

In the Matter of	:	
	:	
ROY L. PEARSON, JR.	:	
	:	Board Docket No. 15-BD-031
Respondent.	:	Bar Docket No. 2007-D149
	:	
A Member of the Bar of the	:	
District of Columbia Court of Appeals.	:	
	:	
Bar Number: 955948	:	
Date of Admission: May 26, 1978	:	
	:	

I. INTRODUCTION AND SUMMARY

Disciplinary Counsel¹ has charged that, in the course of that litigation, Respondent violated

Rule 8.4(d) (in that Respondent engaged in conduct that seriously interfered with

1

the administration of justice.)

BX 2, at 6.²

The Ad Hoc Hearing Committee, composed of Warren Anthony Fitch, Esquire, Chair, Mr. Trevor Mitchell, and Lisa A. Wilson, Esquire, heard evidence on August 31, 2015 and September 1, 2015. Respondent testified in Disciplinary Counsel's case and in his case. At the close of the hearing, the Hearing Committee admitted all of Respondent's and Disciplinary Counsel's exhibits, including BX 107, 108 and 109, which were introduced at the hearing. Tr. 378-383. The Hearing Committee then made a preliminary, non-binding determination that Respondent violated at least one of the Rules as charged by Disciplinary Counsel and ordered the parties to file proposed findings of fact, conclusions of law, and recommendations as to sanction.

Having considered those submissions, as well as reviewing the entire record in this matter and reaching the Findings of Fact set forth in Section III of this Report, the Hearing Committee respectfully recommends that the Board find that Disciplinary Counsel has proved by clear and convincing evidence that Respondent violated Rules 3.1 and 8.4(d) and that Disciplinary Counsel has not proved by clear and convincing evidence that Respondent violated Rule 3.2(a). The Hearing Committee further recommends that Respondent be suspended for 30 days, that the suspension be stayed, that the stay be conditioned upon the successful completion of a period of probation of two years during which Respondent shall not make assertions in litigation unless there is a basis in law or fact for doing so that is not frivolous and shall not be sanctioned by a court for

² The following abbreviations are used in this Report: "Tr." refers to the consecutively paginated transcript of the two-day hearing on August 31, 2015 and September 1, 2015. "BX" refers to Disciplinary Counsel's exhibits, and the page citations are to the Bates numbers on the exhibits. "RX" refers to Respondent's exhibits. "DC Brief" refers to Disciplinary Counsel's Proposed Findings of Fact, Conclusions of Law and Recommendation as to Sanction. "Respondent's Brief" refers to Respondent's Proposed Findings of Fact, Conclusions of Law and Recommendation Regarding the Conduct of [Disciplinary] Counsel. "DC Reply" refers to the Reply of Disciplinary Counsel. "FF" refers to the Hearing Committee's Findings of Fact.

litigation-related conduct; and that any clients Respondent represents in litigation during the period of his probation be informed of the fact of his probation. If Respondent appears as lead counsel in a litigated matter, he should consider associating with other counsel.

II. PROCEDURAL HISTORY

Because Respondent's conduct during the disciplinary process may be relevant to the charges against him and to the possible sanction (as Disciplinary Counsel argues), the salient procedural history of this matter is set forth as Findings of Fact 140-161. The legal issues raised by Respondent in the course of the proceeding that should be brought to the attention of the Board are discussed in Section IV.A. of this Report.

III. FINDINGS OF FACT

BACKGROUND INFORMATION

1. Respondent is a member of the Bar of the District of Columbia Court of Appeals, having been admitted by examination on May 26, 1978 and assigned Bar Number 955948. BX 1.

2. Respondent graduated from Northwestern University Law School in 1975. Thereafter, he worked for approximately a year as a Legislative Assistant for a United States Representative and then served for approximately two years as a teaching fellow at Georgetown University Law Center, where he focused on legislative research and drafting, including supervision of students providing such services to the District of Columbia Council. He then joined the Neighborhood Legal Services Program (NLSP) as a staff attorney in 1978. He worked full-time with the Neighborhood Legal Services Program for approximately the next 25 years, serving *inter alia*, as a consumer law specialist in NLSP's law reform unit and as Assistant Director for Legal Operations from 1989 until approximately 2002. Following a period of some turmoil at NLSP, Respondent left NLSP and worked for approximately two years as a Complaint Examiner

for the District of Columbia Office of Police Complaints. Respondent next worked for approximately six months as an Attorney-Adviser in the District of Columbia Office of Administrative Hearings before being appointed an Administrative Law Judge for a two-year term between November 2005 and November 2007. When his appointment was not renewed, Respondent practiced as a sole practitioner for approximately three years and has since worked as a contract attorney at various law firms for approximately the past five years. RX 21; BX 56 at 168-174; BX 57 at 79; Tr. 180-90.

3. In February 2003, shortly after Respondent left NLSP, his wife filed for divorce in the Circuit Court of Fairfax County, Virginia. Respondent represented himself in the divorce proceedings, and he contested certain of his wife's claims regarding their marriage and separation. The trial court made specific findings that the litigation was disproportionately long in light of the relative simplicity of the case, that Respondent was "in good part . . . responsible for excessive[ly] driving up everything that went on here," and that Respondent fostered "unnecessary litigation." Consequently, Respondent was ordered to pay \$12,000 of his wife's attorneys' fees. Upon Respondent's appeal, the Virginia Court of Appeals affirmed that ruling. BX 57 at 71-80; BX 62 at 5-6.

4. Custom Cleaners, Respondent's neighborhood dry cleaners, was owned by Soo Chung, Jin Nam Chung and Ki Y. Chung. BX 4 at 15. During Respondent's patronage, the Chungs had three signs posted in their store, saying "All Work Done on Premises," "Same Day Service" and "Satisfaction Guaranteed." *Id.*

EVENTS IN 2002 CITED BY RESPONDENT IN THE LITIGATION

5. In July 2002, Custom Cleaners was unable to locate a pair of pants that Respondent had dropped off either for cleaning or alteration. BX 56 at 178-79. Respondent and Jai Chung (a

son of Soo and Jin Nam Chung who waited on Respondent) agreed that Custom Cleaners would compensate Respondent \$150 for the lost pants. *Id.*

6. When Respondent next returned to Custom Cleaners, Jai Chung suggested that Custom Cleaners should compensate Respondent only \$80 because the pants Respondent had dropped off were not new. BX 56 at 179-80. Respondent insisted they had agreed on \$150, and Mr. Chung presented Respondent with a check already made out in that amount. *Id.*

7. When Respondent next visited Custom Cleaners, Soo Chung advised Respondent that Custom Cleaners no longer wished to accept his business. BX 56 at 180.

8. Several days later, Respondent wrote a letter to Custom Cleaners saying, *inter alia*, that the refusal to accept his business was an unfair trade practice under the D.C. Consumer Protection and Procedures Act (hereinafter “CPPA”) and that banning him from the store imposed a condition, after the fact, on their satisfaction guarantee. BX 56 at 182.

9. Approximately two weeks later, Respondent took some clothes to Custom Cleaners and Soo Chung accepted his order without comment. BX 56 at 182-183.

THE PEARSON V. CHUNG LITIGATION

10. On May 3, 2005, Respondent dropped off a pair of pants at Custom Cleaners for alterations to be completed by May 5, 2005. BX 56 at 189-190. Respondent contended that the pants were red and blue striped and comprised part of a Hickey Freeman brand suit. *Id.*

11. On May 5, 2005, Respondent’s pants were not ready. BX 56 at 191.

12. By May 14, 2005, Soo Chung had presented Respondent with a pair of grey pants that she asserted were the ones Respondent dropped off on May 3, 2005. *See* BX 56 at 190-197 (Pearson) (presented pants on May 14); RX 29 at 1 (same); BX 58 at 30-33 (Chung) (presented pants on May 7). Respondent told her the pants were not his. *Id.*

13. On or around June 1, 2005, Respondent wrote a letter to Soo Chung and demanded that she “comply with [her] “SATISFACTION GUARANTEED” promise by hand delivering \$1,150, in the form of cash or a certified check,” to Respondent’s home by noon, June 4, 2005. RX 29. He stated that if Ms. Chung did not make the payment he would file suit for multiple violations of the CPPA and for fraudulent conduct, seeking no less than \$50,000 in damages as well as attorneys’ fees. *Id.*

14. The Chungs did not respond to Respondent’s June 1 demand letter. BX 56 at 204.

15. On June 7, 2005, Respondent filed in the District of Columbia Superior Court his “Verified Complaint for Violation of D.C. Consumer Protection Procedures Act, and Other Claims.” BX 6 (Complaint). The four-count complaint asserted causes of action for fraud, negligence or conversion, and violation of the District of Columbia Consumer Protection Procedures Act (“CPPA”) (including a count seeking an injunction under the CPPA). With respect to the CPPA claim, Respondent asserted that the defendants’ “Satisfaction Guaranteed” representations and advertisements and other actions constituted unlawful trade practices proscribed by the CPPA.

16. Respondent filed an Amended Verified Complaint on July 18, 2005. As in his original complaint, Respondent asserted that he left his pants with Custom Cleaners on May 3, 2005 in reliance on the “Same Day Service,” “Satisfaction Guaranteed” and “All Work Done on Premises” signs. BX 8 at 4, (¶¶ 11-12). Respondent alleged that at that time he “had limited cash” and that “the credit limit on his Visa credit card was at or near its ceiling.” *Id.* at 3 (¶ 7). Respondent also alleged that he asked the defendants to pay him \$1,150, the estimated cost of replacing the suit. *Id.* at 7 (¶ 22).

17. Respondent claimed that he “was damaged by each defendant in the amount of

approximately \$1,500 [the revised estimate] for each of the seven violations of the” CPPA and sought damages in the amount of \$1,500 for each CPPA violation, treble and punitive damages, and \$15,000 with respect to the fraud count. *Id.* at 9 (¶ 38), 11 (¶ 1).

18. The Chungs filed their answer on July 18, 2005. BX 9. The Chungs made multiple general denials in their answer and specifically denied attempting to pass off one pair of pants for another. BX 9 at 7 (¶¶ 36-37). The Chungs further denied any lack of intention to honor their Satisfaction Guaranteed sign. *Id.* at 8 (¶ 42).

19. A Scheduling Conference was conducted on November 15, 2015 before the Honorable Neil Kravitz. Judge Kravitz noted his belief that a lawyer-plaintiff proceeding *pro se* may not recover attorneys’ fees, and Respondent noted his reservation of rights with respect to that issue. BX 10, at 4. Judge Kravitz also informed the parties that he had just entered an order granting Respondent’s motion to compel discovery responses from the defendants. *Id.* at 3.

20. Sometime before November 17, 2005, the Chungs responded to Respondent’s first set of interrogatories to Soo Chung. BX 11 at 8 (Respondent’s summary judgment motion attaching discovery responses). As to the “Satisfaction Guaranteed” sign, Ms. Chung stated:

The sign was already in place when Defendant bought Custom Cleaners. There has never been any discussion regarding the signage. There are industry standards regarding the handling of disputes with customers, and Custom Cleaners abides by such industry standards.

BX 11 at 10.

21. On November 17, 2005, Respondent moved for partial summary judgment on five of his CPPA claims (§§ 28-3904(a), (d), (e), (f) and (h)). BX 11. Respondent argued that the Chungs’ “Satisfaction Guaranteed” sign extended “an unconditional and unlimited guarantee of satisfaction, as a matter of law, because no limiting terms are attached to the words.” *Id.* at 13, n.1 (emphasis in original).

22. In support of his position, Respondent cited to 16 C.F.R. § 239.3(b), “Federal Trade Commission, Guides and Practice Rules, Guides for the Advertising of Warranties and Guarantees,” which provides:

An advertisement that mentions a “Satisfaction Guarantee” or a similar representation should disclose, with such clarity and prominence as will be noticed and understood by prospective purchasers, any material limitations or conditions that apply to the ‘Satisfaction Guarantee’ or similar representation.

BX 11 at 13, n.1; BX 97.

23. Respondent did not refer to § 239.3(a), which adds a specific caution:

A seller or manufacturer should use the terms “Satisfaction Guarantee,” “Money Back Guarantee,” “Free Trial Offer,” or similar representations in advertising only if the seller or manufacturer, as the case may be, *refunds the full purchase price of the advertised product at the purchaser’s request.*

BX 97 (emphasis added).

24. The examples in § 239.3 did not include a “Same Day Service” advertisement.
BX 97.

25. As grounds for summary judgment, Respondent argued that

[D]efendants have admitted, under oath, that for the six years their “SATISFACTION GUARANTEED” sign has greeted each arriving customer, they actually intended only to operate in accordance with prevailing industry standards – and prevailing industry standards do not unconditionally (or even conditionally) include as a part of the purchase price a guarantee that the customer will be satisfied with all aspects of his or her transaction with a cleaners.

BX 11 at 13.

26. In his summary judgment motion, Respondent noted that a plaintiff’s choice of damages (statutory or treble) is made after trial, that the CPPA is an expansive statute which does not have an injury requirement (citing authority) and that he was seeking a judgment of liability on the part of each defendant in the amount of \$7,500 (5 x \$1,500). *Id.* at 1, 14, 19.

27. On November 18, 2005, Respondent filed a Reply to a discovery motion with

attachments that excerpted Respondent's past discovery requests, the Chungs' responses and Respondent's discussion of why he believed those responses to be deficient. BX 108 at 4-29 (Draft Motion to Compel Full Responses), 30-51 (Draft Motion to Compel Production). Respondent claimed it was

...undisputed that defendants refused to meet plaintiff's out-of-court, and now his in-court, requirements for the unconditional "satisfaction" the defendants advertise. As a result, the plaintiff was forced to file, and to continue prosecution of, this lawsuit.

BX 108 at 11 (discussing Response No. 9); BX 12 at 11 (same).

28. On November 19, 2005, Respondent sent Mr. Kim an e-mail attaching a "realistic projection of defendants' liability," totaling \$285,000 in damages, with \$31,500 of that amount attributable to \$1,500 in statutory damages for each of the seven alleged violations of the CPPA, multiplied by three because of the three defendants in the case. RX 37.

29. On November 29, 2005, Respondent filed a Motion to Compel Answers to Interrogatories in Manner that Complies with Intent of November 22, 2005 Court Order. BX 12. Respondent's discussions of purported deficiencies in the Chungs' discovery responses reaffirmed his interpretation of "Satisfaction Guaranteed" and the purported strength of his position ("...the unambiguous words...", "...its obvious meaning...", ...the plain meaning..."). *Id.* at 13-14. This was Respondent's third Motion to Compel; he provided a long list of efforts to resolve the outstanding discovery disputes and noted that the defendants' responses had been filed six weeks late. *Id.* at 1, 3-4.

30. The Court denied Respondent's Motion for Partial Summary Judgment on December 12, 2005. BX 13. As one basis for denying summary judgment, the Court stated:

[T]he plaintiff's [CPPA] claim is premised upon the assertion that the defendants misrepresented the quality of their services by advertising "satisfaction guaranteed" when the defendants in fact apply mere "industry standards" in handling disputes

with their customers. The record, however, contains no evidence of what “industry standards” are, and the Court is therefore unable to conclude as a matter of law that there is any material difference between guaranteeing a customer’s satisfaction and applying industry standards in seeking to resolve a dispute with a customer. That is, on this record, the Court is unable to conclude as a matter of law that the defendants misrepresented the quality of their services by displaying the “satisfaction guaranteed” sign.

