portion of his obligation is sufficient to establish a Rule 3.4(c) violation. So too is Respondent's failure to remit the funds to MOCSE or

[41] ODC admitted that it did not establish that Respondent received notice of VDCSE's Change of Payee Notices, requiring him to remit his payments to VDCSE. Tr. 271. It also did not submit any evidence of the legal basis for its claim that Respondent was subject to the VDCSE order.

VDCSE for disbursement to Ms. Allen. FF 45, 53; *see also* FF 33-34. Indeed, his failure to make the payments through VDCSE or MOCSE establishes a Rule 3.4(c) violation alone, although a less serious violation than the failure to pay court-ordered support at all.

28. The remainder of Respondent's arguments are no more convincing. His claim that he contributed the full amount due each year under the Maryland Order is not credible. He admitted he did not make all the required payments, and his own exhibits show that Ms. Allen frequently requested additional funds. FF 65. None of his exhibits show that he paid her anything close to $550 per month or $6,600 a year. To the contrary, he admitted during the March 12, 2010 Maryland Court hearing that he had not paid what was required, allegedly because he could not. FF 31. It is also clear that, contrary to his claim, Ms. Allen did not testify that he made the required payments. Her testimony was consistent that he was slow to pay, did not pay the full required amount, and that, as a result she suffered financial hardship. FF 51-52.

29. Respondent's claim that the loss of the visitation notebook deprived him of the ability to make his case merits but brief attention. The argument fails for the reasons explained above.[42] It is unclear whether those notebooks recorded his payments and, in all events, both parties were required to maintain the notebook as required by the October 16, 2008 Order. FF 19. Respondent cannot shift the burden to Ms. Allen of showing the amounts he paid. Moreover, had he made the payments,

[42] *See* Conclusions of Law ¶¶ 10-11, *supra*.

he would not have attempted to argue during the hearing and in his Brief, R. Brief at 38, that he could not make the payments.[43]

30. Similarly, without merit is his claim that any failure to pay the $550 per month in child support was not knowing or intentional. He maintains that a knowing or intentional failure to make the payment turns on his ability to pay. R. Brief at 38, 45. However, Respondent was ordered by the Committee to ask the IRS for copies of his tax returns for 2005 through the present. *See Order*, dated August 19, 2020 at 3-4. He never did. Rather, he stipulated on the record that he did not intend to rely on a defense of inability to pay. Pre-hearing Transcript, July 30, 2020, at 7. He reiterated that position in his *Reply to the Hearing Committee's Order*, dated August 19, 2020, filed on August 21, 2020, when he stated, it is: "Respondent's intention not to raise inability to pay as a defense was made abundantly clear and has not changed." *Id.* at 8.

31. Respondent may have changed his mind, but that came too late.[44] The tax information was material and relevant to whether Respondent was able to pay the child support and to the truth of any claim that he could not make those payments. Respondent may not now claim that he was unable to make the payments as a defense to the Rule 3.4(c) charge.

[43] Similarly, had he paid the $550 a month, he would have paid off the $5,000 arrearage by 2015. Presumably, he would have sought to reduce the monthly payment to $500. There is no evidence in the record that shows Respondent sought that relief.

[44] Respondent's claim that there is a difference from "inability" to pay and the impossibility to pay, Tr. 56-58, is spurious.

32. The bottom line is that Respondent knew what his child support obligations were and that he did not satisfy them. Further, he did not make them to VDCSE or MOCSE as required. ODC is not required to prove more to establish that he "knowingly disobeyed" a Court order. Accordingly, the Committee concludes that ODC has established by clear and convincing evidence that Respondent violated Rule 3.4(c).

F. Respondent Violated D.C. Rule 8.1(a) & Rule 8.4(c) When He Denied That He Had Willfully Failed to Make Child Support Payment Pursuant to Any Court Order.

33. D.C. Rule 8.1(a) provides that "a lawyer in connection with a . . . disciplinary matter, shall not[] [k]nowingly make a false statement of fact." Rule 8.4(c) prohibits attorneys from engaging "in conduct involving dishonesty, fraud, deceit, or misrepresentation."

