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

In the Matter of	)	
MICHAEL A ROMANSKY, ESQUIRE	)	Bar Docket No. 163-96
Respondent.	)	

PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND RECOMMENDATIONS

This matter was heard by the Hearing Committee on July 7-8 and 13-14, 1998. Having considered the testimony and the documentary evidence submitted by Bar Counsel and Respondent, the Committee recommends that violations be found as alleged by Bar Counsel and that Respondent be suspended for 30 days.

I. PROCEDURAL BACKGROUND

1. Bar Counsel alleges that Respondent Michael A. Romansky ("Mr. Romansky") violated Rule 8.4(c), which prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation."

2. On July 7-8 and 13-14, 1998, this matter was heard before Hearing Committee No. 2 (the "Hearing Committee"), consisting of Timothy J. Bloomfield, Esq., Chair, Shirley Williams, Esq., and Merna Guttentag, public member. Bar Counsel presented the testimony of seven witnesses. Mr. Romansky, who was present throughout the proceeding and represented by counsel, testified on his own behalf and presented testimony from five witnesses. Bar Exhibits (hereinafter "BX") A-E and 1-18, 21, 22, and 24-31 were offered into evidence without objection. Bar Exhibits 19, 20 and 23 were~the subject of a motion in limine, as to which the

Committee's recommendations are set forth hereinafter, at pp. 27-31. Respondent's Exhibits (hereinafter "RX") 1-2, 5-10, 12-20 and 22-29 were offered and admitted into evidence without objection.

II. PROPOSED FINDINGS OF FACT

3. Mr. Romansky is a member of the Bar of the District of Columbia, having been admitted on December 14, 1977. BX A. In 1979, he joined the law firm of McDermott, Will & Emery (the "Firm") as an associate. He became a partner of the Firm in 1982. Transcript (Tr.) Vol. IV at 7-8 (Romansky).[1] His practice area is health law, Id., and from 1984 until 1995 he was the leader of the health care practice in the Firm's Washington office. Id. at 8; Tr. III at 181-82 (Work). He had an active and thriving practice.

4. This proceeding constitutes Mr. Romansky's first and only contact with the Bar disciplinary process.

5. During 1994, Mr. Romansky had over 100 clients and sent out approximately 30-40 bills each month. This was an unusually large number of bills for an attorney to send out on a regular basis. RX 28; Tr. III at 171-72 (Work); Tr. IV at 11 (Romansky).

6. In late November or early December 1994, a representative of a Firm client, Steven B. Siepser, M.D., contacted Albert Shay, Esq., who was then an associate at the Firm, questioning the accuracy of the bill rendered by Mr. Romansky. Mr. Shay reported that inquiry to a senior partner at the Firm, and the matter came

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[1] "Tr. I! refers to July 7, "Tr. II" to July 8, "Tr. III" to July 13, and "Tr. IV" to July 14.

to the attention of Charles Work$_1$ Esq., the managing partner in charge of the Washington office. Shortly thereafter, Mr. Work designated James Sneed, Esq., a senior partner at the Firm and a member of the Firm's Professional Responsibility Committee, to conduct an investigation of this matter.

7. At Mr. Work's direction, Mr. Sneed conducted an investigation of Mr. Romansky's billing practices. Mr. Sneed also dealt with a pre-dated client letter which Mr. Romansky obtained from a client in connection with the investigation. Mr. Sneed interviewed health-care attorneys from the middle of December 1994 into January 1995. Tr. I at 302 (Sneed); BX 23. Mr. Sneed consulted with Mr. Romansky about the inquiry and received information from Mr. Romansky with respect to approximately 60 clients. Id. at 294, 296. Mr. Romansky provided cover sheets for approximately 10 to 30 files from the approximately 60 reviewed by Mr. Sneed. Id. at 298-99; BX 23; RX 26. The bulk of the inquiry was completed by approximately January 30, 1995. Tr. I at 306 (Sneed). He prepared several drafts of a report of the investigation. Bar Counsel's Specification of Charges are predicated in large part upon the results of Mr. Sneed's investigation.[2]

8. As a result of the inquiry conducted by Mr. Sneed, the Firm took disciplinary action against Mr. Romansky. Tr. III at 181 (Work). He was reduced in compensation by 50 units, which at the

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[2] Mr. Sneed prepared drafts of a report of his investigation. These drafts, BX 19, 20 and 23, are the subjects of Respondent's Motion In Limine. See pp. 27-31, herein.

time translated into a penalty of about $30,000. Id. He was required to submit his time records to Mr. Work on a regular basis, which Mr. Work reviewed for completeness and credibility. Id. He was required to create an account to reimburse the Firm for services performed on behalf of his father. Id. Finally, he was removed from his leadership position as head of the health-care practice group. Id. at 181-82. Billing adjustments were made to certain clients.

A. THE FASA MATTER

9. On December 19, 1994, Mr. Romansky obtained a letter from the Federated Ambulatory Surgery Association ("FASA"). This letter ("FASA Letter") became a focus of one of the charges against him.

10. By 1994, FASA had been a retainer client of Mr. Romansky's for nine years. Tr. I at 80 (Durant); Tr. IV at 41 (Romansky); RX 12. The executive director of FASA was Gail Durant. Tr. I at 80 (Durant). Over the years, Ms. Durant became a close friend to Mr. Romansky. She attended his wedding and, as will be set out later, the bris of his son. Tr. IV at 37-38 (Romansky).

11. 1994 was anticipated to be a busy year for health care lawyers due to the health care reform initiatives undertaken by the Clinton Administration. Tr. I at 120, 129 (Durant); Tr. II at 183 (Millman); Tr. III at 150 (Work); Tr. IV at 20-21 (Romansky). On July 26, 1993, FASA entered into a retainer agreement with the Firm that set FASA's yearly retainer at $150,000 for the three-year period beginning January 1, 1993. RX 10. This arrangement was intended to allow FASA to amortize the cost for the increased

activity resulting from health care reform in 1994 over a longer period. Tr. I at 117-20 (Durant); Tr. IV at 21 (Romansky).

12. By early December 1994, Mr. Romansky's wife, Sally, who had previously had a miscarriage, was almost at the end of a high-risk pregnancy. On Thursday, December 8, their son, Matthew, was born after a difficult labor. Tr. IV at 23-24 (Romansky).

13. When Mr. Romansky returned to work on Tuesday, December 13, 1994, managing partner Charles Work informed him that the Firm was conducting an inquiry into his billing practices. Tr. III at 129-30 (Work); Tr. IV at 24-25, 145 (Romansky). Mr. Work told Mr. Romansky to cooperate with the investigation and not to talk to any of his colleagues or clients about it. Tr. III at 130 (Work); Tr. IV at 27 (Romansky). Mr. Romansky was told that a component of the inquiry was whether he had "padded" hours for retainer clients. Tr. II at 11 (Sneed); Tr. III at 131-32 (Work); Tr. IV at 26-27 (Romansky).[3]

14. Mr. Work testified that Mr. Romansky appeared "very upset" by the news of the investigation. Tr. III at 134 (Work). See also testimony of Mr. Romansky's secretary, Paula Butt. Tr. III at 17-18, 20, 27 (Butt) (Romansky "upset," "not himself"). Mr. Romansky testified that he was shocked and appalled by the investigation, and was "very scared." Tr. IV at 26, 34-37 (Romansky).

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[3] The Firm inquiry did not produce evidence sufficient to support a conclusion that Mr. Romansky had padded these hours. Tr. II at 78, 86-87 (Sneed) ; Tr. III at 213-15 (Work) . Bar counsel made no such allegation in the Specification of Charges. See BX B.

15. On Wednesday, December 14, Mr. Sneed asked Mr. Romansky to collect and provide him with all billing files for Mr. Romansky's clients for the prior two months. Tr. II at 6 (Sneed); Tr. IV at 30 (Romansky). Mr. Romansky understood that Messrs. Work and Sneed wanted to review the materials before Christmas; he felt pressure to complete his own review of those files and present them to Mr. Sneed by Wednesday, December 21, 1994. Tr. IV at 33, 35, 145-46 (Romansky).

16. Mr. Romansky began the task of compiling the materials requested by Mr. Sneed and preparing summaries with background information on most of his clients. Mr. Romansky looked for any "write-offs," "premiums," or edits to pre-bills, and provided comments on those items. Tr. IV at 31-32 (Romansky). Mr. Romansky completed his review of the billing files and preparation of summaries, and submitted them to Mr. Sneed on December 21, 1994. RX 26; Tr. I at 300 (Sneed); Tr. IV at 153-54 (Romansky).