Id. at 2.

31. On December 22, 2005, the Court ruled on five pending discovery motions by Respondent, four of which were directed at the Chungs.³ BX 14. The Court denied two of Respondent’s motions to compel and denied the “majority of the remaining three motions.” BX 14 at 11. It further denied a request by Respondent that he be granted additional time to propound new discovery requests. *Id.* The Court ordered the Chungs to provide discovery in accordance with its order by January 20, 2006. *Id.* at 12.

32. Regarding Respondent’s third set of document requests, the Court ordered that Soo Chung respond only to document request no. 1, which called for documents that related to the “industry standards” Custom Cleaners employed when handling disputes with a customer. *Id.* at 8. The Court found the rest of Respondent’s third set of requests to Ms. Chung “too intrusive, time-consuming, and harassing to be enforced.” *Id.* at 9.

33. The next day, Respondent filed Plaintiff’s Motion to Compel Full Responses to Fourth Request to Soo Chung for Production of Documents. BX 15. The documents Respondent had requested in his fourth request included copies of “all applications of any kind” the Chungs had completed between January 1, 2000 and November 1, 2005 and copies of “all business papers” the Chungs signed between January 1, 2000 and November 1, 2005. *Id.* at 9 (¶¶ 12, 14). Respondent also renewed his arguments on the *pro se* attorney’s fees issues, including a citation

³ The fifth involved a subpoena to a computer company that had provided services to Custom Cleaners. BX 14 at 9-10.

to a Federal Circuit opinion awarding attorney's fees to a *pro se* litigant as a discovery sanction. *Id.* at 12-13; *see also* FF 19.

34. Respondent filed a Motion for Trial by Jury on December 28, 2005. BX 16. In those papers, Respondent relied on the following grounds:

. . . [P]laintiff could not have foreseen, when he filed this action, that it would be assigned to a judge who, at the outset of the litigation and prior to any briefing of the issues, would voice the firm view that the case should not be litigated. No person in their right mind would want a jurist to act as a trier of fact who reaches that factual and legal conclusion without the benefit of briefing or argument. . . .

Id. at 4. The Court issued an Order Denying Plaintiff's Motion for Trial by Jury on January 6, 2006. BX 19. In that Order, the Court observed:

The plaintiff premises his motion upon two accusations of judicial misconduct Neither of the two bases upon which the plaintiff has premised his motion has any merit whatsoever. . . . The transcript – a copy of which is attached to this order – speaks for itself, and . . . the plaintiff's bold accusation of misconduct by the Court at the scheduling conference finds no support whatsoever in the record.

Id. at 1-2.

35. On January 6, 2006, Christopher C.S. Manning, Esquire, replaced Mr. Kim as counsel for the Chungs and the Chungs made an offer of judgment in the amount of \$3,000. BX 17, 18. That same day, the Court denied Respondent's Motion to Compel Full Responses to Fourth Request to Soo Chung for Production of Documents, stating that Respondent had "inundated the defendants" with document requests and that the "document requests that are at issue in this motion appear even more burdensome, intrusive, and calculated to harass the defendant than the many improper and objectionable requests that have preceded them." BX 20 at 2, 3.

36. The Chungs did not comply with the January 20, 2006 discovery deadline specified in the Court's December 22, 2005 order. *See* BX 21, BX 22. On January 25, 2006, Respondent filed a Motion to Sanction Defendants for their Continued Refusal to Comply with Orders

Compelling Discovery. BX 21.

37. On February 7, 2006, the Court denied without prejudice Respondent's sanctions motion. BX 22. The Court found that the Chungs' recent retention of new counsel justified a brief extension until February 24, 2006, to supplement their responses in accordance with the Court's December 22, 2005 order. *Id.* at 1-2.

38. On or around February 18, 2006, despite the Court's December 22, 2005 order that Respondent could not propound more discovery, Respondent served the defendants with a second set of requests for admissions. *See* BX 24 (Respondent's Motion to Deem Matters in Plaintiff's Second Request for Admissions to all Defendants to be Admitted, or Requiring that Answers be Served); *see also* BX 23 at 11-20 (responses attached to Respondent's March 2, 2006 motion). The Chungs' responses were not signed. BX 25 at 2 (Order referring to February 18, 2006 second request).

39. On February 24, 2006, Mr. Manning provided Respondent with additional discovery responses on behalf of Soo Chung. *Id.* at 16 (responses attached to Respondent's March 2, 2006 motion).

40. Ms. Chung's additional responses made clear that the Chungs 1) contested Respondent's interpretation of Satisfaction Guaranteed, and 2) maintained that they had the pants Respondent had dropped off on May 3, 2005. *See* BX 23 at 15-16 (Response to Interrogatory 40).

41. On February 26, 2006, Respondent wrote to Mr. Manning requesting that he consent to a motion for sanctions and request for attorney's fees. BX 23 at 5-6. Respondent alleged various deficiencies with the Chungs' discovery responses to that date. *Id.* at 5.

42. On or around February 28, 2006, Mr. Manning sent Respondent, via e-mail, Supplemental Responses from Soo Chung, with additional responses on behalf of Soo Chung's

co-defendants and other information. BX 23 at 21-32.

43. On March 2, 2006, Respondent filed a Renewed Motion to Sanction Defendants for Their Continued Refusal to Comply with Orders Compelling Discovery. BX 23.

44. On or around March 9, 2006, Defendants provided Respondent with sworn, notarized discovery responses. *See* BX 31 at 1 (Court order re: Respondent's March 2, 2006 motion).

45. On March 20, 2006, Respondent filed a motion to deem certain matters in his second request for admissions admitted. BX 24.

46. On April 5, 2006, the Court denied Respondent's motion to deem certain matters admitted because it "had made explicit in its order of December 22, 2005 that it was not extending the deadline for propounding discovery requests." BX 25.

47. Also on April 5, 2006, Respondent filed a Renewed Motion for Trial by Jury and a Renewed Motion for Summary Judgment on D.C Consumer Protection Procedures Act Claim. BX 26; BX 27. In the renewed jury trial motion, Respondent repeated the same allegations about the pre-trial judge that he had set forth in his first motion for a jury trial. BX 26; *see also* FF 34. In the summary judgment motion, Respondent continued to assert his unlimited theory of Satisfaction Guaranteed, stating: "As a matter of law (as well as plain English), the words "SATISFACTION GUARANTEED" promise an unconditional and unlimited guarantee of customer satisfaction, because no limiting terms accompany the words." *Id.* at 27. Respondent elaborated on the breadth of his "undisputed" theory:

Note that defendants do not just guarantee their services to prospective customers, they unconditionally guarantee the prospective customer's satisfaction with their services, including their guarantee service—leaving it entirely up to the customer whether to declare the defendants in violation of the standard of customer satisfaction the defendants' advertisement *delegates* to the customer. A more sweeping guarantee is hard to imagine.

BX 27 at 35, n.11 (emphasis in original). Respondent also asserted the same damages theory which he had asserted in his Amended Complaint and initial summary judgment motion. *Id.* at 3, 40-41; *see* BX 8 at 9 (¶ 38), 11; FF 17; *see also* BX 11 at 19; FF 26.

48. In the renewed summary judgment motion, Respondent again cited § 239.3(b) to support his interpretation. BX 27 at 27. In a footnote, Respondent also cited multiple cases for the proposition that “[t]he inherently deceptive nature of an unqualified guarantee that turns out to be qualified is well chronicled in the law.” *Id.* at 27, n.1.

49. On April 5, 2006, the Chungs filed a Motion to Dismiss and/or for Summary Judgment. BX 28. They asked the Court to grant summary judgment on Respondent’s common law fraud claim with respect to the “Satisfaction Guaranteed” and “All Work Done on Premises” signs, as well as to three of the alleged violations of the CPPA. *Id.* at 1. Defendants argued that “Satisfaction Guaranteed” was nothing more than an “opinion or prediction of future events” or a “hoped for result.” *Id.* at 6, 7. The Chungs also argued with respect to damages that, if Respondent prevailed on his CPPA claims, he would have established only one violation for the underlying transaction, not separate violations for each unlawful trade practice in violation of the CPPA that Respondent had alleged. *Id.* at 9.

50. The Court denied Respondent’s renewed motion for trial by jury on April 6, 2006, observing that “plaintiff’s motion contains the same false and wholly unsubstantiated accusations. . . .” BX 29 at 1.

51. The Court denied Respondent’s renewed motion for partial summary judgment on April 18, 2006, ruling that Respondent “has not persuaded the Court that its order of December 9, 2005 was in any way erroneous or that the plaintiff is otherwise entitled as a matter of law to the entry of judgment in his favor on his claims under the D.C. Consumer Protection Procedures Act.”

BX 30 at 1.

52. Also on April 18, 2006, the Court denied Respondent's renewed sanctions motion. BX 31. The Court rejected Respondent's claims that sanctions were necessary "to protect either the plaintiff's ability to prosecute his claims on their merits or the integrity of the judicial system." BX 31 at 2.

53. Respondent filed an Opposition to Defendants' Motion to Dismiss and/or for Summary Judgment on April 24, 2006. BX 32. In response to the defendants' Statement of Material Facts, Respondent mentioned his 2002 interaction with the Chungs, claiming that "[i]n August 2002 plaintiff communicated a complaint to the defendants about their services." BX 32 at 2. Respondent made this assertion in response to the Chungs' claim that Respondent "had never logged any complaints with Defendants." *See* BX 28 at 4; FF 49. Respondent did not assert that the events involving his lost item in 2002 reinforced, confirmed, or otherwise affected his interpretation of the signs posted in the store. *See* BX 32 at 10-12. Respondent again asserted the same compensatory damages theory that he had previously asserted in his Amended Complaint, initial summary judgment motion and renewed summary judgment motion, including his theory that damages could be recovered for each proven violation of a section of the CPPA, and expanded his punitive damages argument. *Id.* at 13-15 and 15-21; *see* BX 8 at 9 (¶ 38), 11; FF 17; BX 11 at 19; FF 26; BX 27 at 42; FF 47.

54. Respondent filed a Renewed Motion for Financial Information on May 1, 2006, seeking responses a week before mediation and a week before trial. BX 33 at 2. The Court denied the motion without prejudice on May 16, 2006, reasoning that in a non-jury trial the scope of discovery relating to punitive damages, if any, should be deferred until after the trial. BX 34 at 2. In the course of its ruling, the Court observed that "... the record is replete with genuine factual

issues concerning the defendants' intent in dealing with the plaintiff." *Id.*

55. On May 16, 2006, the Court partially granted and partially denied the Chungs' Motion to Dismiss and/or for Summary Judgment. BX 35. The Court granted summary judgment for the defendants with respect to Respondent's "All Work Done on Premises" common law fraud claim. *Id.* at 3-4. The Court denied summary judgment for defendants as to Respondent's "Satisfaction Guaranteed" common law fraud claims viewing the evidence in the light most favorable to Respondent. *Id.* at 4-6. The Court also denied defendants' request for summary judgment on Respondent's CPPA damages theory on the ground that it is "clear" from decisions of the District of Columbia Court of Appeals that "the legislature intended to authorize the prosecution of a separate claim for each unlawful trade practice committed in violation of the statute." The Court also denied the Chungs' request for summary judgment on Respondent's request for punitive damages on the ground that "... genuine disputes concerning the defendants' state of mind pervade the record." *Id.* at 6-7.

56. Sometime before August 28, 2006, the Chungs removed the "Satisfaction Guaranteed" and "All Work Done on Premises" signs from their store. *See* BX 36 at 7.

57. On August 28, 2006, the Chung's filed a Motion *in Limine* to bar at trial 1) evidence of their removal of their signs; and 2) testimony or evidence relating to other Custom Cleaners customers. BX 36 at 5-9. They reaffirmed their claim that "they have located the Plaintiff's pants and offered them to Plaintiff[.]" *Id.* at 4.

58. On September 19, 2006, the Chungs filed a \$4,600 offer of judgment. BX 37.

59. Respondent filed his Opposition to the Defendant's Motion *in Limine* on September 29, 2006. BX 38. Respondent argued for the first time that "[w]hen an unfair trade practice claim is based on a sign, each day the sign is displayed constitutes a separate violation and a separate

cause of action.” *Id.* at 11 (emphasis in original). He also argued that the statutory damages specified in the CPPA were assessable for each day of violation. *Id.* at 15. Respondent cited no case law in support of his contentions, relying only on the wording of the CPPA. *Id.* at 15.

60. The Court denied the Defendants’ Motion *in Limine* without prejudice on October 3, 2006. BX 39.

61. On October 31, 2006, Respondent filed a Motion to Amend and Supplement Complaint. BX 40. He proposed adding language omitted from his original complaint that specifically inserted the “same day service” and “all work done on premises” claims into clauses alleging violations of four CPPA provisions. Including the two signs tripled the millions of dollars in damages Respondent now claimed under those provisions, pursuant to his one-a-day violation theory. *Id.* at 7-8, 23-25, 28-29.⁴ Respondent also set forth his claim to be acting as a “private attorney general” in the action. *Id.* at 4, 5, 10.

62. On November 14, 2006, the Court, noting that the case would be assigned to a new trial judge effective January 1, 2007 pursuant to standard Superior Court procedures, *sua sponte* continued the date of the pre-trial conference from December 14, 2006 to February 5, 2007. BX 41; BX 5 at 4.

63. The Court denied Respondent’s Motion to Amend and Supplement Complaint on November 20, 2006, primarily on the ground that amendment was being sought “very late.” BX 43 at 2. In the course of its ruling, the Court observed that this was “. . . a case that, in the Court’s view, has been delayed unnecessarily by plaintiff’s disproportionate approach to the discovery process and by the plaintiff’s active but largely unsuccessful motions practice” and that “. . . the

⁴ This jump in claimed damages was reflected in the draft pre-trial statement excerpt that Respondent attached to his motion. *See* BX 40 at 28 (asserting over one hundred million dollars in statutory damages).

Court has significant concerns that the plaintiff is acting in bad faith and with an intent to delay the proceedings.” *Id.* at 4.

64. On February 5, 2007, the Court, the Honorable Judith Bartnoff now presiding, *sua sponte* continued the Pretrial Conference from that day to March 21, 2007. BX 5 at 5.

65. The parties filed a Joint Pre-Trial statement on March 14, 2007. BX 45. The defendants reaffirmed their position that they had Respondent’s pants and contended that Respondent’s interpretation of their “Satisfaction Guaranteed” sign was “excruciatingly unreasonable.” BX 45 at 12, 20.

66. In the Joint Pre-Trial Statement, Respondent reaffirmed his interpretation that by having the “Satisfaction Guaranteed” sign, the Chungs “unconditionally guarantee . . . that all customers will be satisfied with all services the defendants offer (and if not, that the customer’s personal satisfaction will otherwise be guaranteed)[.]” *Id.* at 5. Respondent also argued that “[t]he defendants’ signs guarantee the customer can determine whether the customer is satisfied . . . and, if dissatisfied, the *customer* can determine an alternative method of guaranteeing the customer’s satisfaction.” *Id.*

67. Respondent also asserted that by having the “Same Day Service” sign, the Chungs “unconditionally guarantee . . . same day services” and that “Same Day Service” was a “sweeping and unconditional guarantee.” *Id.* at 5, 13-14. He requested that the Chungs stipulate that they “do not provide same day service to customers when the customer does not specifically request that service.” *Id.* at 23.

