THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

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

In the Matter of:	:	
	:	
MARLENE (KEMI) MORTEN,	:	
	:	
Respondent.	:	Board Docket No. 18-BD-027
	:	Disc. Docket No. 2011-D363
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 272575)	:	

REPORT AND RECOMMENDATION OF
HEARING COMMITTEE NUMBER EIGHT

Respondent, Marlene (Kemi) Morten, is charged with violating the DC Rules of Professional Conduct ("DC Rules") and, in the alternative, the Rules Regulating the Florida Bar ("FL Rules"). The charges arose from Respondent's representation of a Florida resident, Sammie McDonald, Jr., against his Florida employer, Glades Electric Cooperative ("Glades"), in two related matters before the U.S. District Court for the Middle District of Florida – union arbitration whose outcome the employer challenged in federal district court (and in the U.S. Court of Appeals for the Eleventh Circuit) and an employment discrimination lawsuit that was settled before trial.

The Specification of Charges ("Specification") alleges that Respondent engaged in 1) non-negligent misappropriation, in violation of FL Rule 5-1.1(f) or DC Rule 1.15(d); 2) dishonesty, in violation of FL Rule 4-8.4(c) or DC Rule 8.4(c); and 3) conduct that did not comply with the special trust account and written

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

reporting requirements of FL Rule 5-1.1(g)(2) (applicable to handling of "nominal or short-term funds" that cannot earn interest) or conduct that did not comply with the general trust account record-keeping requirements of DC Rule 1.15(a).[1] Disciplinary Counsel contends that Respondent committed all of the charged violations and should be disbarred as a sanction for her misconduct. Respondent claims multiple violations of due process, contends her conduct did not violate any of the Rules, and argues that all the charges should be dismissed. As set forth below, Hearing Committee Number Eight ("the Hearing Committee") recommends that all the charges against Respondent be dismissed.

SUMMARY

Choice of Law. Throughout this proceeding, both Disciplinary Counsel and Respondent have argued that the DC Rules should apply to the alleged misconduct in this case. But as explained below, since all the alleged violations (that Disciplinary Counsel has not abandoned) arose in connection to proceedings before the U.S. District Court for the Middle District of Florida, pursuant to DC Rule 8.5(b) (Choice of Law), the Florida Rules apply.

Misappropriation. The most serious allegation against Respondent in this matter is that she misappropriated settlement funds from the employment

[1] During the prehearing conference of November 30, 2018, the Chair alerted Disciplinary Counsel to the fact that the District of Columbia and Florida trust account rules cited in the Specification of Charges were not comparable. Preh. Tr. 21-22. The Specification does not quote or allege a violation of Florida's general record-keeping rule, FL Rule 5-1.2(f), which is the rule most similar to DC Rule 1.15(a)'s record-keeping obligations. However, Disciplinary Counsel never filed a motion to amend or correct the Specification.

discrimination lawsuit to which her client, Mr. McDonald, was entitled. To facilitate settlement of that matter in August 2011, Respondent had agreed to reduce the total hourly fees Mr. McDonald owed her under the terms of their retainer agreement from $483,000 to $254,000. Glades remitted $153,023.84 directly to Mr. McDonald and made additional payments for his 401(k), pension premiums, and unused vacation and sick time. Glades also sent two checks totaling $364,040 to Respondent, which she placed in her trust account. Within a month after signing the settlement agreement, Mr. McDonald filed a disciplinary complaint with the Office of Disciplinary Counsel ("ODC") and wrote to Respondent that he was disputing her fees. From that time until the December 2015 entry of judgment in her favor in a subsequent fee lawsuit that Mr. McDonald brought in Florida state court, Respondent held at least $105,551.17 in trust –the amount of which Mr. McDonald was entitled after deducting Respondent's reduced fees and discounted costs.[2]

Until closing argument of the hearing, Disciplinary Counsel maintained that Respondent had not in fact held this amount in trust. Disciplinary Counsel maintained that Respondent committed non-negligent misappropriation when, in connection to several trips Respondent took to Zimbabwe to settle her late father's estate, she took most of the balance out of her trust account in the form of large

[2] In addition to reducing her fees to $254,000, Respondent discounted her expenses from $19,477.43 to $12,044.43. In her Closing Statement, Respondent included Florida counsel Jenna Person's invoice for $2,944.40 in fees. Upon crediting $10,500 for amounts already paid by Mr. McDonald and deducting total fees and expenses, the remaining balance of the $364,040 that would have been due to Mr. McDonald was $105.551.17. *See* FF 54.

cashier's checks that, according to Disciplinary Counsel, she then failed to redeposit. *See* Specification, ¶¶ 18-19; Preh. Tr. 23-25 (Nov. 30, 2018). This was the only theory that Disciplinary Counsel mentioned in the Specification or at the November 30, 2018 prehearing conference, and it was the focus of almost all the testimony and other evidence Disciplinary Counsel offered during the hearing. But Disciplinary Counsel now concedes that Respondent *did* redeposit the checks and that she did *not* invade the $105,551.17. ODC Br. at 6.[3]

But rather than concede the non-negligent misappropriation charge, in its closing argument – after both the merits and sanction phases of the hearing – Disciplinary Counsel shifted to a much less-developed factual theory. Disciplinary Counsel argued that, actually, Respondent was obliged to hold $273,030 in trust and that bank statements in the record establish her failure to do so, through conduct completely unrelated to the failure to redeposit cashier's checks. *See* ODC Br. at 28. Disciplinary Counsel's new theory, on which it expanded in post-hearing briefing, focuses on smaller transfers of funds from Respondent's trust account in 2013 and 2014 (on dates unmentioned in the Specification of Charges[4]) that caused the

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[3] "ODC Br." refers to the Corrected Disciplinary Counsel's Amended Proposed Findings of Fact, Conclusions of Law, and Recommended Sanction filed on June 21, 2019. "Resp. Br." refers to Respondent's Second Corrected Rebuttal of ODC's Corrected Findings of Fact, Conclusions of Law and Sanctions filed on August 15, 2019. "ODC Reply Br." refers to Disciplinary Counsel's Corrected Reply Brief filed on August 22, 2019.

[4] The Specification of Charges alleges that the trust account balance shortages (establishing the misappropriation) occurred on "(A) December 17, 2012 to January 10, 2013 when the balance fell to **$1,471.07**; (B) January 11, 2013 to February 3, 2013 when the balance fell to **$71.07**; and (C) November 26, 2014 to December 4, 2014 when the balance fell to **$100,000**." Specification, ¶ 19

account balance to fall below $273,030. While Disciplinary Counsel hinted at this alternate theory a handful of times during the hearing, it was not clearly articulated until closing arguments, at which point Respondent strongly objected.

Disciplinary Counsel's shift in its theory of non-negligent misappropriation raises the core issue of what constitutes "fair notice" of charges sufficient to comport with due process. *See In re Ruffalo*, 390 U.S. 544 (1968). Disciplinary proceedings are '"quasi-criminal"' and, as a result, attorneys subject to those proceedings are entitled to due process of law. *In re Fay*, 111 A.3d 1025, 1031 (D.C. 2015) (per curiam) (citing *In re Williams*, 464 A.2d 115, 118-19 (D.C. 1983)). "Disciplinary proceedings are adversary, adjudicatory proceedings . . . [and] as much as they are concerned with property rights of respondent-bar members, due process safeguards must be observed." *In re Thorup*, 432 A.2d 1221, 1225 (D.C. 1981). The due process protections afforded to attorneys are not as extensive as those provided to criminal defendants, but, at a minimum, attorneys subject to discipline are entitled to "adequate notice of the charges and a meaningful opportunity to be heard." *Fay*, 111 A.3d at 1031 (citation omitted).

As discussed below, we recommend dismissal of the misappropriation charge because we believe that Respondent did not receive fair or adequate notice that she

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(A), (B), and (C) (emphasis in original). However, Disciplinary Counsel now claims in its post-hearing briefing that the trust account balance shortages (establishing the misappropriation) occurred on (A) February 5 to November 21, 2013 when the balance fell to $237,068.07; and (B) January 2014 to February 28, 2014 when the balance fell to $260,036.07. ODC Br. at 28, Proposed Finding of Fact ("PFF") 51 (citing bank records).

needed to defend not only against the charge set forth in the Specification, that she invaded $105,551.17 by failing to redeposit cashier's checks, but also a separate charge of invading $273,030 through other bank transfers.

Dishonesty. Disciplinary Counsel has also leveled a shifting array of dishonesty allegations against Respondent. The Specification asserts that Respondent falsely advised Disciplinary Counsel that she had not invaded the $105,551.17 of entrusted funds (an allegation Disciplinary Counsel has necessarily abandoned), and that Respondent drafted an initial retainer agreement that was confusing and engaged in other dishonest billing practices. *See* Specification, ¶¶ 3, 6, 18. These were the only factual allegations Disciplinary Counsel mentioned at the November 30, 2018 prehearing conference as the basis for the dishonesty charge. *See* Preh. Tr. 26 (Nov. 30, 2018). During the hearing and in its post-hearing briefs, however, Disciplinary Counsel has sought to litigate additional allegations of dishonesty that were not included in the Specification – most seriously that Respondent misled the Florida state court when defending against Mr. McDonald's fee lawsuit. Respondent made a timely objection on due process grounds to the expanded scope of the dishonesty charge. Tr. 224-28. The Committee deferred resolution of the objection and allowed Disciplinary Counsel to present evidence and testimony beyond what had been alleged in the original Specification. Tr. 229.

Having now considered the matter, it is clear that Disciplinary Counsel has raised several allegations of dishonesty that were not mentioned in the Specification or at the prehearing conference (where Disciplinary Counsel was asked to explain

its basis for the Rule 8.4(c) charge). Some of the additional factual allegations raised at the hearing might be considered at least broadly related to the original allegation of dishonest billing practices, but we cannot agree that Respondent received "fair notice" that Disciplinary Counsel would attempt to establish dishonesty to the Florida state court, among other allegations. *Ruffalo*, 390 U.S. at 550-52. Especially in light of Respondent's timely objection, we believe these allegations are barred on due process grounds for purposes of determining a Rule violation. *See infra* Part III(C)(iii) (Due Process Analysis); *infra* note 89.

We recognize, however, that the Court has permitted the consideration of additional evidence of dishonesty under limited circumstances, and when supported by clear and convincing evidence, for the purpose of determining an appropriate sanction. *See In re Kanu*, 5 A.3d 1, 8 (D.C. 2010) (notice of immigration fraud evidence not provided in the Specification of Charges, but its consideration was proper if restricted to the sanction analysis). Although we have recommended dismissal of all charges, the Board or the Court of Appeals may disagree. Accordingly, we have made factual findings on both the dishonesty alleged in the Specification and the additional allegations raised during the hearing.

Ultimately, we conclude that none of the dishonesty allegations were proven. Our conclusion rests in significant part on the many inconsistencies, evasions, and outright falsehoods in the testimony of Disciplinary Counsel's principal witness, Mr. McDonald, whom we did not find credible (along with another Disciplinary Counsel witness who was evasive and inconsistent, union lawyer Thomas Pilacek). In

contrast, based on the overall consistency between her testimony and the extensive evidence in the record (including the credible testimony of one of her local counsel in Mr. McDonald's matter, Esmond Lewis), as well as her demeanor, we find Respondent credible in all material respects.

Trust Account and Record-keeping Issues. Finally, Disciplinary Counsel alleges Respondent violated FL Rule 5-1.1(g)(2) (Interest on Trust Account), which is the Florida rule governing record-keeping for "nominal or short-term funds" that cannot earn income for the client. This rule does *not* contain Florida's more general trust account record-keeping requirements, which are covered by a different Florida Rule. Disciplinary Counsel has not offered sufficient evidence of the Florida Rule violation it charged. *See supra* note 1. (Disciplinary Counsel did charge a violation of DC Rule 1.15(a), which is the District of Columbia's general trust account record-keeping rule, but as noted above Florida law applies to all the charges in this matter).

For these reasons, the Hearing Committee recommends that the Board issue an order dismissing the charges.

I. PROCEDURAL HISTORY

On May 10, 2018, Respondent was personally served with a Specification of Charges that had been filed on April 18, 2018.

Specification. The Specification alleges that Respondent, in connection with the representation of a Florida resident, Sammie McDonald, Jr., and in connection with conduct during Disciplinary Counsel's investigation, violated the following FL or DC Rules:

- FL Rule 5-1.1(g)(2), by failing to deposit her client's settlement funds in an Interest on Trust Account and comply with detailed written reporting requirements;
- FL Rule 5-1.1(f), by failing to treat the disputed funds as trust property to be kept separate[5] until the dispute was resolved, thereby engaging in *non-negligent* misappropriation;
- FL Rule 4-8.4(c), by engaging in dishonesty;
- DC Rule 1.15(a), by failing to deposit her client's settlement funds in an account that included the name of the lawyer or law firm that controls the account, as well as "DC IOLTA Account" or "IOLTA Account,"[6] and by failing to maintain complete trust account records;
- DC Rule 1.15(d), by failing to keep disputed funds separate from her own funds until the dispute was resolved, thereby engaging in *non-negligent* misappropriation; and
- DC Rule 8.4(c), by engaging in dishonesty.

See Specification, ¶ 20 (emphasis in original).

In support of the misappropriation charge, the Specification alleged that Respondent had been obligated to maintain "at least **$105,551.17** in trust, including

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[5] Prior to the hearing, Disciplinary Counsel informed the Chair that it did not intend to present any evidence on possible commingling, *see* Preh. Tr. at 23-24 (Nov. 30, 2018), and Disciplinary Counsel does not argue in its brief that Respondent commingled her client's funds with personal funds. However, because Disciplinary Counsel does not have the authority to decline to pursue charges that have been approved by a Contact Member, *see In re Reilly*, Bar Docket No. 102-94, at 4 (BPR July 17, 2003), we have considered the charge as described in the Specification. We conclude that Disciplinary Counsel has not proven commingling by clear and convincing evidence. If Respondent had simply commingled funds, in our view of the evidence presented, a comparable sanction would be a reprimand or informal admonition, *see In re Lopatto*, Bar Docket No. 2005-D035 (Letter of Informal Admonition Jan. 3, 2006); *see also In re Barnes*, Bar Docket No. 2013-D434 (Letter of Informal Admonition Aug. 27, 2015).

[6] The Specification identifies the trust deposit and titling requirements of DC Rule 1.15(b), but erroneously omits a citation to that rule. The citation to DC Rule 1.15(a) is correct only for the "failing to maintain complete trust account records."

while the civil litigation between her and Mr. McDonald remained unresolved." Specification, ¶ 17 (emphasis in original). The $105,551.17 figure was mentioned four times in the Specification. *Id.* ¶¶ 12, 17, 18. At no point did the Specification allege that Respondent engaged in misappropriation by failing to maintain more than this amount in trust.

In support of the dishonesty charge, the Specification alleged that (1) Respondent's retainer agreement with Mr. McDonald lacked "clarity," (2) that she engaged in unfair billing practices, and (3) that she was dishonest with Disciplinary Counsel by representing that she had not invaded any portion of the $105,551.17 that she was obligated to keep in trust. *Id.* ¶¶ 3-4, 6-7, 18. The Specification made no mention of any other dishonest conduct.

On July 5, 2018, Respondent filed an Answer with fifteen attached exhibits, denying all the charges.

Prehearing Conference. On November 30, 2018, the Chair held a telephonic prehearing conference with Traci M. Tait, Esquire, on behalf of the Office of Disciplinary Counsel; Pamela J. Bethel, Esquire, on behalf of Respondent; and Respondent. When asked by the Chair to explain the factual basis for the misappropriation charge, Disciplinary Counsel reiterated that it was based on Respondent having "invaded" an amount of $105,551.17 that should have been held in trust until the resolution of Mr. McDonald's Florida fee lawsuit in December 2015. Preh. Tr. at 23-25 (Nov. 30, 2018). Disciplinary Counsel explained that it had previously dismissed the misappropriation charge upon completion of an

investigation in 2012, but it reopened the case because it believed Respondent had invaded the $105,551.17 prior to the dismissal of Mr. McDonald's fee lawsuit by the Florida court:

> MS. TAIT: [I]nitially when we looked the money was in fact intact, we got a follow-up complaint from Mr. McDonald and went back several weeks later discovering that in fact the $105,000, after the [disciplinary] matter had been dismissed, was in fact invaded. And *that* is the basis of the misappropriation.

Id. at 24 (emphasis added). Again, Disciplinary Counsel made no mention that Respondent should have held an amount greater than the $105,551.17 that was charged.

When asked by the Chair to explain the factual basis for the dishonesty charge, Disciplinary Counsel similarly adhered to the Specification, stating that the dishonesty charge was based on Respondent's "misrepresentation to Disciplinary Counsel" about having not invaded the $105,551.17 of disputed funds and Respondent's having "misled her client around what her billing practices were." *Id.* at 26.

As to the record-keeping charge, the Chair asked Disciplinary Counsel if it had identified the correct Florida Rule in the Specification of Charges, given that the Rule cited does not impose a record-keeping obligation for trust accounts but, instead, describes a record-reporting requirement for nominal or short-term funds. *Id*. at 21-22. Disciplinary Counsel indicated that it would amend the charges if it had erroneously cited the wrong Florida Rule. *Id*. at 22. No motion to amend was ever filed.

Hearing. The hearing was held on February 27 and 28, March 1, and April 3, 2019 before the Hearing Committee, which consisted of Daniel I. Weiner, Esquire, Chair and Edward R. Levin, Esquire, Attorney Member.[7] Disciplinary Counsel was represented at the hearing by Assistant Disciplinary Counsel Tait. Respondent was present during the hearing and was represented by Pamela Bethel, Esquire. The Committee received the following exhibits of Disciplinary Counsel into evidence: DX A through X.[8] All of Disciplinary Counsel's exhibits were admitted, with DX T-2 and DX X being admitted over Respondent's objections.[9] The Committee received the following exhibits of Respondent into evidence: RX 1 through 77.[10] Respondent's exhibits were admitted, except for RX 72 at 834-841, 863-874; and RX 73 at 830.[11]

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[7] The hearing proceeded with a quorum of two Committee members. *See* Board Rule 7.12. Before the commencement of the hearing, Respondent and Disciplinary Counsel informed the Office of the Executive Attorney that they consented to proceeding without a Public Member, who had become unavailable shortly before the hearing and could not be replaced without changing the hearing schedule.

[8] "DX" refers to Disciplinary Counsel's exhibits. "RX" refers to Respondent's exhibits, which are numbered consecutively. "Tr." refers to the transcript of the hearing held on February 27, 28, March 1, and April 3, 2019.

[9] *See* Disciplinary Counsel's Amended Exhibit List Form (April 10, 2019); *see also* Tr. 263-65, 635-48, 705-07, 745.

[10] As filed, RX 73 has Bates-stamped pages that precede the page numbers in RX 72. The two exhibits were filed out of order, with RX 73 preceding RX 72.

[11] Respondent's Exhibit List Form (April 3, 2019); *see also* Tr. 632-34, 645-48, 692. Disciplinary Counsel objected to the admission of certain pages of RX 72 and 73, *see* Tr. 632-34, and Respondent eventually withdrew those pages, and the remaining portions of RX 72 and 73 were admitted. *See* Exhibit List Form. Disciplinary Counsel initially objected to RX 76 and 77, but its objection was subsequently withdrawn. Respondent withdrew two other proposed exhibits, which would have been RX 78 and RX 79.

During the hearing, Disciplinary Counsel called as its witnesses: Sammie McDonald, Jr.; ODC Investigator Kevin O'Connell; Thomas J. Pilacek, Esquire; Respondent; and Assistant Disciplinary Counsel Dolores Dorsainvil, Esquire. Respondent testified on her own behalf and called one of her Florida co-counsel, Esmond Lewis, Esquire, as her witness.

As to the misappropriation charge, on the first day of the hearing, Disciplinary Counsel in its opening statement for the first time identified "$273,000" as the amount that should have been held in trust until the Florida Court issued its decision in the fee lawsuit. Tr. 11-12. In response to a question from the Chair, Disciplinary Counsel argued that whether it was the lower amount of $105,551.17 referenced in the Specification *or* this greater amount, the funds were misappropriated when Respondent purchased cashier's checks to take with her during travel to Zimbabwe and later failed to redeposit the checks into her trust account upon returning to the United States:

> MS. TAIT: Only on one of those occasions was the actual bank check that was purchased about [sic] the entrusted funds redeposited. In the other instances it was not. So hundreds of thousands of dollars was extracted as a bank check and some lesser amount was redeposited. And there is no way to determine that those funds are in any way connected. One can surmise. One could guess. But there is no actual evidence to tie what was taken out as a bank check and what was redeposited, either as cash or in the form of a different check. *So that is the basis of our claim that it was misappropriation, because she took the money out and rather than depositing the very instrument that she withdrew, some other form was used in order to put those funds back.*
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> COMMITTEE CHAIR WEINER: Of course you are going to have the burden of proof.

> MS. TAIT: All we need to show -- in our theory, *all we need to show is that the money came out and that that instrument that was used to remove the funds was not redeposited.*

Tr. 15-16 (emphasis added). Disciplinary Counsel made no reference to any other conduct apart from the failure to redeposit cashier's checks.

In her opening statement, Respondent's counsel addressed Disciplinary Counsel's continued assertion that the misappropriation occurred when Respondent did not redeposit the cashier's checks upon her return to the United States:

> It is true that she took -- and there are circumstances -- that she took the money out of the trust account and she bought certified checks. But we can demonstrate that those checks, the very checks, not just some other sum of money, that the very check with the same number when she would come back from Zimbabwe, that the very check with the same number was redeposited into the account.

Tr. 33.

Throughout the hearing, Disciplinary Counsel continued to adhere to its theory that Respondent misappropriated client funds when she purchased cashier's checks and then failed to redeposit them, pointing to bank records produced by Respondent showing the purchase of cashier's checks and no apparent redeposit of those checks, although there were other deposits from an account ending in #0097. *See* Tr. 165-66. During the hearing, Respondent continued to assert she had redeposited the checks. Tr. 323-24, 341, 371-72. Eventually Respondent produced two new letters from a BB&T bank official which verified that the account ending in #0097 was an "internal BB&T operating account that is used to source funds for clients' purchases of cashier checks" and confirmed that Respondent had in fact

redeposited the checks she purchased. *See* RX 76 at 910 (February 27, 2019 letter from BB&T); RX 77 at 912 (March 12, 2019 letter from BB&T). Disciplinary Counsel initially objected to the exhibits on the grounds of authenticity, but subsequently agreed to their authenticity after meeting in person with bank officials and Respondent. *See* Preh. Tr. at 43-45 (March 6, 2019 status hearing). Based on this evidence, Disciplinary Counsel subsequently abandoned its core theory underlying the non-negligent misappropriation charge. Tr. at 695-96; ODC Br. at 6.[12]

Disciplinary Counsel did not, however, concede the non-negligent misappropriation charge. Instead, during closing argument, Disciplinary Counsel asserted that regardless of the evidence from BB&T, Respondent's bank records showed that, prior to resolution of Mr. McDonald's Florida fee lawsuit, the balance in Respondent's trust account fell below $273,000 "for weeks at a time" unrelated to the purchase or redeposit of cashier's checks. Tr. 659. Respondent objected during her closing argument and in subsequent argument to this theory of misappropriation on due process grounds, citing lack of notice. *See* Tr. 677 ("This goalpost has moved, it's moved."); 742 ("[T]he Specification . . . refer[s] to the fact that Ms. Morten was required to maintain $105,551.17. That is clearly how we prepared our case. . . . [W]e had assumed that this was the amount that we were defending against.").

[12] When it abandoned its original theory underlying the non-negligent misappropriation charge, Disciplinary Counsel also effectively abandoned its contention that Respondent was dishonest in representing to Disciplinary Counsel that she redeposited the cashier's checks purchased from her trust account – a contention which does not appear in any post-hearing brief.