17. Mr. Romansky had invited Ms. Durant of FASA to his son's bris at his home on December 16, 1994. Tr. IV at 38 (Romansky); Tr. I at 81-82 (Durant). When she arrived, Mr. Romansky asked her to provide a letter regarding the quality and amount of the work done by the Firm for FASA during 1994. Tr. I at 82-83, 126-27 (Durant); Tr. IV at 38-39 (Romansky).

18. Ms. Durant agreed to provide such a letter. Tr. I at 83 (Durant); Tr. IV at 38 (Romansky). Because she was to be out of town the following week, she suggested that Mr. Romansky send a

draft letter to her secretary that could be read to her when she called her office. Tr. I at 83 (Durant).

19. Mr. Romansky did not send a draft letter to FASA. Instead, on Monday, December 19, Mr. Romansky called Ms. Durant's secretary, Shelli Adams. Tr. I at 66 (Adams). Mr. Romansky stated that he had discussed a letter with Ms. Durant at the bris, and stated that Ms. Durant had suggested he call Ms. Adams to dictate a draft. Id. at 61, 66. Mr. Romansky then dictated the letter over the phone, id. at 67, and asked Ms. Adams to date it November 14, 1994. Id. at 76-77; Tr. IV at 47 (Romansky). Ms. Adams typed the letter on her computer and faxed it to Mr. Romansky at his request. Tr. I at 62-63 (Adams).

20. Mr. Romansky expected that when Ms. Durant called her office, Ms. Adams would read to her the letter he had dictated. Tr. IV at 45 (Romansky). Ms. Adams kept a copy of the letter on her computer for that purpose. Tr. I at 77 (Adams). Mr. Romansky understood that if Ms. Durant disagreed with the content of the letter when it was read to her, she would let him know and it would be corrected. Tr. IV at 46 (Romansky).

21. Mr. Romansky also presented evidence that he could have fabricated a letter from FASA without FASA's knowledge. The Firm maintained a supply of FASA letterhead in its offices. Tr. III at 21 (Butt); Tr. IV at 47 (Romansky).

22. Mr. Romansky attached the FASA Letter to one of the billing summaries that he submitted to the Firm, along with the billing files requested by Mr. Sneed, on December 21, 1994. Tr. IV

at 153-54 (Romansky). The summary indicated that the FASA Letter had been obtained "a month or so ago." RX 26; Tr. IV at 186 (Romansky). Mr. Romansky admitted that he was not telling the truth when he represented to Mr. Sneed that he had received the FASA Letter "a month or so ago." He explained that he improperly included that statement in the summary because he had been directed not to discuss the investigation with clients and he did not want it to appear as if he had done so. Tr. IV at 186 (Romansky). The Committee is skeptical of this testimony; had Mr. Romansky been truly concerned about revealing the fact that he had talked to Ms. Durant, he could have simply not submitted the FASA Letter to Mr. Sneed. When Mr. Sneed's attention was focused on the letter, he concluded that the letter was "quite troublesome" and that it suggested "an intended use of the document to inappropriately influence the investigation." Tr. II at 115 (Sneed). The Committee believes that Mr. Sneed's reaction more accurately reflects Mr. Romansky's true intent.

23. When Ms. Durant called her office on December 21, Ms. Adams read her the FASA Letter. Tr. I at 64 (Adams); Tr. I at 84-85 (Durant). Ms. Adams testified that Ms. Durant was "very upset" that the letter had gone out. Tr. I at 64 (Adams). Ms. Durant then dictated to Ms. Adams a message to be faxed to Mr. Romansky. BX 9. The message stated:

> Please be advised that the letter, that I have not seen, dated November 14, 1994, regarding McDermott, Will & Emery's health care reform work and retainer with FASA has not formally been reviewed nor signed by me. The letter you dictated to Shelli has not been approved

by me. I will review it on Tuesday, December 27 and send in my changes.

Id. Ms. Durant testified that she would not have approved the letter that Mr. Romansky had dictated to Ms. Adams because it was not the kind of letter to which she had agreed. Tr. I at 85 (Durant). Ms. Durant also left a voice-mail message at Mr. Romansky's office that she did not want him to use the letter that he had obtained. Id. Mr. Romansky did not recall receiving a voice-mail message from Ms. Durant objecting to the FASA Letter. Tr. IV at 49 (Romansky).

24. By letter dated December 28, 1994, Ms. Durant informed Mr. Romansky of her objections to the FASA Letter. BX 10. She objected to the predating and requested assurance that the letter was not and will not be used. Mr. Durant's letter stated in part, the following:

> The purpose of this letter is to ascertain that the letter you dictated to Shelli Adams on December 19 which you asked her to date November 14 and put on FASA stationery under my signature has not and will not be used.
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> * * *
>
> When I called Shelli on December 21 she read me the letter you dictated to her on December 19 and stated you had told her that the letter had already been approved by me and that she was to put it on FASA stationery and return it to you the next morning (December 20).
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> I had Shelli fax to you on the morning of December 21 a memo stating that I did not approve of the letter you dictated. I also left a phone message on your answering machine that morning stating I did not approve of the letter. There is no way I would be able to comment about the amount of time you or anyone in the firm works on FASA's behalf (be it a

> weekday, nights, weekends, etc.) since you do not provide FASA with a breakdown of your (and others') hours worked on our behalf. Also, I would not approve of pre-dating a letter.
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> What bothers me the most is the fact that you told Shelli that I had approved of this letter and for her to type it on FASA stationery under my name.
>
> Please reassure me that the letter you dictated under my name and on FASA letterhead was not and will not be not used.

Id.

25. Mr. Romansky sent a letter of apology to Ms. Durant on January 3, 1995. His letter stated in part as follows:

> With respect to Shelli's phone request, your fax, and your December 28 letter, let me assure you that the letter we discussed will not be used and has been destroyed.
>
> * * *
>
> Allow me to explain the purpose for the letter. We are in process of reviewing billing arrangements for clients. The use of retainers for association clients has come into question. While the firm recognizes the many positive aspects of maintaining financial relationships with clients along these lines, there have also been questions raised about significant write-offs when work expended substantially exceeds fees paid.
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> * * *
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> As I mentioned, the letter is "out of circulation" and the issue is, as far as I am concerned moot.

BX 12.

26. Mr. Romansky acknowledged that his explanation of the purpose of the letter was not truthful. Tr. IV at 51-58 (Romansky). He testified that he felt that he owed Ms. Durant an

explanation for why he had sought the FASA Letter in the first place, but felt constrained not to disclose the Firm's investigation because he had been instructed by Mr. Work not to discuss it with clients. Id. at 57-58. Again, the Committee is skeptical of this explanation; Mr. Romansky was not under any compulsion to explain why he had asked for the letter. He could have complied with Mr. Work's instructions by being silent on the subject. It is obvious that Mr. Romansky was attempting to deceive his client about the purpose of the investigation.

27. The January 3 letter also falsely indicated that the FASA Letter had been destroyed. While Mr. Rornansky testified that he destroyed his own copy and alerted Mr. Sneed, so that the copy that had been submitted to the Firm would not be relied on in his behalf, Tr. IV at 56, 73 (Romansky), the FASA Letter remained with the billing summary submitted to Mr. Sneed. Further, while the January 3 letter indicated that the FASA Letter will not be used, it did not disclose the fact that it had already been submitted to the Firm.

28. Mr. Romansky spoke to Mr. Sneed about the FASA Letter on January 3, 1995, Mr. Sneed's first day back in the office after the holidays. Tr. I at 301 (Sneed); Tr. II at 82-83 (Sneed); Tr. IV at 53 (Romansky). Mr. Romansky testified that he wanted to make Mr. Sneed aware that he had acted improperly with respect to the FASA Letter and ensure that it would not be used on his behalf. Tr. IV at 55-56 (Romansky). Mr. Romansky told Mr. Sneed that he had predated the FASA Letter. Tr. II at 83 (Sneed); Tr. III at 135

(Work) Mr. Romansky testified that he told Mr. Sneed that the letter had been included with his December 21, 1994 submission. Tr. IV at 73-74 (Romansky). At no point, however, did Mr. Romansky bring Mr. Sneed's attention to the summary which falsely represented that the FASA Letter had been received "a month or so ago." Tr. II at 111-115 (Sneed).

29. After the back-dated letter came to light, Ms. Durant and FASA refused to allow Mr. Romansky to work with them and insisted that FASA work be handled by other Firm attorneys. Tr. I at 97 (Durant); Tr. II at 168-70 (Millman); BX 17. Ultimately, FASA discharged the Firm and engaged new Washington counsel.

30. To summarize, Mr. Romansky dictated to his client an endorsement letter which was predated. Then, without the authority of the client, he submitted the letter to his Firm as a part of materials he had collected in response to an investigation of his billing practices. In doing so, he falsely represented to his partners that he had received the letter "a month or so ago."

