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

In the Matter of:	:	
	:	
SAMUEL N. OMWENGA,	:	Bar Docket Nos. 204-05, 231-06,
	:	106-08, 142-08,
Respondent.	:	and 016-09
	:	
A Member of the Bar of the District of Columbia Court of Appeals Bar Membership No. 461761 Date of Admission: January 8, 1999	:	

REPORT AND RECOMMENDATION OF
AD HOC HEARING COMMITTEE

There are five separate matters before this Ad Hoc Hearing Committee. In an Order dated June 10, 2009, the Board consolidated them for hearing. In the aggregate, Bar Counsel alleges that Respondent violated the following Rules of Professional Conduct:

1. Intentionally misappropriating funds in two matters, in violation of Rule 1.15(a);

2. Failing to safe keep and to deliver to his client advanced costs that were not incurred in one matter, in violation of Rules 1.15(b) and 1.15(d);[1]

3. Failing to return unearned fees and failing to return client property in three matters, in violation of Rule 1.16(d);

4. Engaging in dishonesty, fraud, deceit, and misrepresentation in all five matters, including instances of dishonesty to a tribunal and to Bar Counsel, in violation of Rules 8.1(a) and 8.4(c) in all matters, and of Rule 3.3(a) in one matter;

5. Providing incompetent representation to his clients in all five matters, in violation of Rules 1.1(a) and 1.1(b);

[1] Effective August 1, 2010, a new section (b) was added to Rule 1.15. Existing Rule 1.15(b) was renumbered 1.15(c), and 1.15(d) was renumbered 1.15(e). Throughout this report, we refer to the pre-August 1, 2007 designations in effect at the time of Respondent's misconduct.

6. Seriously neglecting and failing to communicate with his clients, in violation of Rules 1.3(a), 1.3(b)(1), 1.3(b)(2), 1.3(c), 1.4(a) in all five matters, and of Rule 1.4(b) in three matters;

7. Failing to provide a writing setting forth the basis of his fee in three matters, in violation of Rule 1.5(b);

8. Engaging in conflicts of interest in three matters, in violation of Rule 1.7(b)(4);

9. Failing to advise one client of a conflict of interest, in violation of Rule 1.7(c);

10. Disobeying obligations to a tribunal in one matter, in violation of Rule 3.4(c); and

11. Seriously interfering with the administration of justice in four matters, in violation of Rule 8.4(d).

Respondent denies violating any Rule and urges the Committee to "reject all findings of fact and conclusions of law proposed by Bar Counsel." Resp. Br. p. 1.[2]

For the following reasons, we conclude that Bar Counsel has presented clear and convincing evidence to prove most, but not all, of the charges against Respondent. Because we find that Respondent engaged in intentional misappropriation, we recommend that he be disbarred and, as a condition of reinstatement, that he be required to make restitution to his clients, with interest at the legal rate. Even absent the misappropriation, we still would recommend disbarment based on Respondent's pervasive misconduct, including his inadequate representation of his clients and his culpable indifference to their interests, his refusal to take responsibility for his ineffective and inadequate representations, and his dishonesty to his clients, the courts, Bar Counsel and the Hearing Committee.

[2] "BX" refers to Bar Counsel's exhibits. "RX" refers to Respondent's exhibits. "Tr." refers to the consecutively paginated transcript of the hearing, contained in 10 volumes. "PFF" refers to the Proposed Findings of Fact contained in Bar Counsel's Post-Hearing Brief. "FF" refers to the Findings of Fact herein, and "Resp. Br." refers to Respondent's Post Hearing Brief.

I. PROCEDURAL HISTORY

Bar Counsel filed five separate Specifications of Charges against Respondent:

1. Bar Docket No. 204-05, filed April 1, 2009, arising out of Respondent's representation of Tadessi Beraki. Respondent filed an Answer on May 18, 2009, asserting that the charges against him are meritless;

2. Bar Docket No. 231-06, filed April 1, 2009, arising out of Respondent's representation of Josephine Gitau. Respondent filed an Answer on June 3, 2009, asserting that the charges against him are meritless;

3. Bar Docket No. 106-08, filed April 1, 2009, arising out of Respondent's representation of Cane Mwihava. Respondent filed an Answer on May 18, 2009, asserting that the charges against him are meritless;

4. Bar Docket No. 142-08, filed April 1, 2009, arising out of Respondent's representation of Yeneneh Hailu. Respondent filed an Answer on May 18, 2009, asserting that the charges against him are meritless; and

5. Bar Docket No. 016-09, filed May 29, 2009, arising out of Respondent's representation of Dawit Shifaw. Respondent filed an Answer on July 13, 2009, asserting that the charges against him are baseless.

Following prehearing conferences on September 30 and November 10, 2009, the hearing in the consolidated cases took place on ten separate days from November 16, 2009 through February 22, 2010. Bar Counsel's post-hearing submission was due on April 8, 2010, but for good cause shown, the Committee granted Bar Counsel an extension until May 24, 2010. The record closed as of July 6, 2010.

II. FINDINGS OF FACT

1. Respondent was admitted to the Bar of the District of Columbia Court of Appeals by examination on January 8, 1999, and assigned Bar number 461761. BX A.

Bar Docket No. 204-05: Matter of Tadessee Beraki

a. Bar Counsel's charges

2. Bar Counsel contends that Respondent violated the following Rules of Professional Conduct in connection with his representation of Tadessee Beraki:

a. Rules 1.1(a) and (b), in that Respondent failed to provide competent representation to his client;

b. Rule 1.3(a), in that Respondent failed to represent his client zealously and diligently;

c. Rule 1.3(b)(1), in that Respondent intentionally failed to seek the lawful objectives of his client;

d. Rule 1.3(b)(2), in that Respondent intentionally prejudiced or damaged his client during the course of the professional relationship;

e. Rule 1.3(c), in that Respondent failed to act with reasonable promptness in representing his client;

f. Rule 1.4(a), in that Respondent failed to keep his client reasonably informed about the status of his matter;

g. Rule 1.16(d), in that Respondent failed to return unearned fees and surrender papers and property upon the termination of the representation;

h. Rule 8.1(a), in that Respondent knowingly made a false statement of material fact in connection with a disciplinary matter; and

i. Rule 8.4(c), in that Respondent engaged in conduct involving dishonesty, fraud, deceit, and/or misrepresentation. BX 1 at 5 – 6 ¶ 23.

3. These charges arise out of the alleged failure of Respondent timely to file an appellate brief with the Board of Immigration Appeals (hereafter "BIA") (*id.*, p. 2-4 ¶¶ 6 – 14), his explanation for not doing so (*id.*, ¶¶ 19 – 20), and his acceptance of legal fees despite (and

following) that failure (*id.*, ¶¶ 3 – 5, 15, 21).

b. Bar Counsel's evidence

4. Respondent disputes the theory of Bar Counsel's case, contending that his client, Mr. Beraki, understood the circumstances surrounding the BIA appellate process and "had no problem" with Respondent's representation. Resp. Br. at 11. At the core of Bar Counsel's charges, then, is Mr. Beraki's state of mind: what was he told, what did he understand, and to what did he agree?

5. In addition to Respondent, three attorneys testified concerning Respondent's representation of Mr. Beraki. The three attorney-witnesses also represented Mr. Beraki in connection with the matters at issue after Respondent's representation had ended. Because Respondent did not object, the Committee permitted each of these attorneys (David Garfield, Catherine Reynolds, and Linette Tobin) to testify as experts in immigration law.

6. Notably, however, Mr. Beraki did not testify. He had gone into hiding and was unavailable. Tr. 244, 1387. In lieu of his testimony, Bar Counsel offered hearsay attributed to Mr. Beraki, including oral statements, an affidavit (BX 8 at 196-98), and a declaration filed by successor counsel with the BIA. BX 8 at 200.

7. Several aspects of the evidence regarding Mr. Beraki's oral out-of-court statements troubled the Hearing Committee. At all relevant times, communications with Mr. Beraki took place through Amharic interpreters. Tr. 22, 40, 121. In essence, Bar Counsel offered testimony by Mr. Beraki's attorneys recounting what interpreters said that Mr. Beraki had, in turn, told them. As a consequence of this hearsay-within-hearsay, the Committee had no meaningful basis upon which to assess the demeanor and credibility of Mr. Beraki or the reliability of the statements attributed to him. Because Mr. Beraki did not speak English – a fact

confirmed by Respondent (*see, e.g.*, BX 7 at 27) – one link of the hearsay chain necessarily involved unsworn *interpretation* by persons whose own language skills and objectivity were unknown and untested: no interpreter was called to testify.

8. Regardless of whether the statements of Mr. Beraki were offered to prove the truth of the matters asserted or offered to show his state of mind, that *interpretive* link of the hearsay chain was, in the judgment of the Hearing Committee, inherently unreliable. The Hearing Committee therefore does not credit the hearsay evidence concerning Mr. Beraki's alleged oral statements.

9. For similar reasons, the Beraki affidavit and declaration offered by Bar Counsel also failed the test of reliability. First, the affidavit of Mr. Beraki was not notarized. BX 8 at 198. The substance of his declaration is also troubling, because it fails to recite where it was executed and contains a qualification ("to the best of my knowledge and ability") that raises a question as to its sufficiency under 28 U.S.C. § 1746. The declaration also differs in potentially significant respects from the affidavit. *Compare,* BX 8 at 196-98 *with id.* at 200-01. Most problematically, the declaration acknowledges its own unreliability: writing in English, Mr. Beraki, the declaration's purported author, admits "I … do not read and speak English … ." BX 8 at 201 ¶ 10. That same defect taints his English-language affidavit.[3]

10. Finally, Respondent did not have the opportunity to confront and cross examine Mr. Beraki, whose understanding of, and concurrence with, Respondent's tactical decision not to file a brief lies at the heart of Bar Counsel's charges and Respondent's defense. Because Respondent never had the opportunity meaningfully to cross-examine Mr. Beraki, and because

[3] In this regard, we note that Bar Counsel takes a similar position concerning reliability, by suggesting that an English language affidavit signed by Yeneneh Hailu should be disregarded because he was not fluent in English and his affidavit was not properly notarized. *See* PFF 191.

the Hearing Committee never had the opportunity to assess Mr. Beraki's responses personally and under oath, it would be unfair and inappropriate to credit this hearsay evidence.

11. For all of these reasons, then, we conclude that we can not reasonably rely upon oral statements attributed to Mr. Beraki, or upon the affidavit and declaration attributed to him. As a consequence, we conclude that Bar Counsel has not sustained, by clear and convincing evidence, any of the charges against Respondent relating to his representation of Mr. Beraki.

c. The Beraki engagement

12. The non-hearsay evidence in this case does, however, establish the procedural history of Respondent's representation of Mr. Beraki. In that regard it portrays a pattern germane to many of the charges before the Committee: namely, that Respondent's approach to representing his clients seems casual in general, and indifferent in many respects. We may take this evidence into account when assessing the charges in all of the pending matters, since it tends "reasonably to show the purpose and character of the particular transactions under scrutiny." *FTC v. Cement Institute*, 333 U.S. 683, 705 (1948). *See* F. R. Evid. 406 ("[e]vidence of the habit of a person … is relevant to prove that the conduct of the person … on a particular occasion was in conformity with the habit").

13. In July 2004, Tadessee Beraki retained Respondent to provide legal services. BX 4 at 15-16; BX 3 at 9 ¶ 1; BX 7 at 27. Respondent provided Mr. Beraki with a written retainer agreement in which Respondent agreed to represent him "in connection with Client's appeal of denied adjustment application" to the BIA. BX 4 at 16. The appeal had been filed by a predecessor attorney for Mr. Beraki. BX 7 at 197. The retainer agreement, which was prepared by Respondent, states that "[a]ny modification of [it] must be in writing and signed by Client and Attorney." *Id.*

14. Pursuant to the retainer agreement, Mr. Beraki agreed to pay Respondent a total of $3,000, consisting of an immediate payment of $1,000 followed by "monthly payments as billed by Attorney" until Mr. Beraki paid the balance in full. BX 4 at 16. Mr. Beraki paid Respondent $1,000 on July 6, 2004, for which Respondent provided a receipt. BX 4 at 17. Thereafter, Mr. Beraki paid Respondent an additional $950, as follows:

a. August 6, 2004 $200 for legal fees
b. September 6, 2004 $175 for BCIS fee I-765 (employment authorization)
c. September 7, 2004 $100 for legal fees
d. October 18, 2004 $100 for legal fees
e. November 11, 2004 $100 for legal fees
f. February 2, 2005 $100 for legal fees
g. February 28, 2005 $175 for BCIS fee for employment authorization

BX 4 at 17-19; Tr. 1185-86 (Respondent).

d. Respondent does not file an appeal brief

15. On July 6, 2004, Respondent entered his appearance before the BIA. BX 8 at 148-50; BX 3 at 9 ¶ 2.

16. After appearing, Respondent could have immediately reviewed Mr. Beraki's Immigration Court file at the BIA. Tr. 68-70 (Garfield); Tr. at 119, 188-89, 217, 225 (Reynolds). That file contained the record relating to Mr. Beraki's asylum claim. Tr. at 135-36, 187-88 (Reynolds). Respondent, however, did not review the file at that time. Tr. 1806, 1811-12, 1193-94 (Respondent).

17. The BIA transmitted the record and a scheduling order to Respondent. He received it on or about November 5, 2004. BX 7 at 28; Tr. 1812 (Respondent). The order directed Respondent to file his appellate brief by Friday, November 26, 2004. BX 7 at 41-42. The order clearly stated that requests for an extension of time in which to file a brief "must be **RECEIVED** at the Board on or before the expiration of the initial briefing schedule. Requests

for extension of briefing time received after expiration of the initial briefing period, will not be granted." BX 8 at 152 (emphasis in original).

18. Respondent states that, after reviewing the file, he could not identify any valid issues for appeal, but "in lieu of withdrawing the appeal," he decided to move to extend the time to file a brief, as a place holder for the "unlikely" possibility that he "could find on additional research an appealable issue." BX 3 at 9; Resp. Br. At 10.

e. Respondent does not obtain an extension in the time to file a brief

19. Respondent claims that on Friday, November 26 – the date the brief was due – he sent "someone" to file a motion to extend the time to file his brief. According to Respondent, "the person" arrived "just as the [clerk's] office was closing." BX 7 at 29. The unnamed "person," according to Respondent, was "told [by the clerk] to return and file the motion on the following business day." *Id*. On Monday, November 29, 2004, three days *after* Mr. Beraki's brief was due, Respondent filed the motion requesting a 60-day extension in which to file Mr. Beraki's brief. BX 8 at 153-55. By then, of course, the motion was untimely.

20. Respondent's narrative is difficult to believe for three reasons. First, it is vague – Respondent never identifies, either by name or by position, the "someone" he sent on his behalf. Second, it is clear that the BIA clerk's office was open when the "person" arrived, because Respondent asserts that the "person" was orally instructed to return on the following Monday. Yet it is hard to believe that under those circumstances – where BIA filing deadlines are quite rigid – the BIA clerk's office would refuse to accept the filing and instead would direct Respondent to make a later, even more untimely filing. Finally, if the attempted filing had been rejected in the manner described by Respondent, he logically would – and certainly should – have mentioned it in the extension motion that he filed three days later (or in a contemporaneous

supplement to that motion), but he did not. BX 7 at 34-35. Respondent's failure to advise the BIA of the purported November 26 incident suggests that the attempted filing never occurred. BX 7 at 29, BX 8 at 34.

21. We are not convinced that Respondent's account of the misfiling was false. Nonetheless, the narrative raises two concerns. First, it represents what appears to be a pattern of last-minute filings by Respondent – a practice that repeatedly placed his clients at risk. It is in our view unacceptable to wait until the last minute of the last day to file a motion for discretionary relief, especially when the client bears the entire risk of the relief not being granted. Second, in his post hearing submission Respondent seems to disclaim any responsibility for the purported lack of diligence by his unnamed courier, arguing that the "*Courier* did not realize until afterwards the significance of having had the motion time stamped that day." Resp. Br. 11 n. 3 (emphasis added). Although these observations do not change our conclusion that Bar Counsel has not sustained the charges relating to Mr. Beraki, they do influence our assessment of Respondent's conduct in the other matters before us.

22. In his motion to extend the filing deadline, Respondent also claimed that he had "been unable to have the brief completed in time for filing due to unavoidable circumstances" and that he "had a number of other briefs and pleadings due at about the same time and has simply not been able to meet the deadlines for all of them." BX 8 at 153 ¶¶ 2, 3. These rationales are as vague and unpersuasive to the Committee as they apparently were to the BIA. Yet we see nothing in the evidence to demonstrate that that they were knowingly false, nor does Bar Counsel base the Specification of Charges upon their falsity. BX 1. However, these representations also raise questions about Respondent's diligence, especially because

Respondent also sought dispensation from the BIA deadline due to a "planned overseas trip." BX 8 at 154.[4]

23. Respondent knew or should have known that, as stated in the BIA scheduling order, a late-filed extension request would be denied.[5] True to its word, the BIA denied the motion as untimely, BX 8 at 152, 156-57, but it gave Respondent an opportunity to late-file a brief along with a motion for reconsideration, accompanied by supporting documentation justifying the missed deadline. BX 8 at 156-57, 160.

24. Respondent never sought permission to late-file a brief. BX 3 at 10 ¶ 6. Throughout the disciplinary process Respondent repeatedly stated that he did not do so because he could not identify any viable issues for appeal, *i.e*. he was unable to "find a single appealable issue in his case and that therefore briefing the case was out of the question." BX 7 at 28; BX 3 at 9 ¶ 3. He "decided not to file a brief deliberately, because … there was nothing to write about." Tr. 1812. Respondent contends that he advised Mr. Beraki of his analysis, and that Mr. Beraki "had no problem" with his approach. BX 3 at 9 – 10, ¶¶ 3, 7 -8; BX 7 at 30. According to Respondent, he and Mr. Beraki agreed that, in lieu of the BIA appeal, Respondent would

---

[4] Respondent repeatedly used travel as an excuse for failing timely to file papers, to respond to clients, or to attend court proceedings. He used this same tactics in proceedings before the Hearing Committee ("I will be out of the country … [and] would ask the court to give me some additional time after that to respond …" [Tr. 13-14]; "I was out of the country when this arrived at my office. I subsequently returned to the country, but did not review all of my notices that rescheduled" [Tr. 106, 840, 1689]); with respect to his clients (Tr. 130-31, 373, 382, 481, 488-89, 495, 652, 755); with respect to Bar Counsel (BX 50 p 985) and with respect to tribunals. BX 39 p 876; BX 105 p. 2293-94 ("I was traveling. I just came back from out of the country"). This excuse is so pervasive as to bring Respondent's commitment to his clients and to the practice of law into question. Indeed, Respondent says that he started phasing out his immigration practice in 2007 to become more involved in Kenyan politics. Tr. 1160-61, 1276-79.

[5] "Extension requests must be received by the Board by the brief's original due date. Extension requests received after the due date will not be granted." *Board of Immigration Appeals Practice Manual*, Section 4.7(c)(ii)

pursue a separate proceeding (an I-130 relative petition for adjustment in status). Tr. 1806-07 (Respondent). As indicated previously (FF 11), Respondent's contention that his client understood and agreed with his approach is not contradicted by reliable, probative evidence.

f. Successor counsel files an appeal brief

25. In May 2005, Mr. Beraki retained a new lawyer to take over his BIA asylum appeal. Tr. 20, 21, 44 (Garfield). Successor counsel concluded that Mr. Beraki did, in fact, have legitimate appellate arguments and moved the BIA for permission to late-file a brief. BX 8 at 158-95; Tr. 20-22, 29, 57-58 (Garfield); Tr. 144 (Reynolds). The motion was premised on Respondent's ineffective assistance of counsel. BX 8 at 159-60; Tr. 28-29 (Garfield); Tr. 144-45 (Reynolds).

26. As a predicate for his BIA motion, Mr. Beraki and his new counsel were required to file an ethical complaint against Respondent. *Matter of Lozada*, 19 I & N Dec. 637 (BIA 1988). They did so on June 21, 2005, complaining only about the missed briefing deadline. BX 4; Tr. 23-24 (Garfield).