68. Respondent’s portion of the Joint Pre-Trial Statement contained over 18 pages of citations separated by headings. BX 45 at 25-42. He testified at the disciplinary hearing that heading B: “Federal and State Law Uniformly Hold Merchants Liable for Deceptively Claiming

an Unconditional Guarantee of Satisfaction,” supported his interpretation of satisfaction guaranteed. Tr. 125-126. In that section, Respondent cited, *inter alia*, the *Montgomery Ward* case. BX 45 at 26-28.

69. Respondent also stated in the Joint Pre-Trial Statement that the “Satisfaction Guaranteed” and “Same Day Service” signs “among other things, led him to believe the defendants guaranteed satisfactory performance of the alterations they promised, in the time they promised, or that they would satisfy any demand the plaintiff made for compensation.” *Id.* at 9.

70. In the Joint Pre-Trial Statement, Respondent claimed a total of \$67,292,000 in CPPA, common law, and other damages, based primarily on his “each-day-a-separate-violation” theory. As part of this total, Respondent claimed he had performed approximately 1,200 hours of work on the *Pearson v. Chung* matter (to date) worth \$500,000 in attorney’s fees. BX 45 at 24. In support of his “each-day-a-violation” damages theory, Respondent, in the “Citations” section of the Statement, cited to, *inter alia*, a provision in the FTC statute that ““each day of [a violation] shall be treated as a separate violation”” and to a Kansas statute with a similar provision. *Id.* at 30-31.

71. Respondent sought additional relief in the form of an injunction that would force the Chungs to provide him services even after they took the Satisfaction Guaranteed sign down (unless he was compensated for walking to another cleaners) and a judgment that if Respondent determined that the Chungs were not providing him services, the Chungs would be required to pay Respondent \$10,000 so that he could bring legal action against them. BX 45 at 24-25.

72. In the Joint Pre-Trial Statement, Respondent now demanded \$400,000 for settlement, set to increase by \$25,000 on April 1, 2007 and by an additional \$25,000 every month thereafter. BX 45 at 46-47.

73. On March 15, 2007, the Chungs made a \$12,000 offer of judgment. BX 46.

74. The Court conducted the Pretrial Conference on March 21, 2007. BX 47. During the hearing, the Court noted its understanding that “same day service” means that “same day service is available in certain circumstances.” *Id.* at 58. Respondent replied that that was a “disputed issue.” *Id.*

75. Also at the Pretrial Conference, the Court ordered that trial would commence on June 11, 2007. BX 48.⁵

76. On May 11, 2007, the Chungs moved to amend the pre-trial order to re-add two witnesses. BX 50.

77. Respondent filed his opposition to defendants’ motion on May 22, 2007. BX 51. Respondent argued that the proffered testimony of defendant’s witnesses, that they “never found the signage in Custom Cleaners to be misleading in any way,” was irrelevant because “[a]s a matter of law, an advertisement that states ‘SATISFACTION GUARANTEED,’ when the defendants admit they offer no such unconditional guarantee, violates this [misrepresentation] provision [of the CPPA].” *Id.* at 5.

78. On May 31, 2007, Respondent filed his Trial Brief on Plaintiff’s Key Claims in which, for each claim under the CPPA, Respondent asserted his interpretations of “Satisfaction Guaranteed” and “Same Day Service.” BX 52 at 4 (28-3904(a): “Undisputed Facts” support unconditional interpretation), 6 (28-3904(d): same), 7 (28-3904(e): same), 9 (28-3904(f): same), 10 (28-3904(h): same), 13 (28-3904(u): same).⁶

79. Respondent’s “Same Day Service” claims made clear that he was alleging a

⁵ The commencement in this period of time of the disciplinary process against Respondent and the ensuing developments through the evidentiary hearing in this matter are addressed in FF 139-160.

⁶ Respondent did not allege that the Same Day Service sign violated § 28-3904(u).

violation of the CPPA even in situations where the customer did not specifically request Same Day Service. *See, e.g., id.* at 4 (Undisputed Facts: “...*any* customer request for *any* of defendants’ service would be completed the same day...”), 10 (“...defendants never had any intention of providing ‘same day services’ for all of their services, to all of their customers.”).

80. For his fraud claim, Respondent reaffirmed his theory that Satisfaction Guaranteed meant that the Chungs had promised to provide him with whatever money he demanded, irrespective of whether they had lost his pants, and without disputing that they had lost his pants. Respondent made clear his position that if the Chungs had wished to retain the right to dispute the facts about what had happened to Respondent’s pants, they had to say so expressly in their sign:

By *guaranteeing* plaintiff’s satisfaction with their services the defendants essentially guaranteed: THE CUSTOMER WILL ALWAYS BE RIGHT (because only the customer can determine what it takes to satisfy him or her). Thus, to prevail on his claim for fraud the plaintiff need *not* show that the defendants lost his suit pants. Plaintiff is not suing for lost pants. He is suing because the defendants unconditionally guaranteed his satisfaction with their services, and when he was not (for *whatever* reason), they reneged on that unconditional guarantee. As the courts have explained: “[t]he issue is not one of performance, but of advertising.” *Montgomery Ward Co. v. FTC*, 379 F.2d 666 (7th Cir. 1967). The defendants *guaranteed* in their advertisement that there would be no debate on the question of plaintiff’s satisfaction – i.e., the plaintiff-customer would *always* be right. If they wished to condition that guarantee by imposing a money limit or in any other manner they were in a position to do so, **PROMINENTLY**, before-the-fact. To do so after-the-fact is called fraud.

Id. at 28 (all emphases in original).

81. In his Trial Brief, Respondent for the first time suggested that the 2002 incident was one of multiple factors relevant to his common law fraud claim. *See* BX 52 at 29 (2002 discussion under “With Intent to Deceive” heading). *Cf.* FF 53, BX 32 at 4.

82. Respondent also filed his “Trial Brief on Computing Minimum Statutory (CPPA) Damages” on May 31, 2007. BX 53. The brief included a section titled “Counting the Number of Violations” and a subsection titled “How Many Violations is Each Defendant Liable For?” In that

five-page subsection, he provided a detailed analysis of the pertinent provisions of the CPPA and its predecessor in support of his contention that the “per violation” provision of the CPPA’s damages scheme, together with the statute’s express purpose of deterring “the continuing use” of unfair trade practices, supported his “each-day-a-violation” damages theory; he also cited to “each-day-a-violation” provisions in the Federal Trade Commission Act and an analogous provision in a Kansas statute and to such an interpretation in a manual published by the National Consumer Law Center. *Id.* at 10-14. Respondent also repeated his reliance on the *Montgomery Ward* case. *Id.* at 6 n.3.

83. The Chungs filed their Trial Brief on June 2, 2007. In their brief, they cited *Alicke v. MCI Communications Corp.*, 11 F.3d 909, 912 (D.C. Cir. 1997). BX 54 at 7.

84. Defendants also argued in their Trial Brief that the only claims left for adjudication (in light of Respondent’s pleadings and court orders) were those based on Respondent’s “Satisfaction Guaranteed” theory. *Id.* at 2-6. Defendants also restated their position that Respondent’s one-a-day violation theory, and any claims on behalf of others, were not actionable at trial. *Id.* at 3.

85. On June 12, 2007, the Court granted the Chung’s motion to amend the pre-trial order to add two witnesses, citing “the change in the focus of this case, which is reflected in the plaintiff’s trial brief.” BX 55 at 1. The Court also rescheduled trial from June 11 to June 12. *Id.* at 2, n.1.

86. The case was tried on June 12 and 13, 2007. BX 56-58.

87. At the beginning of trial, the Court discussed the status of Respondent’s various claims extensively with the parties. BX 56 at 7-48. Ultimately it allowed Respondent to present his claims about the “Same Day Service” sign and his each-day-a-violation damages theory,

despite the defendants' objections. *Id.* at 21, 29-31, 35-37.

88. During his opening statement, Respondent said he interpreted "Satisfaction Guaranteed" and "Same Day Service" by the "literal meaning of the signs[.]" BX 56 at 53.

89. None of Respondent's witnesses testified to understanding the "Satisfaction Guaranteed" or "Same Day Service" signs as conveying no limits to what they promised a customer. BX 56 at 66-79 (Fazon), 79-96 (Hudgens), 96-114 (testimony of Ms. Dorsey), 115-126 (Hewell), 126-143 (Green), 143-151 (Tyehimba), 151-160 (Adinew), 160-167 (Burnet); *see also* BX 62 at 15.

90. One witness specifically discussed the "Same Day Service" sign, testifying: "[Same Day Service] meant that it would be – that I would get it back the same day *if I needed it back* but I really didn't need it back that same day." BX 56 at 132 (emphasis added).

91. Respondent took the stand as the last witness in his case. He testified, *inter alia*, that the Chungs had apparently agreed to his interpretation of Satisfaction Guaranteed through their actions in 2002. BX 56 at 178-184, 190-191, 205.

92. The following day (June 13, 2007), while discussing Respondent's preliminary matters, the Court emphasized that there was "a legal dispute in this case as well as a factual dispute about how [the Satisfaction Guaranteed] sign should be interpreted." BX 57 at 9.

93. In the course of Respondent's argument that settlement discussions should be admissible at trial because his continuing settlement offers were demands for satisfaction under the Chungs' promised "Satisfaction Guaranteed," BX 57 at 18-32, the Court confirmed that Respondent was "claiming that the satisfaction guaranteed sign means they have to give me whatever it takes to satisfy me" and that he interpreted "Satisfaction Guaranteed" as "absolutely unconditional." The Court advised Respondent that it had "grave doubts" about that position. BX

57 at 28-29.

94. During cross-examination, the Court questioned Respondent directly on his asserted interpretation of the “Satisfaction Guaranteed” sign. BX 57 at 118. During that exchange, Respondent testified that the sign meant that a customer who came into the store to pick up a sweater, and then claimed that the sweater presented was not his/hers and wanted \$1,000 for the “lost” sweater, would be entitled to \$1,000 as a matter of law under the CPPA, even when the Chungs knew it was the correct sweater and believed the customer was lying. BX 57 at 116-123.

95. Following Respondent’s testimony, the defendants moved for judgment as a matter of law. BX 57 at 142-162. While discussing that motion, the Court confirmed that Respondent interpreted “Satisfaction Guaranteed” to require Custom Cleaners to keep an article of clothing for five years (for example) if they did not put on the Satisfaction Guaranteed sign a time limit on their obligation to keep items. BX 57 at 154-155.

96. The Court also discussed the *Alicke* case with Respondent. Respondent pointed out that decisions of the United States Court of Appeals for the District of Columbia Circuit like *Alicke* were not binding precedent in the action, that the CPPA is most analogous to the pertinent FTC regulation, and that the CPPA did not codify the reasonable customer standard. BX 57 at 155-157.

97. The Court ruled for the Chungs, as a matter of law, as to the “Same Day Service” sign, concluding:

I don’t think there’s any evidence that the request for same day service wasn’t honored, and it seems to me completely unreasonable to treat same day service as meaning that same day service has to be -- has to be given to everybody even if they don’t ask for it and there are obviously times when it makes no sense to get same day service because it’s simply not reasonable to do it if you bring your items in two seconds before the, um, the store closes. And Mr. Pearson’s, um, very broad reading of that sign, um, reads things into it that clearly aren’t there.

BX 57 at 161-162.

98. The Court denied the defendants' motion for judgment as a matter of law with respect to Respondent's Satisfaction Guaranteed claims, reasoning that:

There was a statement made in the brief that this case wasn't about pants, but I think that the -- there is a claim that's being made based on the pants incident, and for that reason I don't really think we have a standing issue.

And I think that some of these other issues, um, while they're, quote, questions, I understand the interpretation and I think we should let them go forward and hear the rest of what the defendants have to say.

Id. at 159, 162.

99. Three witnesses testified for the defense, Saymendi Lloyd, Robert King and Soo Chung. BX 58 at 4-36.

100. Ms. Lloyd was a social worker and six-year customer of Custom Cleaners. BX 58 at 4-5. She testified that she interpreted the "Satisfaction Guaranteed" sign to mean she would be compensated what she paid for the item, if one of her items were destroyed or lost. *Id.* at 8-9. Respondent did not cross-examine Ms. Lloyd about her interpretation. *Id.* at 9-10.

101. Robert King, another customer, testified that he interpreted "Satisfaction Guaranteed" as giving him an expectation that if he found fault with work on his clothes, he would be compensated for the value of the clothes. BX 58 at 13-15. Respondent did not cross-examine Mr. King. *Id.* at 15.

102. Soo Chung testified that she interpreted the sign to mean that her store would do their best to fix a problem, and if it could not be resolved, customers would be compensated for the value of their clothing. BX 58 at 21-22. She testified that she had no doubt that the pants she and her family had attempted to return to Respondent were the pants he dropped off. *Id.* at 34-35. Respondent did not cross-examine Ms. Chung. *Id.* at 36.

103. During Respondent's closing statement, the Court again clarified the extent of

Respondent's argument, confirming that he claimed under the CPPA that the Chungs were obligated to satisfy dissatisfied customers even when the customers had not disclosed what exactly would satisfy them and that it did not matter whether customers had legitimate claims because the Chungs were warranting whatever customers said would satisfy them. *Id.* at 54-56, 58.

104. Following defendants' closing argument (BX 58 at 77-84), Respondent argued further in rebuttal. *Id.* at 84-94. During his rebuttal, the Court expressed concern that Respondent was "not being completely accurate" as to the facts of *Montgomery Ward*. BX 58 at 88. The Court also expressed concern that *none* of the cases Respondent had cited "involved this satisfaction guaranteed issue" or "were about a satisfaction guarantee sign alone." *Id.* at 89. The Court reminded Respondent that as a lawyer:

you have an obligation to the Court to be accurate in the representations you make with regard to what cases are about . . . and I do not recall that any of the cases . . . involved this satisfaction guaranteed issue.

Id. at 89. The Court also discussed *Montgomery Ward* with Respondent and concluded the colloquy with the observation that ". . . I also think that it's very important that statutes like this are not misused." *Id.* at 93, 95.

105. The Court concluded the trial by observing that "I do think that this [the CPPA] is a very important statute to protect consumers in the District of Columbia, and I also think it's very important that statutes like this are not misused." *Id.* at 95.

106. The following day, on June 14, 2007, Respondent filed an "Errata for Joint Pre-Trial Statement." BX 59. Respondent apologized for placing the term "satisfaction guaranteed" in quotation marks when citing *Montgomery Ward*, saying, "However close an 'unconditional guarantee' is to 'satisfaction guaranteed,' one could at least argue they are not the same thing." BX 59 at 1. Respondent also noted that *Montgomery Ward's* had, as a guiding principle,

“Satisfaction guaranteed or your money back.” *Id.* at 2.

107. On June 19, 2007, Respondent filed a “Correction” to his June 14, 2007 *errata*, revising his position:

In the second paragraph of his June 14, 2007 *Errata For Joint Pre-Trial Statement* plaintiff wrote: “However close an ‘unconditional guarantee’ is to ‘satisfaction guaranteed,’ one could at least argue that they are not the same thing.”

Plaintiff rescinds that statement. Having devoted considerable time since filing the Errata to an attempt to come up with a rational basis for distinguishing the meaning of the term “unconditional guarantee” from the meaning of the term “satisfaction guaranteed,” plaintiff can think of no basis for drawing a meaningful distinction. The two terms use different words. In plaintiff’s view, however, the two terms are indistinguishable in substance and meaning.