31. Mr. Romansky was not honest with his client in his communications as to the FASA Letter. He stated that the letter had been destroyed and in fact it had not been destroyed. In addition, he volunteered to his client that the letter had been sought in conjunction with a Firm review of retainer arrangements when in fact the purpose was to bolster his response to a Firm investigation into his own billing practices.

32. The FASA Letter was considered by the Firm to be the most serious of the matters uncovered in the course of Mr. Sneed's investigation.

B. BILLING QUESTIONS

33. The Specification of Charges contains allegations regarding five billing incidents. These involve: OOSS/Dr. Romansky, RCII-Summitt; Premium Plastics; Surgical Health Corporation; and Dr. Steven Siepser.

34. A summary of the Firm's billing procedures will be helpful to a description of these matters. Before the actual bills were prepared, so-called "pre-bills" are submitted to billing attorneys for their review. Tr. I at 287 (Sneed). Pre-bills are computer-generated documents reflecting time recorded by attorneys together with descriptions of their work. (BX 6 contains a sample.) The pre-bills were sent to billing attorneys for review and correction. Tr. I at 287-88 (Sneed). The pre-bills are internal law firm records; they are not sent to clients. Id.

35. After billing partner review, including corrections, the pre-bills are returned to billing specialists, who are administrative personnel responsible for the mechanics of the billing process. Id. The billing attorneys are provided with drafts of the bills; this allows them another opportunity to make any appropriate changes. Id. at 312. The draft bills are returned to the billing specialists, who then prepare the final bills sent to the clients. Id. All of these records -- the pre-bills, the draft andfinal bills to the clients, and the billing attorney's

edits to the pre-bills and draft bills -- are maintained in the Firm's billing files. See id. at 310-11.

1. OOSS/Dr. Roma~skv

36. In early 1991, Dr. Monroe Romansky, Mr. Romansky's father, decided to retire and sell his medical practice. Tr. IV at 80 (Romansky). Mr. Romansky asked an associate, Lisa Gilden, to help. He did not expect her work to involve more than a few hours, id. at 85, but her involvement grew, and she spent 20-30 hours on the transaction. Id. at 262.

37. Under Firm procedures, Mr. Romansky should have formally opened a separate matter for the work done on behalf of his father, instructed Ms. Gilden to charge her time to that matter, and then "written-off" her time if he wanted his father not to pay for the services. Tr. III at 203 (Work); Tr. IV at 85 (Romansky). This procedure would have informed the Firm that it was doing "pro bono" work for Mr. Romansky's father. Instead of following the correct procedures, Mr. Romansky asked Ms. Gilden to record the time she spent working on the transaction to the Firm's account for OOSS. Tr. IV at 82 (Romansky). He says he did this so that she would receive credit within the Firm for the time she spent on this transaction, Tr. I at 270 (Gilden); Tr. IV at 82 (Romansky), but apparently she would have gotten the same credit had Mr. Romansky followed proper procedures. (Tr. II at 105).

38. There were no efforts to conceal the fact that Ms. Gilden's work for Dr. Romansky was recorded to the OOSS account. Tr. I at 272, 273 (Gilden); RX 32. Mr. Romansky

acknowledged to Mr. Sneed that he had instructed Ms. Gilden to record her time to the OOSS account. Tr. I at 324-25 (Sneed); Tr. II at 65-66 (Sneed). Mr. Romansky described his action in this regard as a "shortcut," taken out of "laziness." Tr. IV at 86.

39. OOSS is an association client that pays a fixed annual retainer for legal services. Tr. IV at 83 (Romansky). From 1990 through 1993, the retainer remained unchanged. See RX 25; Tr. III at 81 (Fenzl); Tr. IV at 83-84 (Romansky). OOSS was not billed for the time recorded by Ms. Gilden to the OOSS account.

40. Dr. Robert Fenzl, a representative of OOSS, testified that OOSS was not bothered by this misbilling. He saw no potential impact on the amount of the OOSS retainer. Tr. III at 88 (Fenzl). The Firm did not send statements to 0055 setting out the hours on OOSS matters, and OOSS did not review the Firm's records. Tr. III at 82-83 (Fenzl); Tr. IV at 84 (Romansky). Mr. Fenzl testified that the annual OOSS retainer was not influenced by the number of hours recorded to the OOSS account. Tr. III at 92-93 (Fenzl); Tr. IV at 85 (Romansky).

41. All witnesses testified that neither OOSS nor the law firm was harmed in any way by this misrecording of time. There was no economic advantage to Mr. Romansky. Tr. II at 70 (Sneed); Tr. III at 180 (Work); Tr. IV at 86-87 (Romansky). According to the witnesses, Lisa Gilden's time as recorded to OOSS was written-off, since the total OOSS time exceeded the retainer. This write-off was "charged" to Mr. Romansky, just as it would have been had he set up a separate client account. Tr. II at 69-70 (Sneed); Tr. III

at 159-160 (work); ComDare RX 25 with RX 32. It is self-evident, however, that misreporting the time to oogs obscured from Firm management the fact that Mr. Romansky had devoted Firm resources to his family. This avoided any issue as to whether it was appropriate to do "pro bono" work for Mr. Romansky's father.

42. The Firm considers the Dr Romansky/OOSS issue to be a purely internal, procedural irregularity. Tr. II at 89 (Sneed); Tr. III at 180 (Work). The Firm did$_1$ however, require Mr. Romansky to repay the amount reflected by Ms. Gilden's time. Tr. III at 182 (Work).

2. Premium Bi11ing Practices

43. The remaining billing issues alleged in the Specification of Charges relate to the taking of premiums on four different bills: (a) a November 28, 1994 bill to RCII Summitt Technologies; (b) a December 6, 1994 bill to Premium Plastics; (c) an October 6, 1994 bill to Surgical Health Corporation; and (d) a November 17, 1994 bill to Dr. Steven Siepser. These bills were prepared and sent after the Firm initiated a "test period" during which the Firm moved to a new form engagement letter. See RX 14.

44. Prior to September 1994, the Firm's engagement letter specified: "Our fees are determined by the actual time spent by our professional staff ... ." The fee letter then set out the amount of hourly rates for Mr. Romansky and others expected to work on the matter. (BX 1). Effective September 12, 1994, all billing attorneys were required to use a new form, which stated: "[Our] fees will be based primarily on the time spent by each

professional, although other factors may be taken into consideration." RX 14; Tr. III at 169-70 (Work). Under the heading "How We Set Our Fees," a brochure accompanying the new engagement letter set forth the factors considered by the firm when determining fees for legal services:

- The time and effort required to complete the matter, the novelty and complexity of the issues presented, the skill required to perform the legal services promptly, and on occasion the risk assumed by our firm
- The rates of the professional assigned to the matter which are subject to change from time to time
- The amount of money or value of property involved
- Time constraints imposed by circumstances (e.g., external constraints or any substantial disruption of other office business) or by you
- The nature of our professional relationship with you
- The experience and reputation of the lawyers and paraprofessional who perform services for you
- The extent to which our firm's office procedures and systems have produced a high quality product efficiently

RX 14; Tr. III at 170 (Work).

45. In 1994, there was no specified procedure within the Firm for billing attorneys for taking a premium. Mr. Sneed testified that "typically, in our firm, the way a premium is taken is to charge an hourly rate greater than the normal rate for billable hour clients," but that "there's not a single way that premiums are our professional

taken." Tr. II at 61 (Sneed) .4 According to Mr. Sneed, under Firm policy, a client must be informed whenever it is being charged a premium. Tr. II at 63 (Sneed); but see Tr. III at 173 (Work). Mr. Sneed described the Firm's overall policy as follows:

> It's certainly to our financial benefit, obviously, to engage in premium billing. I believe the policy is, however, that that must only be undertaken where the client clearly understands both the fact of a premium and the nature of it, in the sense that if it's a matter of charging a higher hourly rate than we ordinarily charge, that there would be clear disclosure up front, either an engagement letter or if it's an existing client, somehow communicated to them that here's the hourly rate we're charging here.
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> * * *
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> [C] ertainly, they [clients] need to know what they're paying and why -- either the hourly rate or the fact, if it's going to based on some other factors, what those are, and the fact that we believe we deserve a premium or we're basing our bill on whatever factors we in fact base it on.
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> * * *
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> [The firm's decision to make the refunds to clients Mr. Romansky had charged premiums] was based upon the conclusion that the clients had not been adequately informed that there was going to be a premium taken and that therefore it was not appropriate to charge them a premium.

Tr. II at 108-110.

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[4] Mr. Work testified, however, that under the new engagement letter, charging a premium on a statement that does not state the actual number of hours spent would not be a violation of the Firm's policy. Tr. III at 173 (Work)

46. In the instances set out below where Mr. Romansky altered pre-bills, he did not attempt to conceal the alterations. The altered pre-bills remained in the Firm's records. See e.g., BX 5.