27. The BIA granted Mr. Beraki's motion, but then rejected his appeal on the merits. Tr. 61.

g. Bar Counsel's additional allegations

28. Respondent admits that he did not return any of the legal fees that Mr. Beraki paid to him. BX 3 at 11 ¶ 12. After the BIA denied Respondent's extension request, Respondent accepted additional payments of $100 for legal fees and $175 for reimbursement of an employment application fee. BX 4 at 18-19; Tr. 156-57. Bar Counsel contends that acceptance of an additional legal fee was improper because, at the time he took it, Respondent knew that the BIA had denied his request to late-file a brief. BX 7 at 29; BX 8 at 156-57; PFF 288. However,

Respondent's representation of Mr. Beraki included work on the I-130 proceeding as well as the BIA appeal. BX 4 at 17, 19, BX 7 at 28, 30-32, 38. Even after the BIA denied his motion, Respondent continued to work on the I-130 petition and also undertook "further analysis" of possible appeal issues. BX 3 at 10 ¶ 6, 11 ¶ 11. Mr. Beraki paid Respondent only $1600 of an agreed fee of $3000, plus $350 in disbursements. Under these circumstances, we find that Bar Counsel did not clearly and convincingly prove any impropriety in Respondent's acceptance of fees, and we have no basis upon which to conclude that they were excessive. We therefore reject Bar Counsel's claim that Respondent failed to return unearned fees to Mr. Beraki.

29. Bar Counsel's proposed findings also state that Respondent intentionally destroyed Mr. Beraki's original file in July 2005, after they were subject to subpoena in these proceedings. PFF 291. In 2005, however (in compliance with Bar Counsel's subpoena), Respondent produced a *copy* of his Beraki file. BX 7 at 30-145. More than three years later, on September 19, 2008, Bar Counsel subpoenaed Respondent's *original* file. BX 9 at 205-06. On September 30, 2008, Respondent replied that he was unable to locate the original file. BX 10; Tr. 1197, 1202-03. At the disciplinary hearing, Respondent speculated that the original file had been destroyed. Tr. 1275-76 (Respondent).

30. Despite knowing in September 2008 that Respondent's original file was missing, the Specification of Charges against him (dated December 9, 2008) does not include a spoliation charge, and Respondent was not on notice that he had to defend against one. Only after Respondent speculated at the hearing that the original file was destroyed did Bar Counsel make such an allegation, and Respondent did not have adequate opportunity to defend against it. Moreover, we do not believe that Bar Counsel clearly and convincingly proved that Respondent

intentionally destroyed the original file. Nevertheless, its disappearance is a further example of Respondent's sloppy practices.

31. For the foregoing reasons, we conclude that Bar Counsel has failed clearly and convincingly to prove that Respondent's representation of Mr. Beraki violated the Rules of Professional Conduct in any respect. Accordingly, we recommend that the charges against him in that regard be dismissed.

Bar Docket No. 231-06: Matter of Josephine Gitau

a. Bar Counsel's charges

32. Bar Counsel contends that Respondent violated the following Rules of Professional Conduct in connection with his representation of Josephine Gitau:

a. Rules 1.1(a) and 1.1(b) in that Respondent failed to provide competent representation to his client;

b. Rule 1.3(a) in that Respondent failed to represent his client zealously and diligently within the bounds of the law;

c. Rule 1.3(b)(1) in that Respondent intentionally failed to seek the lawful objectives of his client;

d. Rule 1.3(b)(2) in that Respondent intentionally prejudiced or damaged his client during the course of the professional relationship;

e. Rule 1.3(c) in that Respondent failed to act with reasonable promptness in representing his client;

f. Rule 1.4(a) in that Respondent failed to keep his client reasonably informed about the status of her matter and/or to promptly comply with reasonable requests for information;

g. Rule 1.4(b) in that Respondent failed to explain a matter to the extent reasonably necessary to permit his client to make informed decisions regarding the representation;

h. Rule 1.5(b) in that Respondent failed to provide his client with a writing setting forth the basis or rate of his fee;

i. Rule 1.7(b)(4) in that Respondent engaged in a conflict of interest because he continued to represent his client when his professional judgment on behalf of his client was or may have reasonably been affected by his own interests;

j. Rule 1.7(c) in that Respondent failed to disclose to his client the existence and nature of his possible conflict of interest and the possible adverse consequences of such representation;

k. Rule 8.1(a) in that Respondent knowingly made a false statement of material fact in connection with a disciplinary matter;

l. Rule 8.4(c) in that Respondent engaged in conduct involving dishonesty, fraud, deceit, and/or misrepresentation;

m. Rule 8.4(d) in that Respondent engaged in conduct that seriously interferes with the administration of justice.

b. The Gitau evidence

33. Bar Counsel's charges arise primarily out of: (a) Respondent's instruction to Ms. Gitau not to attend an immigration hearing; (b) his own failure to attend that hearing; and (c) his failure to take timely remedial actions after an immigration judge ordered Ms. Gitau deported *in absentia*.

34. The testimony of Ms. Gitau and Respondent concerning these matters is, in major respects, irreconcilable. Indeed, Respondent explicitly claims she is a liar. Tr. 1905, 1911-12; Resp. Br. p. 4-9. We must therefore determine whether to credit the testimony of Ms. Gitau or of Respondent in these matters.

35. Ms. Gitau's testimony was forthright, convincing and, even accounting for the passage of time since the relevant events, relatively precise. Her demeanor, though occasionally emotional and antagonistic toward Respondent, lent credibility to her narrative and was bolstered by contemporaneous documentary evidence. In contrast, Respondent's testimony, though at times equally emotional, was vague and sometimes contradictory; it was also occasionally undermined by documentary evidence. As a consequence, to the extent there is a conflict in their

accounts, we believe and accept Ms. Gitau's version of events, and do not credit Respondent's.

c. The Gitau engagement

36. Josephine Gitau, a citizen of Kenya, entered the United States on November 28, 1998 by means of a visitor (B-1) visa. Tr. 621-22. She remained in the United States after the visa expired on January 15, 1999, and was thus out of valid immigration status. Tr. 622.

37. In August 2001, Ms. Gitau married Kenneth Kurtz, a US citizen. Tr. 622-23; BX 16 at 242. Based on the marriage, Mr. Kurtz filed an alien relative petition (I-130) with INS (predecessor to USCIS) on behalf of Ms. Gitau. Tr. 630.

38. In August 2002, Mr. Kurtz signed a letter advising INS that his marriage to Ms. Gitau was a sham, and withdrawing the I-130 petition. Tr. 626-27, 629-30; BX 16 at 246-47. As a result, in September 2002, INS agents arrested Ms. Gitau and initiated removal proceedings. Bond was set at $20,000. Tr. 626; BX 16 at 250-53.[6]

39. Friends of Ms. Gitau recommended that she hire Respondent to represent her. Tr. 625-26. Respondent agreed to represent Ms. Gitau in her removal proceedings and to help her apply for permanent residence (green card) for a total fee of $5,000, with an initial payment of $1,000. Tr. 625, 638-39; BX 15 at 228 ¶ 1.

40. Respondent never provided Ms. Gitau with a writing setting forth the basis or rate of his fee. Tr. 639.

41. Ms. Gitau paid Respondent $1,000 on October 18, 2002. Respondent entered his appearance on behalf of Ms. Gitau on November 4, 2002, and attended Ms. Gitau's bond hearing

[6] According to Ms. Gitau, Mr. Kurtz did not write the letter; instead, she claimed his relative wrote it to "get [her] out of the country" because the Kurtz family "did not want any black person in their family" and feared that, in the event of Mr. Kurtz's death, Ms. Gitau would inherit property they wanted for themselves. Tr. 626-28.

in Kansas City, Missouri (Tr. 640; BX 15 at 228 ¶¶ 2, 4; BX 16 at 256; BX 22 at 374-75) at which the court reduced bond to $5,000. Tr. 640; BX 16 at 259, 263.

42. On November 4, 2002, Ms. Gitau paid Respondent the following:

a. $1,000 by personal check, to be applied to Respondent's legal fees (Tr. 640, 642-43; BX 16 at 261);

b. $3,000 by personal check, to be applied to the $5,000 bond (Tr. 640; BX 16 at 260).

Respondent cashed the checks. Tr. 642.

43. Friends raised the additional $2,000 needed to bond Ms. Gitau, and she was released from jail on November 14, 2002. Tr. 640-41, 643-47; BX 16 at 262-68. Respondent did not give Ms. Gitau a copy of the bond papers, although she requested them. Tr. 647.

44. In April 2003, Respondent filed a renewed I-130 petition with USCIS (the successor to INS) because Mr. Kurtz, her husband, again supported it. BX 16 at 269-73; Tr. 648-50, 772-73. Respondent did not provide copies of these documents to Ms. Gitau. Tr. 650.

45. Notwithstanding the new I-130 petition, however, Ms. Gitau remained in removal proceedings and was required to attend hearings scheduled by the Immigration Court in Kansas City. Tr. 651, 653.

46. On June 8, 2004, Mr. Kurtz died of pancreatic cancer. Tr. 623; BX 16 at 278. USCIS had not yet acted on the pending I-130 petition at the time of his death.

47. On September 9, 2004, Ms. Gitau attended a Master Calendar hearing in her removal case. Tr. 654-55; BX 16 at 277. Respondent appeared telephonically. The Immigration Court continued the case for seventeen months, to February 13, 2006, to allow time for USCIS to adjudicate the pending I-130 petition. Tr. 656; BX 22 at 372-73. At the hearing, government counsel advised Ms. Gitau that she needed to be fingerprinted three months before her next

hearing. Tr. 656-57. The court orally advised Respondent and Ms. Gitau of the February 13, 2006 adjourned date, and also mailed Respondent a notice of the new hearing date and time. Tr. 656-57; BX 22 at 372-73.

d. Respondent fails to provide USCIS with promised information

48. On December 16, 2004, Ms. Gitau and Respondent met with a USCIS officer to discuss the pending I-130 petition. Tr. 658-60; BX 16 at 280; BX 15 at 230 ¶ 10; BX 25 at 435.

49. The I-130, filed in Mr. Kurtz's name for his wife's benefit, had automatically been revoked upon his death, and would likely not be reinstated by USCIS. Tr. 858-59 (Tousley); BX 15 at 229 n. 4. Accordingly, the USCIS officer advised Ms. Gitau to take an alternative approach to achieve her objective, *i.e.*, file a "widow's petition" (I-360) in her own name (as opposed to Mr. Kurtz's name) to obtain an adjustment of her immigration status. Tr. 660-6l; Tr. 670-71. The widow's petition requires only that a petitioner (here, Ms. Gitau) be married to a United States citizen (here, Mr. Kurtz) for two years prior to death. Ms. Gitau met that criterion. Tr. 857-58.

50. Respondent disagreed with the USCIS officer's suggested strategy. He advised USCIS and Ms. Gitau that he would instead seek to reinstate the lapsed I-130 petition on "humanitarian grounds." To that end, USCIS requested supporting documentation within three weeks (Tr. 660-62), or by January 6, 2005. Although Ms. Gitau had a "feeling" that filing the I-360 widow's petition was the better course (as the USCIS officer suggested), she relied on Respondent's advice to attempt to reinstate the I-130. Tr. 671-72.

51. Respondent, however, neither met the three-week deadline nor sent draft papers to Ms. Gitau for her review within the promised time frame. Concerned that her submission to USCIS was overdue, she e-mailed Respondent on January 10, 2005, asking him about the status

of the papers and requesting that he "communicate and keep me informed." BX 16 at 281; Tr. 662-63. Respondent told Ms. Gitau to be patient and explained that he had a "prioritization scheme that that [*sic*] takes into account a number of factors" in determining which cases he works on. At the time, he said, he was "deal[ing] with cases that otherwise would result in the individuals affected being deported immediately." One of the factors in his prioritization hierarchy was "how imminent one's deportation is." Respondent assured Ms. Gitau that he had her case on his "To Do List" and would work on her matter "as promptly and as practical, given my prioritization scheme." BX 16 at 282.

52. Frustrated by Respondent's apparent indifference, Ms. Gitau called Respondent's secretary and asked for her file, but Respondent did not provide it to her. Tr. 665-66.

53. Ms. Gitau waited another month and again e-mailed Respondent on February 15, 2005, asking about the status of her matter and expressing her concern about Respondent's handling of it. BX 16 at 283. By this time, she was concerned that Respondent had abandoned her. Tr. 667-68. Respondent did not reply to her e-mail, and never submitted the promised documentation to USCIS. Tr. 662, 668.

54. Because Respondent failed to communicate with her or with USCIS, and fearing that Respondent had jeopardized her case, Ms. Gitau decided to prepare and submit papers to USCIS herself. Tr. 666-72; BX 33 at 816-17; BX 16 at 284-284A. Ms. Gitau mailed her documentation directly to USCIS on March 22, 2005, attempting to provide the information she believed necessary to reinstate the I-130 application. Tr. 670-71. The I-130, however, remained revoked as a matter of law. Tr. 859, 864 (Tousley).

e. Respondent and Ms. Gitau fail to attend a removal hearing

55. In May 2005, Respondent changed tactics and advised Ms. Gitau to pursue the I-360 (widow's petition). Tr. 672. Respondent's office prepared forms for Ms. Gitau's signature. She signed and returned them to Respondent on or about May 20, 2005, along with a check for the filing fees. Tr. 672-75; BX 16 at 285-88. However, Respondent did not file the I-360 petition until August 22, 2005, more than three months later. Tr. 675-76; BX 16 at 289. That filing delay caused significant harm to Ms. Gitau. *See* FF 83, *infra*.

56. Recalling the admonition at the September 9, 2004 hearing that she needed to be fingerprinted within three months of the February 13, 2006 removal hearing, Ms. Gitau drove to USCIS in Kansas City on December 27, 2005 to comply. Tr. 678. Her diligence demonstrates that (a) Ms. Gitau understood that her hearing was set for February 13, 2006 and (b) she took meaningful steps preparatory to attending it. She "had all intentions of attending court and was in fact preparing for the February 13th [hearing] as evidence by going for finger prints [*sic*]." BX 21 at 343. Indeed, Ms. Gitau had scrupulously attended the earlier hearings in her removal case, all of which were held in Kansas City. Tr. 653-56. There was no reason, therefore, to believe that she did not intend to appear at the February hearing as well.

57. When she arrived for fingerprinting at the USCIS office, however, USCIS personnel told her that her "case" had been closed. Tr. 678-79. (Evidently, USCIS was referring to the original I-130 matter, not the removal proceeding.) Thereafter, Ms. Gitau immediately phoned Respondent. Tr. 679, 681; BX 16 at 290-91; BX 15 at 231 ¶ 17. Respondent said that Ms. Gitau's removal case had been closed. Tr. 679-80, 682-83, 762. He told her that she would be scheduled for a hearing on her I-360 petition, but that she did not need to attend the February

13, 2006 hearing in the removal case. Tr. 680-84, 750, 762; BX 16 at 290. Respondent confirmed his instruction in a subsequent telephone call with Ms. Gitau. Tr. 680, 683-84.

58. Respondent denies making these statements to Ms. Gitau, and he claims she is lying in her account. Respondent states that Ms. Gitau telephoned him on February 8 and, during that call, he expressly advised her to attend the removal hearing. BX 25 at 397; BX 15 at 231. Ms. Gitau denies calling him on February 8. Tr. 739. We credit Ms. Gitau's testimony and reject Respondent's.

59. We conclude that Respondent neither talked to Ms. Gitau on February 8 nor told her to attend the hearing on February 13. Ms. Gitau's cell phone was her only means for making long distance telephone calls. She did not have long distance service on her land line. Her cell phone records, in evidence, reveal that she did not make any calls to Respondent on February 8, 2006. BX 21 at 344; Tr. 684-85, 810. She neither called Respondent from another phone, nor did she receive any telephone call from him reminding her of the scheduled February 13th hearing. Tr. 684; BX 21 at 344-45.

60. As instructed by Respondent, Ms. Gitau did not attend the February 13th hearing. Tr. 685-86.

61. There is no dispute that Respondent did not personally attend the February 13th hearing either. Because we believe Ms. Gitau's testimony that Respondent told *her* not to attend the hearing, we conclude that Respondent did not attend the hearing because he mistakenly believed, as he told her, that it had been canceled. Our conclusion is supported by a question asked by Respondent of Ms. Gitau on cross-examination: "Is it not the case … that you mistakenly believed your court case was closed, and *that's the reason <u>we</u> did not go to court*?" Tr. 750 (emphasis added).

62. However, rather than accept responsibility for this mistake, Respondent claims not only that he told his client to attend, but also that he had court permission to attend the hearing by telephone. He asserts that he waited in his office for a call from the Immigration Court that never came. BX 15 at 231. We do not credit this testimony either.

63. First, Respondent has produced no evidence corroborating his claim in this respect. Although telephonic attendance is allowed with the approval of the court, Tr. 873-75, there is no record of a motion, letter, order or transcript requesting or granting such permission.

64. Second, Bar Counsel has attempted to refute Respondent's assertion by offering the hearsay testimony of Kathryn Weber, a Chicago attorney commissioned by Ms. Gitau's successor attorneys, to listen to Immigration Court tapes relating to the hearing. Tr. 433-34 (Weber); BX 25 at 402. There are no transcripts of the February 13, 2006 hearing. Tr. 432, 869-70. Ms. Weber listened to the tapes of each of the hearings at which Respondent represented Ms. Gitau, and synopsized each hearing in an affidavit. Tr. 432-34; BX 25 at 401-02. The recordings confirmed that neither Respondent nor Ms. Gitau was present at the hearing and that the Judge did not telephone Respondent from the courtroom. BX 25 at 402. According to Ms. Weber, earlier hearing tapes reflect no request by Respondent to appear telephonically on February 13. Tr. 434; BX 25 at 402. (Despite the fact that Respondent did not object to the admission of the Weber affidavit, our concern as to the completeness of the hearing tapes affects the weight we are willing to give this hearsay. While it is by no means determinative, the Weber evidence does tend to show that Respondent neither sought nor received permission to attend the hearing by telephone).

65. Third, even if Respondent's testimony about his attempted telephonic attendance were truthful, his later conduct on February 13 would have been derelict. Respondent claims

that he passively awaited a telephone call from the Immigration Court that never came. He thereafter made no meaningful effort to inquire about the matter with the court, and he took no action other than to call a government attorney, who told him that an absentia deportation order had issued. Tr. 1973-75. After Respondent claims to have learned of that order, however, he made no meaningful attempt to undo it.[7] His utter failure to try to do so leads us to conclude that Respondent never tried to attend the hearing by phone.

66. On February 22, 2006, the Immigration Court notified Ms. Gitau by mail that it had ordered her removed *in absentia* because of her failure to attend the February 13th hearing. Tr. 688-89; BX 25 at 444-45. Ms. Gitau tried to contact Respondent "to ask him why he had told me not to go to court …." Tr. 689; BX 21 at 343, 349. When she was unable to reach him, Ms. Gitau called the government attorney who confirmed the entry of the *in absentia* order. Tr. 689.

f. Respondent fails to protect Ms. Gitau's interests

67. After trying unsuccessfully to contact Respondent for two days, Ms. Gitau finally spoke with him on February 24, 2006. He told her that he already knew about the removal order. Tr. 689-90; BX 21 at 349; BX 15 at 233 ¶ 33. Respondent advised Ms. Gitau that he could file a motion to reopen her matter, and she understood him to suggest that they could justify her absence by representing that she had been too ill to attend the hearing or that there had been a death in her family. Tr. 692; BX 15 at 232 ¶ 26. Respondent denies making that improper suggestion. Tr. 809. According to Ms. Gitau, Respondent said "he would file a motion to

[7] One would reasonably expect Respondent to do what his successor, Thomas Tousley, would have done: "repeatedly, frantically get ahold of the Immigration Board, and barring that, get ahold of an attorney [in Kansas City] to go to the Immigration Board and see what happened. And if there was an in absentia order, immediately file a motion to reopen…. I would immediately be reacting. Because I know the consequences." Tr. 974 (Tousley). Instead, Respondent appears to have done nothing.

reopen based on the issue that he never received a notice of the Hearing," which she said was false because Respondent had, in fact, received a copy of the notice Tr. 693.