34. ODC argues that Respondent violated those Rules when he stated in response to ODC's question that he had not "evaded or ignored court orders," nor had he "willfully failed to make child support payments" pursuant to any court order." ODC Brief at 16, 38.

In a follow-up question, ODC asked:

> You state that you never "willfully failed to make child support payment pursuant to any court order." If you have not "willfully" failed to make court-ordered child support payments, do you agree that you have failed, however, to make the court ordered support payments. DX 7 at 1.

Respondent said "no." DX 8 at 1; Tr. 107.

35. ODC maintains the record clearly establishes that Respondent failed to make child support payments and, since he did not have any records of his payments, his responses were at least recklessly dishonest.[45] ODC Brief at 36. Thus, it maintains that he violated Rules 8.1(a) and 8.4(c). It also notes that Respondent admitted he failed to make the required payments in the hearing before the Maryland Court and also admitted it in his testimony at the disciplinary hearing. *Id.* at 38.

36. Respondent argues that the question posed by ODC was ambiguous and subject to interpretation. He read it to ask whether he had never paid support. He also argues there is no evidence he *"intentionally* refused to pay." R. Brief at 38; *see also id.* at 41-42. He reiterates his claim that, on an annual basis, he paid Ms. Allen the full amount required and that she "made sure that . . . [he] paid the full amount that was due." In addition, since he "made every effort to be involved in the care, custody and care of his child, . . . [including] financial support," his answer was truthful. *Id*. at 38.

37. The Committee agrees that ODC's initial question was subject to interpretation, but Respondent's argument does not wash. Neither Rule 8.1(a) nor 8.4(c) requires that he "intentionally" make a false statement to ODC. Rule 8.1(a) only requires that he "knowingly" make a false statement.[46] Respondent knew he

[45] A Rule 8.4(c) violation may be established by sufficient proof of recklessness. *In re Romansky*, 825 A.2d 311, 317 (D.C. 2003). To establish reckless dishonesty, Disciplinary Counsel must prove by clear and convincing evidence that Respondent "consciously disregarded the risk" created by his actions. *Id.*

[46] Rule 8.1(a) requires that Disciplinary Counsel prove by clear and convincing evidence that Respondent "knowingly" made a false statement. The Terminology section of the Rules defines

was required to make the child support payments of $550 per month, and he knew he failed to do so. At a minimum, Respondent's response was deceptive.[47] A reasonable person in his position would have understood that, in posing the initial question and clearly in the follow-up question, ODC was not asking whether he never made any payments. It was clear, to a reasonable person, that ODC wanted to know whether he had failed to make the payments required under the court orders, as it was investigating Ms. Allen's complaint alleging that Respondent had ignored court orders to make child support payments, and that he owed approximately $50,000 in back support. FF 66.

38. Respondent had been served with the disciplinary complaint before he filed his response. *Id*. Respondent was on notice of what ODC was investigating. He cannot rely on a questionable technical reading of the question to avoid a responsive answer. *Cf. In re Shorter*, 570 A.2d 760, 768 (D.C. 1990) (per curium); *In re Daniels*, 11 A.3d 291, 298 (D.C. 2011). Respondent knew ODC was asking about the status of his compliance with court-ordered support payments. But he

"knowingly" as "actual knowledge of the fact in question" which "may be inferred from circumstances." Rule 1.0(f). Comment [1] to Rule 8.1 explains that "it is a separate professional offense for a lawyer knowingly to make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct." Moreover, the "[l]ack of materiality does not excuse a knowingly false statement of fact." Rule 8.1 cmt. [1].

[47] Under Rule 8.4(c) case law, deceit is defined to include the "suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead . . . ." *In re Shorter*, *supra* at 767 n.12. To establish deceit in the context of 8.4(c), it must be proved that the respondent had knowledge of the falsity, but it is not necessary that the respondent had intent to deceive or defraud. *In re Schneider*, 553 A.2d 206, 209 (D.C. 1989) (finding deceit where attorney submitted false travel expense forms but did not intend to deceive the client or law firm and there was no personal gain); *see also Shorter*, 570 A.2d at 767 n.12.

dissembled his response to ODC, despite his prior admission before the Maryland Court that he had not complied with its order. *See In re Mardis*, Board Docket No. 14-BD-085 (BPR July 13, 2017), *appended* HC Rpt. at 72-73 (finding a Rule 8.1(a) violation where the respondent misled Disciplinary during its investigation despite prior admission), *recommendation adopted*, 174 A.3d 868 (D.C. 2017) (per curiam); s*ee also In re Boykins*, 999 A.2d 166, 174 (D.C. 2010). The Committee concludes ODC has established by clear and convincing evidence that Respondent knowingly provided a negative answer to its question whether he had willfully failed to pay child support as required by the court orders, and thus violated Rule 8.1(a).