BX 61 at 1.

108. The Court issued its Findings of Fact and Conclusions of Law on June 25, 2007, ruling that Respondent had not established his CPPA or common law fraud claims and therefore finding in favor of the Chungs on all of Respondent’s claims. The Court also awarded costs to the Chungs. BX 62 at 23; BX 63. The Court found that “nothing in the law” supported Respondent’s interpretation of “Satisfaction Guaranteed.” BX 62 at 19. The Court issued its judgment on the same date. BX 63.

109. Although finding the regulation inapplicable to Respondent’s case by its terms, the Court observed that § 239.3(a) “provides some guidance on the reasonable interpretation of the ‘Satisfaction Guaranteed’ sign,” namely, that if one of the Chungs’ customers had an issue with dry cleaning, laundry or alterations, “the cleaner should try to fix it, and if the problem cannot be fixed, the cleaner should make reasonable compensation to the customer for the value of the damaged item.” BX 62 at 22.

110. As to Respondent’s pants, the Court found that Respondent did not meet his burden of proving that “the pants the defendants attempted to return to him were not the pants he brought

in for alterations.” BX 62 at 18.

111. On July 5 and 6, 2007, the Chungs moved for attorneys’ fees of almost \$100,000 and for Rule 11 sanctions and filed their Bill of Costs. BX 64, 65, 66.

112. On July 10, 2007, Respondent moved for reconsideration, saying:

The premise on which the court based its June 25th Order, rejecting each of plaintiff’s claims, is manifestly in error. The court effectively substituted a guarantee of satisfaction with “reasonable” limits and preconditions for the unconditional and unambiguous guarantee of satisfaction the defendant-merchants chose to advertise for seven years. That was a fundamental legal error. It eliminated an essential basis (the defendants’ false or deceptive representation) for each of plaintiff’s claims and required the entry of judgment for the defendants.

BX 67 at 1. Respondent also argued that “the fact that a consumer may make a bogus claim if the merchant’s promise of ‘Satisfaction Guaranteed’ is given its plain meaning in no way alters or is relevant to the definition of the term ‘Satisfaction Guaranteed.’” *Id.* at 2.

113. Respondent argued that the Chungs had to state any reservation explicitly in their Satisfaction Guaranteed advertisement if they wanted to avoid a legal obligation to honor a bogus claim. For example, they could post a sign that stated “Satisfaction Guaranteed **IF** we agree your dissatisfaction is legitimate and we agree to the compensation you demand.” BX 67 at 2 (emphasis in original).

114. Respondent further argued that “[t]he plain and unambiguous meaning of the term ‘Satisfaction Guaranteed’” was “well established under District of Columbia law, and throughout the federal and state courts,” and that *Alicke* was of “no relevance” (even though it involved two of the specific CPPA violations he was alleging) when “considering a term that is as clearly defined in the law as ‘Satisfaction Guaranteed.’” BX 67 at 11, 12.

115. On July 16, 2007, the Court denied Respondent’s motion for reconsideration because he had “not presented any new argument or authority that warrants reconsideration of the

Court's prior rulings." BX 68 at 1.

116. On August 7, 2007, Respondent filed an opposition to defendants' sanctions motion, acknowledging that the definition of "Satisfaction Guaranteed" was a "threshold issue" in his case, and continuing to insist that his interpretation was the "plain meaning" of the Chungs' advertisement. BX 69 at 14.

117. Respondent argued that he should be awarded expenses and attorneys' fees for defending the motion. *Id.* at 18-20.

118. Respondent also filed oppositions to defendants' motions for attorneys' fees and their Bill of Costs. BX 70-71.

119. On or around August 13, 2007, the Chungs withdrew their Motion for Attorneys' Fees and Motion for Rule 11 Sanctions and Bill of Costs. BX 72.

120. Respondent filed his Notice of Appeal on August 14, 2007. BX 74.

121. On August 16, 2007, the trial court entered an order denying Respondent's claim for attorney's fees. BX 73. The Court observed that

[t]he merits of the [Chungs'] motions are not directly before the Court, except by way of the plaintiff's request for attorney's fees or expenses. The Court recognizes that the Consumer Protection Procedures Act was enacted to benefit consumers and that an award of attorneys' fees against a consumer plaintiff would be very unusual. But this is an unusual case, in which the plaintiff attempted to take what was at best a misunderstanding about one pair of pants and expand it to a claim of \$67 million, based on legal theories that – once they clearly were articulated – were unsupported in fact or in law.

Id. at 1-2.

122. Respondent filed his appellate brief on November 13, 2007. BX 79. In his brief, Respondent characterized as one of "two primary branches" of his lawsuit, his claim that the Chungs had agreed to his interpretation of "Satisfaction Guaranteed" in 2002, and thereafter committed fraud by not abiding by that agreement. *Id.* at 14, 21-31, 34-37.

123. Respondent continued to advance his theory that Satisfaction Guaranteed was unconditional and unbound to any reference to reason, and that his interpretation was indisputable. *See, e.g., Id.* at 38, n.4 (Chungs obligated to honor demand “for any amount of money”), 49, n.10 (“any amount of money”), 52 (“If there were any ambiguity about the meaning of the words “Satisfaction Guaranteed” – and there is not...”). He continued also to refer to his interpretation as the “plain meaning” of “Satisfaction Guaranteed.” *Id.* at 38.

124. Respondent maintained his position that if the Chungs had wanted to retain the right to dispute his (or any other customer’s) version of past events, they were obligated to do so by disclosing it in their sign:

For example, they could have advertised: “SATISFACTION GUARANTEED UNLESS WE DISPUTE YOUR CLAIM.” Or: “WHEN IT COMES TO SATISFYING YOU, WE OBSERVE INDUSTRY STANDARDS.” The defendants, instead, chose to misrepresent and conceal their actual complaint policy (orally, as well as by posting), even after plaintiff filed suit in June 2005.

Id. at 41.

125. In his appellate brief, Respondent referred to 16 C.F.R. § 239.3(a) in a footnote, where he purported to agree with the trial court’s finding that § 239.3(a) was instructive in interpreting the Chungs’ sign, but Respondent did not address the provision that a merchant who advertised a “Satisfaction Guarantee” should refund the purchase price to a dissatisfied consumer. *Id.* at 50-51 n.12.

126. Respondent also reaffirmed his unconditional definition of Same Day Service. *Id.* at 58 (“...Thus, rather than provide the same day service to all customers they unconditionally advertised, the unrefuted evidence presented at trial is that the defendants provided three day service as a matter of course.”).

127. At the end of his brief, Respondent acknowledged the assistance of an attorney who

appears to have devoted substantial attention to District of Columbia consumer law issues, at least in the 1980's. *Id.* at 62 n.14.

128. The Chungs filed their appellate brief on December 13, 2007. BX 80. Respondent filed his reply brief on February 8, 2008. BX 81.

129. The Court of Appeals held oral argument on October 22, 2008. BX 82. Respondent acknowledged that there was no case in the District of Columbia that held “Satisfaction Guaranteed” to mean the interpretation he had advanced. *Id.* at 25-28.

130. Respondent also acknowledged that whether or not something could be an undisclosed condition on the Chungs’ guarantee of satisfaction depended on “whether the phrase satisfaction guaranteed means what [Respondent suggested] it means.” *Id.* at 14-15; *see also Id.* at 25-28.

131. Respondent insisted that the *Montgomery Ward* case was “exactly on these facts, unconditional guarantee of satisfaction or satisfaction guaranteed[.]” *Id.* at 24. However, Respondent backed away from the completely boundless definition of “Satisfaction Guaranteed” he had been advancing during two years of litigation. *See, e.g., id.* at 9 (“it depends”), 10 (“that depends on the circumstances of the case”), 11 (“that is not my view”), 19 (agreeing to some objective inquiry), 29-30. He now apparently took the position that his interpretation was only appropriate in his particular case because of his 2002 interaction with the Chungs. *Id.* 82 at 31-32.

132. On October 28, 2008, Respondent filed a Motion for Leave to Submit Legal Memorandum in which he discussed how both § 239.3(a) and (b) applied to services. BX 83 at 1-3. The motion was denied on November 7, 2008. BX 85.

133. The District of Columbia Court of Appeals affirmed the ruling of the trial court in a decision issued on December 18, 2008. BX 86. With respect to the Satisfaction Guaranteed issue,

the Court observed that “the trial court, showing basic common sense,” had rejected Respondent’s “unlimited view of a ‘Satisfaction Guaranteed’ sign” and had, instead, relied upon “case law generally supporting the position that, as with a common law fraud claim, a claim of an unfair trade practice is properly considered in terms of how the practice would be viewed by a reasonable consumer.” *Id.* at 5. The Court of Appeals concluded, “that position has ample support,” citing, *inter alia*, the *Alicke* decision. *Id.* It further noted, “Pearson, on the other hand, cites no pertinent authority that supports his interpretation of ‘Satisfaction Guaranteed’” and explained in an accompanying footnote that the FTC regulation relied upon by Respondent, 16 C.F.R. § 239.3(a), “is not applicable here, since the cleaners were providing a service, not selling a product.” *Id.* at 5, 9 n.9. The Court of Appeals thereupon affirmed the trial court’s ruling on Respondent’s Satisfaction Guaranteed, agreeing with the trial court’s conclusion that Respondent’s interpretation was “not supported by law or reason. . . .” *Id.* at 5.

134. With respect to the Same Day Service issue, the Court of Appeals also affirmed the trial court’s ruling because Respondent “offers no support for [his] interpretation of the ‘Same Day Service’ sign, which frankly defies logic.” *Id.* at 6.

135. The Court of Appeals found that “[i]n the end, whether Pearson’s claims are considered under a common law fraud claim or under the CPPA makes no difference because he was unable to establish the underlying factual basis for relief” (*i.e.*, that the pants the Chungs had attempted to return were not Respondent’s pants). BX 86 at 6.

136. Respondent filed a Petition for Rehearing or Rehearing *En Banc* on December 23, 2008. BX 87.

137. The Court of Appeals denied Respondent’s Petition on January 9, 2009. BX 88, 89.

138. The Chungs closed down Custom Cleaners after Respondent brought his lawsuit.

Tr. 352.

THE DISCIPLINARY PROCESS

139. On May 7, 2007, about six weeks after the Pretrial Conference, Disciplinary Counsel requested that Respondent address, *inter alia*, his conduct in *Pearson v. Chung*. BX 99. Disciplinary Counsel informed Respondent that “[t]he question of improper or excessive litigation has been raised in both [*Pearson v. Chung* and *Pearson v. Pearson*].” *Id.* at 2. By this point, Respondent knew that *Pearson v. Chung* had drawn significant media attention. *See, e.g.*, BX 100 at 1 (article titled “D.C. Judge Seeks \$67 Million for Lost Pants,” American Tort Reform Association letter); RX 26 (4/28/07 entry: “wrote email to Mary Harris of Nightline about inability to comment”; 4/10/07 entry: “[R]esearch rule on pretrial publicity”).

140. Respondent responded to Disciplinary Counsel on May 21, 2007. BX 100. Respondent acknowledged that “your office is requesting that I [address whether] the complaint in *Pearson v. Chung* is frivolous.” *Id.* at 1. Respondent made clear that under his theory, if he said the Chungs lost his pants, the “Satisfaction Guaranteed” sign obligated them under law to accept that as true, irrespective of any evidence to the contrary:

Again, it does not matter whether in fact the defendants lost my suit pants. What matters is that they fraudulently induced me to believe they *guaranteed* that I would determine whether they did or not, and they now admit they never had any intention of honoring that guarantee.

Id. at 3 (emphasis in original).

141. In his response, Respondent blamed the Chungs for expanding his damages claim:

I did not seek the specific sum of \$67 million dollars in damages when I filed this case. With respect to my CPPA claim, my June 2005 complaint simply sought \$1,500 per violation, per defendant. By collectively persisting in their conduct for an additional two years however, by March 2007 the defendants had run the total up to the \$67 million figure.

Id. at 5.

142. From no later than May 21, 2007, Respondent litigated *Pearson v. Chung* while “very aware that Disciplinary Counsel was looking over [his] shoulder.” Tr. 305.

143. By letter dated June 18, 2007, Disciplinary Counsel notified Respondent that the disciplinary process would be deferred until the litigation was resolved. BX 101.

144. Disciplinary Counsel mailed Respondent a copy of the draft disciplinary charges on April 21, 2014. BX 102.

145. Disciplinary Counsel’s Specification of Charges was filed on April 8, 2015. BX 2.

146. Respondent filed his Verified Answer to Specification of Charges on May 4, 2015. BX 4. In his Verified Answer, Respondent, *inter alia*, asserted defenses that were equivalent to motions to dismiss, BX 4 at 1-5, 31; raised an issue implicating the doctrine of collateral estoppel, *id.* at 5-6; alleged a denial of due process as a result of the lengthy pendency of the disciplinary process, *id.* at 8; and asserted rule violations and other improper conduct by Disciplinary Counsel. *Id.* at 6-7, 9-14, 31.⁷

147. A Pre-Hearing Conference was conducted on May 28, 2015, and the evidentiary hearing was scheduled for August 31 – September 2, 2015. Pre-Hearing Conference Transcript at 9. A schedule for the filing and briefing of motions by Respondent was established. *Id.* at 17-18.

148. Respondent filed a Motion for Bill of Particulars and a Motion *in Limine* on June 5, 2015. Disciplinary Counsel filed its Oppositions on June 12, 2015. Respondent filed his Reply to Opposition to Respondent’s Motion for a Bill of Particulars on June 12, 2015 and his Reply to Opposition to Respondent’s Motion *in Limine* on June 15, 2015. The Chair issued an Order denying as moot Respondent’s Motion for a Bill of Particulars on June 24, 2015. The Chair issued an Order denying without prejudice Respondent’s Motion *in Limine* as premature on

⁷ These issues are discussed in Section IV.A of this Report.

June 26, 2015.⁸

149. The evidentiary hearing in this matter commenced on August 31 and concluded on September 1, 2015, more than eight years after Disciplinary Counsel’s initial inquiry and more than six and one-half years after the final action of the Court of Appeals.

150. At the hearing, Respondent acknowledged that he had to define what “Satisfaction Guaranteed” meant before evaluating whether the Chungs’ advertisement violated the CPPA. Tr. 57.

151. Respondent testified that he interpreted “Satisfaction Guaranteed” as unlimited based on § 239.3(b):

Q: You are saying it codifies case law that says “satisfaction guaranteed” is unlimited?

A: It says if you have any limits you must disclose them. I guess by indirection you have unlimited if you don’t disclose them.

Tr. 130; *see also* Tr. 61.

152. Respondent confirmed that his theory of “Satisfaction Guaranteed” contained no reasonable bounds. He acknowledged his theory that the Chungs were promising to honor a trillion-dollar claim of dissatisfaction through their “Satisfaction Guaranteed sign,” and would be violating the law if they did not. Tr. 67-71.

153. Respondent also acknowledged that he claimed the Chungs were liable under the CPPA irrespective of whether they actually had lost his pants. Tr. 108-109.

154. Respondent acknowledged that inserting reasonable limits into his interpretation of “Satisfaction Guaranteed” eliminated the basis for the CPPA claims he brought about that sign. Tr. 88-90.