68. Respondent did not advise Ms. Gitau that she might be able to seek relief from the *in absentia* order based on Respondent's ineffective assistance of counsel, nor did he advise her to consult with independent counsel regarding this issue. Tr. 876 (Tousley); BX 15 at 233 ¶ 29. Instead, Respondent continued to represent Ms. Gitau without regard to the conflict of interest that he had created. Tr. 872-78 (Tousley). Respondent acknowledges, as he must, that "had there been even a slight indication from Gitau that she did not appear for her hearing because of what Respondent did or did not do, … obviously respondent would have advised her to seek other counsel and let the case ride on truth and fact as it must." BX 15 at 233 ¶ 30. Respondent, however, failed to advise her of just that.

69. Instead, Respondent drafted an affidavit for Ms. Gitau's signature and e-mailed it to her. She tried to "edit some of the things that [she] didn't feel were right." Tr. 693. Respondent had erroneously entitled the draft as "Affidavit of Adama Saroung," which Ms. Gitau understood to be a legal term of art that was used for affidavits, similar to the phrase "*sua sponte"* that she had seen in another document. BX 17 at 310; Tr. 694, 719-20.

70. Respondent included the following statements in the draft affidavit:

> 5. … I went to USCIS Kansas City to have my fingerprints taken in connection with my case.
> ***
> 8. The officer told me that my case was closed. …
>
> 9. I then immediately called my attorney to find out what was going on. My attorney told me not to worry about it because there was another case pending.
>
> 10. *Mistakenly believing that it was my court case that was closed, I did not come to court on February 13, 2006.*
> ***

> 14. … *I did not come to court because I mistakenly believed that my case was closed . . . and also because when I called my attorney he said not to worry about it. I thought he meant that I did not have to come to court*."

BX 17 at 310-11 (emphases added).

71. Of course, if Respondent was truthful when he stated he specifically told Ms. Gitau on February 8, 2006 to attend the hearing, this draft affidavit is a deliberate fabrication. *See* FF 58, *supra*. Conversely, if the affidavit drafted by Respondent is true and accurate, Respondent must have lied to Bar Counsel and the Committee about the purported February 8 conversation.

72. When Ms. Gitau received the draft affidavit, she attempted unsuccessfully to call Respondent several times on March 1, 2006 to discuss it. She was unable, however, to leave a message because his voice mailbox was full, and she did not have his cell phone number. Tr. 698, 779; BX 21 at 349-50. Ms. Gitau followed up by e-mail on that same day, indicating that she had been trying to reach him by telephone and had questions about the content of the affidavit. BX 16 at 292.

73. Respondent replied to Ms. Gitau's e-mail on March 2, 2006, instructing her to "go on doing what you are doing" and to call him. BX 16 at 293. Ms. Gitau understood him to mean that she was to edit the draft, sign it before a notary, and send it "to the officers who required it." Tr. 700. She thus signed triplicate originals of her edited affidavit before a notary public on March 2, 2006. Tr. 706; BX 18 at 313-15. Ms. Gitau mailed one original to the government's attorney, sent another to USCIS, and kept the third. Tr. 700, 706. Ms. Gitau e-mailed Respondent on March 3, 2006, and advised him that she had been "trying to get hold of you to discuss some issues but your answering machine is always full. I went ahead and had the edited

affidavit notorized [*sic*] and sent a copy to [the government attorney and USCIS]. Is that what you meant by 'go on'?" BX 16 at 294.

74. On March 7, 2006, Ms. Gitau received a "bag and baggage" order from ICE requiring her to report on March 22, 2006 for deportation to Kenya. Tr. 714-16; BX 33 at 730, 764. Ms. Gitau did not understand why she had received the notice because Respondent had advised her that they had 180 days in which to file a motion to reopen the February 13 *in absentia* order. BX 33 at 764. She also understood that Respondent had already filed a motion to reopen, but he had not yet done so. Tr. 717-18.

75. On or about March 9, 2006, Respondent attempted to file a motion to reopen Ms. Gitau's removal order. The Immigration Court rejected the filing on March 13 because he failed properly to pay the filing fee. BX 26 at 439; BX 26 at 419; Tr. 878-80 (Tousley). Respondent received notice of the rejection. BX 26 at 439, 440; BX 33 at 637.

76. Ms. Gitau repeatedly tried to contact Respondent between March 15 and 20 to learn whether Respondent had obtained ICE's agreement to forestall her deportation, pending determination of the motion to reopen. BX 16 at 298-99; BX 21 at 351-52. On March 16, 2006, Ms. Gitau e-mailed Respondent with the subject line "PLEASE COMMUNICATE." She advised Respondent of her unsuccessful efforts to reach him and stated that "I really don't know what to do until [I] hear from you." BX 16 at 298. Later that day, Respondent replied via e-mail that he did not yet have a response from ICE on his request to cancel or postpone the reporting date. BX 16 at 298. Respondent did not tell Ms. Gitau that the Immigration Court had already rejected his insufficient filing. BX 16 at 298.

77. Ms. Gitau e-mailed Respondent again on March 17, 2006, asking about her imminent deportation: "Did you hear anything new today? [W]e are almost out of time. Do you

know if they received the application [to reopen]? Please call me as I'm very stressed by this issue." BX 16 at 299. Ms. Gitau e-mailed Respondent again on March 20, 2006, asking him:

> Please advice [*sic*] me on what to do as I have only one more day and have not heard anything. I've tried to call you several times without response. I'm worried about my safety and my son. Is it possible for you to call me on ******6276 as I'm at school though very stressed?

BX 16 at 300 (phone number redacted). Later that day, Respondent received notice that Ms. Gitau's bag and baggage order had "been canceled pending the Immigration Judge's decision on her Motion To Reopen." BX 16 at 302; BX 33 at 645 B.

78. Respondent did not re-file the motion to reopen until March 31, 2006. BX 22 at 376-77; BX 22 at 356-61.

79. Respondent based the motion to reopen on a contention that he did not receive a copy of the hearing notice for the February 13th hearing. BX 22 at 356 ¶ 3. This assertion was, at the very least, misleading, because Respondent actually knew the hearing date (after all, he claims he told Ms. Gitau to attend the hearing and he claims he tried to attend by phone) (BX 15 at 229 ¶ 9; BX 20 at 321)), and seems to be deliberately false (the Immigration Court mailed a copy of the notice of hearing to Respondent and it was not returned as undeliverable). BX 22 at 372-73; BX 26 at 549.[8]

80. Respondent also based the motion on a claim that Ms. Gitau mistakenly believed that the February 13 hearing had been canceled. Once again, this representation conflicts with his claim that he explicitly told her on February 8 that she had to attend it. BX 15 at 231 ¶ 19; BX 20 at 322; FF 71, *supra*.

[8] Respondent continued to walk this fine, misleading line in his answer to the Specification of Charges: "The fact is, Respondent did not receive notice for the hearing but the matter was on his calendar…" BX 15 p 236 ¶ 47.

81. Tellingly, Respondent's motion failed to mention his purported attempt to attend the hearing by phone. Under the circumstances, that omission is further compelling evidence that Respondent never tried to attend the hearing by telephone because he thought it had been canceled.

82. Respondent attached Ms. Gitau's affidavit to his motion, but appears to have substituted a first page that differs from the one reviewed by Ms. Gitau. *Compare* BX 22 at 362 (affidavit page filed by Respondent) *with* BX 22 at 368 (actual page Ms. Gitau mailed directly to the Immigration Court); Tr. 694-97, 700-02. Bar Counsel makes much of the discrepancy, but the difference is immaterial, and we can not conclude that the change was intentional as opposed to inadvertent – especially since Respondent and Ms. Gitau exchanged affidavit drafts by e-mail transmission.

83. On March 31, 2006, a month and a half after the February hearing, USCIS approved Ms. Gitau's I-360 widow's petition. BX 33 at 653.[9] Under normal circumstances, this would have enabled Ms. Gitau to avoid deportation. However, the prior issuance of the *in absentia* order on February 13, 2006 negated the I-360 approval, because anyone subject to an *in absentia* order is barred from applying for adjustment of status for ten years from the date of the order. This stricture cannot be waived. Tr. 866, 868, 967 (Tousley).

84. On April 14, 2006, Respondent supplemented the motion to reopen the removal proceeding by providing the Immigration Judge with a copy of the I-360 approval. BX 33 at 655, 614-614A. On May 23, 2006, the Court denied the motion to reopen because both Respondent and Ms. Gitau had had notice of the removal hearing. BX 21 at 341-42; BX 26 at

[9] Respondent delayed more than three months before filing the widow's petition. *See* FF 55, *supra*. That delay is unexplained and unjustified. Had Respondent expeditiously filed it, the I-360 could well have been approved prior to the February 13 hearing, which would have averted the deportation order entirely. *See* Tr. 906-07.

445. The judge rejected as unpersuasive the "self serving" statements of Ms. Gitau and Respondent regarding notice. BX 21 at 342.

g. Successor counsel successfully represents Ms. Gitau

85. In June 2006, Ms. Gitau engaged successor counsel, Tr. 726-27, who timely appealed to the BIA on her behalf. BX 19 at 316. The appeal contended that Respondent had rendered ineffective assistance of counsel by (1) advising her that she did not need to attend the February 13, 2006, hearing; (2) failing to attend the hearing himself; and (3) failing to explain in the motion to reopen why he did not attend the hearing. Tr. 886 (Tousley); BX 19 at 316-19. Pursuant to BIA's *Lozada* procedures, Ms. Gitau filed a contemporaneous complaint with Bar Counsel.

86. On December 28, 2006, the BIA dismissed the appeal, concluding that she had failed to establish exceptional circumstances for her failure to appear at the February hearing. Tr. 892-93; BX 23 at 378. As a consequence, Ms. Gitau was subject to immediate deportation. Tr. 894 (Tousley).

87. Ms. Gitau thereafter filed a second motion to reopen and a motion to reconsider. BX 25 at 392-400. After the BIA denied both motions, she appealed to the US Court of Appeals for the Eighth Circuit. BX 30 at 508, 573-78; Tr. 896-97 (Tousley). In a 2-1 decision, that court denied Ms. Gitau's appeal on March 28, 2008. The majority concluded that Ms. Gitau failed to demonstrate that the BIA abused its discretion when it denied her motions to reopen. *Gitau v. Mukasey*, 520 F.3d 906 (8th Cir. 2008); BX 30 at 573-78; Tr. 896-99.

88. The dissent identified the following inconsistencies and contradictions, *inter alia*, in Respondent's versions of events:

a. Respondent initially explained that Ms. Gitau failed to attend her hearing because she misunderstood Respondent when he told her the case was closed (*see* BX 22 at 356) and then, in his answer to the ethical complaint, claimed that Ms. Gitau did not attend the hearing because she seemed to be concerned that she did not want to make the three hour trip to Kansas City (*see* BX 15 at 228). BX 30 at 576; 520 F.3d at 909-12.

b. Respondent, in his motion to rescind, claimed that Ms. Gitau misunderstood him when he told her that her case was closed and "she thought … he meant that she did not have to come to court" (BX 22 at 358). Conversely, in his answer to the ethical complaint, Respondent claimed that he spoke with Ms. Gitau on February 8, 2006 and specifically advised her to attend the hearing (BX 15 at 231 ¶ 19). BX 30 at 576; 520 F.3d at 909-10.

c. Respondent's own conduct was inconsistent with his version of events because he signed a motion to rescind (with its attendant certifications under Fed. R. Civ. P. 11(b)(3) that the factual contentions had evidentiary support) and claimed that Ms. Gitau did not attend the hearing because of a "mistaken belief" (BX 22 at 356-59). This pleading directly contradicts Respondent's representations to Bar Counsel and the BIA that he specifically advised Ms. Gitau on February 8 that she must attend the February 13 hearing (BX 15 at 231 ¶ 19). BX 30 at 576; 520 F.3d at 910.

d. Respondent failed to attend the February 13, 2006, hearing himself and his explanation is suspect, as evidenced by the sworn affidavit of Ms. Weber (BX 25 at 402). BX 30 at 577-78; 520 F.3d at 910-11.

e. Respondent provided incompetent representation to Ms. Gitau when he failed to comply with proper procedures for filing Ms. Gitau's initial motion to rescind and because he drafted incorrectly an affidavit for Ms. Gitau but identified the affiant as "Adama Sourang" (BX 17 at 310; BX 22 at 362). BX 30 at 577; 520 F.3d at 911.

f. Ms. Gitau made only one inconsistent statement, for which there was a "plausible explanation." BX 30 at 577; 520 F.3d at 911-12. In the affidavit Respondent drafted for her signature, he wrote that she failed to attend the hearing because she "misunderstood" Respondent. In the affidavit she prepared after retaining successor counsel, Ms. Gitau stated that Respondent expressly told her not to attend the hearing. The single inconsistency results from Respondent's choice of words in the affidavit he drafted, which artfully includes a self-serving statement that hides Respondent's actions in advising Ms. Gitau incorrectly not to attend her hearing. BX 30 at 577; 520 F.3d at 911-12.

Based on the evidence admitted in the hearing in this case, the Hearing Committee agrees with the dissent's analysis.

89. After the hearing in this disciplinary matter, the BIA granted the joint motion of Ms. Gitau and the government to reopen her removal case, and remanded it to the Immigration Court. On April 14, 2010, the Immigration Court granted Ms. Gitau's Motion to Terminate Removal Proceedings, without opposition from the government.[10]

[10] On consent of the parties, the post-hearing orders have been added to the record. Ms. Gitau is no longer subject to an order of removal. She may now apply for adjustment of status before USCIS, based on her approved I-360 widow's petition.

90. In his testimony at the disciplinary hearing, Respondent adopted as true and correct all of the statements that he made in his answer to the ethical complaint (BX 26), and his answer to the Specification of Charges (BX 15). Tr. at 1211-15.

91. As set forth below, Respondent made numerous false statements in his July 26, 2006 answer to the ethical complaint, which he also filed with the BIA in defense of the allegations that he had rendered ineffective assistance of counsel to Ms. Gitau. BX 23 at 378. Respondent also repeated some of the false statements in his answer to the Specification of Charges (BX 15).

a. Respondent falsely stated that he received a telephone call from Ms. Gitau on February 8, 2006, in which he advised her that she must attend her hearing on February 13. BX 15 at 231 ¶ 19; BX 20 at 322. No such call occurred. BX 21 at 344-53; Tr. 689-90. Ms. Gitau testified credibly that Respondent advised her not to attend her February 13, 2006 hearing, and we reject Respondent's contentions to the contrary for the reasons set forth in FF 59, *supra*.

b. Respondent falsely stated that Ms. Gitau advised him (when she allegedly called Respondent on February 8) that she did not want to drive the three hours from her home to attend the hearing in Kansas City. BX 15 at 231 ¶ 19; BX 20 at 322. No such call occurred, and Ms. Gitau testified credibly at the hearing that she had no problem traveling to Kansas City and never told Respondent that she did. Tr. 653-56; 687-89; 739-40.

c. Respondent falsely stated that he "confirmed the hearing date for [Ms. Gitau] just a few days before the hearing." In fact, that conversation never took place. Tr. 684-85, BX 20 at 324; BX 21 at 344-53.

d. Respondent falsely stated that he waited in his office on February 13, 2006, for the Immigration Court to call him for a telephonic hearing. BX 15 at 231 ¶ 21; BX 20 at 322.

e. Contrary to Respondent's claims, there is no evidence that Respondent attempted to contact Ms. Gitau soon after learning that she had not appeared in court. BX 15 at 232 ¶ 24; BX 20 at 322. To the contrary, Ms. Gitau's testimony and phone records demonstrate that he did not contact her at all, but instead first discussed the *in absentia* order when Ms. Gitau contacted him on February 24, 2006.

92. Respondent urges us to defer to the Eighth Circuit's majority opinion in this matter. Resp. Br. at p. 4. We decline to do so for three reasons. First, it is based on a deferential standard of review of the BIA decision (which in turn is based on a deferential standard of review of the Immigration Court order).

93. Second, the Immigration Court's decision was rendered in the context of a motion to reopen, the standard for which was itself quite restrictive. In any event, that court had no opportunity to make credibility findings on a fully developed factual record, and collateral estoppel should not apply. *See generally Patton v. Klein*, 746 A.2d 866, 870-71 (D.C. 1999); *Elwell vs. Elwell*, 947 A.2d 1136, 1140 (D.C. 2008); *see also In re Temple*, 629 A.2d 1203 (D.C. 1993).

94. Finally, the record before the Immigration Court was prepared and submitted on behalf of Ms. Gitau by Respondent, who at the time had a conflict of interest. Respondent's own misconduct can not collaterally estop Ms. Gitau or constrain the Hearing Committee.

95. Respondent accepts no responsibility for his actions in Ms. Gitau's case, and has demonstrated no remorse. He claims she "continuously lied" about her case. Tr. 1911. We disagree with his characterization of her credibility.

Bar Docket No. 106-08: Matter of Cane Mwihava

a. Bar Counsel's charges

96. Bar Counsel contends that Respondent violated the following provisions of the Rules of Professional Conduct in his representation of Mr. Cane Mwihava:

a. Rule 1.1(a), in that Respondent failed to provide competent representation to his client;

b. Rule 1.1(b), in that Respondent failed to serve a client with the skill and care commensurate with that generally afforded to clients by other lawyers in similar matters;

c. Rule 1.3(a), in that Respondent failed to represent his client zealously and diligently;

d. Rule 1.3(b)(1), in that Respondent intentionally failed to seek the lawful objectives of his client;

e. Rule 1.3(b)(2), in that Respondent intentionally prejudiced or damaged his client in the course of the professional relationship;

f. Rule 1.3(c), in that Respondent failed to act with reasonable promptness in representing his client;

g. Rule 1.4(a), in that Respondent failed to keep his client reasonably informed about the status of his matter;

h. Rule 1.4(b), in that Respondent failed to explain a matter to the extent necessary to permit his client to make informed decisions regarding the representation;

i. Rule 1.7(b)(4), in that Respondent represented a client with respect to a matter in which his professional judgment on behalf of the client would be or reasonably might be adversely affected by the lawyer's own personal interest;

j. Rule 1.15(a), in that Respondent failed to keep separate from his own property the funds his client paid in advance for unincurred costs;

k. Rule 1.15(b), in that Respondent failed to deliver to his client the advance funds he had received for unincurred costs or to render a full accounting regarding those funds;

l. Rule 1.15(d), in that Respondent failed to safe keep funds that his client had advanced for costs that were not incurred;

m. Rule 1.16(d), in that Respondent failed to return unearned fees and advanced payments for costs that were not incurred and to surrender papers and property after his client terminated the representation;

n. Rule 8.1(a), in that Respondent knowingly made a false statement of fact in connection with a disciplinary matter;

o. Rule 8.4(c), in that Respondent engaged in conduct involving dishonesty, fraud, deceit, and/or misrepresentation; and

p. Rule 8.4(d), in that Respondent engaged in conduct that seriously interfered with the administration of justice.

b. The Mwihava engagement

97. In November 2001, Mr. Cane Mwihava, a Tanzanian national, arrived in the United States with a valid visitor visa. BX 47 at 943; BX 40 at 880; Tr. 443 (Mwihava). In October 2002, Mr. Mwihava changed his status to a student visa, which required him to attend Strayer University. Tr. 444-45 (Mwihava); BX 47 at 943-44, 959. Mr. Mwihava ceased attending school in or about February 2004, and from that time was no longer in valid immigration status. Tr. 468 (Mwihava); BX 51 at 1111.

98. On December 7, 2004, Mr. Mwihava married Tiffany Posey, a United States citizen. Tr. 445 (Mwihava); BX 51 at 1030; BX 40 at 880. Although Respondent disputes the marriage's *bona fides*, Mr. Mwihava and Ms. Posey have remained together since the time of their wedding and have never sought a divorce. Tr. 446-48 (Mwihava).

99. In 2005, Mr. Mwihava contacted Respondent to seek a "family based" adjustment of status, initiated by his citizen-wife filing a Form I-130 petition with USCIS. Tr. 448

(Mwihava); Tr. 317-19 (Kum). Once USCIS approved the I-130, Mr. Mwihava would be eligible to seek adjustment of status. Tr. 319-20 (Kum).