(a) RCII-Summit Technologies

47. RCII-Summit Technologies ("RCII") is a health care provider of refractive surgery services and a laser equipment manufacturer. Tr. III at 36-39 (Herskowitz). RCII signed the "new" form of engagement letter. RX 16; Tr. III at 47 (Herskowitz). Ronald Herskowitz, who at the time was executive vice-president of RCII, first spoke to Nr. Romansky in late August or early September 1994. Tr. III at 39, 46 (Herskowitz). He met with Mr. Romansky and another Firm attorney, Joel Suldan, in Boston on October 26, 1994. EX 5; Tr. III at 50-51, 54-55 (Herskowitz).

48. Prior to that meeting, there had been substantial contact between RCII and the Firm, Tr. III at 47 (Herskowitz). Mr. Herskowitz testified that there had been an intense period of "information exchange" during October 1994. Id. at 49. He sent voluminous materials to be reviewed by Messrs. Romansky and Suldan prior to the October 26, 1994 meeting in Boston. RX 17; Tr. II at 58 (Herskowitz). He spoke with Mr. Romansky at least several times a week and, at times, several times a day. Tr. II at 48-49 (Herskowitz). He also specifically recalled both having conversations with Mr. Suldan during September and October 1994 and the substance of those conversations. Id. at 49-50, 56-57.

49. Mr. Suldan recorded eight hours of time for his work on RCII matters in October 1994. BX 5. He did not, however, record

any time for his conversations with Herskowitz or review of documents prior to the October 26, 1994 meeting in Boston. Id. He recorded only 1.0 hours for his direction and supervision of the research performed by a young associate, Darlene Hampton, on complex regulatory issues Id.; Tr. II at 145-46 (Suldan); Tr. IV at 118-19 (Romansky). Mr. Suldan was known within the Firm to have a "light pencil," meaning that he did not always record all of his time. Tr. III at 162-63 (Work). At the hearing, he admitted that he had not recorded all of his time on this matter. Tr. II at 144-50 (Suldan)

50. The evidence is clear that on this matter, Mr. Romansky was not trying to bill a premium amount. When Mr. Romansky reviewed the pre-bill reflecting that Mr. Suldan had recorded only eight hours, he increased Mr. Suldan's time by six hours. BX 5. Mr. Romansky did not consult with Mr. Suldan about this change. He also reduced his own time from fourteen to twelve hours. Mr. Romansky stated in his summary for this matter that he was seeking a more realistic allocation of time and noted his belief that Mr. Suldan had understated his actual time. RX 26. The client was sent a bill dated November 28, 1994, showing the hours as adjusted; Mr. Romansky did not advise the client that he had changed the number of hours which had been recorded.

51. RCII was satisfied with the bill and Mr. Herskowitz testified that he "got a bargain" because the hours stated on the bill "seemed light." Tr. III at 69 (Herskowitz). He further testified that he had many communications with Messrs. Romansky and

Suldan in September and October 1994 that were not reflected on the bill. Id. at 63-64.

52. As a result of the investigation, the Firm made an adjustment to the RCII-Summit account to refund the amount reflected by the altered hours.

53. Bar Counsel does not press this allegation, stating that the evidence does not demonstrate, "by the requisite standard, that Mr. Romansky engaged in an instance of dishonesty with respect to the RCII bill." Bar Counsel cites Mr. Romansky's concerns about Mr. Suldan's timekeeping practices, the client's satisfaation with the bill, and the absence of an admission by Mr. Romansky of an intent to mislead the client. Bar Counsel Proposed Findings at note 5.

(b) **Premium Plastics**

54. Premium Plastics is a medical device manufacturer that sought advice from the Firm in connection with a Food and Drug Administration ("FDA") regulatory issue. Tr. III at 97-98 (Rosen); Tr. IV at 122-23 (Romansky). David Rosen was assigned to handle the matter, Tr. III at 99 (Rosen), because he had substantial prior experience at the FDA dealing with the pertinent issue, Tr. IV at 125 (Romansky). Mr. Rosen was able to achieve a good result in a timely and efficient manner due to his contacts and prior experience at the FDA. Tr. III at 97-99, 106-07 (Rosen).

55. The November 17, 1994 engagement letter from the Firm to Premium plastics was the new form stating that "our fees will be based primarily on the time spent by each professional, although

other factors may be taken into account"); BX 4; Tr. IV at 123 (Romansky). Mr. Romansky added three hours to Mr. Rosen's time as shown on the pre-bill. BX 6. He intended by this change to take a premium of $465.00. Tr. IV at 126 (Romansky). Mr. Romansky felt that this premium was warranted by the result. Id. at 124-25. Mr. Rosen was unaware that Mr. Romansky had increased his hours in the pre-bill. Tr. III at 108 (Rosen). Mr. Rosen testified that he did not record all of his time on the Premium Plastics matter during November 1994. Tr. III at 104-06 (Rosen).

56. The December 6, 1994 bill for $41,441.25 was sent to Premium Plastics for "professional services rendered." BX 6. The bill did not set out the number of hours spent by Mr. Rosen or any other Firm attorney. Id. Mr. Romansky did not disclose to Premium Plastics that a premium was being charged in connection with Mr. Rosen's services. Id.; BX 23 at 4-5; Tr. I at 322 (Sneed).

57. Mr. Romansky testified that he did not intend or believe the bill to be misleading or dishonest. Tr. IV at 126, 127 (Romansky); BX 6. In connection with the internal investigation into his billing practices, Mr. Romansky readily acknowledged that his intent was to charge a premium. Tr. II at 23 (Sneed); Tr. IV at 124-25 (Romansky).

(c) Dr. Siepser

58. In the Fall of 1994, after having first used another law firm, Dr. Steven Siepser engaged the Firm to help him obtain regulatory approval for an ambulatory surgical center in Pennsylvania. Tr. IV at 104-05 (Romansky). Mr. Romansky asked

Firm attorney Al Shay to work on the matter. See id. at 105. In a short period of time, the Firm was able to obtain for Dr. Siepser a refund of over $21,000 in fees from the prior law firm, process the application for regulatory approval, and provide advice regarding certain joint ventures contemplated by Dr. Siepser. Tr. I at 246 (Shay); Tr. IV at 104-06 (Romansky).

59. Dr. Siepser's arrangement with the Firm provided for payment of bills based on an hourly rate based on actual time spent. Tr. I at 240 (Shay); Tr. I at 292 (Sneed); BX 23 at 1-2.

60. When Mr. Romansky reviewed the September 1994 pre-bill for Dr. Siepser, he thought that a premium of approximately $700 would be in order due to the results obtained by the Firm. Tr. IV at 107 (Romansky). He accomplished the premium by adding three hours to the time recorded by Mr. Shay on the pre-bill. Id. at 108. Mr. Romansky did not consult with Mr. Shay about changing his time entries. Mr. Shay testified that he did not record all of his time to the matter. Tr. I at 249 (Shay).

61. The November 17, 1994 bill was sent to Dr. Siepser for "professional services rendered." BX 3. The bill itself did not disclose any number of hours spent by Mr. Shay or any other Firm attorney. Id. While Mr. Romansky had directed otherwise, a statement detailing the number of hours worked by Mr. Shay and others was included with the bill.[5] BX 3. That detail included

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[5] The client apparently received the backup because a representative of the client, Michael Duca, called Mr. Shay regarding a difference in the time that he and Mr. Shay recorded for the same phone call. Tr. I at 240-41 (Shay).

the three hours added by Mr. Romansky, BX 3, i.e., it did not accurately reflect the time that had been recorded by Mr. Shay. The client was not informed that a premium was being charged.

62. Mr. Romansky testified that he did not intend or believe the November 17, 1994 bill to be misleading or dishonest. Tr. IV at 109 (Romansky). From his instruction that the bill be sent without backup detail, it appears that he did not intend that the bill sent to the client include a representation as to Mr. Shay's or any other Firm attorney's hours. He says he mistakenly relied on the factors in the new engagement letter and materials accompanying it. Tr. IV at 109 (Romansky). See BX 3.

(d) Surgical Health Corporation

63. In mid-1994, Michael Ribaudo, an executive at Surgical Health Corporation, contacted Mr. Romansky to seek assistance on various issues. Tr. IV at 87-89 (Romansky). Mr. Ribaudo asked Mr. Romansky to estimate the legal fees that would be incurred by Surgical Health for the Firm's work on the projects. Mr. Romansky estimated that the fees would total between $3,000 and $5,000. RX 26 (billing summary for Surgical Health); Tr. IV at 89 (Romansky).