Disciplinary Counsel countered that the charges were sufficiently clear notwithstanding that it had primarily focused on its original theory during the evidentiary portion of the hearing. *See* Tr. 742-43 ("[T]the charges were clear that Mr. McDonald disputed the amount that Respondent was entitled to. . . . We focused on the undisputed amount, but that doesn't mean that the disputed amount is not taken into consideration.").

During the hearing, Disciplinary Counsel also ventured significantly beyond the allegations set forth in the Specification and at the prehearing conference with respect to the dishonesty charge. Specifically, Disciplinary Counsel sought to introduce evidence that Respondent's representations to the Florida state court in Mr. McDonald's fee lawsuit were dishonest inasmuch as she told the Florida court that she represented Mr. McDonald in the union arbitration matter, as well as the employment discrimination matter. *See* Tr. 222-25. Respondent made an oral objection to the expanded scope of the dishonesty evidence. Tr. 224-25. In response, Disciplinary Counsel asserted that the evidence would be relevant to whether Respondent's billing practices were "unfair" as alleged in the Specification, to the extent that Respondent may have billed Mr. McDonald for work she did not perform. *See* Tr. 225-29. The Chair allowed Disciplinary Counsel to complete its cross-examination of Respondent on this subject, but added, "[t]he Committee has reservations about this testimony and whether [Disciplinary Counsel] provided adequate notice to the Respondent" and directed that the parties brief the issue of lack of notice in their post-hearing briefing. Tr. 229.

Upon conclusion of the violation phase of the hearing, the Hearing Committee made a preliminary non-binding determination that Disciplinary Counsel had proven at least one of the disciplinary violations set forth in the Specification of Charges. Tr. 711; *see* Board Rule 11.11. In the sanctions phase of the hearing, Respondent testified on her own behalf in mitigation of sanction. *See* Tr. 714-36. Disciplinary Counsel did not offer any evidence in aggravation but noted that it would be addressing aggravating factors in its post-hearing briefing. Tr. 712-13.

Post-hearing. Following the hearing, the Committee entered an order setting the briefing schedule on April 12, 2019. Therein, the Committee clearly directed the parties to "thoroughly address the Choice of Law applicable in this disciplinary proceeding" and "strongly advised" the parties "to cite to relevant authority from both D.C. and Florida." Order at 2 (Apr. 12, 2019).[13] Despite this clear instruction, on May 29, 2019, Disciplinary Counsel filed its initial Proposed Findings of Fact, Conclusions of Law, and Recommended Sanction in which it failed to cite *any* relevant Florida case law or other Florida disciplinary authority. By order on May 31, 2019, the Committee instructed Disciplinary Counsel to file an amended brief "with citation to Florida cases in support of <u>each</u> of the charged Florida Rule violations" and reminded the parties that whether the charged Florida Rules govern Respondent's conduct is "a legal determination . . . to which . . . they may not

[13] Both prior to and throughout the hearing, the applicability of the Florida Rules was raised, and the parties were instructed that "Florida law is likely to apply." Preh. Tr. at 16-17 (Nov. 30, 2018); *see* Tr. at 743-44.

stipulate." Order at 1 (May 31, 2019) (emphasis in original). Disciplinary Counsel's Corrected Amended Proposed Findings of Fact, Conclusions of Law, and Recommended Sanction, filed on June 21, 2019, did cite Florida law.

II. FINDINGS OF FACT

The following findings of fact are based on the testimony and documentary evidence admitted at the hearing, and are established by clear and convincing evidence. *See* Board Rule 11.6; *In re Cater*, 887 A.2d 1, 24 (D.C. 2005) ("clear and convincing evidence [is] more than a preponderance of the evidence," it is '"evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established"' (quoting *In re Dortch*, 860 A.2d 346, 358 (D.C. 2004)); *In re Watson*, 174 So.3d 364, 369 (Fla. 2015) (per curiam) (Clear and convincing evidence "entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy." (quoting *In re Davey*, 645 So.2d 398 (Fla. 1994))).

In general, the Committee found Respondent's testimony at the hearing to be credible, based on the consistency between Respondent's statements and the documentary evidence in the record, and Respondent's demeanor at the hearing. *See* FF 40, 60, 67, 71, 75, 82. During both phases of the hearing, Respondent answered questions directly and without being evasive. Her manner was thoughtful, and she provided details without hesitation when Committee members had questions. In

contrast, the Committee did not credit several of the statements made by Disciplinary Counsel's witnesses Mr. McDonald and Mr. Pilacek, for reasons explained below. *See* FF 13 (not crediting Mr. McDonald's testimony due to inconsistencies with the written record and his own conduct), 26 (finding Mr. McDonald's assertion contradicted his prior sworn statement), 47-48 (not crediting Mr. Pilacek's conclusory statements that were contrary to the record evidence), 49 (noting Mr. McDonald's "demonstrably false" statement), 50 (finding Mr. McDonald's testimony lacked credibility), 61 (noting Mr. McDonald's uncorroborated characterization of the settlement), and 62 (noting Mr. McDonald's conflicting statements).

A. Background

1. Respondent is a member of the Bar of the District of Columbia Court of Appeals, having been admitted by exam on June 4, 1979, and assigned Bar number 272575. DX A. Respondent is not a member of any other Bar.

2. Respondent resided in Cape Coral, Florida from 2009 to 2014. Tr. 267-69 (Respondent). Respondent's elderly father lived and owned property in Harare, Zimbabwe. When her father passed away in August 2010, Respondent was appointed executrix of his estate in Zimbabwe. Tr. 267-68 (Respondent). In 2011, 2013, and 2014, Respondent had to travel to Zimbabwe to defend claims against her father's probate estate. Tr. 268-69 (Respondent).

3. Respondent was retained in 2009 by Florida resident Sammie McDonald, Jr. Mr. McDonald was employed by Glades Electric Cooperative, Inc.

("Glades") as a Lead Lineman for twenty-four years. For sixteen of those years, he also served as shop steward and union representative for the International Brotherhood of Electrical Workers ("IBEW"). RX 74 at 895; ODC Reply Br. at 2, R-PFF 2 (undisputed by Disciplinary Counsel). Mr. McDonald affirmed that during his sixteen years as shop steward he gained experience in reading, reviewing, and negotiating collective bargaining contracts, under which he filed union grievances on behalf of Glades' employees. RX 74 at 895.

4. Following an August 7, 2007 accident involving serious burns to himself and his apprentice, Glades immediately terminated Mr. McDonald. RX 68 at 676; RX 72 at 860; *see also* ODC Reply Br. at 2, R-PFF 3 (undisputed by Disciplinary Counsel).

5. After Mr. McDonald was terminated by Glades, he filed a grievance with his union, IBEW Local 1933. Tr. 199 (Pilacek). Thomas Pilacek, Esquire, acting as IBEW Local 1933's attorney, thereafter brought an arbitration action against Glades for violations of the collective bargaining agreement in Mr. McDonald's case (hereinafter, the "union arbitration case" or "union arbitration matter"). Tr. 46 (McDonald); Tr. 199-200, 202-04 (Pilacek). Although Mr. McDonald was the interested party, under applicable labor law, IBEW Local 1933 and Glades were the only named parties in the union arbitration case, with the union litigating contract benefits owed to Mr. McDonald. Tr. 222 (Pilacek). IBEW Local 1933's dispute with Glades went to arbitration in February and April 2008. RX 68 at 676; RX 74 at 896. On July 8, 2008, the arbitrator ordered Glades to reinstate Mr.

McDonald, but Glades refused and filed a complaint in the U.S. District Court for the Middle District of Florida, *Glades Electric v. IBEW* (No. 2:08-cv-713-FTM-99DNF), asking the court to vacate the arbitrator's reinstatement award.[14] Resp. Br. at 5, ¶ 9; ODC Reply Br. at 3, R-PFF 9. IBEW Local 1933 counterclaimed, requesting that the court issue an order compelling Glades to reinstate Mr. McDonald. Tr. 201 (Pilacek). The complaint and counterclaim were still pending at the time Mr. McDonald retained Respondent.

6. While the union arbitration case was proceeding, on March 5, 2008, a Florida-barred attorney, Daniel Gerleman, Esquire, filed a race- and age-based employment discrimination complaint on behalf of Mr. McDonald against Glades, also in the U.S. District Court for the Middle District of Florida, seeking backpay and other compensatory and punitive damages (hereinafter, the "employment discrimination case"). *See Sammie McDonald v. Glades Electric Cooperative, Inc*., No. 2:08-cv-179; RX 68 at 676.[15]

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[14] Pursuant to 29 U.S.C. § 185(a), federal courts have jurisdiction over breach of contract disputes between unions and employers, including jurisdiction to review an arbitration award pursuant to a collective bargaining agreement.

[15] The complaint initially filed by Mr. Gerleman alleged a violation of 42 U.S.C. § 1981 in addition to the Title VII cause of action. On December 12, 2008, prior to Respondent's involvement in the case, Mr. Gerleman amended the initial complaint and omitted the Section 1981 employment discrimination claim. *See* RX 12 at 62-64 (Mr. Gerleman's letter acknowledging the omission to Mr. McDonald). The record is unclear as to whether Mr. Gerleman intentionally or erroneously removed the Section 1981 cause of action when he filed the amended complaint. Disciplinary Counsel implies that Respondent should have sought to restore this claim after she became lead counsel in the employment discrimination case in 2010, *see* ODC Reply Br. at 2-3. Since this question is not relevant to the charges, we do not address it.

7. IBEW Local 1933 was not a party to the employment discrimination case and was not involved in its litigation. Tr. 203 (Pilacek); ODC Reply Br. at 3, R-PFF 7 (undisputed by Disciplinary Counsel). Mr. Pilacek admitted that he had no knowledge of the facts or circumstances concerning the litigation of the employment discrimination case or its later settlement. *See* Tr. 187. In contrast, as discussed below, Respondent had a role in both the employment discrimination and union arbitration cases on Mr. McDonald's behalf. *See, e.g.*, FF 9, 15, 17-18, 27-28.

B. Respondent's Retainer Agreement with Mr. McDonald

8. In March 2009, Mr. McDonald met with Respondent and asked her to represent him. RX 68 at 677; Tr. 270-71, 276-77 (Respondent). According to Respondent, Mr. McDonald complained to her that Mr. Pilacek had not met with him or properly prepared him prior to his testimony before the federal arbitrator in connection to his union grievance. *See* RX 41 at 256; Tr. 272-73. Mr. McDonald told her that he was unhappy with Mr. Pilacek's representation and that Mr. Pilacek represented the union's interest to the detriment of his own interests. RX 41 at 256; Tr. 272 (Respondent). The Hearing Committee credits Respondent's testimony concerning Mr. McDonald's complaints about Mr. Pilacek, which are consistent with other documentary evidence in the record. *See* FF 17-18.

9. On March 17, 2009, Mr. McDonald signed Respondent's retainer agreement; the agreement was signed and executed in Lee County, Florida. *See* RX 1

at 1-5 (March 17, 2009 Retainer Agreement).[16] The agreement provided that Respondent would act as Mr. McDonald's "lead counsel in mediation and settlement negotiations with the Glades Electric Co-Op and all responsible parties presently known or unknown." RX 1 at 1 (section 1. "Scope and Duties"). Respondent testified that, pursuant to this provision, she acted as lead counsel on Mr. McDonald's behalf in the union arbitration case, while Mr. Pilacek served as IBEW Local 1933's counsel. *See* Tr. 347; *see also* RX 74 at 881, ¶ 4 (Mr. McDonald verifying by sworn affidavit: "In the March 17, 2009 retainer agreement, Ms. Morten also agreed to serve as lead counsel representing Mr. McDonald in his arbitration mediation and related claims against Glades Electric. **UNDISPUTED**"). Her characterization of her role is consistent with the language of the retainer agreement, and with her subsequent conduct. *See* FF 15, 18-21, 24-26.[17] The agreement further provided that Respondent would act as "co-counsel in the federal case litigation filed by Mr.

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[16] The retainer agreement is duplicated in the following exhibits, *see* DX B at 8-12, RX 14 at 83-87, and RX 61 at 384-388, but we cite only to the copy at RX 1.

[17] There is nothing implausible about such an arrangement. While it is true that IBEW Local 1933 and not Mr. McDonald was a party in the union arbitration case, Mr. McDonald was clearly an "interested party" whose interests did not necessarily align with those of the union, so it would have been reasonable for him to seek his own counsel to represent his interests. *See, e.g.*, RX 74 at 896, ¶ 96 (Mr. McDonald describing himself as an interested party); FF 5. Mr. McDonald's insistence in his testimony that Respondent represented him in the employment discrimination case only, *see* Tr. 101, was inconsistent with his own sworn representations in his Florida fee lawsuit. *Compare* Tr. 101, *with* RX 74 at 881, ¶ 4 (Mr. McDonald verifying by sworn affidavit: "In the March 17, 2009 retainer agreement, Ms. Morten also agreed to serve as lead counsel representing Mr. McDonald in his arbitration mediation and related claims against Glades Electric. **UNDISPUTED**"). Given these facts, and the other inconsistences and falsehoods in Mr. McDonald's testimony, *see* FF 13, 26, 49-50, 61-62, we do not credit his statements as to the limited scope of Respondent's representation.

Gerleman" (the employment discrimination case) and that Respondent, who was not a member of the Florida Bar, would be entering an appearance *pro hac vice* as part of a joint representation as agreed to by Mr. Gerleman. RX 1 at 1; *id.* (section 1- "Scope and Duties").[18] Mr. McDonald's relationship with Mr. Gerleman was subject to a separate agreement. RX 1 at 1; *see also* RX 70 at 742 (separate signed Agreement between Mr. McDonald and Mr. Gerleman).[19]

10. The retainer agreement provided that Respondent's fee for legal services was $450 per hour and $100 per hour for paralegals and investigators. Mr. McDonald agreed to pay Respondent an initial retainer of $3,000 upon execution of the contract. RX 1 at 2 (section 4- "Legal Fees"). After the $3,000 initial retainer fee was exhausted, Mr. McDonald would, at a minimum, pay $500 per month until a new payment schedule was negotiated, *id.* at 3, although it appears that, due to his financial inability, Respondent did not actually require Mr. McDonald to make these

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[18] When Mr. Gerleman withdrew, Mr. McDonald retained Florida-barred counsel, Bruce Strayhorn, Esquire, to move Respondent's admission *pro hac vice* in the Florida federal court. Mr. Strayhorn assigned Jenna Persons, a junior attorney at the same law firm, to serve as local counsel. RX 4 at 9; Tr. 54 (McDonald). Subsequently Ms. Persons was unavailable to attend the mediation and trial in the discrimination case, so another Florida-barred counsel, Esmond Lewis, Esquire, assisted Respondent as local counsel with Mr. McDonald's permission. *See* RX 74 at 905, ¶ 158 (Mr. McDonald verifying by sworn affidavit: With Mr. McDonald's approval, Florida Atttorney Esmond Lewis attended as her co-counsel and prepared to sit as second chair at trial after Attorney Jenna Persons stated that she could not attend due to a calendaring conflict. Ms. Morten's investigator also attended the morning session. **UNDISPUTED**").

[19] The January 26, 2010 Agreement between Mr. McDonald and Mr. Gerleman provided for the payment of a flat attorney fee of $10,000 for Mr. Gerleman's preceding work and additional assistance in responding to Defendant Glades' various discovery requests, along with a single appearance and representation at a January 27, 2010 hearing on a motion to compel. RX 70 at 742 (signed agreement between Mr. McDonald and Mr. Gerleman).

monthly payments. *See* FF 29; Tr. 49 (Mr. McDonald testifying that he could not afford to pay $500 a month).[20] The retainer agreement provided that expenses such as attorney travel, courier fees, mail, photocopying, paralegal and investigator fees, and telephone charges were also the responsibility of Mr. McDonald. RX 1 at 3-4 (section 6 – "Expenses"); *see also* RX 74 at 887, ¶ 36 (admitted).

11. The agreement specified that "[i]n the event of recovery or settlement, Client is responsible for paying all fees and costs by Attorney as of the date of recovery or settlement (minus any fees and costs paid up to that point by Client) which amounts shall be deducted from any such recovery or settlement." RX 1 at 3.[21]

12. The agreement stated that "all invoices for work rendered under this Contract . . . shall be due and payable on receipt," but did not specify how frequently invoices were to be sent. *See* RX 1 at 2 (section 4 – "Legal Fees"). According to the terms of the agreement, unpaid invoices were to accrue interest, and if an invoice

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[20] The agreement also provided that if Respondent's fees exceeded $3,000, Respondent and Mr. McDonald would "immediately renegotiate a new payment schedule to consist of: monthly payments, an additional lump sum payment or a negotiated percentage of the amount recovered by Client from Glades Co-Op not to exceed 25%." RX 1 at 3. This language is somewhat confusing and fairly characterized as "poorly written," as Disciplinary Counsel noted in its December 20, 2012 letter to Mr. McDonald dismissing his original complaint. *See* RX 30 at 186. However, it cannot be read to support Mr. McDonald's subsequent contention that the parties had an agreed-upon contingency fee arrangement. Indeed, Disciplinary Counsel itself (and later a Florida state court) concluded that the retainer agreement provided for a $450 hourly fee. *Id.*; *see also* RX 50; FF 13.

[21] The only reference in the agreement to a "contingency fee" was for a circumstance that was already inapplicable: "In the event of settlement prior to filing suit, Attorney shall be entitled to recover on a partial contingency basis as follows: the total amount of legal fees incurred . . . or ¼ of any money recovered if a recovery is obtained without filing suit." RX 1 at 3.

remained unpaid for 60 days or more, Respondent reserved the right to suspend services. *Id.* at 2-3. Mr. McDonald admitted during the hearing that he never requested an invoice until shortly before the employment discrimination case was settled. Tr. 53;[22] *see also* FF 40.

13. At the hearing, Mr. McDonald testified that, notwithstanding the terms of the agreement, he believed that if he won the employment discrimination case, Respondent would receive a 25% contingency fee (plus reimbursement for certain expenses that occurred during the representation). Tr. 50-51. As explained in more detail below, the Hearing Committee does not credit this testimony. In addition to being inconsistent with the terms of the retainer agreement that he signed, Mr. McDonald's testimony is entirely inconsistent with his request for all of Respondent's accrued hourly fees and costs, *see* FF 40, and his conduct during the mediation of the employment discrimination case, during which he expressed repeated concerns about the amount of Respondent's accrued fees, *see* FF 41-45.

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[22] A [Mr. McDonald]: Well, the only time I asked for a regular bill was about the end of the trial thing . . . .

Q [Assistant Disciplinary Counsel Tait]: And when you say "at the end," do you mean towards the end of the representation?

A: Yes.

Q: And before that time, did you ask her to send you bills periodically, either every month or every quarter?

A: No.

Tr. 53.

C. Respondent's Participation in the Union Arbitration Case

14. On January 21, 2010, the U.S. District Court for the Middle District of Florida dismissed Glades' lawsuit to set aside the arbitration award. The Court further awarded "back pay and benefits" (along with prejudgment interest), but only for the period "commencing from the date the arbitration award was rendered to the date of the actual reinstatement . . . ." *See Glades Elec. Coop., Inc. v. Int'l Bhd. of Elec. Workers Local 1933*, No. 2:08-cv-713, 2010 WL 11507126, at 4 (M.D. Fla. Jan. 21, 2010); *see also* Tr. 205-07 (Pilacek). The Court's award, accordingly, did not include the time period from Mr. McDonald's termination to the arbitration award.

15. Glades subsequently appealed the ruling in the U.S. Court of Appeals for the Eleventh Circuit. On April 10, 2010, at Mr. McDonald's request, Respondent traveled to Tampa, Florida with him to assist during the Eleventh Circuit-ordered mediation. Tr. 255-56 (Pilacek). Respondent acquainted herself with the IBEW Local 1933 pleadings before she drove with Mr. McDonald to the mediation in Tampa. *See* RX 16 at 96 ("Research/Prep for Mediation"). The Eleventh Circuit mediation was ultimately unsuccessful. Tr. 261 (Pilacek).

16. Eight months later, on January 13, 2011, the Eleventh Circuit issued its decision in the appeal, upholding the U.S. District Court's dismissal of Glades' lawsuit and the award of backpay for the period between the arbitrator's reinstatement order of July 8, 2008 and the yet undecided date of reinstatement. *See*

Glades Elec. Coop., Inc. v. Int'l Bhd. of Elec. Workers Local 1933, No. 10-10892 (11th Cir. Jan. 13, 2011) (per curiam).

17. Even after the Eleventh Circuit's decision, Glades still refused to reinstate Mr. McDonald, prompting Respondent to contact Mr. Pilacek to complain on Mr. McDonald's behalf. Tr. 377 (Respondent). Moreover, even after Glades finally notified Mr. McDonald that he could return to work on February 28, 2011, it was to return to an inferior position than he originally had held. *See* RX 73 at 796-97, 820. On February 24, 2011, Respondent drafted an e-mail for Mr. McDonald to send to Mr. Pilacek conveying his objection to Glades reinstating him to work at a different position, as a regular lineman instead of lead lineman. *See* RX 72 at 843 (e-mail draft addressed to Mr. Pilacek sent by Respondent to Mr. McDonald). The drafted e-mail also complained that Mr. McDonald had not received the backpay ordered by the U.S. District Court. *Id.*

18. Overall, the record shows that Mr. McDonald was very dissatisfied with the IBEW Local 1933's handling of the conditions of his eventual reinstatement. Mr. McDonald ultimately sent the e-mail Respondent drafted not only to Mr. Pilacek but also to the IBEW International; among other things, it noted that Local 1933 had not returned his phone calls. *See* RX 73 at 796-97 (Mr. McDonald's February 25, 2011 e-mail to Mr. Pilacek and Joseph Davis, the IBEW Fifth District Vice President); RX 72 at 845 (Respondent's copy of her February 24 e-mail sent to Mr. McDonald); Tr. 393 (Respondent identifying Joseph Davis as the IBEW Fifth District Vice President). The e-mail concluded with a request that either Mr. Pilacek, or an

international IBEW representative, accompany Mr. McDonald on his reinstatement date (February 28, 2011) to meet with Glades officials to "negotiate the terms and conditions of my reinstatement." RX 73 at 797. However, neither Mr. Pilacek nor a representative of the international accompanied him, and Glades reinstated Mr. McDonald on February 28, 2011 only as a lineman, without backpay. RX 73 at 796-97, 803; *see also* RX 72 at 842. On March 2, 2011, Respondent sent an e-mail to a U.S. Department of Labor representative which summarized these problems and added that IBEW Local 1933 "has not provided Mr. McDonald with a copy of the current union contract and has not reinstated him to his position as union steward, a position he held for 14 years prior to his unlawful dismissal." RX 72 at 845 (March 2, 2011 e-mail from Respondent to Michael Moody of the Department of Labor). Mr. McDonald himself reiterated these and other complaints in an e-mail to Respondent:

> The Ibew fail to collect my back pay wages, The Ibew fail to accompany me at the reinstatement on feb.28th [.] I was threathen [sic] by the General Manager Tommy Todd[.] The union stewart [sic] (Bill Laneer) testified against me at the arbitration hearing[.] [H]e was made lineman after my dismissal. I'm isolated from other staff members, work schedule was been change, denied over time for callouts. I requested a copy of the contract from the president of the ibew Tom Players, Tom stated [I]'m not a current union member.

RX 73 at 803.