100. Respondent agreed to represent Mr. Mwihava for a total fee of $2,000, payable in $500 installments, as set forth in Respondent's written retainer agreement. Tr. 449-50 (Mwihava); BX 46 at 900. The retainer agreement provided that Respondent would "provide legal services in connection with filing Client's adjustment application." BX 46 at 900. Mr. Mwihava paid Respondent the first installment of $500 by check on the day he retained Respondent. Tr. 450 (Mwihava). The retainer agreement also required Mr. Mwihava to pay "all government filing fees" and, accordingly, Mr. Mwihava provided Respondent with two money orders, totaling $740, for "INS Processing Fee." Tr. 450-51, 454-55 (Mwihava); BX 46 at 900; BX 53A.

101. Mr. Mwihava made payments to Respondent totaling $3,310 for legal fees over the course of the representation. Tr. 455-58 (Mwihava); BX 53. Mr. Mwihava also made one additional payment of $500 in cash (for which Respondent did not provide a receipt). Tr. 458-59 (Mwihava).

c. Respondent fails to file an I-130 Petition

102. At the outset of the representation, at Respondent's request, Mr. Mwihava provided various documents to support the I-130 petition. Tr. 460-61, 520-22, 553-54 (Mwihava).

103. In late June 2005, Respondent completed a Form I-130 (Petition for Alien Relative) and a Form G-28 (entry of appearance) which Ms. Posey had to sign. BX 46 at 901-92; BX 50; Tr. 361-62 (Kum); Tr. 458-59, 461-64 (Mwihava). Respondent gave the documents to Mr. Mwihava. Ms. Posey signed them, and Mr. Mwihava returned the signed documents in a

timely fashion to Respondent's secretary. Tr. 462-64; 517 (Mwihava). Respondent did not file the signed forms with USCIS and did not enter his appearance. Tr. 361-64 (Kum).

104. Thereafter, Mr. Mwihava tried unsuccessfully to reach Respondent on multiple occasions and was advised that Respondent was out of town. Tr. 463-64 (Mwihava). Eventually he met with Respondent in his Washington, D.C. office. Respondent provided Mr. Mwihava with another copy of the completed I-130 form, and directed him again to return the form after Ms. Posey signed the document. Tr. 463-65 (Mwihava). Soon thereafter, Mr. Mwihava returned the second signed document directly to Respondent. Tr. 463-66 (Mwihava).

105. After Mr. Mwihava provided the second signed I-130 form, he made numerous inquiries of Respondent regarding the status of the matter, during which Respondent falsely advised him that he had filed the I-130 and that Mr. Mwihava just had to be patient and wait. Tr. 465-66 (Mwihava).

106. Mr. Mwihava learned that Respondent had relocated his office to Potomac, Maryland. Respondent met with Mr. Mwihava there and, for a third time, gave him the same form for Ms. Posey to sign. Tr. 464-66, 519 (Mwihava). Mr. Mwihava returned the signed form to Respondent at his Potomac office at a later date. Tr. 466-67 (Mwihava).

107. Respondent admits that he never filed the I-130. BX 39 at 875 ¶ 7. Despite that fact, when his client asked him whether he had filed the I-130, Respondent answered in the affirmative, which was a lie. Tr. 504; 614-16; cf. BX 40 at 888 ("Your case was filed, and remains pending, so … I have done exactly in your case what you have retained me to do.").

108. Respondent also admits that, despite having failed to file the I-130 for which Mr. Mwihava paid legal fees and advanced costs, Respondent did not refund any money to Mr. Mwihava. BX 39 at 877 ¶ 16; BX 53; BX 53A.

109. In his written responses to the ethical complaint and Specification of Charges, as well as in his testimony at the disciplinary hearing and his post-hearing submission, Respondent explains that he suspected that Mr. Mwihava and Ms. Posey had a "sham" marriage and that he did not want to "vouch" for it by filing an I-130, "consistent with his policy in such cases." BX 39 at 875 ¶¶ 6-7, 17; Resp. Br. at p. 13. He says that he told Mr. Mwihava that he would not file the I-130, and that Mr. Mwihava should retain another attorney. Tr. 1906. He suggests that Ms. Posey, Mr. Mwihava's wife, could not be found when Respondent asked to meet with her. Tr. 366.

110. There are, however, no contemporaneous records to support Respondent's contentions in this respect, and there is much to contradict them. Respondent requested and received the I-130 filing fees, as contemplated by his retainer agreement which specifically noted that the filing would occur. BX 46 at 900, 912. If Respondent believed that Mr. Mwihava's marriage was not valid, he had an obligation not to file the application and to withdraw from the matter, but he never did so. Tr. 389-90, 400-01, 407 (Kum); Tr. 1957. His contemporaneous letter to ICE stated that he would adjust the status based on marriage. BX 47 at 961. He did not return the documents Mr. Mwihava provided to him to support the I-130 petition, and he did not send Mr. Mwihava any withdrawal letter.

111. Mr. Mwihava denies that his marriage was a sham (Tr. 445-49), and his account is corroborated by successor counsel who did file the I-130: "when I asked for Mr. Mwihava to come with his spouse, he showed up in my . . . office. They showed up every time that I asked them to show up. . . . They provided me documents that they are married." Tr. 366. Finally, the record shows that the I-130 filed by successor counsel was approved. Tr. 355.

112. We therefore conclude that it was Respondent's justification for failing to file the I-130 on behalf of Ms. Posey and Mr. Mwihava that was a sham and that his written responses to the complaint, his answer to the Specification of Charges, his testimony before the Hearing Committee and his post-hearing submissions were deliberately false.

d. Respondent fails to attend a removal hearing

113. On October 18, 2006, ICE arrested Mr. Mwihava because his student visa had lapsed. Tr. 468-72; BX 46 at 903-11. ICE issued Mr. Mwihava a "Notice to Appear," thus placing him in removal proceedings. BX 46 at 903-05; Tr. 472-73 (Mwihava); Tr. 323-26 (Kum). Mr. Mwihava was released pending a hearing. Tr. 325-27; BX 46 at 910. Although Respondent had previously told Mr. Mwihava that he had filed the I-130 application, he had in fact not done so. Tr. 317, 321 (Kum); Tr 483 (Mwihava); BX 39 at 875 ¶ 7; Tr. 1954-59 (Respondent).

114. After his arrest, Mr. Mwihava contacted Respondent, explained what had happened, and gave him all of the papers that he had received from ICE. Tr. 477-78; BX 46 at 903-12 (Mwihava); Tr. 327 (Kum). Respondent assured Mr. Mwihava that he was going "to take care of the removal proceedings," and advised Mr. Mwihava that "we've first got to take care of that and then file the I-130 again." Tr. 484 (Mwihava).

115. Mr. Mwihava signed an additional retainer agreement with Respondent. Tr. 477, 481-82, 554-55 (Mwihava); BX 46 at 912. The new agreement required Mr. Mwihava to pay a total of $5,000 for Respondent to represent him "in removal proceedings, including filing and appearing with Client at her [*sic*] Relative Petition (I-130) interview." Tr. 479 (Mwihava); BX 46 at 912. At the time he signed the new agreement, Mr. Mwihava paid Respondent an

additional $700 by check. He made additional installment payments thereafter. Tr. 480 (Mwihava); BX 53.

116. Respondent claims that he did not represent Mr. Mwihava in connection with the I-130 petition and that the inclusion of the I-130 clause in the retainer agreement was a "scrivener's error." Tr. 1956. We find that that contention is not credible. Respondent drafted the supplemental agreement and it incorporated the previous I-130 engagement, for which Mr. Mwihava had already paid Respondent. Tr. 1956-58 (Respondent); BX 46 at 900, 912. If Respondent believed that he did not represent Mr. Mwihava in the I-130 matter, he had an obligation to tell him so, to refund the unearned fees and to withdraw from the matter. Yet Respondent did none of those things. Tr. 1958-59 (Respondent).

117. On February 5, 2007, Respondent entered his appearance in the removal proceeding on behalf of Mr. Mwihava. As a result, notices issued in the case would go directly to Respondent, not Mr. Mwihava. BX 51 at 1105; Tr. 330-31 (Kum); Tr. 485-86 (Mwihava).

118. Respondent appeared with Mr. Mwihava at his hearing on February 5, 2007, and the matter was continued to April 23, 2007. Respondent received written notice of the time and date of the next hearing. BX 51 at 1087-8, 1094-95; Tr. 332-33 (Kum).

119. Several days before the April 23, 2007 hearing, Mr. Mwihava contacted Respondent to discuss it. Respondent told Mr. Mwihava for the first time that he would be out of the country on the scheduled date, but that he had filed a request for a continuance. Tr. 487-89 (Mwihava).

120. Respondent told Mr. Mwihava that he had to attend the April 23 hearing, but he failed to prepare him for it. Respondent said it was "not a major big hearing," and that he should not answer any questions but should tell the judge that his attorney was seeking another

continuance. Respondent told Mr. Mwihava that he would be given another date for the hearing. Tr. at 487-490 (Mwihava). Respondent also advised Mr. Mwihava that his assistant would be in court with Mr. Mwihava on April 23. Tr. 487-88 (Mwihava).

121. On Friday, April 20, 2007, Respondent sent a last-minute cover letter and motion for continuance addressed to Judge Lisa Dornell at the Immigration Court requesting a continuance. BX 47 at 926; BX 39 at 876 ¶ 11. In his motion, Respondent falsely stated that he "only discover[ed] in the last few days [*sic*] conflict that arose subsequent to counsel's last court appearance" (which was on February 5, 2007). BX 47 at 927 ¶ 2. Respondent admitted in the same pleading, however, he had scheduled the conflicting business meetings much earlier, in mid-March. BX 47 at 926, 927-28 ¶ 3.

122. Local Immigration Court rules at the time required that, absent exigent circumstances, motions for continuance be filed at least 10 days prior to the scheduled hearing. Tr. 344-45, 372, 383 (Kum). In this case, Respondent knew of his conflict more than five weeks before the hearing, but he failed to file a motion until the Friday preceding the scheduled Monday hearing. Tr. 382 (Kum); BX 47 at 926.

123. Whether or not to continue a hearing is a decision made at the court's discretion. Tr. 374-75, 383 (Kum). Respondent therefore failed to take timely and necessary steps to protect his client from having to attend a hearing without counsel, and he was obligated to attend the hearing unless excused in advance by the court. Tr. 344-45, 382-85 (Kum). In addition, Respondent made no effort to determine whether his last-minute motion was granted; he could have called the court to inquire, but he did not. Tr. 344. He could have gotten another attorney to cover the hearing for him, as he told his client he would (Tr. 489), but he did not. Tr. 344, 409. Indeed, he could have canceled his personal trip and attended the hearing with his client,

but he did not. Instead, Respondent failed to attend the hearing and left his client to fend for himself.

124. As instructed by Respondent, Mr. Mwihava attended the hearing on Monday, April 23, 2007. Respondent was not present, nor was anyone else on his behalf. Tr. 343-44, 371 (Kum); Tr. 489 (Mwihava); BX 39 at 876 ¶ 10; BX 47 at 941 (transcript of hearing). When Judge Barrett (who was substituting for Judge Dornell) called the case, Mr. Mwihava advised him that his attorney would not be present and had requested a continuance. Tr. 488-89 (Mwihava). The judge stated that no motion for a continuance had been filed. BX 47 at 947. After concluding that the court had not "been given anything bon[a] fide to show why your counsel is not here," Judge Barrett indicated that "as far as [he was] concerned, [Mr. Mwihava does not] have an attorney." BX 47 at 946.

125. Judge Barrett proceeded to interrogate Mr. Mwihava on the merits of his removal proceeding. Tr. 346-47 (Kum); BX 47 at 941-47 (transcript). Mr. Mwihava stated his understanding that Respondent had already filed an I-130 petition on his behalf. Tr. 491-92, 495 (Mwihava); BX 47 at 941-47. The judge noted that no such petition had been filed, and ordered Mr. Mwihava removed from the United States. Tr. 343 (Kum); Tr. 492-93 (Mwihava); BX 46 at 914; BX 51 at 1079-81; BX 51 at 1096-1102C. The judge noted that Mr. Mwihava's "counsel has not been excused from attending the hearing." BX 46 at 914; BX 47 at 933; BX 51 at 1068; Tr. 344 (Kum). The judge also suggested that Mr. Mwihava may have a basis for an ineffective assistance of counsel claim. BX 47 at 946.

126. Respondent takes no responsibility for this unfortunate result. Rather than acknowledge any fault, Respondent blames the idiosyncrasies of a "wacko" judge and a client (and successor lawyer) who "panicked." Resp. Br. p. 13.[11]

e. Respondent fails to file a BIA appeal brief

127. Mr. Mwihava thereafter spoke to Respondent about the results of the hearing. Tr. 495-96 (Mwihava). Respondent, however, did not advise Mr. Mwihava that he might be able to seek relief from the removal order by alleging ineffective assistance of counsel and did not suggest that Mr. Mwihava consult with another attorney. Respondent had a conflict of interest because the predicate for such a motion was a *Lozada* complaint against Respondent. BX 39 at 877 ¶ 14.

128. Respondent advised Mr. Mwihava that he would file an appeal with the BIA on the ground that the Immigration Court erred in not granting the continuance. Respondent entered his appearance and filed a notice of appeal on May 9, 2007. BX 47 at 949-53; BX 55 at 1205-07; BX 51 at 1074-78; Tr. 347-50 (Kum); Tr. 495-98 (Mwihava). BIA notices in the case, including scheduling orders, were thereafter sent only to counsel of record. Tr. 350 (Kum). Mr. Mwihava gave Respondent a check for the appeal filing fee on May 9, 2007. BX 53 at 1119.

129. In the Notice of Appeal, Respondent stated that he intended to file a written brief and described the general basis for the appeal. BX 47 at 950; BX 55 at 1206.

---

[11] Judge Barrett, of the Immigration Court in Baltimore, was a notoriously tough judge – a "quirky [judge who] was one of those sticklers" (Tr. 423) that rarely gave aliens or their attorneys a break. Tr. 1343-45, 1347, 1369-70, 1384, 1990-91. It may be that Respondent and his client were disadvantaged by the substitution of Judge Barrett, "the toughest judge in Baltimore," for Judge Dornell on the day of the Mwihava hearing. Tr. 391. However, the fact that other judges may have been more receptive to Respondent's last minute filing does not excuse Respondent's tardiness, does not excuse his absence, and does not excuse his failure to take immediate and effective remedial steps thereafter.

130. On October 18, 2007, the BIA issued a briefing schedule, directing Respondent to file a brief in support of Mr. Mwihava's appeal by November 8, 2007. BX 47 at 931-32; Tr. 350-51 (Kum); Tr. 1206-08 (Respondent). Respondent received the notice, which contained the standard warning:

> **WARNING:** If you indicated on the Notice of Appeal (Form EOIR-26) that you will file a brief or statement, you are expected to file a brief or statement in support of your appeal. If you fail to file the brief or statement within the time set for filing in this briefing schedule, the Board may summarily dismiss your appeal. *See* 8 C.F.R. § 1003.1(d)(2)(i)(E).

BX 47 at 931; BX 55 at 1180 (emphasis in original).

131. Respondent did not file a brief by November 8, 2007, nor did he seek an extension of time in which to do so. BX 50 at 984; Tr. 351 (Kum). He also failed to advise Mr. Mwihava that the brief was past due. Tr. 515 (Mwihava); BX 44.

132. On or about January 29, 2008, Mr. Mwihava hired successor counsel who immediately contacted Respondent, asked for a copy of Mr. Mwihava's files, and stated that he expected Respondent to file a motion to withdraw as counsel as soon as possible. BX 40 at 882-85; Tr. 314, 352 (Kum). Respondent received the letter, but did not provide the files to successor counsel or move to withdraw. Tr. 313-14 (Kum); BX 40 at 883.

133. Mr. Mwihava again wrote to Respondent on February 2, 2008 and sent an e-mail on February 18, 2009, directing Respondent to send his files to successor counsel. Tr. 322-23 (Kum); Tr. 501-02 (Mwihava); BX 40 at 881; BX 40 at 888-89. Mr. Mwihava also requested, by certified mail, a refund of the legal fees he had paid to Respondent unless Respondent provided evidence of having completed the work for which he was paid. Tr. 323 (Kum); BX 40 at 881; BX 47 at 924. Mr. Mwihava further asked Respondent to refund the application fees that Mr. Mwihava had paid to Respondent (which would have included the $740 Mr. Mwihava paid

Respondent in 2005 to file the I-130 petition). BX 47 at 924; BX 53A. Respondent received Mr. Mwihava's correspondence but did not refund any money to him, even though Respondent admits that he never filed an I-130 petition on behalf of Mr. Mwihava. Tr. 509 (Mwihava); Tr. 1906-07 (Respondent); BX 39 at 874 ¶¶ 1 and 16. Respondent also failed to respond to the request that he provide his client files (which included Mr. Mwihava's original wedding photographs) to successor counsel. Tr. 446-47, 509-10, 554 (Mwihava); Tr. 322 (Kum); BX 44; BX 49; BX 58.

134. In March 2008, Mr. Mwihava filed a complaint against Respondent with Bar Counsel. BX 40. On March 6, 2008, Bar Counsel requested that Respondent provide a written response to the allegations by March 20, 2008. BX 41. Respondent requested two extensions of time in which to respond, which Bar Counsel granted, until April 6, 2008. BX 42.

135. In his response to Bar Counsel dated April 7, 2008, Respondent falsely stated that he did not represent Mr. Mwihava in connection with his filing of an I-130 petition even though Respondent, in both of the retainer agreements he entered with Mr. Mwihava, states that he represented his client in the I-130 matter. BX 43 at 893; BX 46 at 900, 912. In a later written response dated May 1, 2008, Respondent admitted, in contrast to his original response to Bar Counsel, that Mr. Mwihava retained him in connection with his adjustment of status and that Respondent had prepared the forms for Mr. Mwihava's wife to sign and return. BX 50 at 984. Respondent falsely stated, however, that he did not receive the forms back and that Mr. Mwihava later advised him that his wife had disappeared and wanted help in getting a divorce. Tr. 447-48, 512-14, 541 (Mwihava); BX 49 at 983; BX 39 at 874; BX 50. In fact, Mr. Mwihava remains married to Ms. Posey, whom he married in December 2004. Tr. 447-48 (Mwihava).

136. Bar Counsel, in a written request dated May 9, 2008, asked Respondent to provide

a copy of the brief he had filed on behalf of Mr. Mwihava in his BIA appeal. BX 48. Respondent responded, in a letter misdated as May 1, 2008 and hand-delivered to Bar Counsel on May 19, 2008, that "[n]o brief has been filed because BIA has not set a briefing date." BX 50 at 984. Respondent's statement was false because in the copy of his client file that Respondent produced to Bar Counsel on April 28, 2008 pursuant to subpoena, Respondent included a copy of the briefing schedule setting a due date of November 18, 2007. BX 45; BX 47 at 931-32.

137. Successor counsel filed a motion to reopen Mr. Mwihava's case and remand it to the Immigration Judge. Tr. 353, 391-93 (Kum). The motion alleged that Respondent had rendered ineffective assistance of counsel when he failed to file a brief on behalf of Mr. Mwihava, as ordered in the briefing schedule. BX 51 at 995-99; Tr. 353-54, 395 (Kum). The BIA granted the motion, reopened Mr. Mwihava's removal matter, and remanded it to the Immigration Court. Tr. 354 (Kum).

138. Successor counsel, after concluding that Respondent had never filed the I-130 (relative petition) on behalf of Ms. Posey, filed the necessary documents. Tr. 321 (Kum); BX 51 at 1016-20, 1028-29. USCIS granted Ms. Posey's I-130 petition, concluding that her marriage to Mr. Mwihava was *bona fide*. Tr. 354-55 (Kum).

139. At the time of the disciplinary hearing, Mr. Mwihava was awaiting adjudication of his I-485 Adjustment of Status application for a green card. Tr. 355.

140. The Immigration Court subsequently granted Mr. Mwihava's I-485 application, and he now has Lawful Permanent Residence Status (green card) based on his marriage to Ms. Posey.[12]

[12] On agreement of the parties, Bar Counsel supplemented the record with this additional information.

141. Respondent agreed at the disciplinary hearing that Mr. Mwihava was a credible witness, and the Committee finds, based on his demeanor, his affect, and the content of his answers, that Mr. Mwihava testified truthfully with respect to matters material to the specification of charges. Tr. 1906 (Respondent).