64. In a bill to Surgical Health dated October 26, 1994, for legal services performed in September 1994. BX 2. Mr. Romansky added two hours to the time recorded by Ms. Millman on the pre-bill for that period. He made that change partly to obtain a premium for what he judged to be exceptional services provided in a very cost-effective manner; and partly to recoup, a write-off on the previous month's bill. RX 26 (summary regarding Surgical Health).

Tr. IV at 94-95 (Romansky). The premium on the October 26, 1994 bill was $530, reflecting the two hour adjustment Mr. Romansky made to Ms. Millman's time. The bill did not state the number of hours expended by Firm attorneys during that period. BX 2; Tr. IV at 96 (Romansky). The client was not advised that the bill reflected a premium.

65. The premium reflected on the October bill was less than the write-off s, or reductions, reflected on the four other bills sent to Surgical Health in the relevant period. The Firm in its investigation took the view that the write-of fs were irrelevant to the question of the propriety of the premium and how it was taken. Tr. II at 95-96 (Sneed). During the five month period covered by the above four bills to Surgical Health, the client was billed for $2,210 less than the value of the time actually spent. Tr. IV at 90-91, 97, 104 (Romansky)

66. Mr. Romansky did not recall considering which engagement letter -- old form or new form -- was applicable. Id. at 101. The record reflected that the old form had been used. This form advised that the bills would be based on "actual time spent." BX 1.

67. Mr. Romansky advised Mr. Sneed that he had determined to charge a premium to Surgical Health Corporation because "the value of Diane's time on this project was way in excess of the amount billed." BX 23 at 4; Tr. I at 316-17 (Sneed) . After Mr. Sneed discovered Mr. Romansky's alteration of the pre-bill the Firm made an adjustment with the client. Tr. I, at 319 (Sneed)

68. Mr. Romansky expressed remorse at the hearing for his conduct. As to the FASA letter, he stated that he "fouled up horribly " Tr. IV at 52-53, "had no business predating a letter," id. at 55, he expressed regret that he had taken premiums "inappropriately," id. at 163, and expressed embarrassment and regret over the misreportings of time on his father's matter. Id. at 85-86.

III. PROPOSED CONCLUSIONS OF LAW

A. MOTION IN LIMINE

69. Respondent objected in a motion in limine to the admission of Bar Exhibits 19, 20 and 23, which are drafts of Mr. Sneed's investigative report. Respondents' objections were stated as follows:

> The report is incompetent evidence that has no bearing on any issue to be determined by the Hearing Committee. It is hearsay, contains hearsay, is irrelevant, and usurps the role of the trier of fact. Moreover, in light of the circumstances under which it was prepared, it is unreliable and its use in this proceeding would be unfair to Respondent, Michael Romansky.

70. Respondent acknowledges that some evidence regarding the investigation is necessary to set the stage for the allegations regarding the FASA letter.

71. Pursuant to Rule 7.14(a) the Hearing Committee deferred ruling on the motion and stated that it would make its recommendation for disposition of the Motion as part of it report to the Board. Order dated June 4, 1998.

72. The June 4, 1998 Order provided in part as follows:

> The Committee will also hear, subject to objections, any oral or documentary evidence presented by Respondent and Bar Counsel in light of the fact that the report and response will be included within the record.

Id.

73. As set out in the Order deferring consideration of the motion, the Committee received at the hearing the drafts of the report, Bar Exhibits 19, 20 and 23, as well as Respondent's response, Respondent's exhibit 24, and these documents are part of the record.

74. At the outset of the hearing, Respondent noted an objection to proceeding with the motion in limine having not been ruled upon. Tr. I at 9-10.

75. At the hearing there was substantial testimony adduced about the Firm's investigation insofar as it related to the specific violations alleged in the Specification of Charges. There was no testimony regarding the matters referred-to in the report which were not at issue in the proceeding.

76. The Committee recommends that the investigative reports and Respondents' response be admitted into evidence, for consideration by the Committee and the Board only of those portions of the documents which deal with the matters at issue in these proceedings. In making this recommendation, the Committee relies on a number of factors. First, under Board Rule 11.2, the Committee is not bound by the rules of evidence. See In re Shillaire, 549 A.2d 336, 343 (D.C.1988), where the Court held that

it was error for the Hearing Committee to exclude an affidavit, stating that the "affidavit, although hearsay" was properly admissible.[6] Second, since Mr. Sneed and Mr. Work, the Firm attorneys responsible for the investigation, both testified, the parties had full opportunity for cross examination on the conduct of the investigation, the results of the investigation, and on Bar Exhibits 19, 20 and 23 and Respondent's Exhibit 24. Third, the facts as to the alleged misconduct are not disputed; in this regard, the reports may be considered somewhat cumulative of the testimony. Fourth, as Bar Counsel notes, the reports, while not routine, were prepared in the course of the Firm's business and were relied upon by the firm in reading its own conclusions as to how to deal with the issues presented by Mr: Romansky's conduct. While the Board is not governed by the rules of evidence it does appear that the report would fall generally within the scope of evidence permitted by Rule 807 of the Federal Rules of Evidence. Finally, the reports and the investigation itself are relevant and probative as to the facts at issue. See, e.g., Rule 401 of the Federal Rules of Evidence. The Committee believes it can appropriately consider the actions taken by the firm as a result of the investigation, as these actions reflect the Firm's evaluation of Mr. Romansky's conduct. The Committee stresses, however, that

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[6] Unlike this case, the affiant did not testify. Also, the affidavit in Shillaire contained information submitted by informants and also referred to rumors. In contrast, the author of the Sneed report was a witness, as were the persons who provided information to Mr. Sneed on the issues considered by the Committee. Id.

while it recommends that the reports and the results of the investigation be considered, it has not been governed by them and that its recommendations are based on the application of the Rules of Professional Conduct to facts which are largely undisputed.

77. The cases cited by Respondent in its motion in limine are not persuasive to the Committee. Naples v. United States, 344 F.2d 508, 511 (D.C. Cir. 1964), Brandt v Uniroyal Inc., 425 A.2d 162 (D.C. 1980), and Ruden v Citizens Bank & Trust Co of Marvland, 638 A.2d 1225 (Md. App. 1994) all involve application of the hearsay rule, which does not govern the admission of evidence here. See In re Shillaire 549 A.2d 336 (D.C. 1998). Respondent extracts a quote from Bredice v. Doctors Hospital Inc., 50 F.R.D. 249, 251 (D.D.C. 1970), aff'd, 479 F.2d 920 (D.C. Cir. 1973) where the court was referring back, in dictum, to a statement made by the District Court in Maine in Richards v Maine Cent. R.R., 21 F.R.D. 590 (D. Me. 1957). In that case, the court prohibited, on policy grounds as well as relevance concerns, discovery into possible subsequent disciplinary action taken against an allegedly negligent employee. Here, the investigation report is germane to the proceeding and the Committee believes it is able to determine the appropriate weight to give to the report.[7]

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[7] The Board's Order of June 25, 1998 on the Firm's motion for a protective order suggested that the Hearing Committee would make a recommendation of whether the "self-evaluative" privilege should operate to exclude these materials from evidence. The Committee notes that Respondent did not assert the self-evaluative privilege. The Committee further would note that these materials differ markedly from the type of medical staff review materials protected under the ruling in Bredice v. Doctors' Hospital Inc., 50 F.R.D. 249 (D.DC 1970) or the scientific studies at issue in plough

B. RULE 8.4(c)

78. Rule 8.4(c) provides that it is professional misconduct for a lawyer to engage "in conduct involving dishonesty, fraud, deceit or misrepresentation." Model Rules of Proffessional Conduct Rule 8.4(c). In In re Shorter, 570 A.2d 760 (D.C. 1990) (per curiam), the Court set forth the standard as follows:

> The most general term in DR 1-102 (A) (4) [the predecessor to Rule 8.4(c)] is 'dishonesty', which encompasses fraudulent, deceitful or misrepresentative behavior. In addition, to these, however, it encompasses conduct evincing 'a lack of honesty, probity or integrity in principle; [a lack of fairness and straightforwardness ... .]' [Citation omitted.] Thus, what may not legally be characterized as an act of fraud, deceit or misrepresentation may still evince dishonesty.[8]

Id. at 767-768.

79. Dishonesty includes not only affirmative misrepresentation but also a failure to disclose when there is a duty to do so. "Concealment or suppression of a material fact is as fraudulent as a positive direct misrepresentation." In re

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plough Inc. v. National Academy of Sciences, 530 A.2d 1152, 1158 (DC 1987). Further, it appears quite significant that the Firm voluntarily disclosed the reports to Bar Counsel in the course of Bar Counsel's investigation.