19. In the meantime, litigation in the U.S. District Court continued over Mr. McDonald's backpay award, which Glades continued to challenge.[23] On June 20, 2011, Magistrate Judge Douglas Frazier issued a Report and Recommendation setting out a formula for determining the appropriate backpay amount due for the period of July 8, 2008 (the date of the arbitration reinstatement award) to February 28, 2011 (the date Mr. McDonald was reinstated). *See* Tr. 208-10, 261 (Pilacek); *see also* RX 73 at 816. Through his law firm administrator, Debbie Brock, Mr. Pilacek sent Respondent a copy of the magistrate's Report and Recommendation and asked for her assistance with calculating Mr. McDonald's backpay. RX 73 at 806.[24]

20. At the same time, Mr. Pilacek and Glades' attorney, Brian Koji, began to pursue settlement negotiations. Tr. 209 (Pilacek). Mr. Pilacek acknowledged that he and Mr. Koji received multiple e-mails from Respondent on Mr. McDonald's behalf concerning these negotiations. Tr. 214-15. At her request, Mr. Pilacek provided Respondent with a copy of a draft settlement agreement between the union,

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[23] On March 1, 2011, despite having lost on appeal, Glades filed a motion in the U.S. District Court for the Middle District of Florida challenging the U.S. District Court's backpay award covering the time period after the arbitrator's reinstatement order, "claiming that the [federal] Court had no authority to do that." Tr. 208. On behalf of the union, Mr. Pilacek filed a cross-motion seeking contempt and the imposition of sanctions against Glades for the filing of the frivolous Motion for Relief from Backpay Order. Tr. 208; RX 73 at 798-801. On June 11, 2011, Magistrate Judge Douglas Frazier issued a Report and Recommendation denying Glade's Motion for Relief and granting IBEW Local 1933's cross-motion in part, finding Glade's motion to be frivolous, ordering payment of attorney fees to the union for its defense of the motion, and setting out a formula for backpay. Tr. 208-10, 261 (Pilacek).

[24] Initially, Ms. Brock asked if Respondent could provide information as to Mr. McDonald's "interim earnings [from termination to reinstatement] as soon as possible." RX 73 at 806. On June 26, 2011, Ms. Brock sent another e-mail, asking Respondent to send Mr. Pilacek supporting documents such as W-2s, 1099s, or pay stubs. RX 73 at 808.

Glades, and Mr. McDonald. Respondent marked up the draft – adding comments to, among other things, make it clear that the settlement of the union arbitration case was not going to affect the employment discrimination case or a new charge of discrimination Respondent had filed on Mr. McDonald's behalf with the Equal Employment Opportunity Commission (EEOC) regarding his post-reinstatement discrimination claims (discussed in more detail below). *See* RX 73 at 814, 816-18 (draft agreement with additions in bold); FF 35.[25]

21. In addition to her recommended edits to the draft agreement, Respondent wrote separately to Mr. Koji, Glades' counsel, about the Magistrate's Report and Recommendation. *See* RX 73 at 821. After reviewing the Report and Recommendation, Respondent raised the following issues in a letter to Mr. Koji and explained her additions to the proposed draft agreement:

> In its June 20, 2011 Order denying the motion, the Magistrate did not constrain the right of the union and/or Mr. McDonald from enforcing

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[25] Disciplinary Counsel takes the position that Respondent's comments to the draft agreement were not accepted. ODC Reply Br. at 10. To the extent Disciplinary Counsel is suggesting that an attorney is not entitled to be compensated for any effort that proves ultimately unsuccessful, we cannot agree. In any event, e-mail communications between Mr. Pilacek, Mr. Koji, and Respondent at that time show that her added language to the agreement was not irrelevant or superfluous. During his cross-examination, Mr. Pilacek acknowledged that Respondent's suggestions had value, even if the draft agreement itself was not ultimately signed:

> Q: And Ms. Morten had comments about that, did she not? That she was making sure that whatever was reached in the union grievance matter was not going to impact what was happening in the -- or what could happen in the EEOC case.
>
> A. [Pilacek]: Yeah, that coincided with the union's position as well. We were going to reach our agreement, and then anything more would be negotiated by Ms. Morten on behalf of McDonald in the discrimination claim.

Tr. 258.

> all other standing terms of the Arbitrator's July 8, 2008 award . . . . For these reasons, although we are willing to sign the proposed agreement settling the backpay award issue, we reserve the right to seek an Order from the Arbitrator clarifying that Mr. McDonald be reinstated without loss of seniority; specifically, that [Glades] shall assign a crew to work under Mr. McDonald's supervision; that my client be allowed to sign up to earn standby pay and overtime and to have days off like all other line personnel and in accordance with the requirements of the union contract; that [Glades] make my client whole and that [Glades] refrain from unlawfully threatening him.
>
> This paragraph is intended to clarify that in agreeing not to file exceptions to the Magistrate's June 20, 2011 back pay award Order, Mr. McDonald is NOT agreeing to waive his other legally enforceable rights contained in the Arbitrator's July 8, 2008 order.

RX 73 at 821 (Letter to Mr. Koji from Kemi Morten on which Mr. Pilacek was copied).

22. Mr. Pilacek testified that the union and Glades ultimately reached agreement with a backpay framework, without Mr. McDonald's consent, that was limited to "straight time pay" (no overtime or standby pay) for the period ordered by the Magistrate (from the date of the arbitration award to the date of reinstatement), with rates set by the union contract based on an 80-hour/2-week pay period. Tr. 209-10. No written agreement or e-mail message documenting the agreement is in the record. Mr. McDonald, however, confirmed that he received a check for his backpay in the union arbitration case, which was different than the backpay in the settlement of the employment discrimination case. Tr. 92-93.

23. Mr. McDonald was unhappy with the union's agreement to only the straight time backpay ordered by the Magistrate. Tr. 209-10 (Pilacek). As lead lineman, his base salary was only $65,000 a year, "but with overtime and what they

call standby pay he could earn twice that amount. . . . [A]s much as $130,000 a year." Tr. 293 (Respondent).

24. On June 30, 2011, Mr. McDonald, with Respondent's assistance, asked the new IBEW National President, Greg Krumm, to intercede on his behalf, raising the backpay issue and the fact that Glades was continuing to deny him a crew assignment and isolating him. RX 73 at 820; *see also* RX 73 at 831 (Respondent's June 4, 2011 e-mail asking Mr. Pilacek for Mr. Krumm's contact information so that Mr. McDonald could renew his request that IBEW Local 133 represent him in his NLRB charge concerning his reinstatement). The record does not contain the union's response.

25. As Mr. Pilacek recalled telling Respondent, his client was "the union under Federal labor law," and not Mr. McDonald. Tr. 219-20; *see also* RX 73 at 823 (Mr. Pilacek writing to Respondent by e-mail that "Local 133 is [Mr. Pilacek's] client" and Mr. McDonald is not his client). The only attorney participating in the union arbitration matter directly on Mr. McDonald's behalf was Respondent, and there is no indication that she failed to represent his interests. *See, e.g.*, FF 15, 17-18, 20-21, 27.

26. The Hearing Committee does not credit Mr. McDonald's claim that he only hired Respondent to represent him in the employment discrimination case, and not the union arbitration matter, which conflicts with his own prior sworn statement in his Florida fee lawsuit, as well as his e-mail communications. *See, e.g.*, RX 74 at 881, ¶ 4 (Mr. McDonald verifying by sworn affidavit: "In the March 17, 2009

retainer agreement, Ms. Morten also agreed to serve as lead counsel representing Mr. McDonald in his arbitration mediation and related claims against Glades Electric. **UNDISPUTED**."). As previously noted, Mr. McDonald also repeatedly asked Respondent to advocate on his behalf in the union arbitration matter and was aware of her efforts. *See, e.g.*, FF 15, 17-21.

27. Nor can we credit Mr. Pilacek's assertion that Respondent "did nothing" in connection to the union arbitration case. *See* Tr. 223. Mr. Pilacek's testimony was inconsistent and at times evasive.[26] Moreover, the Committee has

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[26] For instance, Mr. Pilacek initially suggested that Respondent did not attend any hearings related to the union arbitration case. *See* Tr. 203, 251. Yet on cross-examination, he acknowledged that Respondent attended the Eleventh Circuit mediation in Tampa, Florida, where the purpose of the meeting was to settle "only the union claim; correct." Tr. 256. His demeanor was also defensive, and he did not appear to be an impartial witness, as in this exchange:

> Q. [Ms. Bethel]: Okay. Okay. All right. So -- but the fact that you didn't represent Mr. McDonald, if Ms. Morten was providing him services in connection with the arbitration, you wouldn't even know that, would you?
>
> A. [Mr. Pilacek]: I would not.
>
> Q.: So when you say it concerned you, you didn't know if it was true or accurate or not?
>
> A.: Well, what I do know is true and accurate is that she performed no work in the arbitration case.
>
> Q.: And when you are saying no work, sir, did she attend any hearings?
>
> A: No.
>
> Q.: She didn't attend any hearings?
>
> A.: Not in the arbitration.
>
> Q.: She didn't review any documents?

carefully examined the record and finds significant evidence that is contrary to Mr. Pilacek's testimony. *See* RX 73 at 789-95, 831 (numerous e-mail exchanges between Respondent and Mr. Pilacek's firm); Tr. 220 (Mr. Pilacek testifying that Respondent often asked him for information about the arbitration case); RX 66 at 468-69 (Mr. Pilacek's billed time for e-mail exchanges and phone calls with Respondent regarding the arbitration case).

D. Respondent's Handling of the Employment Discrimination Case and Related EEOC Matter

28. In late January 2010, Respondent took over as lead counsel in the employment discrimination case when Mr. Gerleman withdrew. *See* ODC Reply Br. at 6, R-PFF 29(Disciplinary Counsel not disputing that Respondent "took over from Mr. Gerleman as 'lead counsel'"); *see also* RX 4 at 9.[27] In an e-mail he sent on

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> A.: I have no knowledge, other than what material that we furnished when she requested it.
>
> Q.: Whoa, whoa. What difference does it make whether or not she requested it or not?
>
> A.: It really doesn't. You asked me about the state of my knowledge. I said other than those that we furnished her, I don't know what she reviewed.

Tr. 250-51.

[27] According to a pleading filed by Respondent in Mr. McDonald's Florida lawsuit against her, on or about January 28, 2010, Mr. McDonald sent Mr. Gerleman an e-mail stating:

> I want all conversation and discussion and negotiations to be handled by [Respondent] who is lead counsel in my case against Glades Electric. If you wish to continue to work on the case, I have instructed [Respondent] that you may do so only after negotiating a reasonable hourly rate approved by me.

RX 68 at 663. The Florida state court relied on the e-mail in its ruling granting summary judgment to Respondent in Mr. McDonald's Florida fee lawsuit. *See* FF 73. However, a copy of the e-mail itself, which the pleading purports to attach, is not in the record.

January 28, 2010, Mr. Gerleman notified Mr. McDonald that he would move to withdraw. RX 3 at 7-8. Mr. Gerleman was replaced as local counsel by Jenna Persons, Esquire. *See* RX 13 at 66; *see supra* note 18.

29. On January 29, 2010, Respondent sent a letter addressed to Mr. McDonald's residence in Lake Placid, Florida. The letter memorialized her phone conversations with Mr. McDonald about her becoming lead counsel and replacing Mr. Gerleman with another local counsel, Jenna Persons, as well as the terms of the ongoing representation, her outstanding hourly fees of $38,200.23, and her ongoing agreement not to require him to make the $500 monthly payments required under the retainer agreement:

> My email to you concerning Jenna Persons was returned to me marked "undeliverable". Over the past several days, we have had numerous telephone conversations and exchanged emails regarding Ms. Persons and other matters pertaining to your legal representation. Dan Gerleman informed me that he is withdrawing as your attorney in 30 days.
>
> We spoke this morning about Jenna Persons' representation and changes to our retainer agreement.[28] Since I am out of town and unable to reach you by email, I am writing you this letter to confirm our conversation regarding the terms of my representation.
>
> We agreed that I will replace Mr. Gerleman as lead counsel in all your claims against Glades Electric. Because I was not involved in the initial phases of the case, *I informed you that I am unable to take the case on a contingency fee basis*. I will continue to provide legal services to you at my hourly rate of $450 plus expenses and you will remain

[28] In its post-hearing briefing, Disciplinary Counsel erroneously claims that the January 29, 2010 "letter did not even mention the prior agreement," a statement that is plainly incorrect. *See* ODC Br. at 25, PFF 43. The January 29, 2010 letter explicitly refers to the retainer agreement, as well as its terms that continued to apply.

responsible for the cost of depositions, investigative services and other litigation expenses as set forth in our retainer agreement.

To date, my outstanding fees are $38,200.23 ($41,200.23 less your $3,000.00 retainer). As you requested, I will continue to represent you without your having to pay the $500 monthly payment. I will recover my costs (billable hours and expenses) from any recovery that you receive from Glades Electric (including arbitration, settlement or trial proceeds) as set forth in the retainer agreement.

With your approval, Willie Green referred me to Jenna Persons of Bruce Strayhorn's office. I called Ms. Persons, and she agreed to join the legal team as local counsel on an hourly basis of $250 plus expenses. Ms. Persons also agreed to file a pro hac vice motion on my behalf with the Court.

At your request, I explained your financial circumstances to Ms. Persons. She is willing to represent you without requiring the payment of a retainer, deposit or monthly payments with the understanding that you will pay her billable hours and expenses from any recovery that you obtain from Glades Electric. You agreed to enter into a separate retainer agreement with Ms. Persons. I informed you that whether the case is settled or proceeds to trial, as lead counsel I will handle the bulk of the legal work.

Mr. Gerleman informed us that Glades Electric attorney Brian Koji might be calling with a settlement offer, and you asked me not to enter into any settlement of your outstanding claims against Glades Electric without your prior approval. I agreed, noting that this is a provision of our retainer agreement.

Please let me know if you have any questions regarding my representation or if your recollection differs in any meaningful way from that set forth herein. As always, best wishes.

Sincerely,

[Signature]Kemi Morten

DX B at 13-14 (emphasis added).[29]

30. At the hearing, Mr. McDonald for the first time claimed that he never received the January 29, 2010 letter, *see* Tr. 51-52, notwithstanding that Disciplinary Counsel itself implied the opposite in the Specification of Charges when it cited the letter as proof of Respondent's allegedly confusing representations to Mr. McDonald. *See* DX B at 2, 13-14. In paragraph 3 of its Specification, Disciplinary Counsel asserted that:

> Respondent wrote a letter dated January 29, 2010, from the District of Columbia, purporting to memorialize a change to the original retainer agreement. It did not sufficiently clarify how much she would be paid or under what circumstances, and her client was still confused about precisely which provisions of which document applied by the time settlement occurred. Attachment B [the January 29, 2010 letter].

DX B at 2. Tellingly, during the fee litigation in the Florida state court, Mr. McDonald himself did not dispute that he had received the letter after Respondent pointed to it in her own filings. *See* DX N at 9, ¶ 53. Instead, in his Amended Complaint he simply claimed that he and Respondent did not have a new "signed contract." *See* RX 39 at 221, ¶ 18 (Amended Complaint filed July 8, 2014) ("There is no new *signed contract* between parties. . . . [A] new payment schedule was not established *under contract*.") (emphasis added). Given the statements in the Amended Complaint, and Disciplinary Counsel's own prior representations, the Hearing Committee cannot credit Mr. McDonald's new claim to have never received

[29] The January 29, 2010 Letter is duplicated in other exhibits, *see* RX 4, RX 61 at 390-91, but we only cite to DX B at 13-14.

the letter, especially given the many other inconsistencies and false assertions in his hearing testimony. *See* FF 13, 26, 49-50.

31. As lead counsel in the employment discrimination case, Respondent started the discovery process, including several requests to Glades for production of documents and interrogatories. Tr. 280 (Respondent). Additionally, Respondent had to prepare and file responses to interrogatories from Glades. *Id*.[30]

32. Respondent defended Mr. McDonald's deposition in Tampa, Florida, and deposed approximately eleven witnesses identified by Mr. McDonald. Tr. 281. Glades was represented by Allen, Norten & Blue, a law firm based in Tampa, Florida, with about 25 attorneys. Tr. 285 (Respondent). Respondent additionally sought and obtained personnel records from Glades. According to Respondent, "they buried me with paper. They also sent CD-ROMs with microfiche, because I had asked for personnel records." Tr. 285-86 (Respondent's counsel identifying demonstrative exhibit of the pages of documents filed in the employment discrimination case).

33. In reviewing the personnel records, Respondent found an "identical comparator": a Caucasian-American lead lineman who "had committed a safety violation that resulted in an eye injury, almost a blinding eye injury, to his apprentice

[30] During the discovery process, Respondent requested that Mr. McDonald pay her $7,500, which he paid, for costs "associated with depositions, investigator's fees, and subpoena service." RX 18 at 127. Respondent also used the services of an investigator "to locate witnesses, serve[] the subpoenas, [and] conduct[] the necessary depositions (all of which were attended by Mr. McDonald)." *Id.*

who happened to be African American, unlike Mr. McDonald's apprentice who happened not to be African American, he was Caucasian American." Tr. 288 (Respondent). The finding was significant because Glades took no disciplinary action against the white lead lineman, but they terminated Mr. McDonald. Tr. 288-89 (Respondent). Because this discovery had not previously been produced and contradicted the prior statements of Brian Todd, a Glades General Manager, Respondent filed a motion for an emergency order for an additional deposition of Mr. Todd, which was granted. Tr. 289 (Respondent). Ultimately, the existence of an identical comparator was critical in Respondent's successful effort to defeat Glades' motion for summary judgment, which was denied on July 22, 2011. Tr. 289 (Respondent); *Sammie McDonald v. Glades Elec. Coop.*, No. 2:08-cv-179 (M.D. Fla. July 22, 2011), ECF No. 134.

34. After summary judgment was denied, Respondent began preparing for trial. Her trial preparation included responding to numerous motions *in limine* filed by Glades, filing *in limine* motions on behalf of Mr. McDonald, preparing "six, massive exhibit notebooks," drafting and filing proposed jury instructions, and completing other work to comply with "the federal court's pretrial requirements which were substantial." RX 19 at 132; *see also Sammie McDonald v. Glades Elec. Coop.*, No. 2:08-cv-179, ECF Nos. 94-154 (M.D. Fla. Apr. 25, 2011 to Aug. 3, 2011) (motions *in limine* and oppositions to motions *in limine*, pretrial statements, jury instructions, proposed *voir dire*, proposed special verdict form, trial exhibits, trial briefs).

35. Sometime in April 2011, Respondent also drafted, and Mr. McDonald filed, a complaint with the EEOC, alleging that Glades racially discriminated against him following his February 2011 reinstatement. The EEOC opened a case and began investigating. RX 6 at 14, 30-31.

36. The jury trial for the employment discrimination case was scheduled for August 9, 2011. DX F at 2. On July 25, 2011, Judge John E. Steele convened a final pretrial conference, during which the parties were directed to submit Mediation Briefs by July 28, 2011 and to appear for a settlement conference before U.S. Magistrate Judge Douglas Frazier on August 4, 2011. During the final pretrial conference, Mr. Koji asked Respondent to consider a "global settlement" of the employment discrimination case and the new EEOC matter addressing the post-reinstatement discrimination. RX 6 at 19-20; *see also* FF 38.

37. The Mediation Brief filed by Respondent described Glades' ongoing discrimination against Mr. McDonald, including after his reinstatement. *See* RX 6 at 19. The brief also documented his claim for overtime and standby pay for the entire period since his original termination, which had not been included in the union arbitration case:

> [Mr. McDonald] claims that prior to his termination he volunteered for and received substantially more overtime and standby pay based on his willingness to work longer hours than the average line employee. As a result, Plaintiff contends, the formula devised by [Glades] for paying him overtime and standby pay unfairly deprives him of substantial earnings.

RX 6 at 19. Apart from overtime and standby pay, the Mediation Brief claimed straight-time backpay for the period from Mr. McDonald's termination to the arbitrator's initial reinstatement order – August 13, 2007 through July 7, 2008 – which also had not been included in the union arbitration case. RX 6 at 20-21.

38. The Mediation Brief advised Magistrate Frazier that Mr. Koji had asked Respondent to consider settling the EEOC matter concerning post-reinstatement discrimination in conjunction with the employment discrimination case:

> Plaintiff has notified Defendant that he intends to file new litigation regarding his post-reinstatement discrimination claims once the EEOC completes its investigation. It is this new litigation (and the pending Case 2:08-cv-00179) to which opposing [counsel Mr. Koji] referred on July 25, 2011, when he suggested the parties should try to achieve a "global settlement" of the case during the upcoming settlement conference with this Honorable Court.

RX 6 at 14, 19-20, 30-31. The Mediation Brief described Respondent as having accrued hourly attorney fees totaling $483,000. RX 6 at 31; Tr. 467-68.

39. On or about July 28, 2011, Respondent forwarded the Mediation Brief to Mr. McDonald for his review before she filed it with the federal court. Tr. 294 (Respondent). Respondent also forwarded a copy of the Mediation Brief to another Florida-barred attorney, Esmond Lewis, Esquire, who had agreed to act as co-counsel during the trial because Ms. Persons was unavailable. Tr. 444, 468 (Lewis).[31]

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[31] The Hearing Committee does not credit Mr. McDonald's testimony that Mr. Lewis appeared at the mediation without his approval. *See* Tr. 59. Before the Florida state court, Mr. McDonald had averred: "With Mr. McDonald's approval**,** Florida attorney Esmond Lewis attended as

40. Two days later, by e-mail on July 30, Mr. McDonald for the first time requested an invoice of all of Respondent's fees and costs. Tr. 305 (Respondent); DX G; FF 50. In that e-mail, Mr. McDonald specifically asked for "a detailed breakdown of hours worked with dates&time [sic]" and receipts for the expenses "within 10 days excluding weekends and holidays." DX G. Respondent acknowledged her receipt of the e-mail shortly after it was sent, and informed Mr. McDonald that she would provide him with the requested information. DX G; *see also* Tr. 305 (Respondent). Respondent was continuing to prepare for the mediation during the time when Mr. McDonald's request was pending. Tr. 305 (Respondent: "I told him I would get [the requested information] to him. I was working on preparing for the mediation."). The Committee credits Respondent's testimony concerning the circumstances of why she could not immediately respond to her client's request.

41. Respondent, her investigator, Mr. McDonald, Mr. Lewis, Mr. Koji, and Mr. Todd attended the mediation. Tr. 295 (Respondent). During the day-long mediation, Respondent and Mr. Koji made their opening statements, and the Magistrate Judge separated the parties and met with them separately. Tr. 296 (Respondent). Glades' initial offer was for a payment of $50,000 to Mr. McDonald and a requirement that he cover his own attorney fees and retire immediately. After a lunch break, Glades increased its offer to $200,000 and then $300,000. Tr. 297,

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[Respondent's] co-counsel and prepared to sit as second chair at trial after Attorney Jenna Persons state[d] that she could not attend due to a calendaring conflict." RX 74 at 905.

299 (Respondent). Finally, as the court was about to close, at approximately 5 p.m. Glades stated that their final offer was "$565,531.31 (plus additional interests on some portions thereof)" with the same requirement that Mr. McDonald immediately retire and pay his own attorney fees. *See* RX 74 at 906, ¶ 161 (Mr. McDonald's sworn affidavit, admitting Glades' final settlement offer amount); *see also* Tr. 299 (Respondent testifying that Glades' final offer was "565,000-plus dollars."). Elsewhere in the record, a final offer by Glades in the amount of "$563,531.38 (plus interest on some portions)" is described, *see, e.g.*, RX 68 at 730, ¶ 94 (Lewis' sworn affidavit), RX 74 at 908, ¶ 172 (Mr. McDonald's sworn affidavit). Based on our review, it appears that this discrepancy may be related to the handwritten addition of "$1840 interest" to the Agreement and Release, *see* FF 45.

42. To facilitate settlement with Glades, Respondent, in the presence of Mr. Lewis, agreed to reduce her hourly rate from $450 to $247.75 per hour, causing her total fees of $483,000 to be reduced to $254,000. Tr. 300 (Respondent); Tr. 481-83 (Lewis). To be sure Mr. McDonald understood, Respondent wrote the reduced amount of $254,000 on a piece of paper and took Mr. McDonald into the anteroom of the Magistrate Judge's chambers and showed it to him. Tr. 300 (Respondent). Respondent asked Mr. McDonald if the reduced fees "satisfied him" and he said, "Yes, I'm satisfied," and in Respondent's opinion, he seemed "very satisfied." *Id.* They then came out of the anteroom and Mr. McDonald asked Mr. Lewis to let the Magistrate know that he was ready to accept Glades' offer. *Id*. at 300-01. We credit Respondent's recollection of this exchange.