Bar Docket No. 142-08: Matter of Yeneneh Hailu

a. Bar Counsel's charges

142. Bar Counsel asserts that Respondent violated the following provisions of the Rules of Professional Conduct in his representation of Yeneneh Hailu:

a. Rule 1.1(a) in that Respondent failed to provide competent representation to his client;

b. Rule 1.1(b) in that Respondent failed to serve a client with the skill and care commensurate with that generally afforded to clients by other lawyers in similar matters;

c. Rule 1.3(a) in that Respondent failed to represent his client zealously and diligently;

d. Rule 1.3(b)(1) in that Respondent intentionally failed to seek the lawful objectives of his client;

e. Rule 1.3(b)(2) in that Respondent intentionally prejudiced or damaged his client during the course of the professional relationship;

f. Rule 1.3(c) in that Respondent failed to act with reasonable promptness in representing his client;

g. Rule 1.4(a) in that Respondent failed to keep his client reasonably informed about the status of his matter and promptly comply with reasonable requests for information;

h. Rule 1.4(b) in that Respondent failed to explain a matter to the extent necessary to permit his client to make informed decisions regarding the representation;

i. Rule 1.5(b) in that Respondent failed to communicate in writing to his client the basis or rate of his fee;

j. Rule 1.7(b)(4) in that Respondent represented a client with respect to a matter in which his professional judgment on behalf of the client would be or reasonably might be adversely affected by the lawyer's own personal interest;

k. Rule 8.1(a) in that Respondent knowingly made a false statement of fact in connection with a disciplinary matter;

l. Rule 8.4(c) in that Respondent engaged in conduct involving dishonesty, fraud, deceit, and/or misrepresentation; and

m. Rule 8.4(d) in that Respondent engaged in conduct that seriously interferes with the administration of justice.

b. Respondent and Mr. Hailu fail to attend a hearing

143. Yeneneh Hailu, an Ethiopian national, came to the United States in 2002. Tr. 1029 (Hailu).

144. Mr. Hailu retained Respondent in 2006 to provide legal services in order to revive his asylum case (which had been administratively closed on June 8, 2005) and to apply for lawful permanent residence (green card). Tr. 1031-32 (Hailu); BX 62 at 1286; BX 61 at ¶1; BX 62 at 1282; BX 70 at 1838. Respondent charged Mr. Hailu a total fee of $4,000, with the first installment of $1,500 due before Respondent began work and the remainder due before the case ended. Respondent did not provide Mr. Hailu with a written agreement setting forth the basis or rate of his fee. Tr. 1032 (Hailu).

145. On November 21, 2006, the Immigration Court, in response to a motion filed by Respondent, set Mr. Hailu's case for a master calendar hearing on January 10, 2007 at 8:00 a.m. in Baltimore. BX 62 at 1282, 1287; BX 66 at 1321, 1331; BX 68 at 1570; BX 70 at 1827. Respondent timely received notice of the hearing. BX 64; BX 67; BX 66 at 1321, 1331; BX 68 at 1568, 1570; Tr. 1263-64, 1818-19, 1839-40 (Respondent). Mr. Hailu did not receive a copy of the notice, either from Respondent or from the Court. Tr. 1059 (Hailu); BX 62 at 1282.

146. Respondent never told Mr. Hailu that his hearing was scheduled for 8:00 a.m. Tr. 1108-09 (Hailu). Instead, on January 7 or 8, 2007, Respondent called Mr. Hailu and mistakenly advised him that his hearing was scheduled for January 10th at 1:00 p.m. Tr. 1032-33, 1035, 1069, 1072-73, 1074-75 (Hailu). Respondent instructed Mr. Hailu to come to his Maryland office the day before the hearing and pay additional legal fees. Tr. 1034-35 (Hailu); Tr. 1256 (Respondent). Mr. Hailu went to Respondent's office on January 9 as instructed, but Respondent was not there. Tr. 1033 (Hailu); Tr. 1819-20, 1960 (Respondent); Tr. 1987-88, 1999-2000 (Dimas); BX 70A. Mr. Hailu paid an additional $400 in cash. Tr. 1034 (Hailu); BX 62 at 1282.

147. Concerned that his hearing was scheduled for 1:00 p.m. (all of his prior hearings had been held in the morning), Tr. 1033, 1038, 1096-97 (Hailu), Mr. Hailu sought to reconfirm the time of the hearing. Mr. Hailu spoke with a woman in Respondent's office, who told him that if he was concerned he should go to court by 9:00 a.m. Tr. 1033, 1035, 1072-73 (Hailu).

148. Mr. Hailu went the Immigration Court on January 10th and arrived in Judge Barrett's courtroom around 9:00 a.m. Tr. 1070 (Hailu). The court did not call his name. At the 10:00 a.m. recess, Mr. Hailu asked the courtroom clerk about his case. Tr. 1036, 1071 (Hailu); Tr. 1994-95, 2011 (Dimas). The clerk told him to check the docket in the hallway. When he did, Mr. Hailu saw that his case had been set for an 8:30 a.m. hearing. Tr. 1036-37 (Hailu); BX 62 at 1282.

149. Mr. Hailu returned to the courtroom clerk who, after speaking with the judge, served Mr. Hailu personally with an *in absentia* removal order that the judge had entered at 8:40 a.m. Tr. 1036-38, 1072 (Hailu); BX 70 at 1719-20; BX 62 at 1282.

150. Mr. Hailu immediately went to the lobby outside of the courtroom and began calling Respondent's office and cell phone. Respondent did not answer. Tr. 1038, 1076 (Hailu).

In the hallway, Mr. Hailu recognized a female lawyer (Ms. Dimas) he had spoken with at Respondent's office, and told her what had happened. Tr. 1038-39 (Hailu); Tr. 1987-88 (Dimas); BX 62 at 1282. She called Respondent, and advised Mr. Hailu that Respondent would call him back. Tr. 1038-39, 1076-77 (Hailu); Tr. 1994 (Dimas); BX 62 at 1282; BX 69 at 1693.

151. Around 11 a.m., Respondent called Mr. Hailu, and told him that he was on his way to the courthouse and that Mr. Hailu should wait for him there. Tr. 1039, 1078 (Hailu); BX 69 at 1693. In the call, Respondent admitted that he thought the hearing was scheduled for 1:00 p.m. and that his assistant or secretary had mistakenly given him the wrong time. Tr. 1040-41 (Hailu); BX 62 at 1282; BX 69 at 1693.

152. Around noon, Respondent called Mr. Hailu again and asked him to meet him outside the courthouse. Tr. 1039-40, 1042 (Hailu); BX 62 at 1282; BX 69 at 1693. Mr. Hailu found Respondent waiting in his car. Tr. 1041, 1101 (Hailu); BX 69 at 1693. Mr. Hailu sat with Respondent and reported what had happened at the court. Tr. 1040-41, 1078, 1097 (Hailu). Respondent again acknowledged that his assistant had made a mistake in his schedule. Tr. 1040, 1073-74 (Hailu); BX 69 at 1693. Respondent told Mr. Hailu that he could "fix it" and told Mr. Hailu to come to his office the following day. Respondent then said he needed to go somewhere else, and left Mr. Hailu at the courthouse. Tr. 1040, 1078 (Hailu); BX 69 at 1693.

153. Respondent made no effort to contact Judge Barrett to explain that Mr. Hailu was actually present in court on the day of his hearing. Tr. 1260, 1280-82 (Respondent). Doing so could have helped undo the *absentia* order. Tr. 1321-23, 1325 (Tobin).

154. Respondent tells a different story. He claims that he had calendared the case for 9:00 a.m. (even though it was scheduled for 8:00 a.m., and heard at 8:40 a.m.). Tr. 1262-63, 1820, 1839-40, 1965-66 (Respondent). Respondent says that he spoke on the telephone with Mr.

Hailu *prior* to 9:00 a.m. to advise him that he was on his way to court. Tr. 1259, 1820-21 (Respondent). Respondent claims that he parked at a garage near the court at approximately 9:00 a.m. and met Mr. Hailu on the street where Mr. Hailu told him that he had been ordered deported. Tr. 1230-31, 1280 (Respondent); BX 61 at 1275-76; BX 65 at 1299 (adopted as true, Tr. 1211-15).

155. In this respect, we conclude that Respondent was not truthful. At or before 9 a.m., when Respondent claims to have spoken with Mr. Hailu on the phone and met him outside the courthouse, Mr. Hailu was still in the courtroom (where no phones are allowed) and had not yet been served with the 8:40 a.m. *in absentia* order. Tr. 1987-88 (Dimas); Tr. 1036-39, 1070, 1072-73 (Hailu). Mr. Hailu testified that he spoke with Judge Barrett's courtroom clerk when the judge took his morning break (which Ms. Dimas corroborated was at approximately 10:00 a.m.), and the clerk served him with the order later, after she consulted with the judge. Tr. 1036-38, 1070, 1072-73 (Hailu); Tr. 1986-87 (Dimas). This evidence from two witnesses, which we accept because we find that it was credible and consistent with the documentary record, demonstrates that Respondent lied when he maintained to the Immigration Court, BIA, Bar Counsel and the Board that he arrived at the courthouse at 9:00 a.m. Tr. 1230-32, 1252-54, 1257 (Respondent) ("I ran into Mr. Hailu, as he was leaving the courtroom, which was about 9:00—sometime close to 9:00, 9:15, somewhere there"); BX 62 at 1288 (Respondent states that he arrived at the courthouse "just before 9 AM"); BX 70 at 1745-65.[13]

[13] It is unclear why Respondent would misrepresent the facts in this regard. Even if his story were true, he would have been late for the hearing and his client would have suffered the same fate. Respondent dropped his children off at school in Beltsville, Maryland sometime between 8:00 and 8:30 a.m., which made it impossible for him to have been at the hearing in Baltimore by the time his client was deported at 8:40. Tr. 1263, 1821-22, 1964-65 (Respondent).

156. In addition, the next day, January 11, 2007, Mr. Hailu went to Respondent's office as directed, where Respondent had already prepared an affidavit for Mr. Hailu's signature. Tr. 1042-44, 1093, 1108 (Hailu). That contemporaneous affidavit also belies Respondent's claim to have been at the courthouse at 9 a.m., because it states that Respondent "told [Mr. Hailu that Respondent] *had the case on his calendar set for 1:30 PM…*" BX 66 at 1357 ¶ 16 (emphasis added). Respondent tried to reconcile that inconsistency by claiming to have been merely a scrivener for the affidavit, i.e., that he "drafted word by word what [Mr. Hailu] told him." Tr. 1826 (Respondent). That contention – that an alien would dictate a false affidavit to an experienced immigration attorney who would unquestioningly adopt it – is not credible, and we conclude that Respondent drafted the affidavit, in advance and on his own, without Mr. Hailu present. Tr. 1042-43 (Hailu). Moreover, if Respondent had been at the courthouse at 9:00 a.m., he included in the affidavit a statement that he knew to be false ("my lawyer called and told me he had the case on his calendar set for 1:30 PM").

c. Respondent files a flawed motion to reopen

157. Respondent made only a half-hearted effort to support the motion to reopen. He never asked the attorney with whom he shared an office, Marilyn Dimas, for an affidavit to confirm that she saw Mr. Hailu at the courtroom on the day of his hearing. Tr. 2001-02; Tr. 1319. He never asked for an affidavit from the staff person at Ms. Dimas's office, whom Respondent maintains told Mr. Hailu that his hearing was at 9:00 a.m. Tr. 1256, 1963 (Respondent). He did not attach the *in absentia* order, which on its face demonstrated that Mr. Hailu was personally served with the document at Immigration Court, and thus conclusively established that Mr. Hailu was present on the day of his hearing. BX 70 at 1824-25; Tr. 251-53 (Tobin) (order of removal shows personal service on Mr. Hailu); Tr. 261 (Tobin), 1242-45

(Respondent). Most disturbingly, Respondent did not submit his own affidavit, in which he could have and should have taken responsibility for misinforming his client and for missing the hearing himself.

158. Respondent also failed to advise Mr. Hailu that he had a claim for relief based on ineffective assistance of counsel, and failed to advise Mr. Hailu to consult with independent counsel. Tr. 1262, 1334-35, 1820, 1839, 1965-66 (Respondent); BX 61 at 1277; Tr. 1046-48 (Hailu).

159. After Mr. Hailu signed the affidavit, Respondent told him that he was going to file it "right away." Tr. 1095, 1098 (Hailu). However, Respondent did not attempt to file the motion with the Immigration Court until February 14, 2007, more than a month later. Tr. 1238, 1829-31 (Respondent); BX 70 at 1804-05.

160. The Immigration Court "rescinded" Respondent's first attempted filing, because of his failure to comply with local rules. BX 70 at 1804; BX 70 at 1801; Tr. 256-57 (Tobin). Respondent did not (1) advise Mr. Hailu that he had waited for "slightly over a month" to file the motion, (2) provide Mr. Hailu with a copy of the motion, or (3) advise Mr. Hailu that the Immigration Court rejected it. Tr. 1238 (Respondent); Tr. 1047, 1095-97 (Hailu).

161. Respondent re-filed his motion on February 20, 2007. On March 29, 2007, the court denied it on the ground that the court had notified Respondent of the correct hearing time, and there was no "confusion" over the issue, as Respondent contended in his motion. BX 70 at 1799; BX 70 at 1805 at ¶ 9. The court also noted that "[t]he Court has no probative evidence to show that the respondent [Mr. Hailu] did arrive *at any time* for his hearing." BX 70 at 1799 (emphasis supplied).

162. Respondent advised Mr. Hailu that the judge had denied the motion to reopen but did not give him a copy of the order. Tr. 1047 (Hailu). Mr. Hailu agreed to Respondent's suggestion that he file a motion to reconsider, and asked Respondent to "please act quickly." BX 62 at 1283.

163. On April 20, 2007, Respondent filed a letter addressed to Judge Barrett, regarding "Motion to Reconsider Yeneneh Hailu." BX 66 at 1368; BX 68 at 1526; Tr. 1970-71 (Respondent). Respondent requested that the judge reconsider his decision for the reasons set forth in a second affidavit of Mr. Hailu and in a letter signed by Mr. Hailu's mother. BX 66 at 1368; BX 68 at 1526. Respondent still did not inform the court that he had told his client the wrong hearing time. BX 66 at 1323; BX 68 at 1526. In the Hailu affidavit, Respondent attributed Mr. Hailu's absence to his "mistaken belief" that his hearing was at 9:00 a.m. BX 70 at 1325 ¶ 6; BX 70 at 1791. Mr. Hailu signed the affidavit in Respondent's office in Washington, D.C., but there was no notary public present. Tr. 1053 (Hailu); BX 66 at 1324-27 (also at BX 70 at 1790-92). Respondent did not give Mr. Hailu a copy of the document. Tr. 1053-54 (Hailu). The signed affidavit that Respondent filed with the Immigration Judge contained a false notarization page, attesting that Mr. Hailu appeared before a notary in Montgomery County, Maryland. BX 70 at 1793; BX 66 at 1327.

164. The Immigration Court again returned the motion to Respondent because it did not comply with the Court's rules, but Respondent did not advise Mr. Hailu until July 2007 that it had been rejected for that reason. BX 62 at 1283; Tr. 1064-65); BX 66 at 1334. Respondent then advised Mr. Hailu that he would file a proper motion to reconsider. BX 62 at 1283.

165. On July 12, 2007, Respondent wrote to Judge Barrett and "resubmitted" the motion to reconsider because the original one "was apparently returned to our office lack [*sic*] of

proposed Order." BX 66 at 1334; BX 70 at 1782; Tr. 1971 (Respondent). Unlike the April 20 letter to Judge Barrett, Respondent's new submission was prepared as a formal pleading, but Respondent again failed to acknowledge that he had provided an incorrect hearing time to his client. BX 70 at 1784-87.

166. On July 31, 2007, the Immigration Court again denied the motion to reconsider because it was untimely, failed to specify errors of fact or law in the court's prior decision, and exceeded the page limits for motions to reopen. BX 80 at 1780-81.

167. Respondent notified Mr. Hailu in August 2007 that the judge had denied the motion to reconsider, that he would need to appeal it to the BIA, and that Mr. Hailu needed to pay Respondent an additional $1,000 for the representation. Tr. 1048 (Hailu); BX 62 at 1283. Mr. Hailu agreed to do. Tr. 1048-49, 1055 (Hailu). Respondent did not give Mr. Hailu a writing setting forth the basis or rate of the fee that he proposed to charge for the appeal. Tr. 1054 (Hailu). Mr. Hailu paid $600 in cash plus an additional $110 in cash for filing fees. Tr. 1049, 1054, 1067, 1084-85, 1092 (Hailu).

d. The BIA appeal

168. On August 29, 2007, Respondent filed a notice of appeal from the July 31, 2007 order on behalf of Mr. Hailu. BX 70 at 1811-13; BX 66 at 1369-71.

169. Beginning in August 2007, Mr. Hailu requested that Respondent provide him with all of his files because Mr. Hailu wanted to "find another lawyer who is going to do a better job." Tr. 1055 (Hailu); BX 62 at 1283. Mr. Hailu thereafter attempted to reach Respondent on numerous occasions, without success. He went to Respondent's Maryland office and learned that Respondent had moved. He then began leaving telephone messages three to four times per

week. Respondent did not respond to Mr. Hailu's requests for his file. Tr. 1055-56 (Hailu); BX 62 at 1283.

170. On September 10, 2007, the BIA issued a briefing schedule directing Respondent to file a brief by October 1, 2007. BX 70 at 1766. Respondent timely filed a brief, BX 70 at 1768-77, but did not review the brief with Mr. Hailu prior to filing it and did not provide him with a copy. Tr. 1057-58 (Hailu). In the brief, Respondent stated that his assistant advised Mr. Hailu to be in court at 9:00 a.m. BX 70 at 1771. Of course, even this grudging concession could have established a basis for relief from the order based on ineffective assistance of counsel. Tr. 1059, 1108-09 (Hailu); Tr. 1376-77 (Tobin); BX 62 at 1282; BX 70 at 1771.

171. In December 2007, Respondent finally provided Mr. Hailu with what was represented to be his file by leaving it with someone at the front desk of Respondent's office for Mr. Hailu to retrieve. Tr. 1057 (Hailu). The file, however, notably did not contain a copy of the notice scheduling Mr. Hailu's hearing for 8:00 a.m. on January 10, 2007, nor did it contain a copy of the removal order. Tr. 1058-59 (Hailu). The original scheduling notice, however, was in the file that Respondent later produced to Bar Counsel in response to a subpoena. BX 67; BX 68 at 1570.

172. In March 2008, with the assistance of his successor counsel, Mr. Hailu filed an ethical complaint against Respondent. Tr. 1060-65 (Hailu); BX 62 at 1280-93.

173. On April 7, 2008, Mr. Hailu's successor counsel filed a motion to accept additional briefing in his appeal because of Respondent's ineffective assistance of counsel, as demonstrated by (1) his having advised Mr. Hailu of the incorrect hearing time and which led to an *in absentia* removal order being entered and (2) his having filed a procedurally incorrect letter

requesting reconsideration rather than a formal motion in compliance with the court's rules. Tr. 1333-36 (Tobin); BX 70 at 1702-42 (summarized at BX 70 at 1706 and 1708).

174. On November 13, 2008, the BIA granted the motion to reopen based on Respondent's ineffective assistance of counsel. BX 70 at 1696-97. Mr. Hailu thereafter sought to adjust his immigration status because of his 2008 marriage to a United States citizen. Tr. 1066-67. Mr. Hailu has now obtained Lawful Permanent Resident status and has his green card.

175. Throughout the disciplinary process, Respondent refused to accept responsibility for his failure to advise Mr. Hailu of the correct hearing time and the resulting entry of an *in absentia* removal order. He argued that Mr. Hailu was a "victim" of Judge Barrett. Tr. 1846 (Respondent). When asked by the Committee whether he bore any responsibility for what happened to Mr. Hailu, Respondent testified: "That is a good question. Personally, I really don't feel that I am . . . . So I will not in that sense say that I bear any responsibility for that victimization at all." Tr. 1850-51 (Respondent). Indeed, Respondent displayed indignation over the disciplinary charges against him: "These and other assertions by Bar Counsel in this and other matter [*sic*] are not even worth responding to as they are so beneath Respondent's character and integrity." BX 61 at 1276 ¶ 8.