[8] In Shorter, the disciplinary charges against Respondent are based upon his conviction for willful tax evasion and willful failure to pay taxes. Thus, the Court found dishonest conduct in violation of DRl-102 (A) (4) notwithstanding the fact that statements made by Respondent were "technically true" and that he had abstained from actual false statements or affirmative acts of concealment. Id. at 768

Reback, 487 A.2d 235, 239-40 (D.C. 1985), aff'd in relevant part, 513 A.2d 226 (D.C. 1986) (en banc) (citation omitted)

80. The evidence adduced at the hearing established that Mr. Romansky engaged in dishonest conduct as defined by Shorter in several respects.

(1) THE FASA LETTER

81. Mr. Romansky has acknowledged that his conduct with regard to the FASA Letter constituted a violation of the Rule. (Respondent's Proposed Findings at 1-2). Indeed, the record shows that Mr. Romansky's conduct relating to the FASA Letter was dishonest, deceitful and involved misrepresentation in a number of ways. First, on December 19, 1994, when he dictated the draft of Ms. Durant's letter to her secretary, Shelli Adams, he asked her to date the letter November 14, 1994. This was an act of dishonesty. Two days later, on December 21, 1994, he submitted the letter to the firm, representing that the letter had been received "a month or so ago." This was another act of dishonesty, representing to the Firm that the FASA Letter had been unsolicited rather than obtained by Mr. Romansky in connection with the investigation of his billing practice.

82. Mr. Sneed noted, at the time he conducted his investigation, he was not focused on Mr. Romansky's apparent attempt to use the letter to influence the firm’s inquiry. Tr. II at 112 (Sneed). Having focused on this issue, Mr. Sneed believed that the submission of the letter suggested "an intended use of the document to inappropriately influence the investigation." Even if

the Committee were to accept Mr. Romansky's explanation that his purpose was to obscure the fact that he had discussed the investigation with a client after having been directed not to do so, it still is clear that he made a false statement to his firm. Had he been concerned about disclosing his discussion with Ms. Durant, he would have taken the more honest course of not submitting the FASA Letter to the Firm.

83. In his letter of January 3, 1995, apologizing to Ms. Durant, he stated that the FASA Letter "will not be used and has been destroyed." In fact, the letter had already been used and was not destroyed. At best, this statement in Mr. Romansky's letter was a misrepresentation and concealment of the true situation. It is also noteworthy that Mr. Romansky was dishonest in his explanation of the purpose for the letter. He volunteered this explanation and it was not truthful.[9]

(2) BILLING QUESTIONS

(a) Legal Standard Applicable to Documents

84. In the case of In re Schneider, 553 A.2d 206 (D.C. 1989), stated in part:

> Documents are an attorney's stock in trade, and should be tendered and accepted at face value in the course of professional activity.

[9] Respondent complains that the Specification of Charges does not make allegations about this aspect or the January 3 Letter. Resp. Brief at 43. Respondent did not object to any evidence on this point. The Committee believes that Respondent was on notice that all aspects of the FASA Letter incident would be explored in this proceeding. Further, he admitted during the hearing that his explanation of the purpose for the FASA Letter was untruthful. See, e.g., In re James, 452 A.2d 163, 168 n.3 (D.C. 1982); In re Smith, 403 A.2d 296, 300 (D.C. 1979).

> If an attorney knowingly proffers altered documents in a context where the attorney knows or should know that action may be taken thereon, the attorney has engaged in conduct involving deceit in violation of the rule, whatever the ultimate intent or motives may have been in making such alterations. The latter may go to sanction, but not to the threshold issue of violation vel non.

Id. at 209.

Bar Counsel contends that Mr. Romansky altered documents and therefore no additional intent need be established. Mr. Romansky, contends: a) that the changing of time recorded on pre-bills was not an "alteration" of documents; and b) that he did not act with dishonest intent.

85. As to "alteration," the Committee is not persuaded by Respondent's argument that pre-bills were not altered. This argument appears to rest on the fact that Mr. Romansky did not destroy the copies showing his mark-ups and that his mark-ups are in the Firm's files. When he changed the pre-bill, the result was a change in the number of hours shown to be worked by his colleagues. As the revised pre-bills went through the remaining stages of the Firm's billing process, they disclosed an altered, inflated number of hours. Accordingly, the Committee believes that Mr. Romansky altered the pre-bills in the sense contemplated by Schneider.

86. As to intent, Mr. Romansky cites In re Hessler, 549 A.2d 700 (D.C. 1988) , In re Evans, 578 A.2d 1141 (D.C. 1990) and In re Hutchinson, 534 A.2d 919 (D.C. 1987). The Committee believes that these cases are not applicable here, and that this matter is governed by Schneider.

87. In re Hessler, 549 A.2d 700 (D.C. 1988), involved a 6-month suspension rather than disbarment for misappropriation, upon the Court's acceptance of the Board's determination that the misappropriation had not been intentional or purposeful, but rather was negligent and inadvertent.[10] In that case, respondent had deposited clients' funds in his operating account, in which he deposited his own funds from which he paid his own bills. On numerous occasions, the balance in the account fell below the amount of his clients' funds in the account and that fact established misappropriation. The Hearing Committee had found that Respondent was not aware that his bank balance dropped below the amount of the clients' funds, because he did not keep a running balance on his operating account. Id. at 706. Respondent was a sole practitioner, without sufficient administrative support staff. The Committee had found that he had an "honest, though erroneous, belief" that the funds could properly be deposited in his operating account and that the misappropriation resulted from negligence or inadvertence, and therefore did not establish the intent element of a dishonesty violation. Id. at 709. Hessler did not involve an attorney's alteration of documents.

88. In re Evans, 578 A.2d 1141 (D.C. 1990), is a case where the Court upheld a conclusion that there was no dishonesty because

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[10] There, the Board had rejected an allegation that respondent had engaged in dishonest conduct upon its conclusion that respondent's misappropriation had been negligent and inadvertent rather than intentional or purposeful, based upon its conclusion that "a 'dishonesty' offense . . . requires proof of intent." Id. at 709.

respondent had a good faith belief in the propriety of the actions involved. As the Court stated:

> However, it is well established that an honest, though erroneous, belief as to propriety bars a conclusion of dishonest action because it precludes a finding of 'improper intent.'

Id. at 1149.

In Evans, respondent took funds of an estate without authority, and was found to have engaged in misappropriation. The Hearing Committee credited testimony by respondent that he believed he had a side agreement with the executors authorizing an extra fee. On the question of whether the misappropriation was dishonest, so as to require disbarment, the Court accepted the Board's finding that the misappropriation was not "dishonest" because of substantial evidence supporting the Hearing Committee's conclusion that respondent had "an objectively reasonable, albeit erroneous, belief that his actions were proper." Id. at 1142. Again, Evans did not involve alteration or falsification of documents.

89. In Hutchinson, 534 A.2d 919 (D.C. 1987), respondent had pled guilty to securities violations, based upon communication of insider information. Finding that respondent did not have actual knowledge that the information was illegitimate, the Court ruled that, in the absence of affirmative proof of a fraudulent intent or state of mind, the respondent's conviction did not establish a dishonesty violation. Id. at 923. Again, the allegations did not relate to documents.

90. It will be recalled that in Schneider, the respondent, a first-year associate with a law firm, had submitted false travel expense reports. As the Court stated:

> Specifically, Schneider altered 8 credit card receipts by inserting a "1" before each actual charge, thus overstating the amounts represented by such slips by a total of $800.

553 A.2d at 206.

The Hearing Committee found that Schneider's intent was only to recoup money that he believed he personally had advanced for other legitimate client-related travel expenses and that he believed that the alterations represented an accurate statement of his total out-of-pocket expenditures for the client. The Committee also found that Schneider did not intend to personally gain by his act or to deceive or materially represent to the law firm or the client the total amount of client-related expenditures. Id. at 207.

91. On the issue of intent, Mr. Romansky presented multiple points. He stressed that, at the time of these bills, the Firm was moving from a fee arrangement which stated that fees would be based on "actual time" to a fee arrangement, accompanied by an explanatory brochure, indicating that fees would be "based primarily on the time spent by each professional, although other factors may be taken into consideration." RX 16. He presented testimony by the timekeepers indicating that, while they had not been consulted by Mr. Romansky, their time entries may not have captured all of their time. He stressed that he made no efforts to conceal his actions, indicating that the pre-bills in the Firm's files show the adjustments which he made. He acknowledged that his

intent was to obtain a premium, and that he did not do it in the correct manner. He says he did not intend to deceive -- that what he did was to use incorrect procedures to obtain premiums which were justified.