⁸ These issues are discussed in Section IV.A. of this Report.

155. Respondent insisted that the *Montgomery Ward* case was “on all fours” with *Pearson v. Chung*. Tr. 114; *see also* Tr. 118-120.

156. Respondent confirmed that under his interpretation of “Same Day Service,” the Chungs were promising Same Day Service, whether it was requested or not and under all circumstances. Tr. 146-151.

157. Respondent explained that his boundless interpretation of “Same Day Service” was based on the fact that no conditions were disclosed on the sign. Tr. 141-150.

158. Respondent claimed “[i]t was only in trial that all of a sudden” that the Chungs claimed to have found his pants, although the Chungs had repeatedly asserted that they had found Respondent’s pants throughout the litigation. Tr. 320; *see* FF 12, 18, 40, 57.

159. Respondent acknowledged that he did not assert his “each day a violation” theory until after the Chungs filed their motion for summary judgment. Tr. 154-158; *see also* RX 38. He argued to both the Court and later to Disciplinary Counsel that the Chungs were responsible for running up the damages in *Pearson v. Chung*. *See* Respondent’s Brief at 23 (¶ 69), 25 (¶ 77).

160. At the hearing, Respondent was examined by the Chair with respect to the Seventh Defense in his Answer, his claim that “. . . the Office of [Disciplinary] Counsel has denied Respondent the due process protection of the Fifth Amendment by their seven year delay in drafting and prosecuting the Specification of Charges.” BX 4 at 8 (emphasis in original). The examination addressed each of the seven areas of purported prejudice that Respondent had asserted were “incurably prejudicial.” Tr. 360-377; BX 4 at 8.⁹

⁹ This legal issue is addressed in Section IV.A.4, *infra*, and the possible relevance of the delay to the question of sanction is discussed in Section V, *infra*.

IV. RECOMMENDED CONCLUSIONS OF LAW

A. LEGAL ISSUES RAISED BY RESPONDENT

1. Motions to Dismiss

In his Verified Answer, Respondent asserted in his First Defense, Second Defense and Third Defense that Disciplinary Counsel had “Fail[ed] to Allege Elements of A Violation of Disciplinary Rule[s]” 3.1, 3.2(a) and 8.4(d), respectively, and sought dismissal of the Specification of Charges with prejudice. BX 4 at 1-3 (Rule 3.1), 3-4 (Rule 3.2(a)), 4-5 (Rule 8.4(d)), 31. At the Pre-Hearing Conference, the Chair treated the requests for dismissal as motions to dismiss and declined to rule on the requests/motions on the ground that such a ruling “is not within the ken of the Hearing Committee” because the request/motion raises legal issues that can be resolved only by the Board. Pre-Hearing Conference Transcript at 13; *see* Board Rule 7.16(a); *In re Ontell*, 593 A.2d 1038, 1040 (D.C. 1991).

We recommend that Respondent’s motions be denied. The reasons, in our view, for rejecting Respondent’s motion to dismiss the alleged violations of Rules 3.1 and 3.2(a) are set forth in parts 5 and 6, *infra*. The Respondent’s motion to dismiss the Rule 8.4(d) charge, based on alleged deficiencies in the Rule 3.1 and 3.2(a) charges, should, in our view, be denied for the same reasons.

2. Collateral Estoppel

In his Verified Answer, Respondent argued in his Fourth Defense that the doctrine of collateral estoppel does not permit introduction at the hearing of “findings, rulings and even musings of the trial and appellate court in *Pearson v. Chung*” and complained of such references in Disciplinary Counsel’s Specification of Charges. BX 4 at 5-6. In its Specification of Charges, Disciplinary Counsel alleged that “the court found ‘nothing in the law’ that supported

Respondent's position," that "[t]he Court stated . . . the plaintiff . . . based [his case] on legal theories that – once they clearly were articulated – were unsupported in fact or in law," and that the Court of Appeals "stated the Respondent's interpretation of 'Satisfaction Guaranteed' was 'not supported by law or reason' and that his asserted interpretation of 'Same Day Service' frankly defied logic." BX 2 at 4 (¶ 17), 5-6 (¶ 24), 6 (¶ 26).

At the Pre-Hearing Conference, Respondent explained that he was especially concerned about the effect that such statements might have on the judgment of the lay member of the Hearing Committee. Pre-Hearing Conference Tr. 15. Disciplinary Counsel stated that it would not rely upon the doctrine of collateral estoppel for any proof in its case but declined Respondent's request that it file a redacted copy of the Specification of Charges.

Respondent renewed his challenge in a Motion *in Limine* filed on June 5, 2015, to which he attached a list of the statements he was challenging. Disciplinary Counsel filed its Opposition on June 12, 2015, arguing, *inter alia*, with citations to authority, that the statements in question "are admissible for the truth of the courts' assertions therein – that Respondent's positions had no basis in fact and/or law." Opposition of [Disciplinary] Counsel to Respondent's Motion in Limine, at 2-3. Respondent filed his Reply on June 15. The Chair, citing Board Rule 11.3, denied Respondent's Motion *in Limine* as premature in an Order dated June 26, 2015. FF 148.

Respondent properly raised the issue again at the conclusion of the hearing, arguing that the prejudice he feared had been realized. Tr. 379. The Chair stated that Disciplinary Counsel would be held to its representation that it would not rely upon the doctrine of collateral estoppel and that it would address the issue in its Report "if the Hearing Committee, in its deliberations and conclusions, considers any of the pieces of evidence that you're referring to. . . ." *Id.* at 380.

In its deliberations, the Hearing Committee has taken into consideration the Courts'

“disproportionate approach to the discovery process” (FF 63), “grave doubts” (FF 93), “completely unreasonable” (FF 97), “nothing in the law” (FF 108), “unsupported in fact or in law” (FF121), “not supported by law or reason” (FF133) and “frankly defied logic” (FF 134) statements and has concluded that that evidence is probative with respect to the “no basis in law or fact” element of the Rule 3.1 and the Rule 3.2(a) allegations. The Hearing Committee has not treated the statements in question as dispositive of either the Rule 3.1 or the 3.2(a) charge.

3. Purported Disciplinary Rule Violations and Other Purported Improper Conduct by Disciplinary Counsel

In his Verified Answer, Respondent alleged in his Fourth and Fifth Defenses that Disciplinary Counsel had violated the D.C. Rules of Professional Conduct in various ways and asserted in his Sixth Defense that he was immune from disciplinary charges because he had been acting as a “private attorney general” in the *Pearson v. Chung* litigation. BX 4 at 5-8. As relief in this regard, Respondent asked that the Executive Attorney “determine what if any statement by the Board regarding the almost wholly false, misleading, unlawful and frivolous Specifications, and unethical and abusive conduct of [Disciplinary Counsel] . . . is appropriate.” *Id.* at 31. Respondent made similar points and requested similar relief in his Brief. Respondent’s Brief at 1, 65-67. Cognizant of D.C. Bar R. XI, § 19(a), the Hearing Committee did not address this matter, believing that it lies solely within the purview of the Board.

4. Due Process

In his Verified Answer, Respondent asserted as his Seventh Defense that “the Office of [Disciplinary] Counsel has denied Respondent the due process protections of the Fifth Amendment by their **seven year** delay in drafting and prosecuting the Specification of Charges” and then listed seven ways in which he had been prejudiced by the delay. BX 4 at 8 (emphasis in original). The Hearing Committee examined Respondent with respect to each of the seven areas of purported

prejudice set out in his Answer. FF 160. After careful consideration of his testimony in this regard, the Hearing Committee has concluded that Respondent has not established even by a preponderance of evidence that he incurred any of the alleged prejudice. *See In re Morrell*, 684 A.2d 361, 368-370 (D.C. 1996). Therefore, the Hearing Committee recommends that the Board conclude that Respondent has not established his Seventh Defense.

5. Bill of Particulars

In his Motion for a Bill of Particulars, FF 148, Respondent argued that the Specification of Charges initiating this proceeding did not provide him with adequate notice of the manner in which he had allegedly violated Rule 3.2(a) and therefore did not comply with the requirement of D.C. Bar R. XI, § 8(c) that “[t]he petition shall be sufficiently clear and specific to inform the attorney of the alleged misconduct.” In the Order denying Respondent’s Motion as moot, the Chair observed:

The Specification of Charges in this matter consists of 28 paragraphs. None of the first 27 paragraphs contains the word “delay,” asserts that delays occurred in the underlying proceedings, or makes any reference to any steps, actions, measures, tactics or strategies by the Respondent that may have delayed the trial court or appellate court proceedings from which this disciplinary proceeding arises. The 28th paragraph also contains no factual allegation of any delaying action, consisting in pertinent part only of an allegation that “Respondent’s conduct violated . . . Rule 3.2(a) in that Respondent delayed a proceeding when it was obvious that his actions would serve solely to harass or maliciously injure another. . . .”

Moreover, the Specification alleges that the underlying action was filed on June 7, 2005, was tried on June 12-13, 2007, and was concluded in the Court of Appeals with a ruling on December 23, 2008 and a denial of Respondent’s Petition for Rehearing or Rehearing En Banc on January 9, 2009.³ On their face, a two-year period from filing to trial and a 17-month period from the filing of the Notice of Appeal to the denial of the Petition for Rehearing or Rehearing En Banc do not seem at all unusual or inherently indicative of any undue delay or any improper delaying measures by Respondent in the underlying action.

In sum, Respondent’s contention that the Specification of Charges does not provide him with adequate notice of how he allegedly violated Rule 3.2(a) raises a legitimate question.

³ [Disciplinary] Counsel alleges that Respondent filed his Notice of Appeal on August 14, 2007 and filed his principal brief on November 13, 2007. Thus it appears that the remaining 13+ months were taken up by the filing of appellee's brief and Respondent's Reply Brief, by a period before oral argument and by a period of deliberation by the Court of Appeals prior to December 18, 2008.

Order of June 24, 2014, at 1-2. The Chair nevertheless denied the Motion for Bill of Particulars, reasoning that

. . . in its Opposition, [Disciplinary] Counsel appears to assert a theory that Respondent's alleged pursuit of allegedly frivolous claims, if established, can in and of itself constitute clear and convincing evidence that Respondent took certain actions to delay the underlying proceedings when he knew or it was obvious that those actions "would serve solely to harass or maliciously injure another." That clarification satisfies the requirements of Paragraph 8(c) of the Court of Appeals' Rules and serves the purpose of a bill of particulars.

Order of June 24, at 2.

In its brief and reply brief, Disciplinary Counsel has adhered to the Rule 3.2(a) theory set out in its Opposition to Respondent's Motion for a Bill of Particulars. DC Brief at 41-43; DC Reply at 6-7. Consequently, the Hearing Committee recommends that the Board find that Respondent had adequate notice of the Rule 3.2(a) charge against him and that therefore Respondent's Motion for a Bill of Particulars was properly denied as moot. His motion to dismiss the Rule 3.2(a) charge should be denied on the same grounds.

6. Rule 3.1 Charge as Set Forth in the Specification of Charges

Disciplinary Counsel alleged that "Respondent made repeated assertions in a proceeding for which there was no basis in fact or law." BX 2 at 6. Disciplinary Counsel did not expressly charge that Respondent's allegedly factually and/or legally baseless assertions were "frivolous." Nor did Disciplinary Counsel argue anywhere in its discussion of the Rule 3.1 charge in its brief that Respondent's assertions were frivolous; indeed the word "frivolous" does not appear anywhere in the Rule 3.1 section of Disciplinary Counsel's brief. DC Brief at 29-41. (Strangely, however, in the ensuing section of its short discussion of the Rule 3.2(a) charge, Disciplinary

Counsel repeatedly characterized Respondent's actions as "frivolous." *Id.* at 41-42. The "frivolousness" characterization also appears in passing in the Rule 3.1 and 3.2(a) discussions in Disciplinary Counsel's Reply. DC Reply at 4, 5, 7.)

However, in his response to Disciplinary Counsel's initial inquiry, Respondent acknowledged that "your office is requesting that I [address whether] the complaint in *Pearson v. Chung* is frivolous." FF 140. During Disciplinary Counsel's opening statement at the hearing, Disciplinary Counsel and the Hearing Committee Chair discussed various possible parameters of a frivolousness charge. Tr. 22, 23, 25, 27, 28; *see also* Tr. 408. Correlatively, Respondent referred to the Rule 3.1 charge as one of frivolousness, Tr. 34, and subsequently argued that "Disciplinary Counsel has presented any evidence demonstrating by clear and convincing evidence that any of these assertions that he attributes to me were frivolous. . . ." and that "Rule 3.1 . . . prohibits a lawyer from bringing a proceeding or asserting an issue in the proceeding unless there's a basis in law or fact that is not frivolous." Tr. 172, 392.

Respondent did not raise the arguably deficient pleading of the Rule 3.1 charge in his pre-hearing papers. He arguably did so at the hearing: "[Disciplinary] Counsel failed to allege in the specification of charges that I have made frivolous claims. . . ." Tr. 42. In his brief, Respondent expressly asserts:

. . . [N]either in his *Specification of Charges* or in his proposed *Conclusions of Law* does Respondent [*sic; i.e.*, Disciplinary Counsel] argue that the positions on the issues that he ascribes to the Respondent were "frivolous." . . . Rule 3.1 expressly permits a lawyer to assert an issue for which there is no basis in law or fact at the time (for example, a lawyer can argue for a "reversal of existing law") – unless the lawyer's arguments in that regard are "frivolous." So it was essential for [Disciplinary] Counsel to claim frivolousness, and to then demonstrate it. He did neither. . . .

Under D.C. case law an allegation of frivolousness is *mandatory* to allege a violation of Rule 3.1, because it is mandatory to prove it at a hearing.

Respondent's Brief at 58-59 (emphasis in original, footnote omitted). Disciplinary Counsel did not address Respondent's argument in its Reply. Consequently, in an Order dated January 29, 2016, the Chair ordered Disciplinary Counsel to file a Supplemental Reply addressing this issue as raised by Respondent, and Disciplinary Counsel did so on February 12, 2016.

The Hearing Committee is confident that its consideration of this matter has not been affected by Disciplinary Counsel's truncated (and puzzling) wording of its Rule 3.1 charge or by Respondent's arguably belated assertion of the purported pleading deficiency. The Hearing Committee did not observe any prejudice that Respondent incurred during the hearing or the post-hearing briefing from the purported pleading deficiency. In analyzing the Rule 3.1 charge, the Hearing Committee has taken into consideration the full wording of Rule 3.1. Although we are not convinced by Disciplinary Counsel's apparent contention that the question here is controlled by *In re Winstead*, 69 A.3d 390, 397 (D.C. 2013) (the only authority cited by Disciplinary Counsel), we also think that this is not a situation, as in the reciprocal disciplinary matter of *In re Bielec*, 755 A.2d 1018, 1024-25 (D.C. 2000), where "the complaint did not state a specific charge of misconduct," "never mention[ed] any disciplinary code violation" and "fail[ed] to detail any action on Respondent's part that indicates that he engaged in any kind of misconduct" and where the evidence at the underlying hearing did not "detail what, in fact, the respondent did that might constitute misconduct and a disciplinary violation."

Accordingly, based on the tests implicitly set out in *Bielec*, and assuming, *arguendo*, that Respondent has not waived the issue, the Hearing Committee recommends that the Board conclude that Disciplinary Counsel's failure expressly to allege frivolousness does not require dismissal of the Rule 3.1 charge.