176. Eventually, in his post-hearing submission Respondent grudgingly took "full responsibility *for his staff* not giving Mr. Hailu the correct hearing time, and for his having been late for the hearing despite the circumstances." Resp. Br. p. 15. Respondent's concession of vicarious responsibility, however, seems too little, too late.

Bar Docket No. 016-09: Matter of Dawit Shifaw

a. Bar Counsel's charges

177. Bar Counsel contends that Respondent violated the following provisions of the Rules of Professional Conduct in connection with his representation of Dawit Shifaw:

a. Rules 1.1(a) and Rule 1.1(b) in that Respondent failed to provide competent representation to his client;

b. Rule 1.3(a) in that Respondent failed to represent his client zealously and diligently within the bounds of the law;

c. Rule 1.3(b)(1) in that Respondent intentionally failed to seek the lawful objectives of his client;

d. Rule 1.3(b)(2) in that Respondent intentionally prejudiced or damaged his client during the course of the professional relationship;

e. Rule 1.3(c) in that Respondent failed to act with reasonable promptness in representing his client;

f. Rule 1.4(a) in that Respondent failed to keep his client reasonably informed about the status of his matter and/or to promptly comply with reasonable requests for information;

g. Rule 1.5(b) in that Respondent failed to provide his client with a writing setting forth the basis or rate of his additional $550.00 fee;

h. Rule 1.15(a) in that Respondent intentionally and/or recklessly misappropriated his client's funds by withdrawing his client's escrowed funds without authorization;

i. Rule 1.16(d) in that Respondent failed to surrender papers and property to which his client was entitled;

j. Rule 3.3(a) in that Respondent knowingly made a false statement of fact to a tribunal or failed to correct a false statement of material fact previously made to a tribunal;

k. Rule 3.4(c) in that Respondent knowingly disobeyed an obligation under the rules of a tribunal;

l. Rule 8.1(a) in that Respondent knowingly made a false statement of fact in connection with a disciplinary matter;

m. Rule 8.4(c) in that Respondent engaged in conduct involving dishonesty, fraud, deceit, and/or misrepresentation; and

n. Rule 8.4(d) in that Respondent engaged in conduct that seriously interfered with the administration of justice.

b. Respondent is retained to negotiate purchase of a laundromat

178. In September 2004, Dawit Shifaw decided to purchase a Washington, D.C. laundromat business from Lawrence Rozario. Tr. 1461. Mr. Shifaw had negotiated a tentative purchase price of $50,000, which was subject to further negotiation because some of the laundry machines were broken. Tr. 1462-63, 1470.

179. Mr. Shifaw decided to hire an attorney to represent him in the transaction. Based on an advertisement he had seen in the Ethiopian Yellow Pages, Mr. Shifaw e-mailed Respondent and asked, "Would you like to advise me on this matter. How much do you charge me to complete legal matters? I do not know if the seller has legal or financial problems that may cause problem to me later." RX B at 10; BX 102 at 2258; Tr. 1456-60.

180. On or about September 22, 2004, Mr. Shifaw met with Respondent, and Respondent agreed to represent Mr. Shifaw for a flat fee of $1,000, for which Respondent "would do everything." Tr. 1461-65; Tr. 1934 (Respondent).

181. Respondent prepared a written retainer agreement in which he agreed "to provide legal services in connection with Client's [Dawit Shifaw's] purchase of laundromat" for a fee of $1,000. BX 75 at 2044; Tr. 1463-66. The retainer required that "[a]ny modification of the Agreement must be in writing and signed by Client and Attorney." BX 75 at 2044; Tr. 1464-66.

182. The next day Mr. Shifaw mailed Respondent a check for $1,000 (Tr. 1461-62, 1466; BX 77 at 2076, 2079-80; BX 81 at 2112; BX 102 at 2259; RX B at 12), which Respondent deposited into his operating account. BX 77 at 2078-80; BX 81 at 2112; Tr. 1466.

183. On October 28, 2004, Mr. Shifaw obtained a certified check from his bank, payable to Mr. Rozario for the $50,000 purchase amount. BX 79 at 2094; Tr. 1471-72, 1630-31. Mr. Shifaw and Mr. Rozario went to Respondent's office for the closing on November 1, 2004. Tr. 1470-72; BX 98 at 2223, at which time Respondent reviewed Mr. Rozario's documentation and concluded that Mr. Rozario did not own the laundromat equipment, but instead only leased it.[14] RX B at 25, 27; Tr. 1471. Respondent copied the documents that Mr. Rozario provided but never gave a copy to Mr. Shifaw. Tr. 1472, 1510, 1556, 1613-14.

184. The closing did not take place, and Mr. Shifaw retained custody of the $50,000 bank check. Tr. 1472-73.

185. After the aborted closing, Respondent determined that Leaf Financial, Inc. ("Leaf Financial") owned the equipment. Tr. 1703; BX 100 at 2230. Respondent negotiated with Leaf Financial to buy out the equipment for a reduced price. RX B at 36. Tr. 1473, 1512-13. In early November, Respondent told Mr. Shifaw that Leaf Financial had agreed to a $48,050 price, which Mr. Shifaw understood to include all of the equipment at the laundromat. Tr. 1473, 1476, 1513, 1577-78, 1630.

186. Respondent instructed Mr. Shifaw to obtain a replacement certified check for $48,050, payable to Respondent's law office, which he would hold in escrow until he paid the funds to the seller. Tr. 1473, 1475-76, 1550-52, 1584-85. Mr. Shifaw delivered a certified check in that amount on November 8, 2004, Tr. 1476, 1478-79, and on that same day Respondent deposited it into his attorney trust account at Citibank, Account Number 151****7, in the name

[14] Two leases – an equipment lease and a real property lease – were relevant to the business transaction, and the hearing testimony referred to the two leases indiscriminately. The property lease was not offered into evidence, and Respondent denied ever seeing it. Tr. 1545-46. Documents relating to the equipment lease were offered and received. Bar Counsel's charges do not relate to Respondent's competency in the underlying transaction, however; rather, the issue is whether Respondent timely provided transactional documents to his client. Tr. 1544-45, 1547.

of "Law Office of Samuel N. Omwenga PC, Attorney Escrow Account" ("Escrow Account"). BX 80 at 2097; BX 79 at 2092 (copy of check); Tr. 1433-34 (Dixon).

187. Respondent was the only signatory on the Escrow Account. Tr. 1432-33. The $48,050 was to be used for the purchase of the laundromat. Mr. Shifaw did not authorize Respondent to use the funds for any other purpose. Tr. 1476-77, 1496-97.

188. On November 9, 2004, Respondent e-mailed Mr. Shifaw and told him to come to his office on November 11, 2004 which was to "be the 'closing' time at which point you will assume ownership of the business [and] . . . sign the necessary documents." RX B at 37; Tr. 1481-82. Mr. Shifaw went to Respondent's office to sign the documents as agreed. Tr. 1482; RX B at 37. He signed an undated Bill of Sale ("Shifaw Bill of Sale") showing a final purchase price of $48,050. BX 75 at 2049; Tr. 1477-78, 1540-41. Mr. Shifaw did not sign any other Bill of Sale. Tr. 1478.

189. On or about November 9, 2004, Leaf Financial signed another Bill of Sale containing a $48,050 sale price ("Leaf Financial Bill of Sale"). BX 75 at 2062. Respondent did not give a copy to Mr. Shifaw. Tr. 1478.

190. The Shifaw Bill of Sale and the Leaf Financial Bill of Sale differ in what appear to be material respects. *Compare* BX 75 at 2049 *with* BX 75 at 2062 and BX 86 at 2141. The discrepancy was not clarified at the hearing.

191. After he signed the Shifaw Bill of Sale, Mr. Shifaw repeatedly asked Respondent about the status of the matter:

- On November 15, Mr. Shifaw e-mailed Respondent about insurance and asked "Did the owners receive the payment? I am sure you have already identified them." RX B at 41; Tr. 1483-84. At the time, Mr. Shifaw feared that he had

no proof of payment to the seller and that it might cause him problems when he began operating the laundromat. Tr. 1485, 1486-87. Respondent did not reply to this e-mail and did not give Mr. Shifaw any documents. Tr. 1484-85.

- On November 17, Mr. Shifaw took over the laundromat business and asked Respondent, "Did the sellers send the title yet?" RX B at 42.
- On November 22, Mr. Shifaw asked Respondent via e-mail, "Is there any updates from the company I am buying the laundromat from?" He also reported various repair issues at the laundromat and asked, "Does the company know how bad it was?" RX B at 43.
- On November 23, Mr. Shifaw e-mailed Respondent and asked, "Did you get the title for the laundromat from the company that [Mr. Rozario] leased from?" RX B at 44.
- On December 1, Mr. Shifaw asked Respondent in an e-mail, "What is the update on the purchase of the laundromat?" He also asked if the company "could refund me for the repair cost out of my total purchase cost of $48050 I paid?" Mr. Shifaw asked Respondent to call him on his cell phone. RX B at 45; Tr. 1489-90.

192. During this period Respondent continued to negotiate with Leaf Financial, and reached agreement on a reduced price of $46,000. Tr. 1584, 1929.

193. On December 1, 2004, Respondent withdrew $46,000 of Mr. Shifaw's funds from Respondent's Escrow Account and purchased a bank check, number 839250317, payable to Leaf Financial. BX 80 at 2102, 2107, 2108; BX 82 at 2114; Tr. 1437-41 (Dixon). Respondent withdrew the remaining $2,050 of Mr. Shifaw's entrusted funds in cash, which depleted the

entire balance of Mr. Shifaw's money in Respondent's Escrow Account. BX 78 at 2086; BX 80 at 2102, 2107; BX 83 at 2118; Tr. 1438-39, 1442-43 (Dixon). Respondent did not deposit the $2,050 in another trust account. BX 77 at 2080A; BX 83; Tr. 1447-51 (Dixon); BX 78 at 2086; Tr. 1438-39, 1443-46 (Dixon).

194. At the hearing, Respondent speculated that the $2,050 that he withdrew from his Escrow Account might have been transferred to either his personal Citibank account or to another account that "wasn't captioned as a business account" but "most of the transactions there were business-related." Tr. 1943-46 (Respondent). The "business-related" account was not a trust account. Tr. 1946 (Respondent). According to bank records, the $2,050 was not transferred to another account. Tr. 1438-39, 1447-51 (Dixon).

195. Respondent did not provide any of the $2,050 to Mr. Shifaw at the time he withdrew the funds, contrary to his claim in his answer to the ethical charges. Tr. 1496-97; BX 73 at 2032 ¶ 8 ("Respondent denies he withdrew the balance of $2050 'in cash' and also denies that he withdrew or used any funds belonging to Shifaw for use in any purpose other than for the purchase of the laundromat equipment"). In denying that he misappropriated Mr. Shifaw's funds, Respondent declared that "he would have been an idiot of the first class among misappropriators to first tell Shifaw he had saved him the money in the final purchase price and then gone on to misappropriate it" and that misappropriation was "simply beneath him, given his background." BX 73 at 2032 ¶¶ 10-11.[15]

[15] In his post hearing submission, Respondent argues rhetorically that "if Respondent is of the misappropriating type, why would he misappropriate $2050 instead of the $48,050 initially entrusted to him by Shifaw? Also, if Respondent is of the misappropriating type, why would he advise Shifaw he had saved him an additional $2050 from the sale and then go on to misappropriate it? Neither makes any sense no matter." Resp. Br. p. 3.

196. Respondent did not advise Mr. Shifaw of the December 1 withdrawals. Tr. 1496-97. Respondent did not ask Mr. Shifaw if he could take the $2,050 for any other purpose, and Mr. Shifaw did not give him permission to do so. Tr. 1476-77; 1496-97, 1504.

197. On or about December 1, 2004, Respondent sent Leaf Financial a certified check for $46,000 as full payment for the laundromat equipment, and asked Leaf Financial "to forward title and all pertinent documents to our office to complete this transaction." BX 75 at 2046; Tr. 1490-91. Respondent did not provide a copy of this correspondence to Mr. Shifaw. BX 102 at 2258-59. Leaf Financial sent a letter to Respondent on December 9, 2004 acknowledging receipt of the $46,000, indicating that the equipment under the lease belonged to "your client," and stating that "any UCC1 will be removed." BX 100 at 2238. Leaf Financial negotiated the check for $46,000. BX 82 at 2116-17; Tr. 1441-42, 1450-51, 1452-54 (Dixon).

198. Mr. Shifaw continued to try to get information about the laundromat purchase from Respondent:

- On December 10, Mr. Shifaw asked in an e-mail that "I want to know if the purchase of the laundromat is complete." RX B at 46.
- On December 13, Mr. Shifaw in an e-mail stated, "I think you are busy to reply to my last e-mail. Can you tell me if the laundromat purchase is complete?" RX B at 47.
- On December 13, 2004, Respondent replied to Mr. Shifaw's e-mail and stated: "The sale transaction is complete. The equipment is all yours now. Please call me for details." RX B at 48. At the time he wrote Mr. Shifaw, Respondent had not yet provided him with copies of any documents pertaining to the sale of the laundromat. Tr. 1487-88, 1501-02.

- Thereafter, Mr. Shifaw attempted to schedule an appointment to meet with Respondent. RX B at 50-52. On January 4, January 6, and January 10, 2005, Mr. Shifaw e-mailed Respondent regarding the difficulties Mr. Shifaw was having in reaching Respondent. In his January 6, 2005, e-mail, Mr. Shifaw states that he "would like to complete the purchase of the laundry and get DC business license. You told me that you negotiated for the final cost of around $46,000. Thank you very much. The refund will help me for repair of broken machines." RX B at 51; Tr. 1497-98.
- On January 11, 2005, Mr. Shifaw e-mailed Respondent again stating, "I do not know how you could not see me even for a minute. Last time you told me to come to your office at 11 and I did. You did not tell me [you were] canceling that appointment. You then told me to call you the next morning if you could see me. I did but you were not there. . . . I am calling you because my case is not yet done." RX B at 53.

199. On January 14, 2005, Respondent scheduled a meeting with Mr. Shifaw for January 18. RX B at 54; Tr. 1698-99. At that meeting, Mr. Shifaw asked Respondent for copies of the laundromat sales documents, but Respondent gave him none. Tr. 1499-1501. Neither did Respondent provide Mr. Shifaw with a receipt for the $46,000 payment, despite Mr. Shifaw's request for one. Tr. 1501.

200. Mr. Shifaw alleges that, during their January 18, 2005 meeting, he asked for a refund of the $2,050 Respondent was holding in escrow. Tr. 1498, 1553. Respondent gave Mr. Shifaw a check number 1912 for $1,500 (written on Respondent's Citibank business operating account, which is not a trust account), and told Mr. Shifaw that he was keeping the remaining

$550 as additional legal fees because he had negotiated a better sale price for the laundromat. Tr. 1445-47, 1498-99, 1553, BX 77 at 2082, 2083A. Before that meeting, according to Mr. Shifaw, Respondent had never asked for additional legal fees and Mr. Shifaw never offered pay them. Tr. 1502-03 (Shifaw).

201. Mr. Shifaw did not agree to pay the additional legal fees but did not challenge Respondent on the issue for fear that Respondent would never provide Mr. Shifaw with documentation of the sale. Tr. 1498-99, 1503-04, 1559-61, 1565; BX 102 at 2259-60. During cross-examination by Respondent at the hearing, Mr. Shifaw forcefully denied agreeing to additional legal fees: "We didn't agree, that's my point. We had no agreement for you to take even a coin from my money. … You said $1000 is what you are going to charge me, and that's what I paid, [$]1000." Tr. 1567; BX 102 at 2259-60. Mr. Shifaw did not execute a written modification to the retained agreement. Tr. 1627, 1931-32. Respondent has never refunded the $550 that he took from Mr. Shifaw. Tr. 1504.

202. Respondent, on the other hand, claims that Mr. Shifaw, out of gratitude for the negotiation of a lower sales price, insisted that Respondent accept an additional fee and that Respondent only reluctantly agreed to accept $550. BX 73(A) at 2038; Resp. Br. p. 3; Tr. 1926-27; BX 98 at 2224: "Mr. Shifaw insisted on, and I agreed to accept an additional payment of $500 as his appreciation for all the work I had done for him at greatly reduced fees and for my saving him $14,000.00 in the transaction." BX 73(A) at 2039.

203. As to this issue – whether Mr. Shifaw agreed to pay Respondent additional legal fees – the evidence is in direct dispute, and we must again make a credibility determination. We accept the testimony of Mr. Shifaw as truthful, and once again reject that of Respondent, for the following reasons:

a. Mr. Shifaw's demeanor was sincere and credible. His testimony was internally coherent, consistent with contemporaneous documentation, and contextually believable: Respondent was not entitled to an enhanced fee for negotiating because he only did what he was supposed to do, *i.e.*, negotiate on behalf of his client. Tr. 1565. "You said $1,000 is what you are going to charge me, and that's what I paid, 1,000. … [N]egotiation is what we discussed before [I retained you], you need to negotiate, I told you before we discussed this. You were going to negotiate, so what I have to pay is $1,000. That is why I paid you $1,000." Tr. 1567, 1535-36. Indeed, Mr. Shifaw had all of his assets wrapped up in the Laundromat business transaction, and could hardly afford gratuitously to bestow largesse on his attorney when he still had broken laundry machines to fix. As he wrote to Respondent when he learned of the lower price: "Thank you very much. The refund will help me for repair of broken machines." RX B at 51, Tr. 1498.

b. On the other hand, Respondent's recounting of this issue has been imprecise, inconsistent and is contradicted by contemporaneous evidence:

    - In his initial bar response, Respondent claimed he "promptly advised Shifaw that he had saved him a further $2,000 in connection with the purchase and *sent him a check for that amount.*" BX 73 at 2032 ¶ 9 (emphasis added). He specifically "denie[d writing] a check for $1500" (BX 73 at 2033 ¶ 14), and "denie[d advising] Shifaw that he was keeping the remaining $550.00 as an additional legal fee." *Id*. ¶ 15. These statements were false.

- Thereafter, Respondent's story changed. Respondent claims that Mr. Shifaw was overwhelmed with gratitude because Respondent saved him $14,000 by negotiating the sale price from $60,000 down to $46,000. Tr. 1927; Resp. Br. p. 2; BX 73(A) at 2038 n. 4. "He himself was offering to pay me more money. I was not asking for it, never did. I even told him I didn't want the money. He kept insisting, he said 'Mr. Omwenga, Mr. Omwenga, please. You can't believe, I'm so happy what you've sent me, can you take a little bit more?' I said 'Fine. I can take the $500.'" Tr. 1927; BX 73(A) at 2225.
- The facts refute Respondent's claim. Mr. Shifaw had negotiated a tentative price of $50,000 (not $60,000) with Rozario *before* he engaged Respondent, Tr. 1463, 1535-36; BX 102 at 2258, and arrived at the initial closing with a $50,000 certified check, *before* Respondent undertook any price negotiations on his behalf. Tr. 1470, BX 79 at 2094. Though Respondent did get Leaf Financial to reduce the price $4,000 more (from $50,000 to $46,000), that result was not as significant as Respondent claims, and its magnitude seems insufficient to motivate Mr. Shifaw to insist on an enhanced legal fee for the purchase of equipment in need of repair.
- Respondent did not execute or provide Mr. Shifaw with a written modification of the original retainer agreement to justify the additional legal fees, despite its requirement that any modifications had to be written and signed by both parties. BX 75 at 2044; Tr. 1627 (Shifaw);

Tr. 1931-32 (Respondent). Nor do any contemporaneous writings confirm modification of the retainer. Tr. 1498-99, 1502; RX B at 56.

- Finally, Respondent cannot explain the discrepancy in his claim that Mr. Shifaw agreed to pay him $500 in additional fees, while he retained $550. BX 73(A) 2039 at n. 6. "Somehow it ended up being $550, I'm not sure why, but it was $500." Tr. 1927.

c. It is true that Mr. Shifaw did ask Respondent for a receipt for "$1550 for legal service[s]." BX 84 at 2128. Respondent contends that the request reflects Mr. Shifaw's agreement to the enhanced fee payment. We disagree. As Mr. Shifaw explained, "The reason I was asking [for a receipt] is that I paid something. When I pay something I need to get a receipt for that. So, he could deny taking that [$]550 later on, so I want him to mention that he took it." Tr. 1502, 1565. Respondent never provided a receipt. *Id*.