39. The same considerations apply to the Rule 8.4(c) charge. That Rule prohibits lawyers from engaging in "conduct evincing 'a lack of honesty, probity or integrity in principle; [a] lack of fairness and straightforwardness . . . .'" *Shorter*, 570 A.2d at 768 (citation omitted). There the Court held the respondent violated Rule 8.4(c) when he "knew what information the IRS was after, but for his own benefit refrained from supplying that information even when asked questions that grazed the truth." *Id.* "[T]he 'technically true' nature of respondent's answers to questions posed by revenue agents, and his abstinence from actual false statements or affirmative acts of concealment, . . . evince[s] a lack of integrity and straightforwardness, and therefore dishonest." *Id.* The same analysis applies here.

40. That Respondent tried to maintain a close relationship with D.B. and was concerned about her physical and emotional health does not transform his denial into an accurate or even largely accurate one. As the Maryland Magistrate advised

him, emotional support does not substitute for financial support. FF 31. It also does not rebut ODC's showing that his payments fell short of the court-ordered, required amount. If Respondent wanted to rely on his intentions and efforts, a truthful answer would have acknowledged his failure to pay the full amount and explained his defense. He did not do that.

41. Given the standard established in *Shorter*, *supra*, the Committee concludes ODC has established by clear and convincing evidence that Respondent's negative answer to its question whether he had willfully failed to pay child support as set forth in the court orders violated Rule 8.4(c).

G. ODC Has Not Established That Respondent Violated D.C. Rule 8.4(c) When He Told VDCSE that Ms. Allen Had Closed the Virginia Case.[48]

42. ODC claims that Respondent violated Rule 8.4(c) when he told VDCSE on June 20, 2016, that Ms. Allen had closed the case in Virginia, and he could pay her directly. ODC's case with respect to this claim turns on VDCSE's case notes. While the Committee has allowed ODC to submit those records, it is also required to weigh their reliability carefully. *See Slaughter*, 929 A.2d at 444-45; Board Rule 11.3. In contrast to supporting that Respondent was aware of the Virginia proceeding, the Committee finds those exhibits are insufficient to establish that Respondent was dishonest in telling VDCSE that Ms. Allen had closed the case.

[48] ODC charged Respondent with violating both D.C. and Virginia Rule 8.4(c). Since the Committee concluded that only the D.C. Rules apply, it will address the claim under the D.C. Rule and precedent.

Fully understanding the notes is complicated by their use of shorthand and some of the notes raise questions as to the events noted.

43. To establish a D.C. Rule 8.4(c) violation, ODC had to show that Respondent was aware that Ms. Allen had reopened the case and that the Maryland Order permitting him to pay her directly was no longer in effect or that he knew he could not rely on that Order. ODC has not made that showing by clear and convincing evidence. At best, it has shown that Respondent knew that VDCSE was pressuring him to pay; not that the Maryland Order terminating the case and allowing him to pay Ms. Allen directly was no longer in effect.[49]

44. In 2010, Ms. Allen and Respondent filed papers in Maryland and Virginia requesting that the support cases be closed; Respondent would pay Ms. Allen directly. Virginia closed its case and Maryland granted the motions. The Maryland Court's Order terminated Respondent's obligation to pay through MOCSE and allowed him to pay directly. Neither party appeared for the hearings on the motions to dismiss the case. FF 37-41.