92. In Schneider$_1$ the Court rejected arguments similar to those presented by Mr. Romansky here. The Court noted that Schneider's argument suggested that an attorney could intentionally falsify documents and yet commit no violation if he did not "affirmatively intend to deceive." 553 A.2d at 207. In this setting, the Court stated:

> However his strict scienter argument may apply in other contexts, we are unwilling to adopt it in a case of the deliberate falsification of documents, and particularly not where they touch on the sensitive area of matters involving, albeit indirectly, client funds.

Id. at 209.

93. The Committee concludes that this case falls within the scope of Schneider. In that case, the Court concluded that an attorney who knowingly proffers altered documents in a context where the attorney knows or should know that action may be taken thereon, the attorney has engaged in conduct involving deceit in violation of the Rule, whatever the ultimate intent or motives may have been in making such alterations. Here, Mr. Romansky deliberately inflated the amount of time recorded by timekeepers for the purpose of presenting to clients bills which reflected undisclosed premiums. This was knowing, deliberate action and Mr. Romansky expected that the clients would take the bills at face value and pay them.

94. As Schneider makes clear, the coverage of Rule 8.4(c) is influenced by the lawyers' special obligation to clients as to money. These obligations are elucidated in American Bar Association's Formal Opinion 93-379, entitled "Billing for professional Fees, Disbursements and Other Expenses." The Opinion provides the following as a fundamental tenet:

> Consistent with the Model Rules of professional Conduct, a lawyer must disclose to a client the basis on which the client is to be billed for both professional time and any other charges. Absent a contrary understanding, any invoice for professional services should fairly reflect the basis on which the client's charges have been determined. In matters where the client has agreed to have the fee determined with reference to the time expended by the lawyer, a lawyer may not bill more time than she actually spends on a matter, except to the extent that she rounds up to minimum time periods (such as one-quarter or one-tenth of an hour).

ABA Formal Op. 93-379 at 1.

As to disclosure of the basis of charges, the Opinion provides:

> At the outset of the representation the lawyer should make disclosure of the basis for the fee and any other charges to the client. This is a two-fold duty, including not only an explanation at the beginning of engagement of the basis on which fees and other charges will be billed, but also a sufficient explanation in the statement so that the client may reasonably be expected to understand what fees and other charges the client is actually being billed

Id. at 2

The ABA Opinion also relies upon Model Rule 7.1, which is equivalent to Rule 7.1:

> A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. Communication is misleading if it: (a) contains a natural misrepresentation of fact or law, or omits a fact necessary to make the statement conclude as a whole not naturally misleading.

Id.

On the basis of Model Rule 7.1, requiring complete statements about fees to prospective clients, the ABA Opinion further provides:

> A corollary of the obligation to disclose the basis for future billing is a duty to render statements to the client that adequately apprise the client as to how that basis for billing has been applied. In an engagement in which the client has agreed to compensate the lawyer on the basis of time expended at regular hourly rates, a bill setting out no more than a total dollar figure for unidentified professional services will often be insufficient to tell the client what he or she needs to know in order to understand how the amount was determined.

Id. at 3.

The ABA Opinion treats as "a given" the obligation not to charge for more hours than actually expended where the fee arrangement contemplates hourly billings:

> It goes without saying that a lawyer who has undertaken to bill on an hourly basis is never justified in charging a client for hours not actually expended. If a lawyer has agreed to charge the client on this basis and it turns out that the lawyer is particularly efficient in accomplishing a given result, it nonetheless will not be permissible to charge the client for more hours than were actually expended on the matter. When that basis for billing the client has been agreed to, the economies associated with the result must inure to the benefit of the client, not give rise to an opportunity to bill a client phantom hours. This is not to say that the lawyer who agreed to hourly compensation is

> not free, with full disclosure, to suggest additional compensation because of a particularly efficient or outstanding result, or because the lawyer was able to reuse prior work product on the client's behalf.

Id. at 4 (emphasis added).

95. The undisputed facts are clear. In each of the four instances at issue, Mr. Romansky inflated the hours actually recorded in the firm's timekeeping system. The result was that the bill was calculated based on a number of hours larger than had been contemporaneously recorded by the timekeeper. In no instance did Mr. Romansky consult with the timekeeper before making the adjustment. In each instance, except for RCII - Summit, Mr. Romansky stated that his intent was to obtain a premium, i.e., to charge more than the amount resulting from a calculation based on actual hours spent times standard hourly rate.

96. In two instances, RCII-Summitt and Premium Plastics, the firm's engagement letter stated that fees would be based "primarily" on time; in the instances of Dr. Siepser and Surgical Health, the fee agreement stated explicitly that fees would be based on hours:

> Our tees are determined by the actual time spent by our professional staff and our practice is to bill our clients on a monthly basis.

BXl. In two instances, RCII-Summitt and Dr. Siepser, the bill was accompanied by a statement showing the hours as adjusted by Mr. Romansky. In the other instances, Premium Plastics and

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[11] Evidently, the statement of hours was sent to Dr. Siepser by mistake, against Mr. Romansky's instructions.

Surgical Health, the bills contained no reference to the number of hours incurred. In no instance was the client advised that the bill reflected a premium. In each instance, the firm, after completing its investigation, determined that adjustments should be made to the clients' bills to refund the premium amounts.

97. For purposes of analysis, the Committee believes the four bills fall into two categories. As to Dr. Siepser and Surgical Health, the fee agreement stated that fees would be based on "actual time spent." Mr. Romansky rendered bills predicated on his alteration of the timekeepers' recorded hours. His purpose, readily acknowledged, was to obtain a premium. He did not disclose to the clients that a premium was being charged; indeed, Dr. Siepser received -- apparently by mistake -- a statement showing the hours as altered by Mr. Romansky. The Committee concludes that Mr. Romansky violated Rule 8.4(c) when he obtained premiums based on altered time records, from these clients who had been informed that bills would be based on actual time spent.

98. In the Committee's view, Mr. Romansky's protestations that he was uninformed as to the proper method of taking premiums, that the premiums were small and entirely justified, and that they had no impact on his personal compensation, do not detract from the undisputed facts which establish intent within the standards set forth by the Court in Schneider

99. Respondent's argument that his actions were not "dishonest" because they were the result of mistake rather than devious intent is unavailing in this context. As set forth in

Schneider, the attorneys' obligations of honesty and straightforward dealing are paramount in areas involving client funds. If Mr. Romansky wanted to charge his clients a premium, it was incumbent on him to insure that he did it correctly, i.e., to inform the clients that a premium was being charged and about how it was calculated. His apparent belief that it was appropriate to obtain premiums by altering the hours reflected on pre-bills evinces the kind of recklessness which has been deemed to fulfill the requirement of intent. In re Williams, 649 A.2d 557 (D.C. 1994).

100. The other two clients, Premium Plastics and RCII-Summitt, had been subject to the new engagement letter which provided that fees would be predicated primarily on time spent. As to RCII-Summitt, Mr. Romansky did not intend to obtain a premium; his alteration of the time records was intended to correct what he perceived as timekeeping errors by Mr. Suldan. While the Committee has some concern about the fact that Mr. Romansky did not consult with Mr. Suldan about his time entries, the Committee concludes that the record does not show a violation of Rule 8.4(c).

101. As to Premium Plastics, Mr. Romansky did intend to obtain a premium, and, as noted, the fee agreement provided that bills would be based primarily on time but that other factors could be considered. The Premium Plastics bill made no representation as to hours spent. The Committee concludes that Mr. Romansky's billing of Premium Plastics reflected an improper attempt at a premium in that the client was not advised that a premium was being charged,

as required by ABA Opinion 93-379. The Committee believes, however, that since the engagement letters contemplated possible premiums[1] and since Mr. Romansky made no representation in the bill as to the hours spent on the matter, the record does not support a conclusion that Rule 8.4(c) has been violated as to the Premium Plastics billing.

102. To summarize, the Committee concludes that two of the billing irregularities constituted a violation of Rule 8.4(c). In each instance, Mr. Romansky deliberately inflated the number of hours recorded in order to produce a bill larger than would have otherwise been justified to a client who had been informed that bills would be based "on actual time spent."

(b) The Misrecording of Time

103. The evidence is undisputed that the misreporting of time spent on Mr. Romansky's father's matters did not affect the OOSS bill nor did it have any impact on Mr. Romansky's compensation. The Committee credits Mr. Romansky's testimony that misreporting was done out of "laziness" as a "shortcut". Tr. IV at 85-86 (Romansky). The Committee has some skepticism on this point, since the misreporting did tend to conceal from Firm management the fact that Firm resources were being devoted, pro bono, to Mr. Romansky's father. This misreporting of time was clearly wrong and was dishonest in a literal sense. Any misreporting of time is improper and must be viewed skeptically because of the high potential for fraud and abuse. However, the Committee concludes that because (a) there was no evidence showing that Mr. Romansky knew or intended

that any action would be taken in reliance thereon, and (b) there was no potential impact on client funds, this misrecording of time does not constitute a violation of Rule 8.4(c) within the contemplation of the Court in Schneider.