43. Mr. Lewis testified that, based on Mr. McDonald's statements during the mediation, it was clear Mr. McDonald understood he had to pay Respondent's legal fees on an hourly basis:

> Q [Ms. Bethel]. As you sit here today, is there any doubt in your mind that Mr. McDonald was apprised that Ms. Morten's fee was an hourly rate with respect to her representation of him in this matter?
>
> A [Mr. Lewis]. I am -- not only is there no doubt, but I'm convinced that Mr. McDonald knew that what he was paying for was an hourly rate. Throughout the day, we discussed Ms. Morten's hourly rate -- I believe it was $450 an hour -- and the total hours that she had put in.

Tr. 460. In his prior sworn affidavit in the Florida fee dispute, Mr. Lewis had similarly observed:

> Mr. McDonald did not express through facial expression or in words any surprise, concern or dissatisfaction when Ms. Morten stated her legal fees and costs to the Magistrate at the beginning of the mediation or at any other time during the mediation conference. . . . At no time did Mr. McDonald state to the Magistrate, Ms. Morten or to me that he was under the impression, as he now claims, that he had a contingency fee arrangement with Ms. Morten or that it was his understanding that Ms. Morten would be paid 25% of his recovery from Glades Electric.

RX 68 at 722. In this same affidavit, Mr. Lewis also averred that:

> Mr. McDonald never appeared to me to be "confused" about Ms. Morten's legal fee arrangement, and he never expressed to me or to Magistrate Frazier that he had a "contingency fee" arrangement with Ms. Morten.

RX 68 at 733.[32]

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[32] We find Mr. Lewis's testimony to be credible. His answers were consistent with his prior sworn affidavit before a Florida state court, located in his home state where he continues to practice. *See*

44. After Respondent agreed to reduce her fees, Mr. McDonald accepted Glades' settlement offer. *See* RX 68 at 730. Because the court was about to close, the Magistrate Judge directed Respondent and Mr. Koji to work together on an Agreement and Release, and return to the court with their clients the next morning on August 5, 2011. Tr. 301-02 (Respondent).

45. The Settlement Agreement and Release signed by Mr. McDonald and the Glades representative on August 5, 2011 provided in pertinent part that:

> [W]ithin 10 days of the execution of this Agreement, [Glades] agrees to pay Mr. McDonald (a) back pay in the amount of $153,023.84, . . . plus interest, . . . (b) an additional sum in the amount of $362,200, made payable to the "Unfoldment, Inc., Trust Account" (Mr. McDonald's attorney, Kemi Morten). Payment for any unused leave which Mr. McDonald has accrued to date shall be made payable to Mr. McDonald, together with an accounting of the accrued hours (including any balance prior to August 2007 plus any additional accrued sick and vacation time from July 8, 2008 through the date of his resignation). In addition, [Glades] agrees to make contribution to Mr. McDonald's 401(k) plan in the amount of $4590.88 and to pay the premiums into Mr. McDonald's R&S Pension Plan in the amount of $22,544.16.

RX 68 at 722, 733; Tr. 481-83 (Lewis). Further, Mr. Lewis's demeanor was calm and self-assured, and he answered questions directly and without hesitation. During its cross-examination, Disciplinary Counsel nevertheless raised the issue of Mr. Lewis's own prior discipline in an unrelated case and noted that his $2,275 bill for participating in Mr. McDonald's case had not yet been paid, arguing that both would go towards Mr. Lewis's bias. *See* Tr. 477, 479-80. But the Committee is unpersuaded that prior discipline involving entirely different parties is any indication of likely bias. Leaving aside the question of whether it is plausible that an attorney would lie to both us and a tribunal in his home state for the sake of collecting a relatively small bill, the reality is that we observed Mr. Lewis's testimony on direct and cross-examination and also compared his testimony to his prior sworn declaration and found it to be consistent. On these bases, we find that Disciplinary Counsel has not made a sufficient showing of bias on the part of Mr. Lewis to discount his testimony.

RX 9 at 52-53. The typed Agreement and Release included a handwritten notation of "in the amount of $1840" next to the word "interest" and a handwritten "609.5" inserted next to accrued hours.[33] Both the Glades representative Mr. Todd and Mr. McDonald initialed those additions. *See id*. at 52.

46. During the hearing, Respondent described the outcome of the mediation as a settlement of the employment discrimination case and the EEOC charge, but not the union arbitration case, which had been resolved separately. Tr. 491, 494-95. Respondent's characterization of the outcome is consistent with Mr. Koji's August 19, 2011 post-settlement letter to Respondent enclosing the checks, which references only the employment discrimination case and the EEOC matter, DX I at 1, Mr. Lewis's testimony, Tr. 456-57 (describing mediation as resulting in a settlement of the employment discrimination case and the pending EEOC matter), and the representations in the Mediation Brief, FF 38. In addition, the record clearly shows that the union was not part of the employment discrimination mediation, and Mr. Pilacek was not present (nor any other representative of the union) at the mediation to represent the union's interests. *See, e.g.*, FF 41; RX 9 at 55.

47. The Hearing Committee does not credit Mr. Pilacek's assertion at the disciplinary hearing that "a substantial portion" of backpay component of the $565,000 settlement was actually attributable to the union arbitration case and "was

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[33] The employment discrimination case Settlement Agreement is duplicated in the following exhibits, *see* DX D at 23-26, DX H, but we cite only to the copy at RX 9 at 52-55. The $1,840 in interest appears to have instead been remitted to Respondent instead of included in the check sent directly to Mr. McDonald. *See infra* note 36.

not attributable to the discrimination case." Tr. 189. As described in the Mediation Brief, the backpay award in the employment discrimination case covered different time periods than the backpay awarded in the union arbitration case, as well as overtime and standby pay. *See* FF 37. Moreover, the signed Agreement and Release does not mention the union arbitration case, nor were Mr. Pilacek or IBEW Local 1933 participants in the July 28 mediation of the employment discrimination case. *See* DX H at 1; Tr. 566-67, 572 (Pilacek); *see also* FF 41. Neither Respondent nor Mr. McDonald had authority to settle the union claims. As Mr. Pilacek noted:

> [A]s far as the union was concerned all issues had been addressed, then we didn't care very much what happened [in the employment discrimination case]. Our position was very simple. If Mr. McDonald wants anything more, he needs to get it through the discrimination case.

Tr. 215-16.

48. In sum, nothing in the record has persuaded us that the settlement was the result of anything other than Respondent's work on Mr. McDonald's behalf in the employment discrimination case and related EEOC matter.

49. Nor does the Committee credit Mr. McDonald's various assertions that conflict with Respondent's testimony about how the mediation and settlement of these matters unfolded. For example, Mr. McDonald claimed at the hearing that he did not understand or agree to Respondent's fees during the mediation, testifying that when Ms. Morten showed him the piece of paper with her proposed reduced fees, he "didn't look at it, because [he] was really upset." Tr. 63; *see also* Tr. 111 (Mr. McDonald continuing to claim he never saw the reduced hourly fees: "It had

some numbers. I didn't read the numbers."). These statements were demonstrably false. Mr. McDonald himself previously wrote a letter to Disciplinary Counsel in which he stated that Respondent wrote $254,000 as her reduced fee and showed it to him on a piece of paper. *See* RX 21 at 140-41.[34] In fact, Mr. McDonald admitted under oath by his sworn affidavit, RX 75 at 909, in the fee lawsuit he filed in Florida that, in the presence of Mr. Lewis and Respondent, he told the Magistrate that he accepted Glades' final offer. RX 74 at 906, ¶ 161; *see also* RX 74 at 908, ¶ 172. Mr. McDonald also did not dispute that Magistrate Judge Frazier told him that he wanted

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[34] When a Hearing Committee member asked Mr. McDonald about the prior inconsistent October 25 statement in his letter to Disciplinary Counsel (admitting he saw that Respondent had written down $254,000 as her reduced fee), Mr. McDonald testified he could not remember what happened. *See* Tr. 111. This was one of a number of times that Mr. McDonald's demeanor and testimony was evasive when testifying on the hourly fees issue at the hearing. Mr. Lewis's prior affidavit filed in the Florida state court further supports the Committee's finding that Mr. McDonald's testimony that he was not aware of the amount of Respondent's reduced hourly fees and did not agree voluntarily to the terms of the settlement summarized by the Magistrate were untruthful:

> 88. . . . Ms. Morten paused for a moment and then informed Mr. McDonald that she would consider reducing her legal fee if it would help him accept the settlement.
>
> 89. I observed Ms. Morten as she took a moment and did some quick calculations and then wrote something down on a piece of paper.
>
> 90. Ms. Morten then stood up and asked Mr. McDonald to step into a little anteroom just off the room where we were gathered. They spoke for a very brief time.
>
> 91. When they returned to their seats, I observed Mr. McDonald's behavior. He appeared very satisfied.
>
> 92. Ms. Morten informed me that she had agreed to reduce her legal fees. Mr. McDonald told me and Ms. Morten that he was ready to accept Glades Electric's final offer.

RX 8 at 47, ¶¶ 88-92.

to be absolutely sure that Mr. McDonald understood the conditions of Glades' final offer before accepting it. RX 74 at 908, ¶ 173; *see also* Tr. 90 (McDonald acknowledging that Respondent read out loud, the entire Agreement and Release in the Magistrate Judge's office).

50. Likewise, the Hearing Committee cannot credit Mr. McDonald's testimony that he was unaware he had an hourly fee arrangement with Respondent when he agreed to the settlement. That understanding contradicts the plain language of the retainer agreement Mr. McDonald signed with Respondent and the subsequent letter Respondent sent Mr. McDonald when she became lead counsel in the employment discrimination matter. *See* FF 9-11, 13, 29. The record contains no evidence other than Mr. McDonald's own contradictory testimony that Respondent ever told him they had anything other than an hourly fee arrangement. In fact, on July 30, 2011, Mr. McDonald asked Respondent for a breakdown of her *hourly* fees. RX 7 at 33; Tr. 305 (Respondent).[35] Respondent's total hourly fees (and not a contingency percentage) were also included in the Mediation Brief provided to Mr. McDonald for his review. *See* RX 6 at 20 (claiming $483,000 in attorney fees); FF 39. And tellingly, after the settlement, Mr. McDonald wrote to Respondent offering to withdraw his two Bar complaints *in exchange* for her agreement to a 25% contingency fee but made no mention of any belief that they already had such an arrangement. *See* FF 56; RX 15. Given this evidence, and Mr. McDonald's

[35] As noted, Mr. McDonald conceded during the hearing that this was the first time he had ever requested a bill. Tr. 53; *see also* FF 12.

background as a union official who participated in the negotiation of collective bargaining agreements, his claims that he misunderstood the nature of his fee arrangement with Respondent or that she otherwise misled him during settlement of his employment discrimination action are not credible.

E. Initial Post-Settlement Communications Between Respondent and Mr. McDonald

51. Following settlement of the employment discrimination case and related EEOC matter, Glades sent Mr. McDonald a check for $153,023.84 for his backpay, as agreed upon during the mediation. Tr. 65 (McDonald); DX H. Under the terms of the settlement, Glades also paid $4,590.88 to Mr. McDonald's 401(K) plan, contributed $22,544.16 to Mr. McDonald's pension plan, and made a direct payment to Mr. McDonald for his unused leave as well as for accrued sick and vacation time until the date of his resignation. *See* DX H. Glades' attorney, Mr. Koji, mailed the remaining balance of the settlement, $364,040, to Respondent in two separate checks (one from Glades' insurer in the amount of $175,000 and one from Glades in the amount of $189,040);[36] Respondent deposited both checks into her BB&T "Unfoldment Inc Trust Fund Acct" (ending in #8931 with an address in Cape Coral, Florida) on August 22, 2011. DX I at 1-3; DX W at 7; Tr. 116-17, 137 (ODC investigator Mr. O'Connell identifying the deposits in the bank statements).

[36] The total of $364,040 appears to be the sum of $362,200 that was to be paid to Respondent's Unfoldment Trust Account under the Settlement Agreement and Release plus the $1,840 interest payment also referenced in the Agreement. *See* FF 45.

52. On August 25, 2011, Respondent sent Mr. McDonald an e-mail notifying him that, per his request, she had contacted Mr. Gerleman about the $10,000 in fees Mr. Gerleman had billed, but she had not yet heard back from him. RX 10. Later that same day, Mr. McDonald sent Respondent an e-mail reminding her of his prior July 30 request for an itemized breakdown of her hourly fees from March 17, 2009 to July 30, 2011 (the first such breakdown he had requested, *see* FF 40) and various other materials.[37] RX 11; *see* also RX 7 at 33-34 (Mr. McDonald's e-mail message to Respondent on July 30, 2011). He also requested copies of the settlement checks and noted that he was looking forward to a phone call with Respondent scheduled for the next day, August 26. RX 11.

53. Respondent and Mr. McDonald spoke again on August 30, 2011. During that call, Respondent let Mr. McDonald know that she was sending him a detailed Closing Statement by overnight mail and by e-mail. RX 15 at 88; RX 16 at 89. Mr. McDonald replied on September 6 to confirm he had received the statement and accompanying documents. RX 15 at 88.

54. The Closing Statement reflected that Respondent, consistent with her promise, had reduced her $456,843.69 in hourly legal fees to $254,000. RX 16

[37] Mr. McDonald requested all phone records with dates and times; all travel receipts and records; any and all outgoing communication pertaining to his suit; and information pertaining to courier, paralegal, investigator, postage, fax, photocopying and clerical fees if applicable, and other accrued expenses. RX 7 at 33-34.

at 89.[38] Also attached were nineteen pages of detailed time records – in increments of six-minutes or .1 hours and including a description of the work completed – that were dated from March 18, 2009 through August 1, 2011, RX 16 at 91-109; documents including a statement for services from her investigator, John Caldwell, RX 16 at 110-13; a letter from Respondent to a process server, Rodney Elinor, regarding service of subpoena and process server fees, RX 16 at 114; a court reporting service invoice from Von Ahn Associates, Inc., RX 16 at 115; and Ms. Persons' invoices for attorney fees and incurred expenses connected to her service as local counsel, RX 16 at 117-23.[39] Respondent noted in the Closing Statement that she had reduced the itemized $19,477.43 in costs to $12,044.43 and had also discounted and did not bill him for Mr. Lewis's $2,275 fee. RX 16 at 89-90. After crediting Mr. McDonald with his prior payments of $10,500, Respondent asserted that she was due $255,544.43 for her reduced fees and reduced costs. RX 16 at 89. After accounting for that amount and the credit for $10,500, a balance of $105,551.17 to Mr. McDonald remained. RX 16 at 89; *supra* note 2; *see also* FF 63-64.

55. In a footnote to the Closing Statement, Respondent included the provision that "Attorney reserves the right to recover the full amount of legal fees

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[38] A duplicate exhibit of the Closing Statement exists at DX D at 28-29, and at DX J at 1-2. We cite only to RX 16 at 89-90.

[39] According to Mr. McDonald, Ms. Persons subsequently advised him that she had written off what he described as a "$2,900" debt. *See* Tr. 73 (McDonald). The invoice for her legal services was actually for $2,944.40. *See* RX 16 at 90 (Closing Statement); RX 16 at 117 (Invoice from Strayhorn & Persons).

$456,843.69, the full costs and [other] fees incurred through August 30, 2011, in the amount of $19,477 and all billable hours for unbilled telephone calls and consultations with Mr. McDonald and other witnesses should Client fail to pay the agreed upon discounted legal fees billed herein and/or if litigation is required to collect fees for services rendered." RX 16 at 89; *see* Tr. 538-41 (Respondent).

56. On September 6, 2011, Mr. McDonald wrote the following to Respondent by e-mail:

> Kemi, I rec'd the closing statement on 9/2/2011. I have been out of town, I do not agree with the closing statement[.] I requested cancel checks, receipts, any and all documents pertaining to mcdonald vs glades. you failed to submit these items. *I will agree to* 25 percent of the $364,400.00 which is $91,010.00. I will cancel the request for all documents and withdraw my complaint with the florida and washington bar. please respond by Friday sept. 9, 2011. Thanks in advance[,] Sammie McDonald.

RX 15 (emphasis added); *see also* FF 53.[40] Notably, Mr. McDonald's e-mail makes no reference to any prior contingency fee arrangement; instead, the e-mail appears to *propose* a 25 percent contingency as a compromise. *See also* RX 74 at 894, ¶ 77 (Mr. McDonald verifying by sworn affidavit: "On or about September 7, 2011, Mr. McDonald sent an e-mail to Ms. Morten offering to withdraw his two bar complaints against her if she would agree to accept 25% of the settlement amount or $9,010. **UNDISPUTED**"). Mr. McDonald gave Respondent 72 hours to respond. RX 15. The record does not contain any direct response from Respondent to Mr.

[40] Mr. McDonald's proposal did not include any payment of accrued expenses and costs but represented a flat 25% of the two checks that Respondent had received and deposited into her trust account.

McDonald's e-mail aside from her communications with Disciplinary Counsel, but it is undisputed that she declined his compromise offer. *See* RX 74 at 894, ¶ 78 (Mr. McDonald verifying by sworn affidavit "Ms. Morten declined the offer. **UNDISPUTED**").

F. Proceedings Surrounding Mr. McDonald's Initial Complaint

57. On August 29, 2011, the day before Respondent sent the Closing Statement, Mr. McDonald faxed two identical letters to the District of Columbia and the Florida attorney discipline offices. RX 13 at 65-68; RX 14 at 74-77.[41] In the letters, Mr. McDonald complained that Respondent had never provided him with monthly statements or with a final breakdown of her fees and copies of the settlement checks from Glades. He did not dispute that she was to be paid hourly fees:

> I email Ms. Morten on July 30, 2011 and requested a . . . breakdown of her legal fees. I received a[n] email stating "will do." On August 4, 2011 my lawsuit against Glades elect. Coop was settled. I hadn't heard anything from Ms. Morten. On August 23, 2011 I phone[d] Ms. Morten to inquir[ed] on the status of the settlement checks. Ms. Morten stated she was out of town and she had received the (2) settlement checks and had deposit[ed] them. Ms. Morten stated she would be back on 8/26 and she would call me. . . . I phone[d] Ms. Morten on August 26 @ 11:30 am. Ms. Morten inform[ed] me . . . she had to go to Washington D.C.

[41] His Florida disciplinary complaint was filed with the State Bar's Unlicensed Practice of Law Department, notwithstanding that Mr. McDonald knew that Respondent was working with Florida-barred attorneys who had agreed to move her admission *pro hac vice*. RX 13 at 65-68. On November 14, 2011, the Department notified Respondent that its investigation of Mr. McDonald's complaint was closed as she had not engaged in the unauthorized practice of law, having been admitted *pro hac vice*, but that it would be forwarded to the Lawyer Regulation Department (which subsequently dismissed the complaint due to the concurrent investigation being conducted by the D.C. Bar). RX 23; RX 26. Mr. McDonald admitted in his Florida fee lawsuit pleadings that his allegation of unlicensed practice of law was false. *See* RX 74 at 893, ¶ 73 (Mr. McDonald verifying by sworn affidavit: In his Florida bar complaint, Mr. McDonald falsely alleged that Ms. Morten had engaged in the unlicensed practice of law during her representation of him. **UNDISPUTED**").

> and she would email or overnite [sic] the information[.] [A]s of August 29, 2011 I haven't received any e-mail, phone call or overnite [sic] information.

RX 13 at 66-67.

58. In her October 12 response to Mr. McDonald's complaint addressed to Disciplinary Counsel, Respondent explained the circumstances of how she came to represent Mr. McDonald and how he had agreed to pay her an hourly rate. RX 19 at 130-31. She noted that Mr. McDonald "did not request invoices" throughout most of the representation, but that she "regularly informed him of my legal fees and costs." RX 19 at 132. She also provided a detailed description of the employment discrimination mediation and settlement, and the steps she had taken afterwards to provide Mr. McDonald a breakdown of her fees and costs. RX 19 at 133-34. Respondent also noted that she had offered to add language to the proposed settlement agreement requiring Glades to send Mr. McDonald his share of the settlement proceeds directly, but that Mr. McDonald stated he preferred for her to receive the entire settlement, deduct her legal fees and costs, and then forward him the balance. RX 19 at 134.[42]

[42] In his response, Mr. McDonald stated "I did agree to place the settlement checks in the trust account because I was under the impression that the checks would be in both of our names." RX 21 at 140 (October 24, 2011 letter).

59. On October 24, 2011, Mr. McDonald sent a letter to Assistant Disciplinary Counsel Dolores Dorsainvil[43] (who had been assigned to his case) responding to Respondent's letter and adding details to his initial complaint. *See* RX 21. It was in this letter that Mr. McDonald asserted for the *first time* that he had thought he was only responsible for paying a $3,000 retainer fee and 25% of any settlement, notwithstanding the express terms of the retainer agreement. RX 21 at 137. He admitted that Respondent had agreed to reduce her fees to $254,000 and had written that amount on a piece paper during the mediation, but falsely stated that he then "told her we had an agreement for 25% of the settlement and I walked out and sat back down at the table." RX 21 at 140-41; *cf.* FF 42-43. He also falsely asserted that from the outset Respondent had been retained only to work on the employment discrimination case as he had "already won" the union arbitration matter. RX 21 at 137; *cf.* FF 15, 17-21. In the letter to Disciplinary Counsel, he did admit to having received "a very detailed" statement from Respondent of her hourly fees and expenses, but falsely claimed that she "did not show any proof." RX 21 at 141; *cf.* FF 54.

60. In response to Mr. McDonald's October 24 letter to Disciplinary Counsel, Respondent wrote another letter to Disciplinary Counsel on November 14 reiterating her previous points and providing a detailed summary of her work on the

[43] Ms. Dorsainvil was a Senior Staff Attorney at the time Mr. McDonald wrote to her but had been promoted to the position of Assistant Disciplinary Counsel by the time of the hearing. We refer to her as Assistant Disciplinary Counsel herein.

latter stages of the union arbitration case. *See* RX 22. The Hearing Committee finds that the statements in Respondent's October 12 and November 14 letters are consistent with her statements in the Florida state court case and her testimony at the disciplinary hearing in all material respects.

61. In response to Respondent's November 14 letter, Mr. McDonald again wrote to Disciplinary Counsel, in a longer letter dated December 5, 2011. *See* RX 25. Along with reiterating his previous allegations, the December 5 letter claimed for the first time that Respondent, the judge, and Glades' counsel made a settlement agreement without his authorization. *See* RX 25 at 160. There is no credible evidence in the record to corroborate Mr. McDonald's assertion that the Magistrate Judge had forced a settlement, and Mr. McDonald's characterization of the settlement as having been decided by the Magistrate Judge, Respondent and Mr. Koji – without his consent – conflicts with his own prior and subsequent statements.

62. Mr. McDonald's December 5 letter contained other assertions that conflicted with his subsequent statements or other documentary evidence in the record. For example:

- The letter acknowledged that Mr. McDonald and Respondent discussed her fees by telephone prior to the mediation in the employment discrimination case, *see* RX 25 at 163 (after winning the arbitration appeal "is when Ms. Morten called me and said that her bill was is 485,000."), which is not what he testified at the hearing. *See* Tr. 55, 58 (claiming Respondent never told him the amount of her legal fees before the August 5, 2011 mediation conference).

- The letter also acknowledged, contrary to Mr. McDonald's hearing testimony denying that he read the amount Respondent had written down, *see* FF 49, that he *had* read the piece of paper with Respondent's

reduced fee that she handed him during the employment discrimination case mediation. *See* RX 25 at 166 ("After Ms. Morten showed me a piece of paper that said she would get $254,000 and I would get $108,000 I told her to put both checks in her trust account until we get things straightened out.").