204. Following their meeting, Mr. Shifaw repeatedly asked Respondent in writing for copies of the documents relating to the laundromat sale:

- On January 18, 2005, and again on January 19, 2005, he requested "all the documents of the laundromat purchase." BX 84 at 2128-29; RX B at 56; Tr. 1500-01. He stated that "[o]ne of the reasons I came to your office last time was to get all these documents. I was surprised when you told me to go empty hand[ed]" and expressed his concern that "[w]hen some one pays even a dollar for an item, he gets a receipt. I wonder why the company did not send me a receipt and the title when I pay $46,000?" Mr. Shifaw was concerned that documents not "be misplaced or disappear." RX B at 56; Tr. 1499-1501.

He offered to pick up the documents when they were ready. BX 84 at 2128-29; RX B at 56.

- Respondent replied to Mr. Shifaw's e-mails on January 20, 2005 stating, "As I told you the other day at my office, you are the sole owner of the laundrymat [*sic*] equipment you purchased. I did not want to bore you with legal details of this transaction but *Leaf financial released its UCC lien on the equipment on the day they received $46000 negotiated payment* for the equipment, which left you as the clear owner of the equipment." BX 84 at 2130 (emphasis added).[16] Respondent also indicated that Leaf Financial had "informally" notified him of the action but that Respondent would provide Mr. Shifaw with the "formal" notification, when received. BX 84 at 2130. Respondent did not provide Mr. Shifaw with any documents that demonstrated that Leaf Financial had released its lien. Tr. 1506-07. Respondent also stated that he had asked a member of his staff to make copies of Mr. Shifaw's files and send them to him as soon as they received the notification from Leaf Financial. Mr. Shifaw never received any documents. BX 84 at 2130; Tr. 1507.
- On January 24, 2005, Mr. Shifaw acknowledged Respondent's prior e-mail but reiterated that "I still need those documents because I do not want to be bothered by any one who might walk in and claim the equipment in the store. As a lawyer you know this matter better than me. The purchase will be legal only if there are documents to prove it." RX B at 58.

[16] This statement was not true. Leaf Financial did not release its lien until July 2006. *See* FF 215, *infra*.

- Mr. Shifaw wrote to Respondent again on February 9, 2005, reiterating that he had requested documents several times but had not received them. RX B at 69. He asked for the receipt for $46,000 from the seller, a receipt for the $1,550 he had paid for legal services, etc. RX B at 69; Tr. 1557-58. Again he offered to pick up the documents personally.

- Mr. Shifaw wrote Respondent yet again, on February 21, 2005, under the subject of "Still waiting for documents." He stated:

> I do not know why you are not willing to pay attention to my repeated requests. You always told me that you are busy with other clients. Please, remember that I am also your client. . . . It is now more than three mo[n]ths since you told me that you already paid the company $46,000 on my behalf out of $48,050 your office cashed from my account in Bank of America. If they are really paid, why doesn't the company verify this in writing. And I do not think it is hard [to] write for me a receipt that I paid you $1550 for legal services. I hope you will help me. RX B at 70; Tr. 1508-09.

Respondent did not respond to this e-mail. Tr. 1509.[17]

205. In early March 2005, Respondent met with Mr. Shifaw and gave him a copy of his December 1, 2004 cover letter to Leaf Financial and the Shifaw Bill of Sale. BX 75 at 2046; BX 102 at 2264; Tr. 1487-88. Respondent had not, however, obtained the "title and all pertinent documents" and never provided additional documentation to Mr. Shifaw, as Respondent had promised to do in his January 20, 2005 e-mail. RX B at 57, 59; BX 84 at 2130; BX 85 at 2131.

c. Mr. Shifaw cannot sell the laundromat

206. In late 2005, when Mr. Shifaw decided to sell the laundromat, the prospective buyer questioned whether he actually owned the equipment. Tr. 1509-11; RX B at 57, 59. Mr.

[17] It is ironic that when he opposed a motion for sanctions in Mr. Shifaw's later civil action against him, Respondent sought to shift blame by complaining that he "was unable to reach Plaintiff's [Mr. Shifaw's] counsel despite numerous attempts to do so …, including leaving several messages." BX 104 P. 2277-78. *See* FF 217.

Shifaw notified Respondent on January 23, 2006 that the building's landlord claimed ownership of the laundry machines under the terms of the building lease. RX B at 57. Mr. Shifaw wrote Respondent again on January 26, 2006, with an e-mail subject header of "I am in trouble," told Respondent of the problems regarding the conflicting claims to ownership of the laundromat equipment, and asked Respondent for advice. RX B at 59; BX 85 at 2133.

207. On January 26, 2006, Respondent replied that he had spoken with the prospective buyer's attorney and "informed him you now own the equipment as you outright purchased the equipment from Leaf Financial." RX B at 60; BX 85 at 2134. He told Mr. Shifaw that Leaf Financial was obligated to remove any liens and that Respondent would "follow up with Leaf Financial to make sure this was done and, even if it was not done, they can do it right away." RX B at 60; BX 85 at 2134. At that point, Leaf Financial had not released its lien. Tr. 1704-06, 1713; BX 87.

208. Mr. Shifaw responded that he had lost all of his rights in the property and asked Respondent: "Please, help." BX at 62. He wrote to Respondent again on January 29, 2006, under the subject "More trouble," and stated: "I do not know if you have realized how I am in trouble. . . . How are you going to fix this?" Mr. Shifaw asked Respondent to call him at the number he provided. RX B at 63; BX 85 at 2135.

209. Respondent replied by e-mail on January 29, 2006, that Mr. Shifaw needed to schedule an appointment to see Respondent, and wrote that "[a]s I told you and I repeat, you are the legal owner of the equipment. Period." BX 85 at 2135. Mr. Shifaw replied the following day and asked whether Respondent could see him, noting that "[i]t is not easy to find you by phone." RX B at 64; BX 85 at 2136.

210. Mr. Shifaw wrote to Respondent again on January 31, 2006, and reiterated that his circumstances were dire: the landlord was terminating the lease and keeping the equipment: "This is total destruction. What is your solution? What items did I buy? When do you want me to see you?" BX B at 65; BX 85 at 2137-38.

211. Respondent replied to Mr. Shifaw's e-mail the same morning, indicating that he was "off to court" but would be back in his office sometime after 2 p.m. and asked Mr. Shifaw to call him then. RX B at 66. Mr. Shifaw e-mailed Respondent again on February 1, 2006, indicating that he had called Respondent that morning at least 10 times and that "[o]n each call you said you are on the phone and told me to call later. . . . You tell me to call to schedule appointment but if you don't answer the phone, how can I get in touch with you?" Mr. Shifaw asked for an appointment the following day at any time and, again, asked Respondent to "[p]lease, help when I am in trouble." RX B at 67; BX 85 at 2137-38.

212. Respondent agreed to meet two days later. He wrote that he had spoken with a Leaf Financial representative and that "there is something he is doing in connection with your purchase so I expect him to have it done by Friday. Again, I repeat I have no idea what your landlord is talking about; you are the legal owner of the equipment as guaranteed by Leaf Financial." RX B at 68; BX 85 at 2139; Tr. 1512-13. Based on this e-mail, Mr. Shifaw expected that Respondent would provide him with the documents to "make sure that all the machinery inside the laundromat are [*sic*] mine." Tr. 1513; RX B at 68; BX 85 at 2139. Respondent never provided the documents to Mr. Shifaw. Tr. 1513.

213. As of Respondent's February 1, 2006 e-mail to Mr. Shifaw, Leaf Financial had not released its financing statement and Respondent had not verified the release of the lien or obtained any documentation to demonstrate that the lien had been terminated. BX 87. Rather,

on February 3 Respondent received a facsimile from Leaf Financial bearing an order confirmation number for a "termination" with the Maryland Department of Assessments/Taxation pertaining to Mr. Rozario and a "UCC Financing Statement Amendment" indicating a "termination" pertaining to Mr. Rozario. BX 75 at 2066-67; Tr. 1700-03.

214. The laundromat was located in Washington, D.C., not Maryland. Tr. 1703. Respondent could not explain how or why an effective UCC termination could be filed in Maryland, rather than the District of Columbia. Tr. 1704, 1707-08.

215. The original UCC-1 financing statement was filed in the District of Columbia on October 29, 2003 (BX 76 at 2068-72) and was not terminated until July 28, 2006 (BX 87 at 2142-44), more than one and one-half years after Respondent paid Mr. Shifaw's funds to Leaf Financial in December 2004. BX 87 at 2142-44. Respondent recklessly – if not falsely – told Mr. Shifaw in his January 20, 2005 e-mail that "Leaf Financial released its UCC lien, on the equipment on the day they received $46,000 negotiated payment for the equipment" and that Respondent had confirmed that fact with Leaf Financial. BX 84 at 2130; BX 87 at 2142-44.

d. Mr. Shifaw sues Respondent, who engages in misconduct

216. When Respondent failed to address his concerns, Mr. Shifaw hired successor counsel, David Fox, whom he also located in the Ethiopian Yellow Pages. Tr. 1514-15. Mr. Fox brought suit against Respondent in D.C. Superior Court for legal malpractice arising out of his handling of the laundromat purchase. *Shifaw v. Omwenga*, 2006 CA 5236. BX 88 at 2146-48; Tr. 1516-17 (the "Malpractice Case").

217. Respondent appeared *pro se* in the Malpractice Case. The court sanctioned Respondent five separate times for his conduct, beginning in October 2006 and continuing through June 2008. BX 97 at 2187-88 (Attachment B); BX 97 at 2203 (Attachment G):

a. First sanction. On October 13, 2006, the court granted Plaintiff's motion for sanctions and ordered Respondent to pay Mr. Shifaw's counsel $245 within ten days. BX 97 at 2203. Respondent moved to vacate the order on October 23, 2006, BX 107 at 2311, and the court denied the motion on November 8, 2006. BX 107 at 2324. Respondent did not pay the sanction until September 14, 2007. BX 109 at 2362; Tr. 1779-80.

b. Second sanction. On October 1, 2007, the court ordered Respondent to pay Mr. Shifaw's counsel an additional $260 within seven days because Respondent had failed timely to pay the sanctions ordered on October 13, 2006. BX 91 at 2163, 2156-62. Respondent has not paid the sanction. Tr. 1781-84, 1920; BX 106 (docket sheet).

c. Third sanction. On October 1, 2007, the court ordered Respondent and his opposing counsel each to pay $250, within thirty days, into the Court Registry as a sanction for their failure to meet and confer or file a pretrial statement. The court ordered Respondent to file proof of payment. Respondent has not paid the sanction and the court has not vacated its order. BX 93 at 2165-66; Tr. 1781-84, 1920; BX 106 (docket sheet).

d. Fourth sanction. On March 10, 2008, the court ordered Respondent and his opposing counsel to pay $500 into the Court Registry for their failure to comply with the court's earlier order to file a joint pretrial statement. BX 94 at 2167. The court ordered Respondent to pay the sanction within thirty days and to provide proof of payment to the court within 48 hours of making the payment. *Id.* Respondent did not comply with the court's order until April 24, 2009, after the

court issued an order requiring him to show cause why he should not be held in contempt. BX 103 at 2269-70; BX 94 at 2167-68. Respondent received a copy of the show cause order by certified mail on April 13, 2009, which Bar Counsel sent with an additional written inquiry. BX 103 at 2268-71. Respondent replied to the correspondence on April 23, 2009, by attaching a copy of his motion to vacate. BX 104 at 2276-80; BX 105 at 2282 l. 16.

e. Fifth sanction. On June 19, 2008, the court ordered Respondent to pay $1,000 into the Court Registry for his failure to appear at a hearing. Respondent has not paid the sanction and the court has not vacated its order. BX 95 at 2169-70; Tr. 1781-84, 1920.

218. On December 9, 2008, Mr. Shifaw wrote to the judge in the Malpractice Case expressing his frustration over the repeated failures of both Respondent and Mr. Shifaw's own counsel to appear in court, sanctions notwithstanding. BX 97 at 2204. He advised the court, "If I cannot find a lawyer by January 9, 2009, I will not appear at your courtroom to kill your precious time. In this case please, close the case on that day." BX 97 at 2204. On August 26, 2009 the Court dismissed the Malpractice Case for lack of prosecution. BX 106 at 2297.

219. Respondent also made a series of misrepresentations to the court:

a. On April 23, 2009, Respondent moved to cancel the show cause hearing and to vacate the June 19, 2008 sanctions order. BX 104 at 2276-79. In his motion, Respondent falsely claimed that the court imposed only two sanctions against him when Respondent knew there were five orders entered against him. BX 104 at 2277;

b. At the April 24, 2009, show cause hearing, Respondent falsely stated to the court

that he had never seen the June 19, 2008, sanctions order. BX 105 at 2293. Bar Counsel enclosed a copy of the June 19, 2008, order with its letter of February 2, 2009, which Respondent received and responded to in writing. BX 97; Tr. 1727-28 (Respondent). Further, the court had served Respondent with the order via electronic service, and Respondent's representations to the court that a problem with his office mailing address caused him to not receive the order were disingenuous at best. Tr. 1916-18 (Respondent); BX 95 at 2169-70 (order);

c. Respondent falsely stated that he was "only aware of two orders from the judge regarding sanctions" and that his "file does not reflect any of those orders except for two." BX 105 at 2282-83, 2287; Tr. 1772-73. In fact, Respondent received the five orders in the February 2, 2009 ethical complaint, to which he responded on February 18, 19, and 20, 2009. BX 97; BX 98; BX 100; Tr. 1727-28.

e. Respondent's additional misconduct in the disciplinary process

220. Respondent failed to supply to Bar Counsel the account number and bank records pertaining to where Respondent initially deposited Mr. Shifaw's $48,050 entrusted funds, notwithstanding Bar Counsel's subpoena for the documents. Tr. 1727-31; BX 74 at 2041-42; BX 97 at 2181; BX 98. Respondent testified that he did not provide a single bank record or account number in response to Bar Counsel's inquiry and subpoena. Tr. 1730, 1733-36. When asked what happened to his bank records, he testified that they were destroyed after a month or two, or perhaps even five days, of his wife reconciling the statements. Tr. 1736-38. This practice would violate Rule 1.15(a) and D.C. Bar R. XI, § 19(f), which require an attorney to keep trust records for five years after termination of the representation and five years after final distribution of the funds, respectively. Respondent stated that he "did not recall why" he did not

produce online bank records in lieu of the shredded paper documents, Tr. 1738.

221. On February 2, 2009, Bar Counsel subpoenaed all of Respondent's e-mail correspondence with Mr. Shifaw, requiring that Respondent produce the documents by February 12, 2009. BX 74 at 2041-42. Respondent did not produce any such correspondence until almost one year later, when he filed his proposed Respondent's Exhibit B on January 26, 2010, in anticipation of the disciplinary hearing. RX B; Tr. 1685-93. Bar Counsel subpoenaed the hard drives of those computers and Respondent produced some of his computers, but not the one containing his extensive e-mails with Mr. Shifaw. Tr. 1687-89. Respondent's claim at the hearing that he only checked his Outlook file when he was preparing his defense does not excuse his failure to produce materials that were under subpoena since February 2, 2009.[18] Tr. 1687-89.

222. On February 2, 2009, Bar Counsel wrote to Respondent requesting his response to allegations of his potential ethical misconduct in his representation of Mr. Shifaw in the laundromat sale transaction and in the subsequent legal malpractice action. BX 97. Bar Counsel included with its inquiry letter, *inter alia*, copies of the five court orders sanctioning Respondent in the legal malpractice action, which Respondent received. BX 97 (Attachments B, D, E, F, and G) at 2187-88, 2197-98, 2199-2200, 2201-02, 2203; Tr. 1727-28.

223. Respondent first responded to Bar Counsel's inquiry by letter on February 18, 2009. BX 98. In his response, Respondent made the following statements, which were false:

a. Respondent stated that Mr. Shifaw insisted on paying Respondent an additional $500 in legal fees because Mr. Shifaw was "thrilled" with Respondent's success

[18] Although Respondent improperly failed to produce documents subpoenaed by Bar Counsel, that failure does not constitute an independent violation of Rule 8.4(d) (conduct prejudicial to the administration of justice), because Bar Counsel did not seek judicial enforcement of the subpoena with the Court. *See In re Confidential*, Bar Docket Nos. 215-85, *et al*. (BPR April 23, 1987).

in negotiating a lower purchase price for the laundromat. BX 98 at 2224 (attached to answer to Specification of Charges at BX 73 at 2038 and adopted as true at hearing at Tr. 1694-95 (Respondent)). This statement was false. Mr. Shifaw testified repeatedly and credibly that he was unhappy and not "thrilled" with Respondent's services, as further supported by his contemporaneous e-mails and subsequent correspondence with Bar Counsel. *See, e.g.*, Tr. 1533-43; RX B at 23-25, 29, 45-47, 50-53, 56; BX 102 at 2258-60, 2263-66; BX 97 at 2191-95 (letter sent to Judge Vincent on June 12, 2008; more legible copy found at BX 102 at 2263-66).

b. Respondent stated that Mr. Shifaw remitted the $500 to him. BX 98 at 2224; BX 73 at 2038. This statement was false. Mr. Shifaw testified repeatedly and credibly that he did not agree or offer to pay Respondent any additional fees. Tr. 1498-99, 1503-04, 1559-61, 1565; BX 102 at 2259-60, 2264 at ¶ 16.

c. Respondent stated that Mr. Shifaw "erroneously remitted" the certified check for the $46,000 purchase price of the laundromat equipment in the name of Respondent's law firm. This statement was false. In fact, Respondent had instructed Mr. Shifaw to provide a check for $48,050 to be made payable in the name of Respondent's law firm. BX 98 at 2225; BX 73 at 2039; BX 100 at 2231. Mr. Shifaw testified credibly at the hearing that Respondent directed him to have the check made payable to Respondent's law firm. Tr. 1473, 1475-76, 1550-52, 1585.

224. Respondent stated in his supplemental response of February 18, 2009 to the ethical complaint that he "concluded the purchase and transfer of clear title of the laundromat

equipment to Mr. Shifaw on or about November 8, 2004." BX 98 at 2224. Respondent knew, or should have known, that this statement was false because he did not obtain a bank check for the $46,000 payable to Leaf Financial until December 1, 2004, and the UCC lien was not released until one and one-half years later. BX 100 at 2231; BX 73 at 2039; BX 87.

225. On February 19, 2009, Respondent again supplemented his written response to Bar Counsel's inquiry and made the following false and/or recklessly inaccurate statements:

a. Respondent denied depositing the check into his escrow account (when in fact Respondent deposited the $48,050 check into his Escrow Account on November 8, 2004). BX 79 at 2092; BX 80 at 2097; Tr. 1433-34 (Dixon).

b. Respondent stated that he instructed Mr. Shifaw to make the check for $48,050 payable to Leaf Financial, when in fact Respondent directed Mr. Shifaw to make the check payable to Respondent's law firm. *See* Tr. 1473, 1475-76, 1550-52, 1585 (Shifaw).

226. Respondent's attitude toward the disciplinary system, as well as his unexcused disregard in the Shifaw matter of the court's sanctions orders, further erode any remaining credibility that Respondent might have in this case. *See In re Shariati*, Bar Docket No. 491-02, *et al.* at 21-25 (H.C. Rpt. Dec. 30, 2009), *adopted in relevant part*, *In re Shariati*, Bar Docket No. 491-02 (BPR July 30, 2010) (pending Court review); *see also In re L. Saundra White*, Bar Docket No. 292-04, at 31-32 (BPR Aug. 30, 2009) (pending Court review) (dishonesty during disciplinary proceedings is a "substantial aggravating factor," *id.* at 29, and evidence of the need to impose a fitness requirement, *id.* at 32.).

EVIDENCE IN AGGRAVATION

227. Respondent was disciplined in three separate client matters, for which Bar Counsel issued two Informal Admonitions, on September 22, 2003 and on March 30, 2004. BX 111; BX 112. In the first case, Respondent advised his client not to go to a hearing because the case had been continued, although Respondent denied providing this advice when he responded to the ethical complaint. BX 111. Respondent, however, had filed an affidavit and brief to the BIA admitting that he had provided the client with an incorrect hearing date. Respondent also was not present at the hearing. BX 111. In the second case, Respondent was disciplined for failing to provide a writing setting forth the basis of his fee in one client matter and for failing to turn over his file to successor counsel at the termination of his representation in a second, unrelated, client matter. BX 112. The Informal Admonitions predated Respondent's misconduct in the instant matters.