45. Six years later, Ms. Allen called VDCSE requesting that it reopen the case. FF 40. There is no evidence that she notified Respondent that she did that

[49] ODC has also not shown the jurisdictional basis on which VDCSE could effectively vacate a Maryland Order or proceed without regard to the Maryland Order. The Committee is not suggesting that Virginia could not reinstate or enforce Respondent's obligation to pay Ms. Allen notwithstanding the Maryland Order. It only concludes that ODC has not established the legal basis on which Virginia acted.

prior to June 20, 2016.[50] Even assuming *arguendo* she told Respondent she was going to reopen the case, that does not put him on notice that she had, or that the Maryland Order was no longer in effect.

46. VDCSE had substantial difficulty in reaching Respondent to enforce the child support order. FF 39, 41, 43-44. Notices to him were returned unopened, and Ms. Allen testified that VDCSE was having trouble reaching him. FF 43. Indeed, ODC admitted that Respondent was not served with the Change of Payee notices. FF 41.

47. Thus, although the record shows that Respondent was aware that VDCSE was attempting to get him to make its payments through their office, there is no evidence that Respondent was aware on June 20, 2016, when he spoke to VDCSE, that he could not rely on the Maryland Order allowing him to make payments to Ms. Allen.[51] Indeed, as late as August 2019, Respondent stated in an email to Ms. Allen "the court order regarding child support states that I am to make payment directly to you, not [to] the division of child support." RX 10 at 114 (emphasis omitted).

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[50] On August 10, 2019, Respondent emailed Ms. Allen requesting her address, as money orders mailed to her had been returned. On August 12th, Ms. Allen replied that she would not be providing her address and stated, "that there [was an] open case of child support" pending with "the division of child support." RX 10 at 114. This email correspondence occurred three years after the June 2016 telephone conversation with VDCSE.

[51] The Committee acknowledges the Maryland Order allowed Ms. Allen to reopen the case, but ODC has not shown that Respondent knew, or should have known, that she had re-opened the case.

48. Respondent has maintained throughout this saga that Virginia had no jurisdiction over him and that, in all events, it could not modify the Maryland Order. FF 24. The jurisdictional position is dubious, but he has a statutory argument concerning the latter position. *Id*. ODC has not rebutted the statutory argument.

49. ODC argues that Respondent cannot avoid an adverse finding by deliberately avoiding being served by VDCSE.[52] However, ODC has the burden of proving its case by clear and convincing evidence, and just as Respondent may not shift the burden of proof to Ms. Allen to establish the amount he paid, ODC cannot rely on an inference to meet its heavy burden.

50. In addition, any alleged effort by Respondent to avoid service does not cure the defect that ODC has not established by clear and convincing evidence that Virginia could nullify or modify the Maryland Order or could require Respondent to pay through VDCSE notwithstanding the Maryland Order. Accordingly, the Committee concludes that ODC has not established by clear and convincing evidence that Respondent violated Rule 8.4(c) when he told VDCSE that Ms. Allen had closed the case.

H. Conduct Prejudicial to the Administration of Justice

51. ODC argues Respondent violated Maryland Rule 19-308.4(d) when he withheld information from the Maryland Court and his failure to pay child support required MOCSE to file a petition for contempt involving multiple hearings. It also

[52] ODC Brief at 12-13.

claims that Respondent's efforts to challenge Virginia's enforcement of the support requirement burdened the Maryland courts.

52. Maryland Rule 19-308.4(d) prohibits an attorney from engaging in conduct prejudicial to the administration of justice. Under Maryland law, conduct is prejudicial to the administration of justice when it affects the actual operation or efficacy of the legal system, *Attorney Grievance Comm'n v. Rand*, 981 A.2d 1234 (Md. 2009), or would "negatively affect a reasonable person's perception of the legal profession." *Attorney Grievance Comm'n v. Maldonado*, 203 A.3d 841, 862 (Md. 2019).

53. Respondent maintains he was not given adequate notice of the charge and pursuing the claim therefore violates his due process rights. He also argues that ODC hasn't established his conduct negatively affected the operation of the Maryland courts.

54. There are several procedural problems with this charge. First, the Committee has found that only the D.C. Rules apply to this matter. Second, ODC never alleged a violation of D.C. Rule 8.4(d), the comparable D.C. Rule to Maryland's 19-308.4(d). Third, while the Second Amended Specification included the Maryland Rule 19-308.4(d) charge, ODC submitted into evidence *only* the original Specification, which did not include the Maryland Rule 19-308.4(d) charge. *See* DX 2 at 14.