B. DISCIPLINARY COUNSEL HAS ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT VIOLATED RULE 3.1.

Rule 3.1 provides, in relevant part:

MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law.¹⁰

The Court of Appeals has cautioned that “[t]he distinction between a weak claim and a frivolous one can be difficult to pinpoint. . . .” *In re Yelverton*, 105 A.3d 413, 424 (D.C. 2014) (footnote omitted). The Hearing Committee is very cognizant of that admonition, as well as of the clear and convincing evidence requirement.

In determining whether a claim or contention is meritorious, the Court of Appeals has relied in part on Superior Court Civil Rule 11, which calls for determining whether a claim is meritless by assessing 1) the “clarity or ambiguity of the law;” 2) the “plausibility of the position taken;” and 3) the “complexity of the issue.” *Yelverton*, 105 A.3d at 424-425 (D.C. 2014); *see also In re Spikes*, 881 A.2d 1118, 1125 (D.C. 2005). The Court also considers a fourth factor or criterion set forth in Rule 38 of the Rules of the District of Columbia Court of Appeals – whether, after “an objective appraisal of the legal merits of a position,” a “reasonable attorney” would conclude that [an asserted position] is so “wholly lacking in substance” that it is “not based upon even a faint hope of success on the legal merits[.]” *Id.* at 425.

The Court of Appeals has provided some additional guidance for the application of these

¹⁰ Disciplinary Counsel notes that “Rule 3.1 was amended effective February 1, 2007, to add the phrase ‘in law and fact’” and observes, “Given that the Court, in *Yelverton*, cited approvingly to *Spikes*, a 2005 case, for purposes of Rule 3.1 analysis, the change does not appear to have altered the conduct prohibited by the Rule. We are not so sure of that conclusion since the conjunctive “in law and fact” requirement might be a change from a possible pre-amendment requirement of a less demanding requirement of only one basis in law or fact. In any event, our analysis does not turn on that question.

four primary tests. First, a pleading (or, presumably, an argument therein) is sanctionable under Rule 11 if it is “legally unreasonable.” *District of Columbia v. Fraternal Order of Police*, 691 A.2d 115, 119 (D.C. 1997). Second, “the rule creates an objective standard of ‘reasonableness under the circumstances.’” *Id.* (citation omitted). Third, attorneys are required “to make an objective appraisal of the legal merits of a position. *Yelverton*, 105 A.3d at 425 (citing *Spikes*, 881 A.2d at 1125. Fourth, “[w]here the applicable statute offers no clear answer and there is no case precedent contrary to the position, it cannot be said that the case has no chance of success; therefore, its assertion will not be sanctionable.” *Fraternal Order of Police*, 691 A.2d at 119. (citation omitted).

Clarifying this fourth guidance, the Court of Appeals added:

Rule 11 is violated only when it is patently clear that a claim has absolutely no chance of success.

* * * *

A showing sufficient to defeat sanctions may be made where it is *not* patently clear that the party’s position has no chance of success. . . . [The absence of] settled law on the precise question [at issue] . . . undercuts any claim that sanctions are warranted.”

Id. at 119, 120 (quotation marks and citations omitted). Keeping this supplemental guidance in mind, we turn to the four-factor analysis specified by the Court of Appeals.

1. The Clarity or Ambiguity of the Law

Disciplinary Counsel argues that “[t]he case law provided no support for Respondent’s claim” and that, therefore, “the case law clearly and unambiguously placed reasonable restrictions on the compensation available to a dissatisfied customer after a promise of ‘satisfaction guaranteed.’” DC Brief at 32 (initial capitalization omitted). Disciplinary Counsel then explores a number of judicial decisions and FTC rulings involving “satisfaction guaranteed” promises. *Id.* at 32-37.

Even if Disciplinary Counsel has accurately summarized the rulings in those cases, those

cases do not appear to have involved or addressed the assertions that Respondent was making regarding liability and damages; therefore, since the issue raised by Respondent was not presented in those cases, those cases do not appear to preclude the interpretations that he advanced. Moreover, none of those decisions were issued by District of Columbia courts or were decided under District of Columbia law. Additionally, reported litigation involving the CPPA appears to be sparse,¹¹ and the parties have not cited and we have not found any decisions addressing the interpretative contentions advanced by Respondent in the *Pearson v. Chung* litigation; thus Respondent cannot be said to have overlooked, ignored or failed to disclose any case law, let alone any binding case law, that was directly adverse to his contentions.

Respondent pursued his “Satisfaction Guaranteed” liability theory throughout the trial and appellate litigation (perhaps paring it down in an insignificant respect in the Court of Appeals). FF 123-126, 131. The trial court denied the Chungs’ motion for summary judgment on the “Satisfaction Guaranteed” claim under the CPPA, FF 55, and denied the Chungs’ motion for judgment as a matter of law on the “Satisfaction Guaranteed” claim at the conclusion of Respondent’s case, thereby allowing the CPPA and common law claims to proceed to verdict. FF 98, 108. On the other hand, the trial court granted the defendants’ motion for judgment as a matter of law on the “Same Day Service” claim. FF 97.

With respect to potential damages, Respondent timely introduced his “each-day-a-

¹¹ The Court of Appeals addressed the question of the applicable standing requirement in CPPA actions in *Grayson v. AT&T Corp.*, 15 A.3d 319 (D.C. 2011) (*en banc*), approximately five and one-half years after Respondent filed his action and about twenty-two months years after completion of the appellate phase of the *Pearson v. Chung* litigation. In *Grayson*, the *en banc* Court reversed a panel’s decision adopting an interpretation of the CPPA’s standing requirement consistent with Respondent’s position on that issue in the *Pearson v. Chung* litigation and, in an exhaustive opinion, reached a conclusion, over an equally exhaustive dissent, inconsistent with Respondent’s position on the standing issue in *Pearson v. Chung*. Thus Respondent’s contention that he had standing to bring the action appears to have been anything but frivolous.

violation” theory in his Opposition to the Defendant’s Motion *in Limine*, which he filed on September 29, 2006, about 16 months after filing his complaint, five and one-half months before submission of the Joint Pretrial Statement, and eight and one-half months prior to commencement of trial. FF 59, BX 38; *see also* FF 70, 82 (where Respondent provided case law authority in support of his theory). The trial court permitted Respondent to pursue his damages theory at trial, FF 87, and did not further address the issue before trial, during trial, or post-trial in light of its verdict against Respondent on the liability issues.¹²

This matter, in the Hearing Committee’s view, differs in determinative respects from *Yelverton* and *Spikes*. In *Yelverton*, the respondent filed two groundless motions to recuse the trial judge, repeatedly included in his pleadings “lengthy passages copied verbatim from previous motions,” “filed six motions [in the Court of Appeals . . . some of which were largely verbatim copies of previously submitted filings,” and, even though inexperienced in criminal matters, failed to “consult[] someone who was knowledgeable” in the area. *Yelverton*, 105 A.3d at 417, 419, 423. Moreover, the law regarding the relief sought by *Yelverton* was “clear and has been so for a long time,” “the issues [were] not complicated,” and “the law [was] firmly settled against [*Yelverton*’s] position.” *Id.* at 425. In *Spikes*, the respondent filed a defamation claim based on a complaint submitted to Disciplinary Counsel despite the absolute immunity expressly provided to such submissions by the “plain meaning” of D.C. Bar Rule X1, § 19(a) and by “[t]he consistent decisional law of [the D.C. Court of Appeals]” which “weighs entirely against a suit such as the one respondent filed. . . .” *In re Spikes*, 881 A.2d at 1123.

None of the foregoing can be said of most of Respondent’s pleadings or the issues he was

¹² Disciplinary Counsel acknowledged at the commencement of the hearing, with respect to Respondent’s CPPA damages calculations, “I don’t think it would be per se frivolous,” and elaborated, “the theory that he plugged into the statute is the problem, not the numbers multiplying.” Tr. 23, 24.

raising. The CPPA and related issues implicated by Respondent’s contentions were far from settled – indeed, they were largely questions of first impression – and the potential resolution of those questions was anything but clear. The trial court did not at any point strike Respondent’s “Satisfaction Guaranteed” or “each-day-a-violation” theories from the case, either in pre-trial rulings or in the course of the trial. Instead, the trial court allowed the action to proceed to trial and resolved the case on the merits because, in its view, as it stated during pretrial discussions, there was “a legal dispute in this case as well as a factual dispute about how [the Satisfaction Guaranteed] sign should be interpreted.” FF 92. Acting as the finder of fact in this non-jury trial, the trial court, in its Findings of Fact and Conclusions of Law, rendered a verdict against Respondent after applying the law to the facts, not by finding that Respondent’s case was legally insufficient on its face, let alone worse. FF 108. Similarly, the Court of Appeals entertained full briefing and allowed the normal 30 minutes per side at oral argument. FF 122-126, 129-131. Respondent appears to have consulted, albeit only at the appellate stage, with at least one attorney who seems to be experienced in consumer law issues. FF 127. Under all these circumstances, and leaving aside for a moment the other *Yelverton-Spikes* factors and related facts that must be analyzed, the Hearing Committee is hard-pressed to conclude that the law potentially applicable to the “Satisfaction Guaranteed” and “each-day-a violation” issues was clear or unambiguous, especially in light of the Court of Appeals’ observation – which we take as a cautionary admonition – that “[t]he distinction between a weak claim and a frivolous or meritless one can be difficult to pinpoint.”

We are also mindful here of the fourth ancillary guideline from the Court of Appeals that we identified above. As we have discussed, “the applicable statute offers no clear answer and there is no case precedent contrary to the position [asserted by Respondent]” and it is not “patently clear

that [Respondent's] claim ha[d] absolutely no chance of success.” Under the Court of Appeals’ rulings, these circumstances “undercut[] any claim that sanctions are warranted.” *Fraternal Order of Police*, 691 A.2d at 119, 120 (quotation marks and citations omitted).

In sum, judging by the standards and analysis set out in *Yelverton* and by the manner in which those standards have been explained and applied in *Yelverton* and other cases, the Hearing Committee concludes that analysis of the first principal analytical factor – the clarity or ambiguity of the law – does not, in and of itself, lead to a recommended conclusion of law that Respondent pursued unmeritorious claims or adduced unmeritorious contentions in the *Pearson v. Chung* litigation.¹³

2. The Plausibility of the Positions Taken by Respondent

The Hearing Committee has focused its analysis of the “plausibility” factor on the following facts. None of Respondent’s witnesses testified to the “Satisfaction Guaranteed” or “Same Day Service” interpretation that Respondent was advocating. FF 89-90. Nor did any of the Chungs’ witnesses and, moreover, Respondent knew prior to trial that they would not do so. FF 77, 100-101. Third, Respondent knew that the trial court had granted summary judgment against him on his tortured interpretation of the Chungs’ “All Work Done on Premises” sign, which did not differ in kind from his other two claims, especially the “Same Day Service” contention. FF 55. Fourth, Respondent also knew that his “Same Day Service” theory had been essentially rejected by the trial court in pretrial proceedings, but he persisted in it nevertheless until the trial court granted the defendants’ motion for judgment as a matter of law on the “Same Day Service” claim. FF 97; FF 74, 79, 86-87 (BX 56 at 35). Fifth, after his testimony on direct, the trial court expressed “grave doubt” about Respondent’s “Satisfaction Guaranteed” theory. FF 93 (BX 57 at 28-29).

¹³ We attend to the “Same Day Service” theory in the next section.

Sixth, Respondent knew from the time that he received Disciplinary Counsel’s inquiry, shortly before trial, that a significant question existed as to whether his theories were frivolous. FF 139, 140, 142. Thus, well before trial and as the trial and appeal wore on, Respondent must be charged with knowing that no one other than himself had concluded that the CPPA could be interpreted in the extreme manner as he did with respect to the “Same Day Service” issue. Nevertheless, he continued to pursue this and all of his other theories through appeal. FF 122-123.

We are mindful at this point of the first three ancillary guidelines from the Court of Appeals that we have identified, which seem to us particularly applicable to a “plausibility” analysis. Specifically, we must apply an “objective standard of ‘reasonableness under the circumstances.’” Second, Respondent was under a correlative professional obligation to make his own “objective appraisal of the legal merits of [his] position[s].” Those two factors determine, in our understanding, whether, third, a position, even on an unclear or ambiguous issue, is so “legally unreasonable” as to be “implausible”¹⁴ and therefore sanctionable. *Fraternal Order of Police*, 691 A.2d at 119; *Yelverton*, 105 A.3d at 425. We apply this analytical approach as follows.

With respect to the litigating attorney’s obligation, there comes a point in any litigation at which the attorney has had a fair opportunity to explore and try out his or her theories and potential alternatives and then must, in accordance with the Court of Appeals’ instructions, re-assess, refine and circumscribe them into reasonable claims going forward into trial and upon appeal. In our

¹⁴ We assume that “implausibility” for Rule 3.1 purposes is more serious or extreme than the “implausibility” standard that has governed the resolution of Rule 12(b)(6) motions in federal litigation since *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and we trust that not every D.C. Bar member who has a claim in federal court dismissed on implausibility grounds will be found to have violated Rule 3.1. Nevertheless, we find the imprecision of, and absence of definition of, the term in the Rule 3.1 context to be troubling. We note also that the federal implausibility standard has been strongly criticized for its subjectivity and its possible deterrence of important causes of action. See, e.g., Kassem, *Implausible Realities: Iqbal’s Entrenchment of Majority Group Skepticism Towards Discrimination Claims*, 114 Penn State Law Review 1443 (2010).

view, that point came in *Pearson v. Chung* certainly before the appeal but arguably, and in our view, before the case went to trial. We think that it is incontestable from the record in the trial and appellate courts and in this matter that Respondent has never, to this day, made the requisite objective appraisal. FF 29, 47, 66, 77, 80, 88, 93, 94, 114, 123.

When we ourselves turn to such an appraisal, we find ourselves in agreement with Disciplinary Counsel's observation:

Pearson v. Chung posed a question as to what a merchant's "Satisfaction Guaranteed" sign promised when a customer is not complaining about a service, but rather is disputing that the item returned to him is not the item he dropped off. Rather than craft an answer grounded in law, Respondent advanced an implausible and unreasonable theory. . . .

DC Brief at 37-38. In essence, in our view Respondent simply pushed too far, too long on his "All Work Done on Premises," "Same Day Service" and "Satisfaction Guaranteed" theories.