- The letter falsely claimed that (1) Mr. Gerleman "was not my counsel" and "I did not have an agreement with Mr. Gerleman" and that (2) Respondent was his sole counsel in the employment discrimination case. *See* RX 25 at 160, 164. Both of these statements contradict the plain terms of the retainer agreement with Respondent and Mr. McDonald's separate retainer agreement with Mr. Gerleman. *See* FF 9.

- Similarly, the letter falsely claimed that Mr. McDonald told Respondent "not to interfere" in the union arbitration matter, RX 25 at 168. That assertion directly contradicts other evidence, including the e-mails Respondent drafted on Mr. McDonald's behalf related to the terms of his reinstatement, *see* FF 17-21, and Respondent's undisputed testimony that Mr. McDonald asked her to accompany him to the Eleventh Circuit mediation of the union case, *see* FF 15.

- Finally, in a handwritten addition to the letter, Mr. McDonald wrote that "Ms. Morten added my arbitration pay to get the [total discrimination settlement] amount of $565,531.38." RX 20 at 160. Yet Mr. McDonald himself testified at the hearing that he had received his backpay from the union arbitration case, which was separate from the backpay check he received from the discrimination case. FF 22; *see also* FF 47-48. Moreover, it is undisputed that neither IBEW Local 1933 nor its counsel Mr. Pilacek participated in the mediation of the discrimination case. FF 41-46.

63. There is no evidence of any further action after December 5, 2011 on Mr. McDonald's disciplinary complaint until August 2012. On August 13, 2012, Respondent sent Assistant Disciplinary Counsel Dorsainvil a letter referencing an August 7 telephone conversation in which Ms. Dorsainvil advised Respondent to issue a check to Mr. McDonald for his remaining portion of the settlement. RX 27

at 170.[44] The August 13, 2012 letter confirms that Respondent issued a check to Mr. McDonald for $105,551.17. RX 27 at 170-71; *see also* DX L (copy or check); Tr. 317-19, 321 (Respondent).

64. Along with the check, Respondent sent a certified letter to Mr. McDonald informing him (in conformity with the original Closing Statement) that she was (1) deducting her legal fees of $254,000 and costs (totaling $255,544.43), as agreed, from the $364,040 payment from Glades; (2) remitting 2,944.40 to Ms. Persons for her fees and costs, "unless you notify me in writing within 10 calendar days that you object"; and (3) enclosing the balance of $105,551.17 in the form of a cashier's check. RX 27 at 174-77. In the letter, Respondent informed Mr. McDonald that if he continued to dispute the amount, she reserved "the right to charge the hourly rate as set forth in our retainer agreement of $456,843.69, plus costs." RX 27 at 173; *see* Tr. 538-41 (Respondent).

65. Through retained counsel, DeeAnn Dempsey, Esquire, Mr. McDonald returned the $105,551.17 check. RX 28 at 177-79.[45] On August 21, 2012,

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[44] Ms. Dorsainvil's telephone log omits any record of an August 7 call. *See* DX T2 at 18-20. However, having received the August 13 letter from Respondent, there is no record that Ms. Dorsainvil replied to point out the letter's reference to a call that had not actually taken place. Nor did Disciplinary Counsel claim at the hearing that the reference to an August 7 call was false. Under these circumstances, the Committee finds the August 7 call did in fact take place as described.

[45] Ms. Dempsey's e-mail to Respondent offered to work towards "a swift and amicable resolution," *see* RX 28 at 177, in response to which Respondent agreed to discuss "the possibility of settling." RX 28 at 179. However, the record does not reflect that any further conversations regarding settlement took place, although Mr. McDonald's Amended Complaint claimed that his counsel tried to reach Respondent but, at that time, Respondent was residing in Harare, Zimbabwe. *See* RX 39 at 222-23; FF 2.

Respondent wrote to Ms. Dempsey confirming that she had received Ms. Dempsey's letter stating (1) that Mr. McDonald had rejected the settlement offer and (2) that Mr. McDonald did not authorize Respondent to release funds to pay the $2,944.40 fees owed to Jenna Persons. RX 28 at 178; Tr. 534-35 (Respondent).[46] Respondent notified Assistant Disciplinary Counsel Dorsainvil by letter that the check had been returned and redeposited the check (marked "not used for purpose intended") into her trust fund account on August 23, 2012. DX W at 49, 53.

66. On December 20, 2012, Assistant Disciplinary Counsel Dorsainvil sent a letter to Mr. McDonald that informed him that the Office of Disciplinary Counsel had completed its investigation of his complaint, which had been docketed for investigation on September 7, 2011 (Bar Docket No. 2011-D363). A copy of the letter was also sent to Respondent. The letter notified Mr. McDonald that the Office of Disciplinary Counsel was dismissing the complaint:

> You dispute the amount of legal fees owed to Ms. Morten and state that you did not agree to pay her hourly rate but rather a contingency fee of 25%. Ms. Morten's retainer agreement states that in the event that your matter settled or went to trial, you agreed that she would bill you at her hourly rate of $450. . . . Here we do not find that Ms. Morten's actions rise to the level of dishonesty, misappropriation or unreasonable fee. Therefore, this matter represents a civil dispute which this office cannot resolve. I have previously sent you information related to the Attorney

[46] While Ms. Dempsey's e-mail to Respondent purports to attach a letter, *see* RX 28 at 177, the letter itself is not part of the record. However, we have no basis to doubt the accuracy of Respondent's characterization in her reply.

> Client Arbitration Board (ACAB), the office that resolves fee disputes. . . .

RX 30 at 186-87.[47] The letter described the retainer agreement as "poorly written," and also faulted Respondent for having not put any renegotiated payment schedule in writing – but noted that "such a situation does not necessarily violate ethics rules." RX 30 at 186. Similarly, while it was "unfortunate" that Respondent had taken several weeks to provide Mr. McDonald with a final accounting following settlement of the employment discrimination case, Disciplinary Counsel concluded the delay had not violated any Rule. RX 30 at 187.

67. Respondent testified that she believed the Office of Disciplinary Counsel's December 20, 2012 letter – dismissing the complaint and affirming the hourly rate of $450 an hour in the retainer agreement –allowed her to withdraw $254,000 (her fees at a reduced hourly rate of $247.75 per hour, *see* FF 42) and preserve only $105,551.17, equal to Mr. McDonald's undisputed share of the settlement funds. *See* Tr. 325, 543-45, 551. Based on Respondent's demeanor at the hearing and general credibility supported by other evidence in the record, we credit that this is what Respondent sincerely believed. *See* FF 42-43, 46, 50, 54; *see also* FF 8, 71; *supra* p. 18 ("Respondent answered questions directly and without being evasive. Her manner was thoughtful, and she provided details without hesitation when Committee members had questions").

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[47] Disciplinary Counsel's December 20, 2012 dismissal letter is duplicated at DX D at 39-42, but we only cite to the copy at RX 30 at 184-87.

G. The Florida Fee Lawsuit

68. On February 27, 2013, approximately two months after Disciplinary Counsel issued the letter dismissing his complaint, Mr. McDonald filed a fee lawsuit in Florida state court, Case No. 13-CA-000575, suing Respondent for breach of contract. Mr. McDonald filed his lawsuit with the assistance of Ms. Dempsey's law firm, Renejuste Law & Associates. RX 31 at 188-91 (Complaint); DX M at 7-10 (same). The Complaint alleged, *inter alia*, that Respondent "fail[ed] to provide Plaintiff with the $269,531.17 due to him according to the terms of the Contract." RX 31 at 190, ¶ 31.[48] At the time Respondent was in Zimbabwe; service of the Complaint was by publication on or about November 7, 2013. *See* RX 39 at 223.

69. After Respondent failed to answer his Complaint, Mr. McDonald moved for entry of a default judgment on January 2, 2014. RX 39 at 223; DX M at 1. Respondent filed an opposition on January 28, 2014, responding to the allegations in Mr. McDonald's complaint and explaining that she had failed to timely answer because she was in Zimbabwe and had not been served there. *See* DX N at 1-28; *see also* RX 33 at 197-201 (March 13, 2014 Response to Defendant's Opposition to Motion for Default Judgment); RX 34 at 202-06 (March 21, 2014 Reply by

[48] The discrepancy between what Disciplinary Counsel now alleges should have been held in trust ($273,030) and what Mr. McDonald's counsel at Renejuste Law & Associates initially sought ($269,531,17) appears to be the result of his original Florida complaint including incurred costs that were owed to Respondent in the disputed fees. Disciplinary Counsel has yet to explain – if it is correct and a contingency fee agreement existed – why under the retainer agreement Respondent would not still be entitled to incurred costs or why its calculation of a 25% contingency fee was not calculated after the incurred costs were deducted. *See* FF 54 (Closing statement and receipts documenting costs totaling $19,477.43).

Defendant).[49] On March 31, 2014, the Florida state court denied Mr. McDonald's motion for a default judgment. DX M at 2.[50]

70. On July 8, 2014, Mr. McDonald filed an Amended Complaint seeking monetary damages of $274,030 and adding claims for breach of fiduciary duty, trust account mismanagement, fraud, and unjust enrichment. RX 39 at 219-30 (Amended Complaint).[51] On September 4, 2014, Respondent filed her Answer and Counterclaim, which she amended on November 4, 2014. RX 41 at 220; DX M at 2.

71. Following pretrial discovery, on October 9, 2015, Respondent filed a Motion to Dismiss or in the Alternative Motion for Summary Judgment on Plaintiff's Amended Complaint and Motion for Summary Judgment on Defendant's Counterclaims. *See* RX 68 at 662-734. Having carefully parsed through the record, the Hearing Committee finds that Respondent's representations in this filing were materially consistent with her testimony at the hearing.

72. On December 2, 2015, Mr. McDonald, through counsel, filed Plaintiff's Opposition to Defendant's Motion for Summary Judgment or in the Alternative Motion to Dismiss and Motion for Summary Judgment on Defendant's Counter-

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[49] On March 21, 2014, Respondent filed a "Notice of Compliance with Rule 2.516 and Designation of Email Address and Notice of Unavailability" informing the court and Mr. McDonald that she would be again traveling to Harare, Zimbabwe on April 2, 2014 and returning to the United States October 20, 2014. RX 35.

[50] Mr. McDonald filed a second motion for entry of a default judgment on July 29, 2014, DX M at 2. The Florida court denied Mr. McDonald's motion on August 13, 2014. DX M at 2.

[51] A duplicate copy of the Amended Complaint is at DX M at 12-23, but we only cite to the copy at RX 39 at 219-230. We note that the Disciplinary Counsel's exhibit does not have a date of filing stamped on the pleading.

Claim, and attached Mr. McDonald's sworn affidavit verifying the accuracy of its contents and his statement that he had both read and understood his Opposition. RX 74 at 875-908 (Opposition); RX 75 at 909 (Affidavit).[52] As with his statements to Disciplinary Counsel, Mr. McDonald's sworn representations in his court filing diverged in several material respects from his testimony before this Committee and the documentary evidence in the record. For example:

- The state court filing confirmed that, under the March 17, 2009 retainer agreement, Respondent was to serve as "lead counsel representing Mr. McDonald in his arbitration mediation and related claims against Glades Electric," in addition to originally acting as co-counsel with Mr. Gerleman in the federal discrimination case. *See* RX 74 at 881, ¶¶ 3, 4; *compare* Tr. 48 (Mr. McDonald falsely testifying that he did not have any interest in Respondent representing him in the union arbitration matter: "[A]ll I wanted her to do was to take the discrimination case that [Mr.] Gerleman had.").

- Mr. McDonald's state court filing also falsely disputed that he had ever made Respondent lead counsel in the employment discrimination case. *See* RX 74 at 882, ¶¶ 6-7 (disputing that Respondent took over as lead counsel in the federal discrimination case); *compare* Tr. 100 (Mr. McDonald admitting that based on his wishes, Respondent became lead lawyer once Mr. Gerleman withdrew).

73. On December 17, 2015, the Florida court, after reviewing the pleadings and having heard oral argument, granted summary judgment for Respondent. *See*

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[52] The Specification of Charges incorrectly alleges that the Florida state court's decision in Mr. McDonald's fee lawsuit was based on an unopposed motion to dismiss. *See* Specification, ¶ 15. The following exhibits offered by Disciplinary Counsel, however, show that (1) Mr. McDonald, through counsel, filed his own motion for summary judgment and opposed Respondent's motion for summary judgment and (2) that the Florida state court's order granted Respondent's motion for summary judgment on the merits, making legal rulings as to the validity of the agreement for hourly fees and rejecting Mr. McDonald's claim that they had contingency fee arrangement. *See* DX M at 5 (Final Judgment for Defendant); DX O at 1-6; FF 73.

DX O.[53] The Florida court began by noting that "both parties stipulate[ed] on the record that the issues in dispute pertain to the Court interpretation of the Attorney-Client Retainer Agreement executed on March 17, 2009 by the parties thereto are purely legal and proper for resolution by the Court at the Summary Judgment hearing . . . ." DX O at 1. It then made the following findings that are relevant to the Committee's findings of fact:

> (a) On March 17, 2009, Mr. McDonald and Ms. Morten executed a retainer agreement in Lee County, in which Ms. Morten agreed to serve as co-counsel in the federal discrimination case with Mr. Gerleman serving as lead counsel.
>
> (b) In the retainer agreement, Ms. Morten also agreed to serve as lead counsel in the union arbitration case (*Glades Electric v. IBEW*).
>
> (c) On January 28, 2010, Mr. McDonald sent an email to Mr. Gerleman advising him that Ms. Morten was now lead counsel in the federal discrimination case.
>
> (d) Ms. Morten and Mr. McDonald agreed that Respondent "would serve as lead counsel in the federal discrimination litigation and to continue to serve as lead counsel in the arbitration litigation at the hourly rate of $450 plus costs and expense[s]. Ms. Morten memorialized the parties' agreement to modify the March 17, 2009 retainer agreement in a January 29, 2010 letter that she mailed from Washington, D.C. to Mr. McDonald at his home in Highlands County" (citing Defendant's Exhibit #7).
>
> (e) "The Florida Bar rules set forth specific requirements for contingency fee agreements. Nothing in the March 17, 2009 Retainer Agreement states that Ms. Morten will represent Mr. McDonald on a contingency fee basis. On its face the March 17, 2009 retainer agreement clearly states that Ms. Morten agreed to represent Mr. McDonald at the hourly rate of $450; that he pay an initial retainer amount of $3,000 and pay all expenses and costs associated with her representation of him. . . ."

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[53] A duplicate exhibit of the Florida fee judgment order exists at RX 50, but we only cite to the copy at DX O.

(f) "The March 17, 2009 retainer agreement contains none of the language mandated under the Florida Bar rules for a contingency fee retainer agreement."

(g) "Mr. McDonald made numerous requests that Ms. Morten provide him with a breakdown of her billed hours and supporting documentation evidencing that he clearly understood that Ms. Morten represented him on an hourly and not on a contingency fee basis. ([citing] Defendant's Exhibit B. Emails from Sammie McDonald to Kemi Morten)."

(h) Ms. Morten and Mr. McDonald have a "valid enforceable hourly rate plus cost agreement . . . and not a contingency agreement."

DX O at 1-3, 5. The judgment order concluded that Mr. McDonald "shall take nothing and go hence."[54] RX 50 at 311; DX O at 5.[55]

H. Respondent's Use of Cashier's Checks for Entrusted Funds

74. We conclude, based on our independent review of the record, that throughout the time period of her dispute with Mr. McDonald, Respondent protected well in excess of $105,551 in trust account funds, either deposited in her Unfoldment trust account or in the form of cashier's checks.

75. Respondent testified that she withdrew entrusted funds in the form of cashier's checks so that she could pay Mr. McDonald the money he was owed from

[54] It is not clear on the face of the Florida state court's decision why it found that Mr. McDonald was not due any portion of the settlement funds held by Respondent, not even the $105,551 amount. Because this issue in not material to resolution of this matter, we do not address it. It is undisputed that Respondent did not have an obligation to hold in the settlement funds in trust for Mr. McDonald after the court issued its decision on December 16, 2015. *See* ODC Br. at 38.

[55] The Florida state court '"reserve[d] jurisdiction to enter such other and final orders as are proper including, but not limited to, judgments taxing attorney's fees and costs."' DX Q at 2 (quoting December 17, 2015 Order). Respondent filed a late motion for fees in defending the fee lawsuit. Upon Mr. McDonald's opposition to the motion, the court denied the motion. *See* DX P; DX Q; DX R.

Zimbabwe, where she had to travel to handle her father's probate estate, and then she redeposited them on her return to the United States. Tr. 326, 340-41, 370-71, 373, 529-31; *see also* RX 69 at 735-40 (e-mail communications regarding father's estate); Tr. 124 (Disciplinary Counsel investigator O'Connell testifying that "Respondent told us that she was travelling to Africa and wanted to take funds with her in case she settled with Mr. McDonald"). Because Zimbabwe was under sanctions and Respondent's bank, BB&T, had a policy that a person had to be present in the bank to wire funds, "the only way I could disburse funds was if I had them with me." Tr. 530 (Respondent); *see also* Tr. 344-45 (Respondent). The record includes e-mail communication on May 15, 2012 from BB&T that confirm Respondent's testimony. *See* RX 71. We credit Respondent's explanation of why she withdrew the funds through the purchase of cashier's checks.

76. Respondent testified that she contacted Assistant Disciplinary Counsel Dorsainvil about her plan to use cashier's checks in December 2012, and that Ms. Dorsainvil told her that she could withdraw entrusted funds so as long as she "didn't invade the trust funds." Tr. 531; *see also* Tr. 326.[56] At the hearing, Ms. Dorsainvil

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[56] Respondent testified:

> First part of December, I got a call from co-counsel in Zimbabwe [in the probate matter for the estate of Respondent's father] and I'd like to withdraw all or most of the funds from my trust account and open an account in Zimbabwe. Can I do that? And she said: If you get it in a cashier's check, you take the cashier's check to Zimbabwe, you open the account, and you deposit that back into the account, that's fine. So I pulled out the cashier's checks for $315,000 to take with me to Zimbabwe.
>
> Q. What happened next?

stated that she did not have any recollection of this December 2012 conversation and would not have given such advice. Tr. 586-87. However, as discussed below, Ms. Dorsainvil did not object in 2014 when Respondent provided her with copies of the cashier's checks she had taken to Zimbabwe; to the contrary, she had asked for copies of the checks. *See* FF 87. And while Respondent's call with Ms. Dorsainvil is not reflected in Ms. Dorsainvil's telephone log, there is at least one instance, from August 2012, in which a different conversation that can otherwise be corroborated was also not included in the log. *See supra* note 44. For that reason, the telephone log does not appear to be sufficiently complete to serve as a reliable means to establish, by clear and convincing evidence, that the call never took place. Accordingly, we credit Respondent's recollection of the communication with Disciplinary Counsel, which is consistent with her other actions and communications at that time.[57]

77. In accordance with what she testified was Disciplinary Counsel's guidance, Respondent purchased cashier's checks for portions of the balance in her

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> A. About a few days or a week later I got this nice letter from the Bar dismissing all the charges. So now I stop, I said, well, wait. Maybe I should find out what this means. You know, what do I have to do? I talked to Ms. Dorsainvil. She agreed that $105,5[5]1, . . . I couldn't disturb that.

Tr. 326.

[57] Consistent with Disciplinary Counsel's guidance, Respondent's decision to bring entrusted funds with her to Zimbabwe in the form of cashier's checks plainly did not constitute misappropriation under controlling court precedents. *See In re Ingram*, 584 A.2d 602 (D.C. 1991) (per curiam). Disciplinary Counsel does not dispute this point in its post-hearing briefing.

trust account and subsequently redeposited all or most of the amount she had withdrawn on the following dates:

Purchased Official Check	Redeposited
$105,551.17 on 8/13/12[58]	Same check on 8/23/12
$315,000 on 12/17/12	Same check on 12/21/12
$300,000 on 12/21/12[59]	Same check on 1/15/13
$280,000 on 1/15/13	Same check on 2/4/13
$114,000 on 3/13/14	Same check on 12/5/14

See RX 71 at 745-65 (Sierra Davis of BB&T's October 12, 2017 letter sent to Assistant Disciplinary Counsel Tait with copies of the $105,559.17, $315,000, $300,000, and $280,000 Official Checks and deposit slips);[60] DX D at 8 ("Realizing she would be out of the country for a number of months handling her late father's probate matters . . . on March 13, 2014, Respondent withdrew trust funds in the amount of $114,000 in the form of BB&T Cashier's Check #5005112029."); DX W at 89 (copy of the $114,000 Official Check dated March 13, 2014); DX W at 108 (Office Check # 5005112029, signed on back "for deposit only"); DX W at 109-

[58] Ms. Davis' summary letter has a typographical error; instead of $105,551.17, she wrote $105,559.17. *Compare* RX 71 at 745 (her letter), *with* RX 71 at 749 (Office Check dated August 13, 2012 in the amount of $105,551.17).

[59] Ms. Davis' summary letter has a typographical error; instead of December 21, 2012, she wrote "December 21, 201**7**." *Compare* RX 71 at 745 (her letter) *with* RX 71 at 754 (Official Check of December 21, 2012 in the amount of $300,000).

[60] The same letter and the copies of attached deposit slips and official checks are duplicated at DX U at 1-20, but we cite only to RX 71 at 745-65.

10 (deposit slips in the amount of $106,000 and $8,000 dated December 5, 2014); DX W at 65-71, 86-88.[61]

78. During the hearing, Disciplinary Counsel's expert, Mr. O'Connell, testified that the bank records established a trust account shortage from December 2012 through "the first three days" of February 2013; he opined that this was evidence Respondent misappropriated the $105,551.17 she was to hold in trust for Mr. McDonald until December 2015, when the Florida state court entered its judgment. *See* Tr. 120-21.[62] However, Mr. O'Connell's conclusions about the status of entrusted funds during this time were wrong. Up until February 5, 2013, Respondent actually maintained at least $280,000 in entrusted funds, either deposited in her trust account or in the form of cashier's checks.

I. Balance in Respondent's Trust Account from February 2013 to August 2015

79. On February 5, 2013, the day after she redeposited a $280,000 cashier's check into her trust account – and prior to Mr. McDonald filing his fee lawsuit in Florida – Respondent withdrew $43,000 from her Unfoldment trust account by a telephone transfer to another BB&T account ending in #6505, dropping the total amount in Respondent's trust account to $237,068.07. *See* DX W at 69. Roughly

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[61] As explained below, each time Respondent redeposited a check, the funds passed through an internal BB&T operating account (ending in #0097) related to cashier's checks, which is what appears to have led Disciplinary Counsel to mistakenly believe the same cashier's check was not used to redeposit the funds. *See* FF 97.

[62] The transcript notes this amount as $105,55**9**.17 (emphasis added) instead of $105.551.17. Given that no explanation exists for this discrepancy, we find that it is an error in transcription.

nine and a half months later, on November 21, 2013, Respondent deposited into her Unfoldment trust account an insurance settlement check from USAA Casualty Insurance Company to the "Estate of Baker Morten" in the amount of $43,000, bringing the balance back over $280,000. DX W at 81-82; *see* Tr. 123 (O'Connell identifying the source of these funds).[63] The balance in the trust account remained above $280,000 for the rest of the year. DX W at 80, 83-84.

80. On January 6 and 23, 2014, Respondent transferred a total of $20,000 out of the Unfoldment trust to the #6505 account, bringing the balance of the trust account to $260,036.07 on January 23, 2014 (with a $5 service fee). DX W at 84. The balance in Respondent's Unfoldment trust account remained close to approximately $260,000 (reduced by $11 on February 21, 2014 due to bank service charge) until Respondent again left for Zimbabwe to work on her father's probate estate in March 2014. DX W at 85.