55. Turning to Respondent's lack of notice claim, the Court of Appeals has taken a fairly restricted view of when a respondent may successfully make a lack of

due process claim for lack of notice. It has held that a respondent's due process rights were not violated where the respondent "was aware of the nature of the charges against him . . . and therefore was not lulled into a false sense of security." *In re Slaughter*, 767 A.2d 203, 212 (D.C. 2001). Similarly, there is no due process violation where ODC's exhibits gave the respondent notice of the rules allegedly violated and the factual basis of the claimed rule violations. *See, e.g.*, *Austin*, 858 A.2d at 976; *Kanu*, 5 A.3d 1 at 7 (specifying that analyzing a due process challenge generates an inquiry not only to the specification, but "also to subsequent filings by [Disciplinary] Counsel").

56. Here, Respondent was given notice of the factual basis that might support a charge that he interfered with the administration of justice. The original Specification includes allegations relating to his Virginia contempt citation, his consistent failure to pay child support, his alleged failure to provide relevant information to the Maryland courts, and the number of hearings held concerning his failure to pay child support. *See* DX 2, ¶¶ 8-9, 14. The difficult question, however, is whether Respondent was given sufficient notice of the actual Rule he allegedly violated. Had ODC submitted the Second Amended Specification into evidence, Respondent wouldn't have a notice claim; but ODC submitted only the initial Specification, which did not include the Maryland Rule 13-908.4(d) or a D.C Rule 8.4(d) charge. Thus, Respondent could have believed that ODC had dropped the interference charge.

57. However, in response to a question from the Chair, ODC stated at the outset of the hearing that it was alleging a Rule 8.4(d) charge based on the Maryland contempt proceeding. Tr. 10.[53] It is unclear whether that abbreviated statement, without reference to which jurisdiction's rule ODC was referring to, provided Respondent with adequate notice of the issues he would have to address. At the same time, Respondent did not object to ODC's statement at the time, and did not seek a continuance to allow him to prepare his response. *See In re Slattery*, 767 A.2d 203, 209 n.8 (D.C. 2001).

58. Even if ODC's statement was sufficient to put Respondent on notice that he faced an interference with the administration of justice charge based on the Maryland contempt proceedings, the question remains whether Respondent was on notice that he faced a Rule 8.4(d) charge under the D.C. Rules. The Committee concludes he was not. ODC never alleged a D.C. Rule 8.4(d) violation. There is no reason why Respondent should have understood that he might face that charge under the D.C. Rules.

59. Moreover, there are differences between D.C. Rule 8.4(d) and Maryland Rule 19-308.4(d).[54] The Maryland Rule appears to be broad and to encompass "conduct [that] tends to bring the legal profession into disrepute and is

[53] The Chair asked ODC: "Are you basing any of your charges of rule violations on the contempt citation rather than just a failure to pay child support?" ODC responded: "the 8.4[d], Interfering in the Administration of Justice, is based on the contempt proceedings that were in Maryland. Virginia does not have an 8.4[d] rule, so we are basing that on the Maryland proceedings." Tr. 10.

[54] *Compare, e.g.*, *Attorney Grievance Comm'n v. Rand*, 981 A.2d at 1242-44, *and Attorney Grievance Comm'n v. Jacobs*, 185 A.3d 132, 143-44 (Md. 2018) *with In re Mayers*, 943 A.2d 1170 (D.C. 2008) (per curiam); *In re Hopkins*, 677 A.2d 55, 59-61 (D.C. 1996).

therefore prejudicial to the administration of justice." *Attorney Grievance Comm'n v. Hoerauf*, 229 A.3d 802, 823 (Md. 2020), *Attorney Grievance Comm'n v. Goff*, 922 A.2d 554, 566 (Md. 2007) (MLRPC 8.4(d) is violated where attorney conduct "reflects negatively on the legal profession and sets a bad example for the public at large." (citation and quotation marks omitted)).