We recognize that it is fair to ask us, "What is the 'objective standard' by which you reach this conclusion?" The record lacks, for example, any expert testimony from experienced litigators or ethics experts as to how a litigator must appraise his or her case or what a litigator must take into consideration in developing and pursuing his or her case (or defense). Similarly, the record contains no expert testimony from consumer law specialists regarding the state of, or responsible progressive thinking on, the consumer law positions that Respondent was asserting. There is also an absence of any controlling District of Columbia case law expressly delineating Rule 3.1 "implausibility" or involving closer or more complicated situations than the basically clear-cut abuses that were present in *Yelverton*, *Spikes* and *Fraternal Order of Police*.¹⁵ Thus, our conclusion

¹⁵ *Fastov* also presented a much more extreme situation than the one present in this matter. There, the respondent "engaged in extensive and unwarranted discovery practice, including deposing the Chair of Christie's, who Respondent acknowledges knew nothing about the case," and filed extremely lengthy pleadings, one of which was struck for being "an abuse of the litigation process." Board Docket No. 10-BD-096 at 5-6. *Fastov* continued to file such pleadings even after being warned by the court. *Id.* at 6.

rests, of necessity, primarily on our assessment of the entire record in this proceeding, including the papers filed by Respondent in the Superior Court and the Court of Appeals, his testimony at trial, the dialogue between Respondent and the trial judge throughout the trial, and his testimony in this proceeding – all the while keeping in mind the important policy and fairness issues at stake here. We think also that the objective basis for our conclusion is bolstered by the consistent judicial expressions of “grave doubts” about Respondent’s theories, FF 93, and of concerns that the theories were “simply not reasonable” and “clearly not there,” FF 97, as well as the judicial conclusions that “nothing in the law” supported them, FF 108, that they were “unsupported in fact or in law,” FF 121, that they were “not supported by law or reason,” FF 133, and that they “frankly defied logic.” FF 134. In addition, Respondent’s belated request, in the Joint Pre-Trial Statement, for an injunction obligating the Chungs to continue to provide services to him and for \$10,000 in damages to cover the costs of any additional action he wished to bring against them in the future was, in the Hearing Committee’s view, patently non-cognizable. FF 71.

Under these circumstances, we conclude that Respondent’s various positions became at various stages so “legally unreasonable” as to be “implausible.” In reaching this conclusion, we are not unaware of the arguable tension between and potential inconsistency of our or any other “clarity or ambiguity” analysis and our “implausibility” analysis. Frankly, we wish that the number of Rule 3.1 decisions and the guidance therein for the requisite “objective analysis” were not so sparse¹⁶ (although we are obviously pleased that such violations perhaps do not arise very often). We are also acutely aware of the danger of improperly deterring creative attorneys from appropriately pushing the boundaries of existing law in many important areas. And we are troubled

¹⁶ Indeed, the Court of Appeals observed barely a decade ago that “We have not previously considered what constitutes a ‘frivolous’ proceeding or issue that warrants a sanction under Rule 3.1.” *Spikes*, 881 A.2d at 1125.

that we are asked to reach, and have reached, an “implausibility” determination when the trial court allowed the “Same Day Service” and “Satisfaction Guaranteed” claims to go to trial and the Court of Appeals entertained full briefing and oral argument on those claims. Nevertheless, as we read the (few) controlling opinions of the Court of Appeals, we feel compelled to conclude that the theories pursued by Respondent, even though technically sustainable as a matter of strict legal interpretation, were so legally unreasonable as to be impermissibly implausible.

3. The Complexity of the Issue

The Hearing Committee is frankly uncertain of the meaning of this criterion and of the manner in which it is to be applied. We have found no cases discussing this factor separately or any other guidance as to what constitutes “complexity” or makes an issue “complex.” Indeed, the Hearing Committee is not totally certain even as to whether a more complex issue provides an attorney more or less leeway in formulating his or her arguments on the issue. Unfortunately, Disciplinary Counsel’s briefing is unhelpful: Its principal brief purports to provide a complexity analysis in a subsection entitled “Plausibility and Complexity of the Issue” but, in actuality, contains only a plausibility discussion, and its reply brief does not even allude to the complexity question. Respondent’s brief is equally silent and unhelpful on this factor.

The Hearing Committee assumes – but is by no means certain – that the CPPA issues raised by Respondent in *Pearson v. Chung* are fairly characterized as relatively complex. This assumption is based, in the absence of any other guidance, on the analysis set forth with respect to the “clarity or ambiguity” test, as discussed above. The Hearing Committee also assumes – and, again, is by no means certain – that the relative complexity of any given issue in any given matter provides an attorney with more leeway than if the given issue had already clearly been resolved (directly or implicitly) or if his or her arguments even in a more debatable matter were clearly, simply,

obviously and/or totally wrong-headed. Beyond that, the Hearing Committee is unable to provide any further insight. In effect, the Hearing Committee is reduced to treating the “complexity” factor as equivalent to the “clarity or ambiguity” factor and therefore concludes that the “complexity” factor does not, in and of itself, lead to a recommended conclusion of law that Respondent pursued unmeritorious claims or adduced unmeritorious contentions in the *Pearson v. Chung* litigation.

4. The Potential for Success of Respondent’s Contentions

We have concluded above that the state of CPPA jurisprudence in 2005-2009 was not so clear and unambiguous as to render Respondent’s “Satisfaction Guaranteed” and “Same Day Service” theories clearly unmeritorious, as a matter of technical statutory and case law analysis. We think, however, that the “clarity or ambiguity” analysis is different from and not dispositive of the analysis of whether a position was “wholly lacking in substance” and did not have even “a faint hope of success on the legal merits.” On the other hand, we think that this factor and the “plausibility” factor overlap substantially if not completely, and we have found no case law exploring or delineating the differences, if any, between the “plausibility” factor and this fourth, “[no] faint hope of success” factor. For the same reasons discussed in connection with the “plausibility” factor, we conclude that Respondent’s “Satisfaction Guaranteed” and “Same Day Service” claims did not have “even a faint hope of success.”

* * * *

In sum, in our view, in the initial stages of the *Pearson v. Chung* litigation, Respondent identified unresolved questions under the CPPA and proposed, at least in most instances, analytically possible – albeit extreme – answers to those questions. Those questions, however, did not need to be resolved in the circumstances that had arisen, and Respondent’s proposed answers became evidently preposterous. The Chungs do not appear to have been unreasonable in their

attempts to resolve the underlying problem (the apparent loss of a pair of expensive suit trousers), and it seems likely that Respondent could very well have achieved adequate and even more than adequate recompense either informally or through an action in Small Claims Court. Additionally, after a point, Respondent could have settled the case for at least \$12,000. FF 73. Instead, Respondent chose to escalate and prolong the run-of-the-mill dispute into a four-year, no-holds-barred crusade. Whether he did so for significant personal gain or to make his mark in consumer law, or both, Respondent carried his claim to such an extreme set of answers that no one could reasonably believe that he had even a faint hope of prevailing. Despite Respondent's "private attorney-general" proclamations, the Hearing Committee has concluded after much deliberation that Respondent's course of action was an unacceptable perversion and betrayal of the noble law reform work that his former, distinguished legal services organization and other such entities properly pursue. The Hearing Committee recommends, therefore, that the Board conclude that Respondent pursued unmeritorious claims and supporting theories in violation of Rule 3.1.

C. Disciplinary Counsel Has Not Established by Clear and Convincing Evidence that Respondent Violated Rule 3.2(a)

Rule 3.2(a) provides:

EXPEDITING LITIGATION

In representing a client, a lawyer shall not delay a proceeding when the lawyer knows or when it is obvious that such action would serve solely to harass or maliciously injure another.

Disciplinary Counsel contends (i) that Respondent pursued a frivolous claim and (ii) that pursuit of a frivolous claim can in and of itself, under circumstances such as those in the *Pearson v. Chung* litigation, constitute a Rule 3.2(a) violation.¹⁷ Disciplinary counsel cites *Yelverton*, 105

¹⁷ "Because Respondent made the affirmative decision to rest his entire case on a frivolous foundation, it inherently caused delay." DC Brief at 41. "The pursuit of what [Disciplinary] Counsel alleges are frivolous claims, including that Respondent was put on notice that the Superior

A.3d at 427, for the principle that under Rule 8.4(d), “Frivolous actions ‘waste the time and resources of th[e] court, delay the hearing of cases with merit and cause [opposing parties] unwarranted delay and added expense.’”

Respondent argues that the pertinent portion of the Board’s decision in *In re Fastov*, Board Docket No. 10-BD-096 (July 31, 2013), is controlling here. R Brief at 64. There, the Board found that “Respondent may have conducted excessive discovery, filed frivolous and redundant motions, filed unacceptable lengthy pleadings, and otherwise engaged in unacceptable practice, but we do not think [Disciplinary] Counsel has demonstrated that those practices were designed or intended to delay the proceedings.” *Fastov*, Board Docket No. 10-BD-096 at 31.

To begin with, there is not clear and convincing evidence that there was an undue delay at all in the *Pearson v. Chung* litigation. As the Chair observed in the Order of June 24, 2014, at 2:

[T]he Specification alleges that the underlying action was filed on June 7, 2005, was tried on June 12-13, 2007, and was concluded in the Court of Appeals with a ruling on December 23, 2008 and a denial of Respondent’s Petition for Rehearing or Rehearing En Banc on January 9, 2009. On their face, a two-year period from filing to trial and a 17-month period from the filing of the Notice of Appeal to the denial of the Petition for Rehearing or Rehearing En Banc do not seem at all unusual or inherently indicative of any undue delay or any improper delaying measures by Respondent in the underlying action.

Even after this pre-hearing observation, Disciplinary Counsel did not introduce any evidence to establish that the durations of the trial court period and/or the appellate court period were in any way out of the ordinary. Consequently, the Hearing Committee cannot find that any unusual delay

Court and later the District of Columbia Court of Appeals held the view that those claims had no basis in fact and/or law, delayed final resolution of the case when it was obvious that prolonging the litigation would serve solely to further harass or injure the Chungs.” Opposition of [Disciplinary] Counsel to Motion of Respondent for a Bill of Particulars, at 2 (footnote omitted). “Now, if you look at [Disciplinary] Counsel’s position, it’s essentially that because it was so facially obvious that his claims were frivolous from the outset, every action in a sense is delaying the proceeding when it should be obvious to him that all it’s going to do is harass.” Tr. 388; *see also* Section IV.A.5, *supra*.

occurred in the course of the 26-month litigation period in the Superior Court and/or the 17-month litigation period in the Court of Appeals. *See* FF 15, 119, 120, 137.

Thus, the Hearing Committee arguably does not need to reach what appears to be the second element of a Rule 3.2(d) violation – whether the lawyer intended, knew or should have known that his or her delaying measures would serve solely to harass or maliciously injure another. Nevertheless, we now address that issue in case the Board disagrees with our first conclusion. In this regard, the Hearing Committee is aware that the Court of Appeals vacated its decision in *In re Fastov* after learning that Mr. Fastov had passed away prior to the opinion being issued. *In re Fastov*, No. 13-BG-850, September 18, 2014, *vacated*, September 26, 2014. The Hearing Committee believes, however, that the Board’s ruling in *Fastov* remains of precedential value for the Hearing Committee. In any event, the Hearing Committee is persuaded by the Board’s reasoning in its ruling in *Fastov*.

In *Fastov*, the Board observed that the only Court of Appeals case addressing the use of delaying tactics for the purpose of harassment is *In re Pelkey*, 962 A.2d 268 (D.C. 2008). *Fastov*, Board Docket No. 10-BD-096 at 31. That appears to the Hearing Committee to remain accurate at this time, three years later. In *Pelkey*, the respondent had agreed to arbitration only as part of a delaying strategy in which he schemed to challenge the arbitration and otherwise “engaged in tactics to avoid and prevent the arbitration” such as moving the court to rescind the arbitration agreement and to remove the arbitrator, even though he had signed an agreement consenting to arbitration and participated in the selection of the arbitrator. *Pelkey*, 962 A.2d at 280. Respondent’s conduct in this matter did not descend to that level.

The Hearing Committee presumes that harassing delay that violates Rule 3.2(a) need not necessarily be as clear-cut as in the underlying matter in *Pelkey*. That brings us to *Fastov* and the

record in this matter. Respondent, like Fastov, submitted voluminous and at times excessive discovery and other pleadings in the *Pearson v. Chung* matter, but he also sought to move up the trial date, the trial court granted some of his discovery motions, the Chungs were dilatory on several occasions in their discovery responses, and the court *sua sponte* twice delayed the trial. FF 20, 27, 36, 62, 64. Also, the Hearing Committee does not agree with Disciplinary Counsel's assertion – and finds the record devoid of any evidentiary support for the assertion – that Respondent harbored a personal animus against the Chungs. *See* DC Brief at 44. Thus Respondent's litigation measures seem to the Hearing Committee to be either indistinguishable from or less serious than Fastov's.

In sum, after considering the facts in this matter and the rulings in *Pelkey* and *Fastov*, the Hearing Committee cannot find by clear and convincing evidence that the litigation was unduly delayed, that Respondent engaged in the abusive delaying tactics that Pelkey undertook, or that Respondent's conduct differed materially from Fastov's. Accordingly, the Hearing Committee recommends that the Board conclude that Disciplinary Counsel has not proved by clear and convincing evidence that Respondent engaged in conduct delaying a proceeding when the lawyer knows or when it is obvious that such action would serve solely to harass or maliciously injure another.¹⁸

D. Disciplinary Counsel Has Established by Clear and Convincing Evidence that Respondent Violated Rule 8.4(d)

Rule 8.4(d) prohibits a lawyer from engaging in conduct that seriously interferes with the administration of justice. Like its predecessor, DR 1-102(A)(5), Rule 8.4(d) is “a general rule” that

¹⁸ The Hearing Committee also notes that Rule 3.2(a) begins, “In representing a client. . . .” By proceeding *pro se* in *Pearson v. Chung*, we presume that Respondent was representing a client within the meaning of Rule 3.2(a).

is “purposely broad to encompass derelictions of attorney conduct considered reprehensible to the practice of law.” *In re Hopkins*, 677 A.2d 55, 59 (D.C. 1996) (quoting *In re Alexander*, 496 A.2d 244, 255 (D.C. 1985) (*Alexander II*) (discussing predecessor rule); *see also* Comment [5] to Rule 8.4(d) (Rule 8.4(d) is to be interpreted flexibly.”).¹⁹ In order to violate Rule 8.4(d), the lawyer’s conduct must (1) be “improper,” (2) “bear directly on the judicial process (*i.e.*, the ‘administration of justice’ with respect to an identifiable case or tribunal),” and (3) “taint the judicial process in more than a *de minimis* way.” *Hopkins*, 677 A.2d at 60-61 (D.C. 1996); *accord*, *In re Drew*, 693 A.2d 1127, 1134 (D.C. 1997); *In re Uchendu*, 812 A.2d 933, 936 (D.C. 2002). A Rule 8.4(d) violation does not require any actual interference with judicial decision-making, but rather requires only that the conduct “potentially impact upon the process to a serious and adverse degree.” *Hopkins*, 677 A.2d at 61. The Court of Appeals has “found a broad range of conduct to violate Rule 8.4(d), but violations generally involve misleading the court or misusing or obstructing proceedings in a specific case or interfering with [Disciplinary] Counsel’s efforts to investigate attorney misconduct.” *Yelverton*, 105 A.3d at 426-27 (citations omitted). In assessing the circumstances in this matter, and after reviewing numerous Rule 8.4(d) decisions, we have taken guidance primarily from *Spikes* and *Yelverton* while keeping in mind that all three factors involve judgments that are “a matter of degree.” *Id.* at 427.

We think it plain that Respondent’s conduct of the *Pearson v. Chung* litigation or of this disciplinary proceeding does not rise to the very serious levels at issue in the nine representative Rule 8.4(d) cases summarized in *Yelverton*. 105 A.3d at 426-27. Disciplinary Counsel does not contend otherwise.

¹⁹ And Comment [2] to Rule 8.4 instructs, “Paragraph (d)’s prohibition of conduct that ‘seriously interferes with the administration of justice’ includes conduct proscribed by the previous Code or Professional Responsibility under DR 1-102(A)(5) as ‘prejudicial to the administration of justice.’”