81. Disciplinary Counsel's expert Mr. O'Connell noted briefly in his testimony that bank statements showed that the Unfoldment trust account balance remained below $273,030 from "the end of . . . February" until November 2013 (when Respondent deposited the $43,000 check from the Estate of Baker Morten which raised the balance above $273,030) and again from January 2014 "through

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[63] As noted earlier, Disciplinary Counsel asserted at the prehearing conference that this disciplinary matter did not involve commingling of disputed funds with personal funds, despite the language in the Specification of Charges. *See supra* note 5. The Committee is not able to determine on this record whether Respondent received this settlement check made out to what may be her father's estate for her own personal benefit or in a fiduciary role for the estate. Because the record is unclear as to whether the $43,000 check was personal or entrusted funds, we conclude the evidence of this deposit is not sufficient to establish commingling.

August of 2015." Tr. 122-23. His testimony did not specifically identify the February 13, 2013 withdrawal of $43,000 or the two January 2014 withdrawals totaling $20,000. Nor did Disciplinary Counsel question Respondent or offer other evidence about these transactions or the nature of the BB&T account ending in #6505, either on direct or through cross-examination.

82. Realizing that she would be in Zimbabwe for a number of months to handle her father's estate, on March 13, 2014, Respondent withdrew funds in the amount of $114,000 in the form of another BB&T Cashier's Check (No. 5005112029). DX D at 8.[64] In contrast to the other cashier's checks, Disciplinary Counsel's expert Mr. O'Connell conceded that Respondent re-deposited $106,000 of the uncashed $114,000 Cashier's Check to her trust account following her return to the United States, on December 5, 2014, bringing the balance in the account to $206,000. *See* Tr. 124-25 (O'Connell); *see also* DX W at 107; Tr. 341, 371-72 (Respondent).

83. The final bank statement in the record, dated August 31, 2015, indicates that Respondent's trust account had a balance of $142,996 on that date. DX W at 120.

84. Until its closing argument, Disciplinary Counsel did not clearly and specifically raise transactions other than the alleged failure to redeposit cashier's checks as evidence of misappropriation. Tr. 659.

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[64] Respondent testified that she took $114,000, slightly more than she owed Mr. McDonald at the time, so that she could offer him an extra incentive to settle the dispute. Tr. 341.

J. Mr. McDonald's New Complaint and Disciplinary Counsel's Re-Opened Investigation

85. On June 17, 2014, while his fee lawsuit was pending, Mr. McDonald filed a new complaint with Disciplinary Counsel alleging that:

> As a result of my lawsuit i was granted $364,040 on August 4, 2011 since winning the suit *i have not received any money*. There is also no money in the trust account. *Kemi Morten has failed to release the funds that were agreed upon.* I have tried countless times to settle this matter. But my attempts have been unsuccessful.

RX 38 at 215 (emphasis added). The complaint attached a letter with enclosed documents from Mr. McDonald's fee counsel asserting that Respondent's trust account "does not have or has not had the total amount of $364,040.00 from Mr. McDonald's settlement since August 2011" and that "Ms. Morten was only entitled to 25% of the settlement amount . . . ." RX 38 at 217 (June 18, 2014 Letter from Curtis Flexter, Esquire, of Renejuste Law & Associates). Mr. McDonald's complaint failed to mention that he had returned the August 13, 2012 check in the amount of $105,551.17 that Respondent had sent to him. *See* FF 64-65. The Committee finds that Mr. McDonald falsely represented to Disciplinary Counsel that he had not received any money from the settlement.

86. On August 22, 2014, Assistant Disciplinary Counsel Dorsainvil notified Respondent by mail that her office had reopened its investigation based on Mr. McDonald's June 16, 2014 complaint. RX 40 at 235-36.[65]

[65] Respondent was in Zimbabwe at the time and did not receive the letter. RX 43 at 279. On October 2, 2014, Assistant Disciplinary Counsel Dorsainvil sent a second letter, RX 42 at

87. In her October 23, 2014 response to Mr. McDonald's new complaint, Respondent informed Ms. Dorsainvil that she still had a BB&T cashier's check for Mr. McDonald's funds "in my possession." RX 45 at 292; *see* Tr. 596 (Dorsainvil). Ms. Dorsainvil replied on November 13, 2014, asking Respondent to mail her the front and back of the check as proof that she had not invaded the trust fund amount, which Respondent did on December 5, 2014. RX 44 at 286; RX 47 at 301-304; Tr. 343-44 (Respondent); Tr. 594, 597 (Dorsainvil). Respondent also e-mailed Disciplinary Counsel her voluminous client records. RX 67 at 476-661; *see* Tr. 527-28 (Respondent). She also called Ms. Dorsainvil, explaining that she would once again need to travel to Zimbabwe "for about 8 or 9 months" and would again take funds for Mr. McDonald with her in the form of a cashier's check. Tr. 531 (Respondent).

88. On June 18, 2015, Assistant Disciplinary Counsel Traci Tait informed Respondent that she would be handling Mr. McDonald's complaint instead of Assistant Disciplinary Counsel Dorsainvil and that she would be "conducting a review of the file to conclude our investigation as quickly as practicable." RX 48

275-76, which Respondent's house sitter brought to Respondent's attention. *See* RX 42 at 277. Respondent asked the house sitter to call Ms. Dorsainvil and request her e-mail address. RX 42 at 277; Tr. 338-39. Ms. Dorsainvil later e-mailed Mr. McDonald's June 2014 disciplinary complaint to Respondent. *See* RX 38 at 214-15; RX 44.

at 305.[66] This appears to have been the last communication Respondent had with Disciplinary Counsel until July 2017.

89. Having not communicated with Respondent for two years, on July 25, 2017, Assistant Disciplinary Counsel Tait wrote in an e-mail to Respondent that she had "reactivated" the investigation. RX 66 at 430, 434.

90. On July 25, 2017, Respondent wrote an e-mail to Ms. Tait and Mr. O'Connell, asking for the nature of the inquiry given that "[t]his matter was fully investigated and resolved in my favor by the Office of Bar Counsel." RX 51 at 314. In response, Ms. Tait wrote in an e-mail: "We are trying to establish what happened to the funds encapsulated by the check you gave your client, but which he rejected and would like to discuss the matter with you." RX 51 at 314.[67]

91. Respondent and her bank, BB&T, produced bank records showing that Respondent redeposited the cashier's checks she purchased and therefore did not invade the trust amount of $105,551.17. *See* RX 54 at 325 (letter from BB&T Bank Manager, Sierra Davis); Tr. 353 (Respondent testifying that she believed BB&T sent

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[66] Assistant Disciplinary Counsel Tait omitted Mr. McDonald's complaint from the e-mail message. On July 22, 2015, Respondent asked her to re-send the complaint. RX 49 at 306.

[67] Respondent argues that Disciplinary Counsel should have provided her with written notice that it had received a "new complaint" from Mr. McDonald and Mr. Pilacek about the Florida fee case and provided her with an opportunity to respond. *See* Resp. Br. at 59-60. Because the matter had already been docketed and was no longer closed, it is not evident that notice of additional communications from the complainant, even if supported by a new party, is formally required, though we believe that would have been preferable in the interests of notice and timely disclosure. *See* Board Rule 2.7. With the benefit of hindsight, it is now clear that Disciplinary Counsel would have been in a better position to assess the credibility of Mr. McDonald's and Mr. Pilacek's assertions if Respondent had been so informed.

over "a complete record of everything"); *see also* Tr. 735 (Respondent). In the letter enclosing the bank records, Sierra Davis, a BB&T manager, wrote to Assistant Disciplinary Counsel Tait that "[t]he enclosed checks and deposit slips are provided to Marlene Morten to illustrate the sequence of events that occurred once the Official Checks were issued on August 23, 2012 through February 4, 2013." RX 54 at 325; RX 55 at 326 (September 29, 2017 e-mail from Assistant Disciplinary Counsel Tait indicating that the forwarding of BB&T documents in sealed enveloped sent by Respondent was "fine").

92. On November 6, 2017, Mr. O'Connell sent an e-mail to Ms. Davis (including Ms. Tait on the message but not Respondent) attaching the two BB&T letters that Respondent had provided to the Office of Disciplinary Counsel. Mr. O'Connell asked Ms. Davis to confirm that Ms. Davis authored the dated and signed letter (the other was unsigned), which she did. RX 66 at 451. Mr. O'Connell then responded with a request for additional information:

> Attached is your signed letter to Ms. Morten, dated 10/12/17; and Ms. Morten's Unfoldment Inc Trust Fund Account monthly bank statements for December, 2012 and January, 2013. In paragraph 3 of your attached letter, you state that Ms. Morten deposited an official check for $315,000.00 into "the trust account" on 12/21/2012. As can be seen from the attached December, 2012 statement, it was not deposited into the Unfoldment Trust Account. Was it deposited into another trust account for Ms. Morten?
>
> The same question applies for the activity on 1/13/2013 which you have described in the first sentence of the last paragraph of your letter. This did not occur in the Unfoldment Trust account. Is there another trust account?

RX 66 at 449-50.

93. Ms. Davis wrote back: "I cannot further discuss the client information with you, but you can send a letter to the branch and we can forward your questions to the legal department who can further assist you." RX 66 at 449. Mr. O'Connell forwarded Ms. Davis's message to Ms. Tait and wrote: "The response from Ms Davis. We can invite Ms. Morten to explain." RX 66 at 449. There is no indication that Disciplinary Counsel ever followed up on Ms. Davis's offer or took any further steps to obtain information directly from Respondent's bank.[68]

94. The following day, on November 7, 2017, Ms. Tait wrote to Respondent indicating that the Office of Disciplinary Counsel was still "unable to understand how these [BB&T] records account for what happened to all funds you withdrew to pay your former client Sammy McDonald, until you redeposited them." RX 56 at 331. The letter requested that Respondent arrange for a time to visit the BB&T branch together in order to discuss how the bank's copies of checks and deposit slips "relate to the entrusted funds at issue." RX 556 at 332 (emphasis omitted). Respondent promptly replied to propose that they meet at the bank later that week. RX 57 at 334 (November 13 and 14 e-mails from Respondent to Assistant Disciplinary Counsel Tait); Tr. 356-57 (Respondent); *see also* RX 57 at 335-36.[69]

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[68] The record does not indicate – and Disciplinary Counsel has not suggested otherwise – that either Mr. O'Connell or any other representative of the Office of Disciplinary Counsel subpoenaed records or sent a letter to the legal department of BB&T.

[69] We have spent time reviewing the entire record of e-mail communications and letters between the Office of Disciplinary Counsel and Respondent and have found no support for Disciplinary Counsel's assertion in its brief (without any citation) that "Disciplinary Counsel . . . sought during the investigation to meet with Respondent and some representative of the bank to understand how

After initially agreeing to meet at the bank on Friday, November 17 at 11 a.m., Ms. Tait requested that Respondent first produce additional bank statements, which Respondent reached out to her bank to obtain. RX 57 at 335; Tr. 358 (Respondent).[70] The bank statements Respondent produced all related to her Unfoldment trust account.[71]

Mr. McDonald's funds were handled. Respondent stated the bank would not do so." ODC Br. at 41.

[70] On November 15, 2017 at 1:25 p.m., Respondent wrote to Assistant Disciplinary Counsel Tait:

> Dear Ms. Tait, I just called my bank and requested the December 2012 and January and February 2013 Trust Fund bank statements that you asked me to produce when we meet on Friday. Branch Manager Kia Briscoe says the bank has to research and quote a cost for retrieving the statements. She said she would refer the matter to Sierra Davis, the official who pulled copies of the certified check, and get back to me. I can produce the other documents that you requested for our meeting on Friday. My ability to produce the requested statements depends on the bank's timeline. If you have the statements for those periods provided by my bank, I am happy to use those statements.

RX 57 at 337-38. Two days later, on November 17, Respondent wrote to Ms. Tait:

> Sierra Davis from my bank just called. The bank located the trust fund statements for the period you requested and is [in] the process of pulling the other account statements for December 2012, January and February 2013. Ms. Davis says everything should be ready by lunchtime, and I will have to physically retrieve them as the bank will not e-mail them.

RX 57 at 339.

[71] At the hearing, Respondent's counsel pointed out that Respondent could not have provided bank statements for the 0097 account because they were not in her control. *See* Tr. 691 ("The records that they want are in the accounts over which Ms. Morten has no power. She has the copies of the [cashier's] checks. That's the only record. They don't like that, but that's what it is. I mean, she can't give them the records relating to [account #]0097, because that's the transfer account."). We credit counsel's explanation of why Respondent's bank statements were limited to those in her possession, which Disciplinary Counsel did not dispute.

95. On November 17, Assistant Disciplinary Counsel Tait wrote to Respondent and scheduled a meeting at the Office of Disciplinary Counsel instead of the bank for the following Monday, November 20. RX 57 at 339. Respondent testified that following that meeting, having produced information from her bank consistent with the copies of the checks she had previously produced, Respondent believed "the matter would be closed." *See* Tr. 359. The record does not contain any evidence of additional communications between Respondent and the Office of Disciplinary Counsel prior to the conclusion of Disciplinary Counsel's investigation.

96. On March 6, 2018, Ms. Tait sent a letter to Respondent noting that the investigation had concluded, and that the Office of Disciplinary Counsel believed Respondent had violated the Rules. A copy of the Specification was included with the letter. RX 58 at 341-45; Tr. 360 (Respondent).

97. As discussed above, throughout the hearing, Disciplinary Counsel continued to dispute that these records provided sufficient proof that Respondent had redeposited the amounts withdrawn from her trust account in the form of cashier's checks and had not invaded the funds. *See, e.g.*, Tr. 120-21, 128-29 (O'Connell); 164-66, 231-35 (Disciplinary Counsel). Disciplinary Counsel maintained that position even after Respondent submitted a letter from BB&T explaining that funds from Respondent's redeposited checks had passed through an internal BB&T operating account (ending in #0097) and had in fact been redeposited as Respondent claimed. *See* Tr. 232-35 (Disciplinary Counsel questioning whether the letters from BB&T were sufficient to establish chain of custody for entrusted funds).

Disciplinary Counsel did not change its position until after a March 4, 2019 in-person meeting with Respondent, her counsel, and bank representatives. *Supra* p. 15; Preh. Tr. (March 6, 2019) at 43; ODC Br. at 6. Disciplinary Counsel ultimately conceded in its post-hearing briefing that Respondent did not invade the $105,551.17 prior to the Florida state court's December 17, 2015 grant of summary judgment in the fee lawsuit. *See* ODC Br. at 6.[72]

III. CONCLUSIONS OF LAW

A. Choice of Law

Before we address the evidence as it applies to the charged Rule violations, we consider the choice of law issue, which is a preliminary question of law that the parties were repeatedly directed to address in their post-hearing briefing. *See supra* pp. 17-18.

DC Rule 8.5(b) provides the following guidance on which Rules of Professional Conduct we are to apply in our disciplinary proceedings:

> (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*

[72] Disciplinary Counsel attributed its delay in conceding the authenticity of the BB&T letter to "Respondent never arranged that meeting [with BB&T] during the investigation," ODC Br. at 3, but we disagree. The Hearing Committee has carefully reviewed the record and has not found any evidence supporting Disciplinary Counsel's claim that Respondent did not cooperate in setting up a meeting with BB&T bank officials prior to the hearing. Rather, the evidence shows Respondent's timely cooperation in 2017 during Disciplinary Counsel's reopened investigation, and Disciplinary Counsel's failure to subpoena BB&T for records related to account #0097, which Respondent did not control. *See* FF 89-97.

> *the tribunal sits*, unless the rules of the tribunal provide otherwise;[73] 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 . . . .

DC Rule 8.5(b) (emphasis added).

In this case, Respondent is only a member of the District of Columbia Bar, but the alleged misconduct arising out of her representation of Mr. McDonald related to matters pending before the U.S. District Court for the Middle District of Florida. Pursuant to Rule 8.5(b), the choice of law determination must therefore be guided by that court's rules.[74] Under the Board's precedent, that conclusion extends to the alleged trust account violations. The entrusted funds for which Respondent is alleged to have failed to deposit to an IOTA account under the FL Rules, or a properly titled trust account under the DC Rules were obtained from the settlement of the employment discrimination case following her representation of Mr. McDonald in that case and, accordingly, were received "in connection with" the representation before the U.S. District Court for the Middle District of Florida for purposes of DC Rule 8.5(b)(1). *See In re Ponds*, Board Docket No. 17-BD-015, at 16 n.9, 36 ("*Ponds*

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[73] "Tribunal" is defined as "a court, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency, or other body acting in an adjudicative capacity." DC Rule 1.0(n).

[74] To the extent it is relevant, we also note that most of Respondent's alleged misconduct took place in Florida. The retainer agreement was executed in Florida. FF 9. Mr. McDonald is a resident of Florida, and the representation involved his employment in Florida. FF 3. Litigation, mediation and settlement of both the union arbitration case and the employment discrimination case occurred in Florida. FF 14-16, 19-22, 31-34, 36, 41.

III") (BPR June 24, 2019) ("based on the plain language" of Rule 8.5(b), where fees obtained in connection with a proceeding in the Virginia courts, the Virginia rules are to apply to record-keeping and misappropriation charges), *review pending*, D.C. App. No. 19-BG-0555.

The U.S. District Court for the Middle District of Florida's local rules provide that non-Florida barred attorneys practicing before that court are subject to the Rules of Professional Conduct adopted by the Florida Bar. Local Rule 2.04(d) for the U.S. District Court for the Middle District of Florida; *see also* D.C. Legal Ethics Op. 311, p. 2 ("When an attorney appears before a federal court the applicable rules of professional conduct will be those governing the bar of that court."). Accordingly, the Florida Rules of Professional Conduct (which are included in the Rules Regulating the Florida Bar) apply to any alleged misconduct related to the union arbitration and employment discrimination cases, as well as the fee lawsuit filed by Mr. McDonald in Florida. *See, e.g.*, *In re Ponds*, 888 A.2d 234, 235-36 (D.C. 2005) ("*Ponds II*") (applying Maryland Rules of Professional Conduct for misconduct related to federal court proceeding in Maryland); *In re Gonzalez*, 773 A.2d 1026, 1029, 1031 (D.C. 2001) (applying disciplinary rules of the Commonwealth of Virginia and Virginia Legal Ethics Opinion).

We recognize that both Disciplinary Counsel and Respondent prefer that we apply the DC Rules instead of the Florida Rules. But choice of law is a legal question controlled by DC Rule 8.5(b), not the parties' preferences. Moreover, DC Rule 8.5(b) makes clear that only one set of rules is to apply to a lawyer's conduct. As

noted in Comment 3, the rule "takes the approach of (i) providing that any particular conduct of an attorney shall be subject to only one set of rules of professional conduct, and (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions." DC Rule 8.5(b), cmt. [3]; *see also, e.g.*, *In re Ponds*, 876 A.2d 636, 637 (D.C. 2005) ("*Ponds I*") (per curiam) (applying sanction for a violation of the Maryland Rules of Professional Conduct); *In re Bynum*, Board Docket No. 16-BD-029, at 1, 2 n.2 (BPR Apr. 4, 2018) (applying South Carolina Rules of Professional Conduct to attorney not licensed to practice law in South Carolina but whose misconduct was in connection with a matter pending before the South Carolina courts), *recommendation adopted where no exceptions were filed*, 197 A.3d 1072, 1074 (D.C. 2018) (per curiam).

Disciplinary Counsel argues that we need not make a choice of law determination, relying on *In re Bernstein*, 774 A.2d 309 (D.C. 2001), where the Court of Appeals declined to rule on a Respondent's choice of law objection because it found that any failure to apply the correct state law could not have resulted in prejudice. 774 A.2d at 316. We find this argument unpersuasive. In *Bernstein*, as the Court of Appeals noted, the underlying misconduct took place "more than three years" before Rule 8.5(b)(1) went into effect; it related to a matter before an administrative agency, not a court; and Respondent never actually showed that he was admitted *pro hac vice* before the agency. *Id.* at 315. Thus, there were strong arguments that Rule 8.5(b)(1) did not apply. Here, in contrast, it is undisputed that

Respondent was admitted *pro hac vice* before the U.S. District Court for the Middle District of Florida, and both the union arbitration and the employment discrimination matters were pending before that court. These facts and DC Rule 8.5(b) leave us no choice but to apply the Rules Regulating the Florida Bar.[75]

B. Non-Negligent Misappropriation

Turning to the charged FL Rule violations, we begin with the non-negligent misappropriation charge. We believe this charge should be dismissed on due process grounds.

i. Legal Standard

FL Rule 5-1.1(f) provides that:

> When in the course of representation a lawyer is in possession of property in which 2 or more persons (1 of whom may be the lawyer) claim interests, the property must be treated by the lawyer as trust property, but the portion belonging to the lawyer or law firm must be withdrawn within a reasonable time after it becomes due unless the right of the lawyer or law firm to receive it is disputed, in which event the portion in dispute must be kept separate by the lawyer until the

[75] The sole exception to our conclusion that Florida rules apply would be with respect to Respondent's alleged dishonesty during the Disciplinary Counsel's investigation. *See, e.g.*, *In re Anthony*, Board Docket No. 17-BD-082 (BPR July 17, 2018), appended HC Rpt. at 9-10 (May 23, 2018) (applying DC Rule to alleged misconduct during the disciplinary investigation, but not to the conduct in connection with the U.S. Tax Court case), *recommendation adopted where no exceptions were filed*, 197 A.3d 1070, 1072 n.1 (D.C. 2018) (per curiam). However, Disciplinary Counsel has conceded that allegation of dishonesty in that it is no longer disputed that Respondent had not, in fact, invaded the $105,551.17, so her assurances to Disciplinary Counsel that the amount had been held in trust were not false. *See* ODC Br. at 6; Specification, ¶ 18.

> dispute is resolved. The lawyer must promptly distribute all portions of the property as to which the interests are not in dispute.[76]

The Comment to FL Rule 5-1.1(f) adds that:

> Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds must be promptly distributed.

Florida courts define misappropriation as "[t]he use of client funds for purposes other than the specific purpose for which these funds were entrusted," *Fla. Bar v. Wolf*, 930 So.2d 574, 575-76 (Fla. 2006) (per curiam), which is similar to the "unauthorized use" standard employed in the District of Columbia. *See, e.g.*, *In re Pleshaw*, 2 A.3d 169, 173 (D.C. 2010). As in the District of Columbia, proving misappropriation under the Florida rules does not require a showing of scienter (improper intent), but an attorney's state of mind may go to the severity of the sanction. *See Fla. Bar v. Mirk*, 64 So.3d 1180, 1185 (Fla. 2011) (per curiam) (finding

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[76] DC Rule 1.15(d) similarly provides:

> When in the course of representation a lawyer is in possession of property in which interests are claimed by the lawyer and another person, or by two or more persons to each of whom the lawyer may have an obligation, the property shall be kept separate by the lawyer until there is an accounting and severance of interests in the property. If a dispute arises concerning the respective interests among persons claiming an interest in such property, the undisputed portion shall be distributed and the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. Any funds in dispute shall be deposited in a separate account meeting the requirements of paragraph (a) and (b).

misappropriation and noting that "the presumption of disbarment is exceptionally weighty when the attorney's misuse is intentional rather than a result of negligence or inadvertence"); *Florida Bar v. Mason*, 826 So.2d 985, 987-89 (Fla. 2002) (finding misappropriation but declining to impose the presumptive sanction of disbarment where the attorney "did not intentionally misappropriate client funds for her personal use"); *accord In re Abbey*, 169 A.3d 865, 872 (D.C. 2017).

ii. Arguments

As explained above, Disciplinary Counsel has abandoned the only misappropriation-related factual allegations that were set forth in the Specification and at the prehearing conference, and that were the overwhelming focus of its presentation at the hearing – namely that Respondent failed to preserve at least $105,551.17 (the undisputed amount to which Mr. McDonald was entitled) by failing to redeposit cashier's checks she withdrew from her trust account. *See supra* pp. 3-5; ODC Br. at 6. Disciplinary Counsel's new argument – an alternative position that it did not set forth clearly until closing argument over Respondent's objection – is that Respondent committed misappropriation *unrelated* to the failure to redeposit cashier's checks, but instead based on the balance in Respondent's trust account dipping below $273,030[77] on several occasions due to other transactions. ODC Br. at 38.