60. The D.C. Rule is more specific and requires ODC to establish four elements: (a) the conduct was improper, (b) the conduct bore directly upon the judicial process with respect to an identifiable case or tribunal, (c) the conduct tainted the judicial process in more than a de *minimis* way, *i.e.* it must have at least potentially had an impact on the judicial process to a serious and adverse degree, *Hopkins*, 677 A.2d at 60-61, and (d) the conduct occurred during a judicial proceeding, not after its conclusion. *In re Carter*, 11 A.3d 1219, 1224 (D.C. 2011).

61. In light of these differences between the Rules and the lack of clear notice that Respondent could be charged under the D.C. Rule, the Committee finds that Respondent was not provided sufficient notice of the charges against him. Although the Maryland Rule is broader and, in many respects more difficult to refute, alleging a Maryland Rule violation does not give the Respondent notice of the factors he must be prepared to refute.

## I. ODC Has Not Established That Respondent Violated D.C. Rule 8.4(d) During the Maryland Court Proceedings

62. Assuming *arguendo* that Respondent was on notice of a D.C. Rule 8.4(d) charge, the Committee concludes that ODC did not establish by clear and

convincing evidence that Respondent's conduct, potentially or actually, had an impact on the judicial process to a seriously adverse degree.

63. As noted, to establish a Rule 8.4(d) violation, ODC is required to establish that Respondent's conduct (a) was improper, (b) bore directly upon the judicial process with respect to an identifiable case or tribunal, (c) tainted the judicial process in more than a *de minimis* way by impacting the judicial process to a serious adverse degree, and (d) occurred during a judicial proceeding. ODC argues a violation based on Respondent's (i) failure to pay child support to MOCSE, which then had to file for contempt, (ii) withholding of the Virginia contempt citation from the Maryland Court, and (iii) assertion to the Maryland Court that he had no income, which then led to referrals to the Arbor program. ODC Brief at 31-34.

64. While there were a number of hearings in Maryland on MOCSE's efforts to hold Respondent in contempt, ODC has not shown that Respondent's conduct was improper or that he abused the process. Respondent appeared at the hearings or notified the Maryland Court when he couldn't. He attempted to convince the Maryland Court that he could not pay the support and should not be held in contempt. He is clearly entitled to do that. *See* FF 30-33. The Maryland Court dismissed the contempt proceeding at Respondent's and Ms. Allen's request. Respondent did not otherwise abuse the process. He was entitled to defend against a contempt motion, including by convincing the movant to accept a settlement.

65. The second claim is also inaccurate and thus does not support the charge; Respondent told the Maryland Court that he had been jailed in Virginia and

it is clear from the transcript that the Magistrate understood what he was telling her. FF 31. Finally, Respondent was twice referred to the Arbor program during the pending Maryland Court proceeding to determine support. FF 30, 33. But the Magistrate's referrals occurred during scheduling continuances, and there is no evidence that such a referral is irregular in support proceedings or wasted the court's time and resources.

66. Accordingly, the Committee concludes that ODC has failed to establish a D.C. Rule 8.4(d) violation by clear and convincing evidence.

## IV. SANCTION

Determining the appropriate sanction is typically among the hardest parts of a disciplinary decision. This case is no different. Rule XI enjoins the disciplinary system to impose consistent sanctions in similar cases; yet each case is unique. Rule XI, § 9(h)(1). Finding comparable cases on which to base the recommended sanction is difficult, as it involves subjective judgments. *See In re Yelverton*, 105 A.3d 413, 429 (D.C. 2014), *cert. denied*, 136 S. Ct. 168 (2015); *In re Kitchings*, 857 A.2d 1059, 1060 (D.C. 2004) (per curiam). The absence of any prior decisions from the Court in this matter makes it more difficult.

ODC recommends that Respondent be suspended from the practice of law for a one-year period, with all but 60 days stayed in favor of three-years' probation. Under ODC's proposal, Respondent would be required to file monthly certifications from VDCSE that he is complying his support obligations. In addition, probation

would be conditioned on his not violating any of the Rules of Professional Conduct. ODC Brief at 40-41.