However, there are some parallels between *Yelverton* itself and this matter that need to be considered. First, Yelverton’s basic legal theory flew in the face of law that was “clear and ha[d] been so for a long time . . . [and was] not complicated.” 105 A.3d at 425. Thus, Yelverton’s basic legal theory was, in the Hearing Committee’s view, simply egregious, unlike Respondent’s (as discussed above). Nevertheless, Respondent pursued his case far beyond the point at which his contentions became implausible.

Second, Yelverton filed repeated “motions to recuse the judge [that] were . . . unfounded,” 105 A.2d at 427. Respondent made similar allegations against the pre-trial judge, also on two occasions, albeit not in formal recusal motions. FF 34, 47.

Third, Yelverton filed grossly unmeritorious and often totally repetitive motions in a case where his client was not a party and thus plainly had no standing, followed by litigation in a different court against Disciplinary Counsel. 105 A.2d at 417, 419. Respondent appears to have been less repetitive in his discovery and most other papers but, in the pre-trial judge’s view and in the Hearing Committee’s, he abused the discovery process. FF 32, 33, 35. He also violated a court order prohibiting more discovery.²⁰ FF 38.

On balance, it seems to the Hearing Committee that the specific improper aspects of Respondent’s conduct in the course of *Pearson v. Chung* (i.e., apart from the significant amount of work that any complete trial and appeal entail on the part of the judiciary) imposed on the judicial system nearly the same degree or amount of unnecessary burdens as resulted from the apparently unbroken string of misconduct by Yelverton. In light of the “purposely broad” scope of the Rule, *Hopkins*, 677 A.2d at 59, and the holding in *Yelverton* that Yelverton’s misconduct “caused more than *de minimis* harm to the judicial process,” 105 A.3d at 428, the Hearing

²⁰ This misstep seems to us not of the same seriousness as the flagrant violation in *In re Travers*, 764 A.2d 242 (D.C. 2000).

Committee recommends that the Board conclude that Respondent engaged in conduct that seriously interfered with the administration of justice.

V. RECOMMENDED SANCTION

A. THE FACTORS TO BE CONSIDERED

The Court of Appeals has instructed that, in determining the appropriate sanction for a disciplinary infraction, the factors to be considered include (1) the seriousness of the misconduct, (2) the presence of misrepresentation or dishonesty, (3) Respondent's attitude toward the underlying conduct, (4) prior disciplinary violations, (5) mitigating circumstances, (6) whether counterpart provisions of the Rules of Professional Conduct were violated, and (7) prejudice to the client. *In re Peek*, 565 A.2d 627, 632 (D.C. 1989) (citations omitted); *In re Jackson*, 650 A.2d 675, 678 (D.C. 1994); *In re Hill*, 619 A.2d 936, 939 (D.C. 1993); *In re Knox*, 441 A.2d 265 (D.C. 1982).

The Court of Appeals has further instructed that the discipline imposed in a matter, although not intended to punish a lawyer, should serve to maintain the integrity of the legal profession, protect the public and the courts, and deter future or similar misconduct by the respondent-lawyer and other lawyers. *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (*en banc*); *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (*en banc*). Additionally, the sanction imposed must not “foster a tendency toward inconsistent dispositions for comparable conduct or . . . otherwise be unwarranted.” D.C. Bar R. XI, § 9(h)(1).

Disciplinary Counsel spends barely half a page on the sanctions issue and, without analyzing the foregoing factors, argues only that

In re Yelverton, 105 A.3d 413 (D.C. 2014) is instructive for fashioning the appropriate sanction in this matter. In imposing a 30-day suspension upon finding violations of Rule 3.1 and 8.4(d), the *Yelverton* court noted that the attorney acted “not for personal gain but for the benefit of his client[.]” *Id.* at 429. On this record, motives are more mixed. Respondent was seeking significant, personal financial benefit. In addition, at some points Respondent's actions reflected a level of

personal animus against the Chungs. *See* PFF 62, 69, 77. Finally, not only did Respondent receive repeated signals from the Court that he was taking things too far, Respondent's conduct surrounding the filing of his errata (PFF 102-103) coupled with his stepping away from his long-advanced theory at oral argument (PFF 127), suggests some level of actual understanding as to why the court was concerned, at least in the later stages of litigation.

"The attorney's intent may be a matter for consideration of the appropriate sanction, but is not dispositive of the question whether an attorney's actions violate Rule 3.1." *Yelverton, supra*, 105 A.3d at 426. Given this consideration, and the distinctions between *Yelverton* and the instant matter, as well as the Rule 3.2 violation (not charged in *Yelverton*), a 90-day suspension is appropriate.

DC Brief at 44. The Hearing Committee finds the sanction question in this matter to be more complicated than Disciplinary Counsel appears to suggest and also believes that Disciplinary Counsel's recommended sanction is both unduly harsh and insufficiently protective of the public and the courts, as explained below.

1. Seriousness of the Misconduct

Disciplinary Counsel has not charged Respondent with any violations that normally require disbarment or a significant period of suspension. Indeed, Disciplinary Counsel asks only for a 90-day suspension and does not seek a fitness requirement.

2. Misrepresentation or Dishonesty

Disciplinary Counsel has not contended that Respondent engaged in misrepresentation or dishonesty during the litigation at issue in this matter or during the disciplinary process.

3. Respondent's Attitude toward the Underlying Misconduct

This is the only factor that Disciplinary Counsel touches upon even cursorily in its terse sanctions discussion. Nevertheless, this factor raises material concerns on the part of the Hearing Committee.

First, Disciplinary Counsel asserts that Respondent "was seeking significant, personal financial benefit" from his aggressive liability theories, damages theories and settlement demands

in the *Pearson v. Chung* litigation. DC Brief at 44. The Hearing Committee concurs with Disciplinary Counsel’s assessment, notwithstanding Respondent’s repeated claim to be acting as a “private attorney-general” in the public interest. *See* FF 61.²¹

Second, from the very beginning of and then throughout the litigation, and from the very beginning of and then throughout the disciplinary process, Respondent has obstinately refused even to consider the possibility that his theories, even though arguably not foreclosed as a technical legal matter, were so extreme as to breach, at least at some point after he had had a fair opportunity to test them, the bounds of reasonableness and of ethical litigation conduct. FF 29, 47, 66, 69, 77, 80, 88, 93, 94, 114 , 123, 140, 151, 152, 155; Tr. 61. He consistently characterized his theories as “unambiguous,” “obvious,” deriving from “plain meaning,” based on “plain English,” subject to “no debate” and “well-established.” FF 29, 47, 114. He also argued that important but not completely on-point case law was on “all-fours” with his CPPA liability theory. FF 155.

Third, in the Hearing Committee’s view, Respondent’s litigation tactics went beyond aggressiveness and crossed the boundary into abusiveness. Concerned by what it eventually concluded to be Respondent’s “disproportionate approach to the discovery process” and Respondent’s possible “bad faith,” the trial court found his third set of document requests to be “too intrusive, time-consuming, and harassing to be enforced” and his fourth set of document requests “even more burdensome, intrusive and calculated to harass.” FF 32, 35; *see also* FF 63. Respondent also served discovery requests after the trial court’s prohibition of further discovery. FF 38; *see also* FF 31. Respondent’s comments about the pre-trial judge’s objectivity and conduct

²¹ The Hearing Committee does not agree that there is adequate evidence in the record to support Disciplinary Counsel’s contention that Respondent has been shown to have had “a level of personal animus against the Chungs.” DC Brief at 44. However, the Hearing Committee has concluded that Respondent has amply demonstrated, as discussed in the ensuing text, that he would have pursued his action in the same manner against any such similarly situated defendants.

were ill-considered at best and apparently groundless although, at least in this instance, Respondent may now recognize their impropriety – or at least their tactical dysfunctionality. FF 34; Tr. 214-217. This same abusiveness continued throughout this disciplinary proceeding, culminating in Respondent’s unduly long and quixotic brief. That brief includes a patronizing – and totally unconvincing – scenario of a hypothetical law school discussion of the issues in this proceeding. And, in that brief Respondent improperly and groundlessly accuses Disciplinary Counsel of “a transparently frivolous effort to interfere with the administration of justice . . . and to harass or maliciously injure the Respondent,” of a “ploy” of submitting “144 paragraphs of inflammatory, prejudicial and legally unfounded alleged facts,” of bringing a disciplinary charge that is “slapstick, ludicrous and nightmarish,” of submitting a brief consisting of a “conglomeration of gibberish,” of failing to understanding Respondent’s theories “that any sentient person would understand,” and of pursuing a disciplinary action that is “an abuse of prosecutorial powers.” Respondent’s Brief at 1, 2 n.1, 3, 50, 56, 57, 63.

Fourth, the Hearing Committee notes that the trial judge raised a question about the accuracy of Respondent’s representations about the facts and/or law of some of the cases that he relied upon. FF 104. Having reviewed the case law at issue and Respondent’s discussion of it in his papers and during oral arguments, the Hearing Committee shares this concern. *See* FF 29, 131, 155. Disciplinary Counsel also notes, and the Hearing Committee takes into consideration, that Respondent consistently relied very heavily on 16 CFR § 239.3(b) of the FTC’s advertising guidelines while seemingly purposely ignoring the apparent limiting provision in § 239.3(a). FF 22-23, 48. These incidents do not seem to the Hearing Committee to rise to the level of intentional misrepresentation or dishonesty on Respondent’s part (the second sanctions factor) but they do seem to reflect on his troubling and unnecessarily aggressive approach to litigation.

Finally, Respondent's conduct of his litigation against the Chungs seems to the Hearing Committee to be something of a betrayal of the values that one would expect in a truly committed public servant devoted to the interests of the legally vulnerable and underserved.

The foregoing concerns with respect to the third sanctions factor particularly inform the sanction that the Hearing Committee recommends below.

4. Prior Discipline

Respondent has no prior disciplinary history in the District of Columbia, as confirmed by Disciplinary Counsel. Tr. 416-417. Also, there is nothing in the record to suggest that Respondent has committed or has been charged with committing any disciplinary infractions since the events at issue in this proceeding.

5. Mitigating Circumstances

Respondent has had an impressive record of public service during much of his career as a legislative assistant for a United States Representative; a teaching fellow at the Georgetown University Law Center; a staff attorney, consumer law specialist and Assistant Director at the Neighborhood Legal Services Program for approximately 25 years; a staff member at the District of Columbia Office of Police Complaints; and an Administrative Law Judge. FF 2.

We have also given some weight to Respondent's present health problems and apparent financial situation.

6. Number of Violations

Respondent's two rule violations occurred during the same piece of litigation and arose from the same course of conduct. This proceeding does not involve a pattern of misconduct where a respondent has violated numerous Rules and/or committed violations in more than one representation and/or committed violations over a substantial period of time (other than what

appears to be the normal course of a trial and appeal in the Superior Court and the Court of Appeals).

7. Prejudice to the Client

Respondent represented himself in the *Pearson v. Chung* litigation and therefore this factor is not directly relevant. We note, however, that Respondent was so unwavering in his obstinacy that he recklessly deprived himself of a settlement of at least \$12,000. FF 73. He also came very close, in the Hearing Committee's view, to being sanctioned under Rule 11 and being assessed attorneys' fees, costs and fines in the \$100,000 range before the Chungs withdrew their motions after receiving donations from third parties. FF 73, 111, 119.

B. RECOMMENDED SANCTION

The respondents in both *Spikes* and *Yelverton* were suspended for 30 days. *Spikes*, 881 A.2d at 1128; *Yelverton*, 105 A.3d at 429.²²

We think that our discussion in Section IV.D. of why we consider Respondent's Rule 8.4(d) violation to be somewhat less serious than *Yelverton*'s is equally applicable here. We also conclude that the circumstances relied upon by the Court of Appeals in *Spikes* for finding a Rule 8.4(d) violation are not present here. For example, the respondent in *Spikes* had no basis for his claims for "astronomical amounts of compensatory and punitive damages," 881 A.2d at 1126, whereas Respondent's damages claim had a statutory basis in the CPPA and is not asserted by Disciplinary Counsel to have been ethically improper.

Similarly, we find Respondent's Rule 3.1 violation to be less extreme than *Spikes*' blatant disregard of the indisputable absolute privilege of the communication that he was challenging in his defamation action, 881 A.2d at 1122-24, and less extreme than *Yelverton*'s filings in a case

²² *Yelverton* was also required to demonstrate his fitness to resume the practice of law. *Id.* 105 A.3d at 432. Disciplinary Counsel does not seek a fitness requirement in this matter.

where his client obviously had no standing and the law was “clear . . . for a long time . . . [and] not complicated.” 105 A.3d at 425.

We also note that Spikes, unlike Respondent, had prior “ethical infraction[s],” 881 A.2d at 1127. And, as previously noted, we do not see any evidence in the record of any personal animosity on Respondent’s part toward the Chungs, as asserted by Disciplinary Counsel without any citation to the record. DC Brief at 44.

Thus we cannot find an adequate basis for Disciplinary Counsel’s proposal of a 90-day suspension or for any suspension in excess of the 30 days imposed on *Spikes* and *Yelverton*, and we think that (i) the somewhat less serious situation here as opposed to either that in *Spikes* or that in *Yelverton*, (ii) the limited number of violations, (iii) the mitigating circumstances, (iv) the absence of dishonesty, (v) the absence of prior discipline and (vi) the absence of client prejudice all counsel for a stay of the suspension.

However, we have identified concerns about one other factor in the sanctions analysis – Respondent’s attitude toward the underlying conduct. We have already discussed these concerns in detail in Section V.A.3 and will not repeat them here. We think that those concerns clearly warrant – indeed, demand – as a condition of the stay, that Respondent be placed on unsupervised probation for two years, with the conditions that he shall not make assertions in litigation unless there is a basis in law or fact for doing so that is not frivolous and shall not be sanctioned by a court for litigation-related conduct. We believe that the potential that Respondent will be suspended for 30 days if he violates probation will give him an added incentive to avoid the behavior involved here and should encourage Respondent to associate with co-counsel in litigated matters.²³ Because clients in litigated matters may be harmed if Respondent repeats the conduct at

²³ Pursuant to Board Rule 18.3, if Disciplinary Counsel has probable cause to believe that Respondent has violated the terms of probation, it may seek to revoke Respondent’s probation.

issue here, we recommend that any clients Respondent represents in litigation during the period of his probation be informed of the fact of his probation. *See* D.C. Bar R. XI, § 3(a)(7) (the order of probation shall “state whether, and to what extent, the attorney shall be required to notify clients of the probation.”).

CONCLUSION

Based on its Findings of Fact and its legal analysis, the Hearing Committee respectfully recommends that the Board conclude that:

there is clear and convincing evidence that Respondent violated Rules 3.1 and 8.4(d);

there is not clear and convincing evidence that Respondent violated Rule 3.2(a);

Respondent should be suspended from the practice of law for a period of 30 days;

the suspension should be stayed;

the stay should be conditioned upon the successful completion of a period of two years of probation, during which Respondent shall not make assertions in litigation unless there is a basis in law or fact for doing so that is not frivolous and shall not be sanctioned by a court for litigation-related conduct; and

any clients Respondent represents in litigation during the period of his probation be informed of his probation.

Respectfully submitted,

Dated: June 3, 2016

/WAF/
Warren Anthony Fitch, Chair

/TM/
Trevor Mitchell, Public Member

/LAW/
Lisa A. Wilson, Attorney Member