IV. RECOMMENDED SANCTIONS

104. In In re Steele, 630 A.2d 196 (D.C. 1993), the Court stated that sanctions must be evaluated as to whether a proposed sanction would "foster a tendency toward inconsistent dispositions for comparable conduct or would otherwise be unwarranted." Id. at 199. In applying the first part of this standard, the Court measures "consistency between cases by comparing the gravity and frequency of the misconduct, any prior discipline, any mitigating factors such as cooperation with Bar Counsel, remorse, illness or stress." Id. As to the second part of the standard, i.e., whether a sanction would be "otherwise unwarranted," the Court articulated the purpose of sanctions:

> In determining the proper sanction, our foremost concern is the need to protect the public, the courts, and the legal profession. Hutchinson, supra, 534 A.2d at 924; In re Reback, 513 A.2d 226, 231 (D.C. 1986) (en banc); Smith, supra, 403 A.2d at 303; Haupt, supra, 422 A.2d at 771; see also Lenoir, supra, 585 A.2d at 774. Our purpose in conducting disciplinary proceedings and imposing sanctions is not to punish the attorney; rather, it is to offer the desired protection by assuring the continued or restored fitness of an attorney to practice law. In re Kennedy, 542 A. 2d 1225, 1228 (D.C. 1988).

Id. at 200.

105. Bar Counsel recommends six months suspension. The cases upon which Bar Counsel relies do not support a suspension of this length. In re Ziegler, 692 A.2d 1351 (D.C. 1997), which involved very serious conduct$_1$ imposed a 60-day suspension. In In re Bikoff, No. 95-BG-530, Bar Docket No. 18-92 (D.C. 1995), the Court imposed a 60-day suspension, where an attorney intentionally misclassified $100,000 in reimbursable client expenses to avoid client scrutiny. In re Jackson, 650 A.2d 675, 678-79 (D.C. 1994) where respondent was given a six-month suspension, involved the preparation of fraudulent tax returns submitted under penalty of perjury. In Hutchinson, respondent was suspended for one year after a criminal conviction for conduct which violated multiple disciplinary rules.

106. Respondent argues that reprimand or censure would be consistent with the precedents for violations of similar severity. Resp. Brief at 48. The cases to which Respondent points for censure or reprimand do not involve violations of Rule 8.4(c) or its predecessor DR1-102 (a) (4) arising from the relationship between attorney and client.[12] These cases do not speak to the issues presented here.

107. There appear to be only two recent District of Columbia disciplinary cases speaking to the standards for sanctions for

[12] Respondent cites, at Resp. Brief 48-49, In the Matter of Gutlahr, Bar Docket No. 278-79 (BPR Sept. 11, 1998) (reprimand for false statement in letter to employer in connection with immigration matter where substantial mitigating factors were found); In re Margulies, No. 88-1032 Bar Docket No. 47586 (D.C. 1989) (censure for false representation that he had notified court of change of address; respondent also guilty of neglect and conduct prejudicial to the administration of justice); and In re Hadzi-Antch, 497 A.2d 1062 (D.C. 1985) (censure for false statements on resume)

dishonest conduct in connection with attorney-client billings.[13] One is Schneider, and the other is Bikoff. Both cases are highly instructive.

108. In Schneider, the Board had recommended a six-month suspension and respondent urged censure. The Court imposed suspension for 30 days. The Court had found that the violation consisted of a

> documentary alteration knowingly made with respect to a matter ultimately involving client funds, a particularly sensitive area of professional conduct warranting scrupulous care.

553 A.2d at 210.

Involving as it did "improper action touching client funds on eight occasions" Id. , the conduct was found by the Court to warrant more than censure. Stressing the "significant mitigating factors" present, the Court imposed suspension of thirty days. The mitigating factors considered by the Court were: a) remorse; b) cooperation with bar counsel; c) inexperience at time of offense; d) lack of opportunity for indoctrination into firm financial procedures; e) absence of motive of personal gain; and f) an otherwise unblemished record.

109. In Bikoff, the Court imposed a 60-day suspension, based upon the Board's recommendation, for a respondent who over a four

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[13] In re Appler, 669 A.2d 731 (D.C. 1995) the Court upheld disbarment, without discussion by the Court on this aspect of the sanction, for fraudulent billing practices. In that case, respondent: (a) effectively cheated his law firm by having a client pay fees directly to him; and (b) cheated his client by double billing and billing for personal expense.

year period intentionally misclassified over $100,000 in client expenses on bills in order to avoid client inquiry into "debatable" categories of expenses. Respondent had reclassified questionable expenses such as secretarial overtime into more routine categories, such as telephone calls and duplicating costs. There was no claim that respondent had falsified or inflated the total amount of expenses.

110. In Bikoff, the Board had quoted the Hearing Committee with approval:

> 'At the heart of the attorney-client relationship is the duty of an attorney to be truthful with his or her client. [Citation omitted] ('Clients must be able to rely unquestioningly on the truthfulness of their counsel.') This is particularly important with regard to billing of clients, who have a fundamental right to receive bills that honestly reflect expenses incurred by the attorney on their behalf." (Hearing Committee Report at 12.)'

Id. at 13.

111. Again, in Bikoff, the Board spoke to the need for vigilance in the area of client billing:

> Far from excusing or mitigating such misconduct, today's harsh economic climate for law firms and lawyers reinforces the necessity for meticulous adherence to the duty of honesty in dealing with their clients. ... [E]very client must be able to repose absolute confidence in the integrity of the bills sent to them by lawyers.
>
> * * *
>
> We believe that the Court intended to send a message to the Bar in In re Schneider, supra, that dishonesty in the billing process will not be tolerated. That message needs to be reinforced here.

Id. at 13-14.

112. The Board found Bikoff to involve more serious misconduct than Schneider. The Bikoff respondent had experience (20 years in Bar and had been a co-chair of the firm's practice group); the misconduct occurred over a longer period of time; and the amount of money involved was more substantial ($100,000 vs. $800).

113. The factors to be considering in recommending sanction are: (a) nature of violation; and (b) aggravating or mitigating factors.

114. Here, the Committee believes the misconduct was quite serious. Mr. Romansky's conduct with regard to the FASA Letter was inexcusable. He predated a letter that purported to come from a client, and then presented the letter to his Firm as having been received "a month or so ago." He did this in connection with the Firm's investigation of his billing practices. When Ms. Durant objected, Mr. Romansky apologized but was dishonest in the explanation of his purpose in asking for the letter. Lawyers must be honest with their clients in all respects; it is particularly troublesome to see a lawyer asking a client to misdate a document.

The premium billing incidents are also serious misconduct. It is true that the dollar amounts were small and it may even be true that premiums could have been justified, had they been disclosed and had the clients accepted them. The fact remains that in two instances, Dr. Siepser and Surgical Health, clients who were supposed to be billed based on "actual time" received bills inflated by an adjustment to the hours recorded. Any

misrepresentation on a bill to a client is a serious matter. In view of the rulings in Schneider and Bikoff, a suspension of thirty days would appear to be appropriate to the nature of these violations.

115. The next question is whether there are aggravating or mitigation circumstances. In Schneider, the Court reduced the suspension from 6 months to 30 days, considering respondent's remorse, cooperation with bar counsel, inexperience at time of offense, lack of opportunity for indoctrination into firm financial procedures, absence of motive of personal gain and otherwise unblemished record. Here, Mr. Romansky exhibited remorse, cooperated with Bar Counsel, and had an otherwise unblemished record

116. These mitigating factors are overcome, however, in the Committee's view, by important aggravating factors. At the time of the violations, Mr. Romansky had practiced law for about fifteen years at the Firm; as the leader of the health care practice group, he was an important and influential partner. He had major billing responsibilities. There was no excuse for a partner in his position to be unaware of proper billing procedures. It is particularly important for lawyers in his position to be scrupulous about billing matters, both because of the amounts of client funds involved in their practices and because of their need to set examples for other lawyers. Similarly, and just as importantly, Mr. Romansky's dishonesty as to the FASA Letter is aggravated by his seniority and place of leadership within his firm.

117. Due to Mr. Romansky's expression of remorse and his embarrassment about this matter, and because the violations are not so serious as to call into question Mr. Romansky's fitness to practice law, the Committee concludes that there is little likelihood of recurrence of similar violations in the future and it does not believe a showing of fitness should be required as a condition to reinstatement after the suspension period expires.

118. For the reasons set forth above, the Committee would recommend a suspension of thirty days with no requirement for a showing of fitness.

Timothy J. Bloomfield
Timothy J. Bloomfield, Chair
Hearing Committee Number Two

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