Respondent argues that, due to the mitigating factors in this case, an informal admonition is the appropriate remedy, citing *Richardson*, Bar Docket No. 2003-D259 (Letter of Informal Admonition). R. Brief at 48. He acknowledges that he disobeyed the Maryland Court child support orders requiring him to make payments to MOCSE and that he made payments directly to Ms. Allen, albeit not the $550 monthly payment required. He acknowledges that he should have paid what he could to MOCSE, R. Brief at 45, but paid the funds to Ms. Allen because he hoped by paying when he visited D.B. he could maintain a relationship with her. *Id.* at 46. He also notes that he lost his mother during this period while he was engaged in extensive litigation with Ms. Allen. *Id.* at 45-46. Finally, "he accepts responsibility for his actions and regrets this outcome." *Id.* at 46.

"The purpose of imposing attorney discipline is not to punish the attorney, but rather to serve the interests of the public and of the profession." *In re Askew*, 225 A.3d 388, 397 (D.C. 2020) (per curiam); *In re Cleaver-Bascombe*, 986 A.2d 1191, 1195 (D.C. 2010) (per curiam) (citations omitted). In determining the appropriate sanction, the Committee is to weigh

> (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. *In re Pelkey*, 962 A.2d 268, 281 (D.C. 2008) (alteration in original) (citation omitted).

Respondent's conduct was serious as it involved a knowing failure to obey a Court order, and prejudiced Ms. Allen and D.B. by depriving them of needed funds. The underlying misconduct did not involve dishonesty but an avoidance of his obligation to pay support. However, his conduct in connection with ODC's investigation and prosecution of Respondent's misconduct involved obfuscation and a lack of candor. On the other hand, Respondent has no prior disciplinary record. In addition, he acknowledged his misconduct in his brief, although other portions of his brief and his conduct during the hearing question the sincerity of that acknowledgement. The Committee also finds problematic both Respondent's continual filing of unauthorized pleadings, without requests for leave, and his reliance on technical arguments and his own legal theories rather than seeking resolution of those issues through the courts. In both these regards, Respondent's misconduct warrants a more severe sanction than an informal admonition or Board reprimand.

The last factor – mitigation – weighs heavily in his favor. His testimony concerning his efforts to maintain a relationship with D.B. was compelling, and there is little evidence to rebut his claims that Ms. Allen interfered with those efforts. Withholding support and paying the support directly to Ms. Allen was one of the few ways in which Respondent could put pressure on Ms. Allen to allow him to establish a meaningful relationship with D.B.

As this is a case of first impression in this jurisdiction, there are no Court decisions which provide clear guidance as to the appropriate sanction. Although Rule XI provides that reciprocal discipline can be imposed only if the misconduct would be a violation of the D.C. Rules, *see* Rule XI, § 11(c)(5), the decisions imposing reciprocal discipline are of little, if any, guidance: each involved far more serious misconduct than established here, including criminal conduct and allegations of frivolous and vexatious litigation. There is no discussion in the Court's opinions of which of the underlying charges supported the reciprocal discipline. *See* Conclusions of Law ¶ 22 n.38,*supra.* The case on which Respondent relies, *In re Richardson*, *supra*, is distinguishable. The respondent there paid his past due child support payments before the sanction was imposed. Bar Docket No. 2003-D259, at 3.

Given the lack of D.C. precedent, the Committee has reviewed decisions in other jurisdictions for failure to pay child support. Those decisions also do not provide much help as the range of sanctions is broad, from disbarment to a short suspension.[55] Further, disbarment and long suspensions are inconsistent with the sanctions imposed by our Court where a Rule 3.4(c) is the primary basis for imposing

[55] *See, e.g.*, *Kentucky Bar Ass'n v. James*, 452 S.W.3d 604 (Ky. 2015) (disbarment for conviction of flagrant non-support); *In re Giberson*, 581 N.W.2d 351 (Minn. 1998) (per curiam) (indefinite suspension for willful failure to pay child support and ignoring disciplinary investigation); *In re Spring*, 801 So. 2d 327 (La. 2001) (per curiam) (two-year suspension, deferred subject to two-year probation); *Colorado v. Rosenfeld*, 452 P.3d 230 (Colo. 2018) (suspended for a year and a day, with all but three months stayed with a three year probation); *Disciplinary Counsel v. Geer*, 858 N.E.2d 388 (Ohio 2006) (per curiam) (one year suspension for failure to pay child support and failure to respond to disciplinary inquiry); *In re Chase*, 121 P.3d 1160 (Or. 2005) (en banc) (per curiam) (thirty-day suspension for failure to pay full child support).