[77] As noted earlier, this figure is actually at odds with the calculation of Mr. McDonald's own counsel in the fee litigation, who initially calculated that if the retainer agreement called for a 25% contingency fee, when accounting for unpaid expenses, the amount due to Mr. McDonald was

In her post-hearing briefs, Respondent denies that $273,030 was the amount in dispute and reiterates her due process objections to Disciplinary Counsel's change of its underlying factual theory. Resp. Br. at 56-57. Respondent focuses in particular on Disciplinary Counsel's change as to the amount required to be held in trust:

> From September to October 2017, ODC Forensic Investigator Kevin O'Connell ("O'Connell"), Assistant Disciplinary Counsel Traci Tait ("Tait") and Respondent exchanged a series of emails in which ODC identified **$105,551.17** as the disputed trust fund amount.
>
> In the eight years since McDonald filed his first complaint in Docket No. 2011-D363, the disputed amount cited by ODC has been **$105,551.17.** Yet, at the hearing, without notice, O'Connell testified that he "calculated" that the disputed amount was "$273,000" – a figure that appears nowhere in the record.

Resp. Br. at 57 (emphasis in original).

Disciplinary Counsel concedes that it initially took a "conservative" approach and focused on the undisputed $105,551.17. ODC Br. at 38. But Disciplinary Counsel argues that Respondent was on notice that Mr. McDonald claimed that she was only entitled to take $91,010 as her fees, leaving a balance of $273,030, and Respondent "did not and could have produced evidence to show her trust account maintained a balance" in that amount. ODC Reply Br. at 30.[78] Disciplinary Counsel

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$269,531.17. The amount claimed in relief was later increased to $274,030 in the Amended Complaint without any explanation in the Amended Complaint.

[78] On December 17, 2015, the Florida state court granted summary judgment in favor of Respondent, finding that Mr. McDonald was to be paid no part of the $105,551.17 that Respondent had previously offered to him. RX 50 at 312; DX O at 1, 6. Mr. McDonald could have appealed the Florida state court's ruling by filing a notice of appeal within 30 days but did not do so, *see* Fla. R. App. P. 9.110(b). Disciplinary Counsel agrees that after December 17, 2015, Respondent

also seeks to put the blame for its last-minute change in theory on Respondent, arguing that it "focused on the undisputed $105,551.17 rather than the disputed settlement funds" because "Respondent had not provided documents sufficient to establish even the $105,551.17 had been maintained in trust," and that Respondent "should not be rewarded after refusing to comply with her ethical obligations to maintain adequate financial record of entrusted funds." *Id.* at 29-30.

iii. Due Process Analysis

In our view, Disciplinary Counsel's pursuit of its new misappropriation theory is barred by due process under the Fifth Amendment to the United States Constitution. Disciplinary Counsel did not merely, as Respondent contends, change the amount that should have been held in trust from what had been alleged in the Specification; it shifted to an entirely new allegation of misappropriation, one that Respondent did not have a fair opportunity to defend or rebut. Allowing Disciplinary Counsel to proceed in this manner would be inconsistent with fundamental principles of due process.

The leading authority governing due process rights in attorney discipline proceedings is the decision of the United States Supreme Court in *Ruffalo*, 390 U.S. at 544. In *Ruffalo*, the Supreme Court explained that attorney discipline proceedings are "of a quasi-criminal nature," meaning that respondents in these proceedings are entitled to many of the procedural safeguards afforded to criminal defendants. 390

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had no obligation to continue to hold in trust any portion of the settlement funds for Mr. McDonald. *See* ODC Br. at 28; ODC Reply Br. at 29.

U.S. at 551; *accord Fay*, 111 A.3d at 1031 ("Because disciplinary proceedings are 'quasi-criminal,' attorneys subject to discipline are entitled to due process of law." (quoting *In re Williams*, 464 A.2d 115, 118-19 (D.C. 1983))). Of particular relevance here, a respondent in a disciplinary proceeding is entitled to "fair notice as to the reach of the grievance procedure and the *precise nature of the charges*." *Ruffalo*, 390 U.S. at 552 (emphasis added).

The paradigmatic circumstance in which a lack of fair notice arises is one in which a respondent is sanctioned for conduct that was not included in the original charging document and which they would not have otherwise been on notice was a Rule violation. In *Ruffalo*, the respondent was charged with improper solicitation of new clients through an agent, an investigator named Michael Orlando. At the hearing, the respondent testified that he had not solicited new clients through Orlando but had only employed him to investigate existing cases. It subsequently came to light, however, that Orlando also worked for one of the railroad companies the respondent was suing, making it an offense to employ him for any purpose; it was on that ground that the respondent was disbarred. 390 U.S. at 546, 550-52. In setting aside the respondent's disbarment, the Supreme Court noted that "petitioner had no notice that his employment of Orlando would be considered a disbarment offense until after both he and Orlando had testified at length on all material facts." *Id.* at 550-51. As Justice White observed, "[s]ome responsible attorneys . . . would undoubtedly find no impropriety at all in hiring a railroad worker, a man with the

knowledge and experience to select relevant information and apprise relevant facts, to . . . work on his own time [] collecting data." *Id.* at 555 (White, J., concurring).

The District of Columbia Court of Appeals has distinguished *Ruffalo* in ways that are important to acknowledge. For example, as Disciplinary Counsel notes, the Court has afforded it some leeway in how it characterizes particular charges in a Specification. In *In re Slattery*, 767 A.2d 203 (D.C. 2001), the Specification could have been read to allege "theft by trick," but the proffered facts actually demonstrated theft by conversion. The Court concluded that notwithstanding this discrepancy, the respondent "was aware of the nature of the charges against him (theft), and therefore was not lulled into a false sense of security." *Id.* at 212; *see also* ODC Br. at 38-39.

In considering whether a respondent received adequate notice of the charges against her, the Court may also look "not only to the Specification of Charges, but also to subsequent filings by [Disciplinary] Counsel," especially if Respondent did not object to those submissions. *Kanu*, 5 A.3d at 7; *In re Austin*, 858 A.2d 969, 976 (D.C. 2004) (no due process violation where post-hearing filings to which respondent did not object put respondent on notice regarding additional charges); *see also In re Winstead*, 69 A.3d 390, 396-97 (D.C. 2013) (finding no due process violations where Specification of Charges "gave respondent notice of the specific rules she allegedly violated" and Respondent did not timely object to the introduction of allegations not specifically referenced in the specification).

Finally, the Court has held that there is no resort to due process where a respondent freely admits to flagrant misconduct that any responsible attorney would have known to be impermissible, even if it was not in the original charges. *See In re (Conrad) Smith*, 403 A.2d 296, 302 (D.C. 1979) (respondent admitted to fraud against his own client). Under such circumstances, a respondent cannot claim they were "lulled into a false sense of security and, thereby, trapped." *Id.*

We believe that none of these exceptions apply and that this case presents the sort of entrapment that the Supreme Court decried in *Ruffalo*.[79] The Specification alleged and described "the $105,551.17 [Respondent] was supposed to be holding in trust," and that this was the amount that was not to be invaded "before the Florida fee dispute litigation was resolved." Specification ¶¶ 17, 18. The dates cited in the Specification where the BB&T records for the trust showed a balance shortage (and thus alleged misappropriations) were December 17, 2012, January 11, 2013, and November 26, 2014 (Specification ¶ 19) –in each case related to issuance of checks held by Respondent during her travel to Zimbabwe and which were proven during the hearing to have been redeposited into the same trust account upon her return to the United States. *See* FF 75-77. E-mail communications from Disciplinary Counsel and Disciplinary Counsel's statements at the prehearing conference reinforced the

[79] The only clear difference with *Ruffalo* is that here the uncharged conduct for which Disciplinary Counsel is seeking disbarment would violate the same rule that Disciplinary Counsel properly charged for a different set of facts. But it cannot be that properly charging a Rule with respect to one set of facts gives Disciplinary Counsel the right to raise every other conceivable violation of that Rule at the last minute without notice.

understanding that its underlying theory was that Respondent invaded the undisputed amount owed to Mr. McDonald of $105,551.17 when she purchased and then failed to redeposit cashier's checks. Disciplinary Counsel continued to focus on these same allegations throughout the evidentiary phase of the hearing. Now, of course, it is undisputed that these allegations were unfounded.

Instead, Disciplinary Counsel has adopted a new theory underlying the misappropriation charge. Having failed to mention this alternate theory in the Specification and at the prehearing conference, Disciplinary Counsel made only faint allusions to it during the evidentiary phase of the hearing itself. On one occasion during opening statements, for example, Disciplinary Counsel described the amount in dispute between Respondent and Mr. McDonald as approximately $273,000, and the undisputed amount as approximately $105,000 (implying that Respondent should have held the full disputed amount in trust). Tr. 11-12. However, Disciplinary Counsel's description of how the misappropriation occurred remained focused on the movement of very large sums via cashier's checks that were not redeposited. *See, e.g.*, Tr. 12, 15 ("Respondent denies that she invaded the undisputed minimal due Mr. McDonald of $105,000, but the records will show otherwise. . . . Respondent [with]drew hundreds of thousands of dollars at a time, or more than hundreds of thousands of dollars at a time . . . . [and] [o]nly on one of those occasions was the actual bank check that was purchased . . . redeposited."). This in turn led counsel for Respondent to focus in her own opening statement on Respondent's ability to prove in every instance that she did in fact redeposit all or most of the funds withdrawn in

the cashier's checks. *See* Tr. 33-35. Disciplinary Counsel's investigator, Mr. O'Connell, also alluded to the $273,030 figure in his testimony, identifying bank statements showing a balance below that amount, *see* FF 81, but the thrust of his testimony was again on the large cashier's check withdrawals. *See* FF 78.

Notably, despite having an opportunity at the hearing, Disciplinary Counsel never asked Respondent about *any* other withdrawals – not the telephone transfer of $43,000 in February 2013 that initially caused her trust account balance to fall below $273,030, or the two $10,000 bank transfers in January 2014 that caused it to do so again. *See, e.g.*, Tr. 491-536, 549-50, 731-36 (Disciplinary Counsel's cross-examination, recross-examination, and examination of Respondent); FF 81, 84.

It was not until closing argument that Disciplinary Counsel articulated its theory that Respondent had committed misappropriation *not* by purchasing and then failing to redeposit the cashier's checks into her trust account, but by simply allowing the balance in her trust account to fall below $273,030 "for weeks at a time" unrelated to the large cashier check withdrawals. *See* Tr. 659. At that point in closing, Respondent argued (correctly, in our opinion) unfair surprise and emphasized that the disciplinary investigation had always been about the failure to protect $105,551.17, as alleged in the Specification of Charges, written communications with Disciplinary Counsel prior to the hearing, *see, e.g.*, FF 90 (July 25, 2017 e-mail from ODC), FF 94 (November 7, 2017 letter from ODC), and in Disciplinary Counsel's statements at the prehearing conference. Having sat through four days of hearing testimony and having carefully reviewed the hearing transcript,

we must agree that the hearing we observed (and that was actually litigated) was almost entirely focused on the $105,551.17 amount and Respondent's purchase and alleged failure to redeposit cashier's checks.

Although we have found no analogous District of Columbia case, the Maryland Court of Appeals was recently confronted with a very similar circumstance. In *Attorney Grievance Comm'n v. Frank*, 236 A.3d 603 (Md. 2020), the respondent was charged with making an intentionally misleading statement and concealing information pertinent to Maryland Bar Counsel regarding a payment made from his trust account, both violations of Maryland's rule against dishonesty when responding to a disciplinary investigation. *Id.* at 619, 623. But though the hearing judge found that rule violation, he did so based on a different factual allegation not originally charged, namely that the attorney had misrepresented the total amount of money that was in his trust account. *Id.* at 623-24. The court vacated this finding, because '"tacking-on disciplinary charges against an attorney without notice of such charges deprives the attorney of procedural due process."' *Id.* at 624 (quoting *Attorney Grievance Comm'n v. Costanzo*, 68 A.3d 808, 821 (Md. 2013) (per curiam)). This decision does not appear to be an outlier. *See, e.g.*, *Disciplinary Counsel v. Reinheimer*, No. 2019-1742, 2020 WL 4516060, at *3 (Ohio Aug. 6, 2020) (per curiam) (dismissing charges where "relator's theory of the case changed after the presentation of the evidence"); *Attorney Grievance Comm'n v. Sanderson*, 213 A.3d 122, 140 (Md. 2019) (setting aside finding of misappropriation not raised in initial complaint); *Cincinnati Bar Ass'n v. Wiest*, 72 N.E.3d 621, 626 (Ohio 2016)

(per curiam) (dismissing charged because the failure to allege facts putting the respondent on notice that certain conduct would be at issue is "fatal to [the disciplinary counsel's] belated claim").[80] The same logic applies here.

This case is not analogous to cases where the Court of Appeals has declined to apply *Ruffalo*, such as *Slattery*, which Disciplinary Counsel cites, or *Smith*, *Austin*, and *Kanu*, which it does not. This is not a case where a respondent, as in *Slattery*, is attempting to parse the language of a general charge in a Specification (in that case theft) to foreclose Disciplinary Counsel from pursuing a particular factual theory. *Slattery*, 767 A.2d at 208. Here, the Specification alleged a very specific factual theory, identifying three dates when the balance in the trust account allegedly fell below $105,551.17, *see* Specification, ¶ 19(A), (B), and (C), and highlighted "$**105,551.17**" as the amount "[Respondent] was supposed to be holding in trust." Specification, ¶ 17 (emphasis in original). And unlike the respondents in *Austin*, 858 A.2d at 976, and *Kanu*, 5 A.3d at 7, Respondent *did* timely object to Disciplinary Counsel's attempt to shift to a new factual theory of misappropriation, so we cannot treat the due process question lightly.

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[80] The circumstances in this case could be described as analogous to a "constructive amendment" in the criminal context. A constructive amendment can occur "where the jury convicted the defendant of a factually different offense from that presented to the grand jury." *Wooley v. United States*, 697 A.2d 777, 785 (D.C. 1997) (Farrell, J., concurring) (emphasis omitted). The operative test is whether '"the prosecution was relying at trial on a complex of facts distinctly different from that which the grand jury set forth in the indictment."' *Id.* at 786 (quoting *Jackson v. United States*, 359 F.2d 260, 279 (D.C. Cir. 1966)). The analogue to an indictment here is the Specification; as in a constructive amendment case, Disciplinary Counsel is seeking to have Respondent disbarred based on "a complex of facts distinctively different" from what it set forth in the Specification.

Moreover, Disciplinary Counsel's revised theory of misappropriation was not predicated on the sort of self-serving voluntary admission that was the focus on the Court's concern in *Smith*. *See* 403 A.2d at 302. The court in *Smith* was concerned about unscrupulous attorneys using voluntary admissions to avoid the consequences of their actions:

> Under [the respondent's] reading of *Ruffalo* an attorney could immunize himself from discipline for the bulk of his professional indiscretions by confessing freely at any time after being charged with some trivial violation. . . . [T]his sort of wholesale immunity from sanction is inconsistent with the purpose of bar discipline to protect the public, the courts, and the legal profession from the misconduct of individual attorneys.

Id. at 300. In contrast to *Smith*, here Disciplinary Counsel is not primarily relying on a clear admission from Respondent, but on an interpretation of documentary evidence that it never gave Respondent a fair opportunity to rebut.[81] In fact, this case presents the exact opposite concern of the one the court expressed in *Smith.* Allowing Disciplinary Counsel to prevail here would make it possible for disciplinary authorities to evade notice requirements by keeping their presentations of evidence intentionally vague, which would defeat *Ruffalo*'s requirement that respondents

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[81] Respondent did admit that she *believed* that Disciplinary Counsel's December 20, 2012 letter dismissing Mr. McDonald's initial disciplinary complaint gave her the right to take all but the $105,551.17, *see* FF 67, but Disciplinary Counsel did not elicit any testimony from her about the transfers that Disciplinary Counsel now alleges constituted the actual misappropriations. *See* FF 78, 84. In recommending dismissal of the misappropriation charge, we are not concluding that Disciplinary Counsel's December 20, 2012 letter constituted a final judgment that allowed Respondent to take the funds. Our dismissal recommendation is based solely on Disciplinary Counsel's failure to provide Respondent with adequate notice of the alleged facts underlying the misappropriation charge in the Specification, at the prehearing conference and during the hearing.

must have "fair notice" of the "*precise* nature of the charges." 390 U.S. at 552 (emphasis added).

In any event, we do not think the alleged violation here was so flagrant that even an unambiguous voluntary admission from Respondent would have been sufficient to obviate the need for any due process safeguards. *See Smith*, 403 A.2d at 302. After all, Disciplinary Counsel itself had rejected the theory Mr. McDonald advanced in his Florida fee lawsuit, which the Florida court ultimately dismissed. *See* FF 66, 73. Indeed, Mr. McDonald had not even filed his lawsuit at the time the balance in Respondent's trust account first fell below $273,030 on February 5, 2013. FF 79.[82] It is certainly closer to the apparent confusion experienced by the attorney in *Ruffalo* than to the outright misrepresentations to his own client that the respondent made in *Smith.*

Finally, Disciplinary Counsel offers no support for its argument that its failure to provide Respondent with adequate notice of the charges against her can somehow be excused by her failure to keep adequate records. We cannot accept this argument. First, whether or not Respondent kept sufficient records, there is ample evidence in the record of her efforts to forthrightly respond to Mr. McDonald's allegations and cooperate with Disciplinary Counsel during its investigations. *See* FF 57-65, 85-95.

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[82] By the time Mr. McDonald filed his fee lawsuit on February 27, 2013, Respondent had returned to Zimbabwe. FF 68. Service of Mr. McDonald's initial complaint was by publication on or about November 7, 2013. *Id*. The first definitive proof that Respondent was aware of the lawsuit was on January 28, 2014, when she filed her Opposition to the Motion for Entry of a Default Judgment. *See* FF 69.

Even if that were not the case, there is no "contributory negligence" doctrine for due process. It was Disciplinary Counsel's obligation to provide Respondent with adequate notice of the charges against her in the Specification. *See* Board Rule 7.1 (the Specification of Charges "shall be sufficiently clear and specific to inform respondent of the alleged misconduct and the disciplinary rule or rules alleged to have been violated"). Disciplinary Counsel could have also sought to amend the Specification to ensure full consideration of any new allegations of misconduct. *See* Board Rule 7.21.[83] It did neither.

We note in closing that the members of this Committee sat through four days of argument and witness testimony focused on Disciplinary Counsel's many allegations of dishonesty (discussed below) and the now withdrawn misappropriation theory related to the cashier's checks. To say that Disciplinary Counsel's alternative misappropriation theory was not clearly sketched out in its presentation would be a gross understatement. In truth, it was less than an afterthought, omitted entirely from the Specification and prehearing conference and

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[83] Board Rule 7.21 provides:

> No amendment of any petition or of any answer may be made except on leave granted by the appropriate Hearing Committee Chair. Whenever, in the course of a formal hearing, evidence shall be presented upon which another charge or charges against respondent might be made, it shall not be necessary to prepare or serve an additional petition with respect thereto, but upon motion by respondent or by Disciplinary Counsel, the Hearing Committee Chair may continue the hearing. After providing respondent reasonable notice and an opportunity to answer, the Hearing Committee may proceed to the consideration of such additional charge or charges as if they had been made and served at the time of service of the original petition.

obliquely alluded to only briefly in Mr. O'Connell's testimony (accounting for less than five pages, *see* Tr. 121-24, out of almost 700 pages of hearing transcript). In our view, this does not constitute adequate notice under *Ruffalo*. Accordingly, this charge should be dismissed.[84]

C. Dishonesty

We next turn to the dishonesty charge, which we also believe should be dismissed, though mostly for different reasons.

i. Legal Standard

FL Rule 4-8.4(c) provides that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." DC Rule 8.4(c) tracks the same language.

Florida courts have held that "[i]n order to find that an attorney acted with dishonesty, misrepresentation, deceit, or fraud, the Bar must show the necessary element of intent." *Florida Bar v. Fredericks*, 731 So.2d 1249, 1252 (Fla. 1999) (per curiam) (internal quotations and citation omitted). The element of intent is

[84] We do not endorse Respondent's interpretation of Disciplinary Counsel's December 20, 2012 letter as allowing her to take all of her reduced fees. But given the absence of a fully developed or litigated record, we are not in a position to say whether any misappropriation in fact occurred here. This is because we do not believe that the bank statements alone constitute clear and convincing evidence of a misappropriation, especially in a case where Disciplinary Counsel did not clearly explain their significance and did not ask Respondent during the evidentiary phase of the hearing to explain the transactions that are now the basis for the misappropriation. *Cf. In re Thompson*, 579 A.2d 218, 221 (D.C. 1990) (declining to hold that evidence of an unauthorized taking of client funds creates a formal rebuttable presumption of misappropriation). In *In re Nave*, another misappropriation case, the Court "c[ould] not say that there was no misappropriation, but [was] satisfied that misappropriation was not clearly and convincingly proven." 197 A.3d 511, 521 (D.C.2018) (per curiam). We are bound to reach the same conclusion here.

established by showing that the conduct was deliberate or knowing. *Id.*; *see also Florida Bar v. (Jeanette Elizabeth) Smith*, 866 So.2d 41, 46 (Fla. 2004) (per curiam) (recognizing that the motive behind an attorney's action was not the determinative factor but instead the issue was "whether the attorney deliberately or knowingly engaged in the activity in question"). Proof is required that the dishonesty is both knowing and intentional. *See Florida Bar v. Johnson*, 132 So.3d 32, 37 (Fla. 2015) (per curiam) (no finding of intentional dishonesty where attorney delegated responsibilities and failed to supervise); *Florida Bar v. Lanford*, 691 So.2d 480, 481 (Fla. 1997) (per curiam) (dismissal of FL Rule 4-8.4(c) charge justified where no evidence of an intent to defraud or deceive).[85]

ii. Arguments

Throughout this proceeding, Disciplinary Counsel has made numerous allegations and insinuations of dishonesty against Respondent. For simplicity's sake, we limit the discussion here to those instances specifically enumerated in post-hearing briefing. In its opening brief, Disciplinary Counsel argues that Respondent engaged in the following acts of dishonesty:

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[85] In contrast, establishing a violation of DC Rule 8.4(c) only requires proof that the respondent "acted in reckless disregard of the truth," *In re Rosen*, 570 A.2d 728, 728-30 (D.C. 1989) (per curiam); *see also In re Romansky*, 825 A.2d 311, 315, 317 (D.C. 2003) (dishonest intent can be established by showing the respondent "consciously disregarded the risk" created by his actions). Although the *mens rea* for dishonesty may be less exacting under DC Rule 8.4(c), there is no instance in which we think applying D.C. disciplinary case law would have made a difference in our finding that Disciplinary Counsel failed to prove that Respondent violated FL 4-8.4(c) by clear and convincing evidence.

- Representing to Mr. McDonald that she would only claim 25% of any recovery absent a fee-shifting agreement and then claiming her full $450/hour rate at the employment discrimination case mediation;

- Promising but failing to disclose her legal fees and costs prior to the employment discrimination case mediation;

- Retaining Mr. Lewis and failing to explain his compensation to Mr. McDonald;

- Asserting the right, if Mr. McDonald challenged the reduced fees to which she agreed in the employment discrimination case mediation, to claim her full fees;

- Spending disputed funds without authority prior to resolution of the fee dispute with Mr. McDonald; and

- Falsely representing to the Florida state court in Mr. McDonald's fee lawsuit that she had been lead counsel in the union arbitration matter.

ODC Br. at 49. Respondent denies all of these allegations, and also asserts that Disciplinary Counsel has once again violated her due process rights by pursuing instances of alleged dishonesty – particularly the alleged misrepresentations to the Florida state court – that are beyond the scope of the charges enumerated in the Specification. Resp. Br. at 56; *see also* Tr. 193-94, 226-28, 730.

Apart from restating these allegations in its Reply Brief, Disciplinary Counsel added new ones, including:

- Inducing Mr. McDonald – an "unsophisticated client" – to sign a "complicated, internally inconsistent" retainer agreement; and

- Pushing a "reluctant" Mr. McDonald "into a global settlement" of all his claims against Glades without showing him a breakdown of her fees.

ODC Reply Br. at 24-25, 27.

iii. Due Process Analysis

As discussed earlier, Respondent did timely object at the hearing to Disciplinary Counsel's introduction of new dishonesty allegations. Tr. 193-94, 226-28, 730; *supra* pp. 6, 16. The most notable allegations of dishonesty that were raised at the hearing but not included in the Specification were Respondent's alleged misrepresentations of her role in the union arbitration matter to the Florida state court and her alleged failure to explain to Mr. McDonald the role and compensation of Mr. Lewis at the employment discrimination case mediation. Disciplinary Counsel contends that all additional facts not detailed in the Specification are "outgrowths" of Respondent's allegedly dishonest billing practices, which the Specification arguably did raise, *see, e,g.*, Specification ¶¶ 4, 11. That argument is plausible with respect to the contentions related to Mr. Lewis (although Respondent did not actually bill Mr. McDonald for Mr. Lewis's fee, *see* FF 54). But we believe it is an impermissible stretch with respect to the new and unfounded allegation that Respondent lied to the Florida state court. It is difficult to see how any allegation in the Specification could have provided Respondent with adequate notice that she would be accused of dishonesty not only towards Mr. McDonald but also to a Florida tribunal. *See Ruffalo*, 390 U.S. at 552. Especially since Respondent timely objected, we believe this allegation cannot be considered for purposes of determining whether she violated a disciplinary rule. *See supra* pp. 90-91; *see also* Board Rule 7.1.

Nevertheless, we are mindful that allegations of dishonesty barred by due process for purposes of determining whether Respondent violated FL Rule 4-8.4(c),

might still have some relevance for purposes of determining a sanction. In *Kanu*, the Court found that it was proper to consider allegations of immigration fraud against the respondent, notwithstanding that the Specification of Charges "did not mention immigration fraud or fraud against the federal government." 5 A.3d at 7. Among other factors, the Court emphasized that the *Kanu* Hearing Committee and Board had not relied on the immigration fraud evidence in deciding a violation of Rule 8.4(c), but used that additional evidence solely for the purpose of its sanction analysis:

> Kanu's due process argument might have some force had the Hearing Committee or the Board used Kanu's alleged immigration fraud as a basis for their eventual conclusions that she had violated Rules 7.1 (false or misleading communications regarding lawyer's services) and 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit and misrepresentation).

Id. at 8.

As in *Kanu*, evidence of dishonesty, even if barred by due process for purposes of determining a *rule violation*, could be relevant as an aggravating factor for sanction purposes if established by clear and convincing evidence. We have recommended dismissal of all charges, but we recognize that the Board or the Court may disagree. Therefore, to assist the Board and/or the Court, we have addressed both the significant acts of dishonesty raised in the Specification of Charges and the new allegations that were litigated at the hearing.

iv. Sufficiency of the Evidence

As noted earlier, Disciplinary Counsel's real problem is simply that it has failed to demonstrate Respondent's dishonesty by clear and convincing evidence; we find that Respondent did not violate FL 4-8.4(c). *See Johnson*, 132 So.3d at 37; *Lanford*, 691 So.2d at 481. While we have applied Florida precedents to reach this finding, we note that none of our conclusions would change if we were applying DC Rule 8.4(c) instead, including for sanction purposes. *See, e.g.*, *Romansky*, 825 A.2d at 317; *see supra* note 85.

a. The Retainer Agreement and Related Representations to Mr. McDonald

Disciplinary Counsel contends that "[f]rom the outset of her representation, Respondent played a shell game with Mr. McDonald with respect to her fee," starting with the use of a confusing and internally inconsistent retainer agreement coupled with oral representations to the effect that she would only charge Mr. McDonald a contingency fee of 25 percent of any recovery (unless Glades agreed to pay all of Mr. McDonald's legal fees). ODC Br. at 43-44.

The problems with this argument are two-fold. First, Disciplinary Counsel itself concluded at the end of its first investigation of this matter that the retainer agreement, while "poorly written" in places, clearly provided for an hourly fee arrangement if Mr. McDonald's case either settled or went to trial, regardless of any fee shifting. RX 30 at 186.[86] The Florida state court that heard Mr. McDonald's fee

[86] As previously noted, we are not suggesting that Disciplinary Counsel's earlier dismissal constituted a final judgment in this matter with any preclusive effect in this proceeding. *See supra*

lawsuit later reached an identical conclusion. *See* FF 73. Importantly, Disciplinary Counsel was also aware at the close of its first investigation of Mr. McDonald's unproven contention that Respondent had "verbally told" him that she would only charge a 25 percent contingency notwithstanding the terms of the retainer, but it gave dispositive weight to the signed retainer agreement. RX 30 at 185-86. Disciplinary Counsel's dismissal letter noted that while Mr. McDonald alleged that Respondent had failed to provide him with an invoice or a distribution sheet following the mediation, "[t]he documents in your client file indicate that Ms. Morten provided you an invoice for her services as well as a disbursement sheet one month following the mediation and settlement." *Id*. at 187. It concluded that while Respondent should have communicated more effectively with Mr. McDonald, "we do not find that Ms. Morten's actions rise to the level of dishonesty, misappropriation or unreasonable fee." *Id*. at 186.

There is also the matter of Respondent's January 29, 2010 letter to Mr. McDonald memorializing their conversation about her becoming lead counsel in the employment discrimination matter and restating her hourly rate and fees. FF 29. In its Specification filed April 18, 2018, Disciplinary Counsel acknowledged that Mr. McDonald received the letter. *See* Specification ¶¶ 3, 6. It was not until post-hearing briefing that Disciplinary Counsel, without explanation, appeared to adopt Mr. McDonald's new assertion that he had *not* actually received the January 29, 2010

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note 84. But we believe that Disciplinary Counsel's own prior conclusions set forth in the letter constitutes evidence that supports dismissal.

letter in the mail. *See* ODC Br. at 25, PFF 43 (citing Mr. McDonald's hearing testimony).

This change of position points to a larger problem. To prove this instance of dishonesty, Disciplinary Counsel relies primarily on the hearing testimony of Mr. McDonald, who has continued to insist that Respondent led him to believe that she would only take 25 percent of any recovery. But as explained above, we did not find Mr. McDonald to be a credible witness. Among other things, his claim that he thought he had a contingency fee agreement with Respondent is hard to square with his request prior to the mediation for a breakdown of her hourly fees and the concerns he expressed during the mediation itself that any recovery be large enough to afford him a substantial recovery after paying Respondent's fees. FF 50; *see also* Tr. 299-300.

Apart from Mr. Donald's testimony, the record contains no reference to any 25 percent contingency –except for clearly inapplicable language in the parties' retainer agreement, *see supra* notes 20 & 21, and language expressly rejecting such an arrangement in Respondent's January 2010 letter, *see* FF 29 – prior to September 6, 2011. That was the date Mr. McDonald sent an e-mail to Respondent disputing the reduced fees to which the parties agreed during mediation of the employment discrimination case. FF 56. That e-mail makes no reference to any prior agreement but instead appears to be *proposing* a 25 percent contingency as a compromise. *Id.* We also note with great skepticism Disciplinary Counsel's claims that Mr. McDonald "did not understand how Respondent would be compensated for her

services" and that he was an "unsophisticated" client when he retained Respondent. *See* ODC Br. 8, 12; ODC Reply Br. at 24. To the contrary, he was an experienced union shop steward who had participated in contract negotiations on behalf of his union for well over a decade. FF 3. We cannot credit his claim to have not understood his agreement with Respondent.

As Disciplinary Counsel originally did, we acknowledge that the retainer agreement in this case was poorly drafted in places, and that Respondent could have taken other steps to communicate more effectively with her client (including by maintaining written records of all communications). But as Disciplinary Counsel itself articulated in its dismissal letter, we conclude that the elements of dishonesty have not been established under FL Rule 4-8.4(c).

b. Disclosure of Legal Fees Prior to the Discrimination Case Mediation

As additional evidence of dishonesty, Disciplinary Counsel notes that "[t]hroughout the representation, Respondent had not provided Mr. McDonald with an invoice or other statement apprising him of the fees and costs she was amassing." ODC Br. at 45. Disciplinary Counsel acknowledges that Mr. McDonald never asked for such a statement until shortly before the employment discrimination case mediation but faults Respondent for not immediately providing a statement at that time. *Id.* at 45-46; *see also* FF 12 (Mr. McDonald acknowledged never requesting an invoice until shortly before the case was settled).

Once again, we begin with Disciplinary Counsel's own assessment in December 2012. In its letter informing Mr. McDonald that it was closing its initial

investigation, Disciplinary Counsel wrote: "While it is unfortunate that it took Ms. Morten several weeks to provide the accounting to you, this office does not find that her actions violate [Rule 1.4]." RX 30 at 187.[87] At the hearing, Respondent testified that she did not immediately provide Mr. McDonald with the accounting he requested because she was occupied with preparing for the mediation, and we have no reason to question this explanation. *See* FF 40. While it would have been ideal for Respondent to send Mr. McDonald a final breakdown of her accrued fees and costs prior to the mediation, immediately after Mr. McDonald requested that they be provided, we once again cannot agree that the failure to do so establishes dishonesty in violation of FL Rule 4-8.4(c).[88]

c. Claim for Total Fees

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[87] DC Rule 1.4(a), which was not charged in this case, requires attorneys to promptly respond to client requests for information.

[88] Disciplinary Counsel's claim in its Reply that Respondent "pushed [Mr. McDonald] into a global settlement" that he only agreed to "because he was afraid of an even worse outcome if he refused" is equally unfounded. *See* ODC Reply Br. at 24. This appears to be another reference to Respondent's alleged dishonesty regarding her fees, inasmuch as her "large outstanding bill" was an incentive for Mr. McDonald to agree to a settlement of the employment discrimination case. *See* ODC Br. at 46-47. It is difficult for us to understand how Disciplinary Counsel can make this argument while *also* claiming that Mr. McDonald was not aware of what Respondent's accrued fees were at the time of the mediation. *See* ODC Br. at 18 ("Without knowing precisely how much Respondent would claim in fees or costs if the case did not settle, Mr. McDonald had insufficient information to assess the settlement offer . . . and eventually accepted" it.). Indeed, Mr. McDonald himself claimed that he "didn't look" at the piece of paper stating Respondent's total fees that she handed him during the mediation. *See* FF 49. We did not find his statement credible, but that points to the larger problem with virtually all of Disciplinary Counsel's claims of dishonesty: they are based largely – and in this case entirely – on Mr. McDonald's self-serving testimony, which repeatedly conflicted with his own prior written statements to Disciplinary Counsel and his pleadings filed in the Florida fee lawsuit. *See, e.g.*, FF 30, 49, 62; *see also* FF 50. Mr. McDonald's testimony does not provide an adequate basis for us to conclude that there is clear and convincing evidence that Respondent engaged in dishonesty.

Disciplinary Counsel further takes issue with Respondent's decision to include a provision in the Closing Statement indicating that she "reserves the right to recover the full amount of legal fees [and] the full costs . . . should Client fail to pay the agreed upon discounted legal fees billed herein and/or if litigation is required to collect fees for services rendered." FF 55; *see* ODC Br. at 47-48. Because Respondent allegedly "sought to impose these conditions on Mr. McDonald" without discussing them or obtaining his assent, Disciplinary Counsel asserts that this amounts to dishonest behavior. ODC Br. at 48-49.

We cannot agree with Disciplinary Counsel's characterization of Respondent's conduct. Respondent was not attempting to extract additional fees out of Mr. McDonald. To the contrary, she had agreed to a significant *reduction* in the fees to which she was legally entitled, as documented in the Closing Statement and its attachments. The provision at issue simply reserves her rights under the original retainer agreement in the event of Mr. McDonald's failure to pay her reduced fees. We certainly recognize that there are limits on a lawyer's ability to engage in hard-nosed negotiations with her own client to obtain disputed fees. *See Florida Bar v. Vining*, 707 So.2d 670, 671-74 (Fla. 1998) (per curiam). But we find that Respondent's conduct here did not come close to this level and did not amount to dishonesty.

d. Alleged Spending of Disputed Funds

Disciplinary Counsel contends that Respondent committed dishonesty when she "spent part of the disputed funds [from the employment discrimination case

settlement] without authority." ODC Br. at 49. This contention appears to be based on the same factual allegations underlying the misappropriation charge, which we believe are barred by due process. *See supra* Part III(B)(iii) (Due Process Analysis). In any event, we credited Respondent's testimony that she genuinely believed that Disciplinary Counsel's December 20, 2012 letter dismissing Mr. McDonald's initial complaint meant that she only needed to hold $105,551.17 in trust (which Disciplinary Counsel now concedes she did). *See* FF 66-67. Even if Respondent was mistaken, her actions do not constitute a violation of FL Rule 4-8.4(c). *See (Jeanette Elizabeth) Smith*, 866 So.2d at 46; *Lanford*, 691 So.2d at 481.

e. Failure to Explain Role and Compensation of Mr. Lewis

Disciplinary Counsel claims that Respondent failed to explain Mr. Lewis's role to Mr. McDonald and also never "explained that Mr. Lewis expected to be paid." ODC Br. at 46, 49. Yet Mr. McDonald admitted in a filing in the Florida fee dispute that Mr. Lewis attended the settlement meeting with his approval because Ms. Persons was unable to attend. *See supra* notes 18 & 31. It is also undisputed that Mr. McDonald was aware that Respondent was not licensed in Florida and that local counsel was required. We do not credit Mr. McDonald's testimony that neither Mr. Lewis nor Respondent explained any details about how, how much, and by whom Mr. Lewis was to be paid. Tr. 59-60. Ultimately, Respondent did not charge Mr. McDonald for Mr. Lewis's fee. FF 54. For all of these reasons and given our broader concerns about the veracity of Mr. McDonald's testimony, we find that Disciplinary Counsel has not met its burden on this charge.

f. Representations to Florida State Court regarding Scope of Representation of Mr. McDonald

Finally, Disciplinary Counsel claims that Respondent was dishonest when she "falsely told the Florida court that she was lead counsel in the arbitration case, when in fact she played no role." ODC Br. at 49; *see* ODC Reply Br. at 25-27. As discussed, we address this argument solely to assist the Board and/or the Court of Appeals should they need to determine an appropriate sanction. *See supra* p. 104.

In support of this argument, Disciplinary Counsel primarily relies on the testimony and opinion of Mr. Pilacek that Respondent falsely represented her role in the arbitration matter to the Florida court. *See* ODC Br. at 26 (PFF 47), 44; ODC Reply Br. at 25-27. However, as noted, we do not credit either Mr. Pilacek or Mr. McDonald in their depiction of Respondent's role. FF 26-27. Instead, we find that the record provides overwhelming evidence that Respondent took significant part in the arbitration matter. FF 26-27. Accordingly, Disciplinary Counsel has failed to prove dishonesty in this regard as well.[89]

D. Certification of Handling of Nominal or Short-Term Funds

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[89] In its Reply Brief (which Respondent did not have an opportunity to rebut), Disciplinary Counsel also raises the entirely new allegation that Respondent treated both Ms. Persons and Mr. Lewis "unfairly" because she failed to pay them their fees. ODC Reply Br. at 27. Perhaps even more than the alleged dishonesty to the Florida state court, this allegation is a significant departure from the charges in the Specification. There is scant evidence in the record as to how Respondent treated co-counsel, as it was not an issue Respondent was on notice to defend at the hearing. Moreover, it was Mr. McDonald who refused to authorize the release of any settlement funds to Ms. Persons. *See* FF 65. As for Mr. Lewis, Respondent explained that she had not yet paid him because of the fee litigation and the ongoing disciplinary matter; an explanation we credit. Tr. 535. Mr. Lewis testified as part of Respondent's defense and gave no indication that he was dissatisfied with how Respondent treated him. Accordingly, Disciplinary Counsel has failed to prove that Respondent's failure to pay local counsel amounted to dishonesty.

Lastly, the Specification of Charges alleges that Respondent violated FL Rule 5-1.1(g)(2), because, "if Florida ethics rules apply to her handling of the settlement funds, she was obligated to deposit them in an Interest on Trust Account and comply with detailed written reporting requirements, which she failed to do." Specification ¶ 20. Disciplinary Counsel has not met its burden of proving this charge.

Although she is not a member of the Florida Bar, the Florida Rules Regulating Trust Accounts applied to Respondent's holding of the settlement funds in the employment discrimination case filed in the U.S. District Court for the Middle District of Florida. *See supra* Part III(A) (Choice of Law); *see also* FL Rule 5-1.2(a) (applying Florida trust accounting rules to non-Florida Bar members).

But in contrast to Disciplinary Counsel's charging of the Florida and D.C. misappropriation and dishonesty rule violations, the rules Disciplinary Counsel charged here – FL Rule 5-1.1(g)(2) and DC Rule 1.15(a) – are not comparable. Unlike DC Rule 1.15(a), FL Rule 5-1.1(g)(2) does not involve the keeping of full trust account records, which is covered by an entirely separate rule.[90] Disciplinary Counsel was aware of this discrepancy but chose not to address it. *See supra* note 1. We address only the Florida rule Disciplinary Counsel actually charged.

FL Rule 5-1.1(g)(2) provides that:

> All *nominal or short-term funds* belonging to clients or third persons that are placed in trust with any member of The Florida Bar practicing law from an office or other business location within the state of Florida

[90] *See* FL Rule 5-1.2(f) ("A lawyer or law firm that receives and disburses client or third-party funds or property must maintain the records required by this chapter for 6 years subsequent to the final conclusion of each representation in which the trust funds or property were received.").

> must be deposited into one or more IOTA [Interest on Trust Account] accounts, . . . [o]nly trust funds that are nominal or short term must be deposited into an IOTA account. The Florida bar member must certify annually, in writing, that the bar member is in compliance with, or is exempt from, the provisions of this rule. (emphasis added)

"'Nominal or short-term' [funds] describes funds . . . that the lawyer has determined cannot earn income for the client or third person in excess of the costs to secure the income." FL Rule 5-1.1(g)(1)(A). "'IOTA account' means an interest or dividend-bearing trust account benefiting The Florida Bar Foundation established in an eligible institution for the deposit of nominal or short-term funds of clients or third persons." FL Rule 5-1.1(g)(1)(C). The annual statement that verifies one is in compliance with the rule or exempt is the only recordkeeping required under the rule.

FL Rule 5-1.1(g)(3) provides the following guidance on how an attorney is to make the determination as to whether particular funds are "Nominal or Short-Term Funds":

> (3) Determination of Nominal or Short-Term Funds. The lawyer must exercise good faith judgment in determining on receipt whether the funds of a client or third person are nominal or short term. In the exercise of this good faith judgment, the lawyer must consider such factors as the:
>
> (A) amount of a client's or third person's funds to be held by the lawyer or law firm;
>
> (B) period of time the funds are expected to be held;
>
> (C) likelihood of delay in the relevant transaction(s) or proceeding(s);

> (D) lawyer or law firm's cost of establishing and maintaining an interest-bearing account or other appropriate investment for the benefit of the client or third person; and
>
> (E) minimum balance requirements and/or service charges or fees imposed by the eligible institution.
>
> The determination of whether a client's or third person's funds are nominal or short-term rests in the sound judgment of the lawyer or law firm. *No lawyer will be charged with ethical impropriety or other breach of professional conduct based on the exercise of the lawyer's good faith judgment*. (emphasis added).

In these proceedings, Disciplinary Counsel did not present evidence or otherwise address why the settlement funds that Respondent held were nominal or short-term under FL Rule 5-1.1(g)(2) and (g)(3). Under the plain reading of the latter rule, no other funds must be kept in an IOTA account. Additionally, Disciplinary Counsel presented no evidence or argument on how Respondent could *not* have acted in good faith weighing the five factors in FL 5-1.1(g)(3) to determine if they should be held in an IOTA account.

That leaves the annual certification requirement. Had the settlement funds at issue in this case been "nominal or short-term," this requirement plausibly would have applied to Respondent even though she is not a Florida a bar member, but since the funds likely were not "nominal or short-term" (and in any case there is no evidence Respondent failed to act in good faith), we do not see how she can be

faulted for ignoring a certification requirement that she would have had no reason to think applied to her. Accordingly, this Florida charge should be dismissed.[91]

IV. Alleged False Testimony to Committee

Apart from the allegations of dishonesty noted above, as an additional aggravating factor for sanction, Disciplinary Counsel alleges that Respondent lied to this Committee – first, about the nature of the settlement that resulted from the discrimination case mediation and, second, about her conversations with Assistant Disciplinary Counsel Dorsainvil concerning the withdrawal of entrusted funds as cashier's checks when traveling to Zimbabwe. ODC Br. at 52-55; *see also* ODC Reply Br. at 28. Dishonesty to a hearing committee is a significant aggravating factor in assessing the appropriate sanction, *see In re Tun*, 195 A.3d 65, 73-74 (D.C. 2018). Although we have recommended dismissal of all charges, and therefore no sanction, we once again address Disciplinary Counsel's contention in case the Board or the

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[91] We acknowledge that the question on this charge would have been closer if the DC Rules of Professional Conduct applied. DC Rule 1.15(a), charged by Disciplinary Counsel, requires attorneys to keep "[c]omplete records" of entrusted funds "for a period of five years after termination of the representation." For records to be "complete," they must be sufficient to reconstruct the attorney's handling of entrusted funds "so that any audit of the attorney's handling of client funds by [Disciplinary] Counsel can be completed even if the attorney or the client, or both, are not available." *In re Clower*, 831 A.2d 1030, 1034 (D.C. 2003) (per curiam) (quoting Board Report). We agree with Disciplinary Counsel that *Clower* requires more than copies of bank records. *See* ODC Br. at 40-42. In briefing this question, the parties focused primarily on Respondent's cooperation with Disciplinary Counsel's investigation. Respondent argues that she fully cooperated; we agree. *See* Resp. Br. at 68; Tr. 691; FF 91, 94-97. But Respondent's cooperation with a disciplinary investigation is not dispositive as to whether she kept adequate records. If the DC Rules applied, we might have found a violation of Rule 1.15(a) pursuant to the holding in *Clower*. A violation of the record-keeping requirement of DC Rule 1.15(a) by itself would have resulted in a recommended sanction of an informal admonition. *See In re Harris-Lindsey*, 242 A.3d 613, 625 (D.C. 2020) (informal admonition is an appropriate sanction for record-keeping violation).

Court of Appeals disagrees with any part of our recommendation and decides that a sanction is warranted. *See supra* p. 104.

We find that Disciplinary Counsel has not demonstrated false testimony from Respondent by clear and convincing evidence. To the contrary, we consistently found that Respondent was credible and forthright in her testimony during these proceedings, and we frequently credited her above other witnesses, particularly because her testimony was regularly supported by additional record evidence. *See, e.g.*, FF 26-27, 46-49, 60, 62, 67, 75-76. Respondent explained her conduct clearly and was not evasive in her responses to Disciplinary Counsel's questioning on cross-examination. As to Respondent's communications with Assistant Disciplinary Counsel Dorsainvil, the record is at best ambiguous. *See, e.g.*, FF 75-76. It does not show by clear and convincing evidence that Respondent testified falsely about Ms. Dorsainvil's advice regarding cashier's checks. Accordingly, even if the Board or the Court were to find a rule violation and impose some form of sanction, we find that Respondent did not testify falsely and no aggravating factor should apply.

CONCLUSION

For the foregoing reasons, the Committee recommends that the charges be dismissed on the basis of a lack of due process and a failure of proof.

HEARING COMMITTEE NUMBER EIGHT[92]

Daniel I. Weiner, Chair

Edward R. Levin, Attorney Member

[92] *See supra* note 7 (Disciplinary Counsel and Respondent consented to a hearing before a quorum of two Hearing Committee Members).