discipline. Typically, the Court has suspended the lawyers for periods of thirty days to six months. *See, e.g.*, *In re Padharia*, Board Docket No. 12-BD-080 (BPR Apr. 7, 2017), *recommendation adopted*, 235 A.3d 747 (D.C. 2020) (six-month suspension with fitness); *In re Askew*, 96 A.3d 52 (D.C. 2014) (per curiam) (six-month suspension, all but 60 days stayed with a one-year probation); *In re Murdter*, 131 A.3d 355 (D.C. 2016) (per curium) (same); *In re Lopes*, 770 A.2d 561 (D.C. 2001) (six-month suspension, followed by two years probation).

The closest case the Committee found from another jurisdictions that is consistent with D.C. precedent is *In re Chase*, *supra*. There, the lawyer paid child support infrequently, had been held in contempt as a result, failed to comply with the terms of his probation, and had been arrested. In mitigation, he did not contest the trial court's determination that he violated the Oregon equivalent of Rule 3.4(c). The Oregon Supreme Court suspended him for thirty days. *Chase*, 121 P.3d at 1162, 1164-65.

Respondent's misconduct here is more serious than in *In re Chase* in that he violated not only Virginia Rule 3.4(c), but D.C. Rules 8.1(a) and 8.4(c) as well. Moreover, he has not paid his child support arrearages. As a result, the Committee believes a longer suspension is required. At the same time, the emotional problems Respondent faced in dealing with Ms. Allen were substantial, and his frustration with having to deal with a disciplinary proceeding in addition to other enforcement efforts was manifest.

For the reasons set forth above, the Committee believes ODC's recommendation of a one-year suspension, with all but 60 days stayed in favor of three-years of probation is close to the appropriate sanction.[56] However, the Committee believes that the 60-day initial suspension is too short. Respondent's efforts to evade ODC's questions during the hearing and his insistent filing of unauthorized pleading warrant a 90-day initial suspension.

In addition, the Committee is concerned Respondent will not be able to meet the financial terms of the probation. Respondent's income is periodic and meeting the monthly requirement on a regular basis may be difficult. Thus, the Committee recommends that the VDCSE certificate should be based on a three-month period, *i.e.* that VDCSE certify that Respondent has paid the amount due for three months – $1,650 – over a three-month period.[57] Finally, nothing should preclude Respondent from seeking modification of his support obligation in the appropriate forum.

[56] The Committee notes that, by the time this case works its way through the disciplinary process, Respondent will no longer be obligated to pay child support. Under Virginia law, child support expires when the child turns 19, except where the child is still in high school. Va. Code § 20-124.2(C) (2018). D.B. was born in 2004 and will turn 19 sometime in 2023 – two years from now. In the event that this case is not resolved before Respondent's obligation to pay support ends, the Committee recommends that Respondent be suspended for the full year, unless VDCSE certifies that he has contributed the full amount of his obligations, including arrearages, between the release of this Report and Recommendation and the date he is no longer legally obligated to pay child support.

[57] Given the difficulty ODC had in obtaining a witness from VDCSE, the Committee is uncertain whether Respondent will be able to obtain a certificate from VDCSE. In that event, the Committee recommends that Respondent submit an affidavit under oath attaching evidence demonstrating compliance with this condition.

## V. CONCLUSION

For the reasons set forth above, the Committee recommends that Respondent be suspended from the practice of law for a period of one year, with all but 90 days stayed in favor of three years of probation. As a condition of probation, Respondent shall be required to (1) submit either a certificate from VDCSE showing that over a three-month period he is complying with court-ordered child support and arrearage payments, or, if VDCSE will not provide the certificate, Respondent shall file an affidavit with ODC attaching evidence demonstrating compliance with this condition, and (2) not violate any Rules of Professional Conduct.

AD HOC HEARING COMMITTEE

Theodore D. Frank, Chair

Dr. Robin Bell, Public Member

Leonard J. Marsico, Attorney Member