228. A troubling pattern in these proceedings is Respondent's persistent and pervasive practice of claiming that his integrity is unassailable. These claims are clearly contrary to the evidence. Respondent testified that his own standards for his conduct were far higher than the Rules of Professional Conduct, which are a "lower standard for me. I have a higher standard that I apply in all of the cases, in all of my personal conduct, in everything that I do. So, while there might be some gray areas for some, for me they can be as clear as day and night." Tr. 1814. Respondent's conduct and veracity, however, are inconsistent both with his professed standards and those of the legal profession.

229. Respondent also claims that most of his former clients are liars, painting them as clients untrustworthy and untruthful. For Respondent, "[t]he Beraki case was as clear as day and night that he had misrepresented, he had lied under oath; he had admitted to me as much. I was

not going to further that for him or for anybody else." Tr. 1814. "The other three Hailu, Mwihava, Gitau . . . . are individuals who are real pathological liars. They have lied as proven on the record . . . " Tr. 1817. As this Hearing Committee has noted above, after hearing the testimony and reviewing the evidence in these consolidated matters, we have little, if any, belief in the credibility of Respondent, who repeatedly offered half-truths, mischaracterizations, self-serving statements, and demonstrable falsehoods. Respondent also defiantly contended that Bar Counsel's case is unfounded and possibly vindictive, such that he had to be admonished not to launch *ad hominem* attacks on Bar Counsel. Tr.1804-5, 2030, 2034-35. Finally, Respondent steadfastly refused to concede that he bears any responsibility for the consequences that his actions had for his clients, *see, e.g.*, Tr. at 1851 (Respondent denies responsibility for light of Mr. Hailu). In the view of the Hearing Committee, all of these factors represent additional aggravating evidence.

III. CONCLUSIONS OF LAW

Because of the manifold charges lodged by Bar Counsel against Respondent, we will discuss them generally, and then assess their application to the individual cases before us.

a. Rule 1.1: competence, care and skill

Rule 1.1(a) requires a lawyer to provide competent representation, which involves not only legal knowledge and skill, but also the "thoroughness and preparation" reasonably necessary for the representation. Rule 1.1(b) mandates that a lawyer serve the client with the skill and care commensurate with that generally afforded clients by lawyers in similar matters. Comment [5] reiterates that competent representation "includes adequate preparation and continuing attention to the needs of the representation to assure that there is no neglect of such needs. The required attention and preparation are determined in part by what is at stake…"

Attorneys who are capable of providing competent representation but fail to do so may violate Rule 1.1(a). *See In re Drew*, 693 A.2d 1127, 1132 (D.C. 1997) (per curiam) (lawyer who has requisite skill and knowledge, but who does not apply it for particular client, violates obligations under Rule 1.1(a)); *In re Bland*, BDN 245-95 (BPR Jan. 13, 1998) at 13, *adopted*, 714 A.2d 787 (D.C. 1998).

Respondent repeatedly failed to file appropriate documents and repeatedly failed timely to take the necessary steps to assist his clients. *See In re Mance*, 869 A.2d 339 (D.C. 2005) (violation of Rules 1.1(a) and (b) by filing an untimely appeal from the client's criminal conviction, failing to seek available relief for that lapse, and failing to get the client's sentence reduced on the available ground that some of the offenses of which he was convicted were merged); *In re Lyles*, 680 A.2d 408 (D.C. 1996) (lawyer professing to be a bankruptcy specialist violated Rule 1.1(b) when she failed to follow fundamental pleading and filing requirements of the Bankruptcy Code); *In re Nwadike*, 905 A.2d 221 (D.C. 2006) (failure to file appropriate expert disclosure). In addition, Respondent repeatedly made misleading statements in court filings. *In re Willis*, 505 A.2d 50 (D.C. 1985) (attorney who filed pleadings that were '"sloppy, incoherent, incomplete and misleading on their face . . . [and] prepared . . . without any meaningful investigation,"' violated DR 6-101(A)(2) (citation omitted), predecessor to Rule 1.1(a)).

b. Rule 1.3: Diligence and Zeal

Rule 1.3(a) provides that "[a] lawyer shall represent a client zealously and diligently within the bounds of the law." Comment [1] notes that a "lawyer's workload should be controlled so that each matter can be handled adequately." Violations of Rule 1.3(a) have been found where attorneys have failed to take action on their clients' behalf. *See In re Wright*, 702

A.2d 1251, 1255 (D.C. 1997) (per curiam); *In re Lewis*, 689 A.2d 561, 564 (D.C. 1997) (per curiam) (Board Report appended); *In re Chisholm*, 679 A.2d 495, 564 (D.C. 1996) (Board Report appended). The rule is violated even where "[t]he failure to take action for a significant time to further a client's cause . . . [does] not [result in] prejudice to the client. . . ." *Lewis*, 689 A.2d at 564. In *In re Ryan*, 670 A.2d 375 (D.C. 1996**)**, an immigration lawyer was found to have violated Rule 1.3 by missing filing deadlines and failing to appeal her client's deportation order.

Rule 1.3(b) provides that "[a] lawyer shall not intentionally: (1) fail to seek the lawful objectives of a client through reasonably available means permitted by law and the disciplinary rules; or (2) prejudice or damage a client during the course of the professional relationship." The hallmark of a Rule 1.3(b) violation is that the neglect must be intentional. *See In re Reback*, 487 A.2d at 240, *aff'd in pertinent part*, 513 A.2d 226, 229 (D.C. 1986) (en banc). Intent can be found when the lawyer is aware of his neglect, or when the neglect is "so pervasive that the lawyer must be aware of it." *Lewis*, 689 A.2d at 564; *see In re O'Donnell*, 517 A.2d 1069, 1072 (D.C. 1986) (per curiam) (appended Board Report) (attorney's "inaction was coupled with an awareness of his obligations, and he thus made a deliberate and conscious choice not to pursue his client's objectives in violation of DR 7-101(A)(1)," predecessor to Rule 1.3(b)(1)); s*ee also Ryan*, 670 A.2d 375 (violation of Rule 1.3(b) by missing numerous filing deadlines, failing to file an appeal of her client's deportation order, and going on maternity leave without notifying her clients); *In re Robertson*, 612 A.2d 1236 (D.C. 1992); *In re Haupt*, 444 A.2d 317 (D.C. 1982) (per curiam) (appended Board Report); *In re Haupt*, 422 A.2d 768 (D.C. 1980) (per curiam); *In re Fogel*, 422 A.2d 966 (D.C. 1980) (per curiam). We believe that Respondent's conduct – consistently proved in the matters at issue before us – is sufficiently pervasive to meet this threshold.

Rule 1.3(c) provides that "[a] lawyer shall act with reasonable promptness in representing a client." Comment [8] recognizes that

> Perhaps no professional shortcoming is more widely resented by clients than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions . . . . Even when the client's interests are not affected in substance . . . unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. Neglect of client matters is a serious violation of the obligation of diligence.

Respondent's failure to take action for significant periods of time, combined with his false assurances to his clients that he had made the necessary filings, showed a total lack of "promptness" in representation. *See In re Geno*, 997 A.2d 692 (D.C. 2010) (per curiam) (failure to attend hearing violated Rule 1.3(c)); *In re Cole*, 967 A.2d 1264 (D.C. 2009) (violation of Rule 1.3(a-c) for failing to timely file an asylum application and lying to client about the status of the application). Indeed, Respondent's failure to pursue his clients' matters caused them substantial harm or prejudice, both financial and psychological (*see* FF 208, 210, 211, *supra*)**,** in addition to placing them at risk of unwarranted deportation.

c. Rule 1.4: failure to communicate

Rule 1.4(a) provides that "[a] lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information…" *See In re Hallmark*, 831 A.2d 366, 374 (D.C. 2003); *In re Wright*, Bar Docket Nos. 377-99 *et al*., at 7-8 (BPR Apr. 14, 2002) (consistent failure to return telephone calls about a matter can constitute a violation of Rule 1.4(a)), *recommendation adopted*, 885 A.2d 315 (D.C. 2005) (per curiam). Comment [1] to Rule 1.4 states that "[t]he client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued."

Rule 1.4(b) provides that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Comment [1] states that "a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party, and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party." *See In re Baron*, 808 A.2d 497 (D.C. 2002) (per curiam) (violation of Rule 1.4(b), *inter alia*, where lawyer's conduct included failure to communicate with her client during the entire pendency of his appeal and failure to respond to her client's attempts to communicate with her). "[F]ull and complete communication with the client is an essential part of the attorney's role." *In re Stanton*, 470 A.2d 272, 278 (D.C. 1983) (per curiam).

The Rule also requires a lawyer to respond to a client's inquiries; comment [2] states that a "client is entitled to whatever information the client wishes about all aspects of the subject matter of the representation …."

Respondent routinely failed to keep his clients informed about the true status of their matters, failed to take or return their telephone calls, and failed to appear for scheduled appointments. *See In re Sumner*, 665 A.2d 986, 989 (D.C. 1995) (Board Report appended) (lawyer violated Rule 1.4(a) by failing to keep his client reasonably informed of how he could be reached or to inform the client that court deadlines had been set that the lawyer would not meet); *In re Outlaw*, 917 A.2d 684, 687 (D.C. 2007) (violation of 1.4(a) when attorney failed to advise client of his professional lapses).

d. Rule 1.5(b): written fee agreement

Rule 1.5(b) requires a lawyer to provide his client a fee agreement or other writing setting forth the basis or rate of the lawyer's fee before or within a reasonable time after commencing

the representation. Comment [1] to Rule 1.5 states that although the lawyer is not required to recite all factors that underlie the basis of the fee, he must explain "those that are directly involved in its computation."

Respondent violated Rule 1.5(b) by failing to provide any writing that explained the computation of his fee to two of his clients – Ms. Gitau and Mr. Hailu. *See Drew*, 693 A.2d 1127; *In re Williams*, 693 A.2d 327 (D.C. 1997). And, he failed to prepare a written retainer justifying his retention of additional monies from Mr. Shifaw.

e. Rule 1.7(b)(4): conflict of interest

Rule 1.7(b)(4) provides that a lawyer shall not represent a client with respect to a matter if the lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's interests, unless, pursuant to Rule 1.7(c), the client provides "consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation."[19] In the Gitau, Hailu, and Mwihava matters, Respondent violated Rule 1.7(b)(4) by failing to disclose to his clients the conflicts of interest that arose based on his ineffective assistance of counsel. *See In re Fitzgerald*, 982 A.2d 743 (D.C. 2009); *In re Hager*, 812 A.2d 904, 912-15 (D.C. 2002).

f. Rule 1.15(a): Intentional Misappropriation
Rules 1.15(b) and 1.15(d): Failure to Safe keep and Deliver Advanced Costs
Rule 1.16(d): Failure Upon Termination to Surrender Papers and Property and to Refund Advance Payments of Fees that Were Not Earned

Rule 1.15(a) requires a lawyer to "hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own

[19] Rule 1.7(c) was amended effective February 1, 2007, to provide specifically that the consent must be "informed." *See also* Rule 1.0(e) (Terminology) (defining "informed consent"). Clearly, however, even before the amendment the client's consent had to be "informed."

property." Misappropriation is "any unauthorized use of client's funds entrusted to [the lawyer], including not only stealing but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom." *In re Anderson*, 778 A.2d 330, 335 (D.C. 2001) (quoting *In re Harrison*, 461 A.2d 1034, 1036 (D.C. 1983)). Misappropriation is essentially a *per se* offense and does not require proof of improper intent. *See Anderson,* 778 A.2d at 335. Once misappropriation is established, the question is whether it was intentional, reckless, or negligent. Where Bar Counsel proves by clear and convincing evidence that the misappropriation was intentional or reckless, disbarment is imposed absent "the most stringent of extenuating circumstances." *See In re Addams*, 579 A.2d 190, 193 (D.C. 1990) (en banc).

In the Shifaw matter, Respondent engaged in misappropriation when he took for himself $2,050 in cash, which depleted the entire escrow account balance. Respondent compounded his offense when he refunded only $1,500 of Mr. Shifaw's funds and, over Mr. Shifaw's objection, kept $550 for himself. As a consequence, we find that Respondent intentionally misappropriated $550 from Mr. Shifaw and should refund that amount to him.

Mr. Mwihava also paid Respondent $740 in advanced costs, plus additional legal fees, for the filing of the I-130 petition that he retained Respondent to file in 2005. Rule 1.15(b) requires that a lawyer, upon request of a client, render a full accounting of property he holds in which the client has an interest. Rule 1.15(d) requires that any advances of unearned fees and unincurred costs shall be treated as property of the client unless the client consents to a different arrangement. Rules 1.15(d) and 1.16(d) both require that in connection with any termination of the representation, the lawyer take timely steps to refund any advance payment of fees and expenses that has not been earned. Respondent violated Rules 1.15(b), 1.15(d), and 1.16(d) by

failing to account for the advanced fees Mr. Mwihava paid, despite the fact that Mr. Mwihava asked him to refund those monies, and by failing to refund those unearned legal fees and advanced costs, as evidenced by Respondent's insistence that "no refund is due."[20] *See In re Hallmark*, 831 A.2d 366, 372 (D.C. 2003) (lawyer violated Rule 1.16(d) when failed to refund fee paid for particular task that lawyer never performed); *Lockhart v. Cade*, 728 A.2d 65, 69-70 (D.C. 1999) (client who advances funds to attorney entitled to recover sums for services he did not receive).

Rule 1.16(d) also requires that, in connection with any termination of representation, the lawyer must take timely steps to protect the client's interests, including surrendering unearned fees, papers and property to which the client is entitled. A "client's right to documents exists when the client has a plausible ownership interest in them and there is no competing claim to their ownership." *Ryan*, 670 A.2d at 380 (quoting Board order). The Rule requires an attorney to surrender a client's file upon termination of a representation. *Bernstein*, 707 A.2d 375. In the Mwihava and Shifaw matters, Respondent failed to turn over unearned fees, papers, and files to his clients when the representation ended, even though they had requested him to do so. Respondent also refused to respond to the often urgent requests of successor counsel to turn over the client files. We thus find that Respondent violated Rule 1.16(d) in the Mwihava and Shifaw matters. *See In re Thai*, 987 A.2d 428 (D.C. 2009) (lawyer violated Rule 1.16(d) when he delayed providing file to client); *In re Arneja*, 790 A.2d 552, 556-57 (D.C. 2002) (lawyer

[20] Bar Counsel further alleges that Respondent's failure to refund the $740 in advanced costs for the I-130 petition constitutes intentional misappropriation. Although Respondent's failure to refund the costs violates Rule 1.15(d) and 1.16(d), Bar Counsel has not proven misappropriation of these funds because it has failed to establish unauthorized use, a necessary element of the charge. *See In re Kanu*, 5 A.3d 1 (D.C. 2010) (declining to address whether the prolonged failure to refund a legal fee constitutes misappropriation).

violated Rule 1.16(d) when he delayed turning over client's files to successor counsel despite requests); *In re Landesberg*, 518 A.2d 96 (D.C. 1986) (per curiam) (lawyer violated predecessor to Rule 1.16(d) by failing to return client file even though the file was "not significant").

g. Rules 3.3(a)(1) and 3.4(c): False Statements of Fact to a Tribunal; Knowingly Disobeying an Obligation Under the Rules of a Tribunal

Rule 3.3(a)(1) prohibits a lawyer from making a false statement of material fact or law to a tribunal or failing to correct a false statement of material fact or law previously made to the tribunal by the lawyer. *See In re Cleaver-Bascombe*, 98 A.2d 1196 (D.C. 2010); *In re Owens*, 806 A.2d 1230, 1231 (D.C. 2002). Respondent violated these proscriptions in the Shifaw litigation (FF 219).[21]

Rule 3.4(c) prohibits a lawyer from disobeying an obligation under the rules of a tribunal. Respondent violated Rule 3.4(c) in the Shifaw matter when he failed to pay the sanctions against him (FF 217).

h. Rule 8.1: Knowingly False Statements of Material Fact in Disciplinary Matters

Rule 8.1(a) provides that an attorney shall not knowingly make a false statement of material fact in connection with a disciplinary matter.[22] Respondent repeatedly violated Rule 8.1(a) in these consolidated cases. Respondent's misrepresentations included false statements about (1) when he arrived late at the Immigration Court for Mr. Hailu's hearing (FF 155); (2)

[21] The Hearing Committee would also find a violation of Rule 3.3(a)(1) in the Gitau matter based on Respondent's assertion in his motion to reopen that he did not attend the February 13th hearing because he did not receive a copy of the hearing notice and that Ms. Gitau mistakenly believed the hearing had been canceled. *See* FF 79, 80, 81. Because Bar Counsel did not charge a violation of Rule 3.3(a)(1) in that matter, and because the violation would not affect our sanction recommendation, we decline to make such a finding.

[22] Effective February 1, 2007, Rule 8.1(a) was amended to delete the materiality requirement. Thus, in Respondent's false statements made after February 1, 2007 in the Hailu, Mwihava and Shifaw matters, Respondent's statements need not be material. In any event, Bar Counsel proved that they were. *See, e.g.*, FF 135.

advising Ms. Gitau on February 8, 2006 that she must attend her February 13 hearing; (3) stating that he did not represent Mr. Mwihava in his I-130 matter; and (4) denying that he took any of Mr. Shifaw's entrusted funds (FF 193, 194, 195).

i. Rule 8.4(c): Pervasive Dishonesty

Respondent violated Rule 8.4(c), which declares that it is professional misconduct for a lawyer "to engage in conduct involving dishonesty, fraud, deceit or misrepresentation." The term "dishonesty" includes not only fraudulent, deceitful or misrepresentative conduct, but also "conduct evincing 'a lack of honesty, probity or integrity in principle; [a] lack of fairness and straightforwardness.'" *In re Shorter*, 570 A.2d 760, 767-68 (D.C. 1990) (per curiam) (quoting *Tucker v. Lower*, 434 P.2d 320, 324 (Kan. 1967)). Further, "what may not legally be characterized as an act of fraud, deceit or misrepresentation may still evince dishonesty." *Shorter*, 570 A.2d at 768. Respondent's conduct in connection with the pending disciplinary proceedings clearly and convincingly demonstrates his violation of this standard.

j. Rule 8.4(d): Conduct that Seriously Interferes With the Administration of Justice

Rule 8.4(d) provides that "[i]t is professional misconduct for a lawyer to . . . engage in conduct that seriously interferes with the administration of justice." In *In re Hopkins*, 677 A.2d 55 (D.C. 1996), the District of Columbia Court of Appeals set forth three elements that must be present for an attorney's conduct to be prejudicial to the administration of justice. First, the attorney's "conduct must be improper. That is, the attorney must either take improper action or fail to take action when, under the circumstances, he or she should act." *Id*. at 60-61. Second, "the conduct itself must bear directly upon the judicial process . . . with respect to an identifiable case or tribunal." *Id*. at 61. Third, "the attorney's conduct must taint the judicial process in more

than a *de minimis* way; that is, at least potentially impact upon the process to a serious and adverse degree." *Id.*

Respondent filed false documents with governmental authorities, including motions and affidavits. FF 121. 156, 161, 163. He repeatedly failed to appear in court without a legitimate excuse, despite having notice of the hearing dates and times. FF 55-66, 118-24, 145-55. Current Comment [2] to Rule 8.4 and, former Comment [4] make clear that a lawyer's failure to appear in court for a scheduling hearing or to obey a court order violates Rule 8.4(d). In the Shifaw matter, Respondent's misconduct in the legal malpractice action resulted in the court sanctioning him on five occasions. FF 217. Respondent also violated Rule 8.4(d) by his willful disobedience of the series of sanctions orders the court entered against him. FF 218. "Court orders must be respected" and "[c]ompliance with court orders is required until they are reversed on appeal or are later modified." *Baker v. United States*, 891 A.2d 208, 212 (D.C. 2006) (citations omitted). Here, Respondent never complied timely with any of the five sanctions orders and belatedly has paid only two of them. FF 217, 219. None of the sanctions orders was overturned on appeal or otherwise modified and Respondent admits that he has not even filed an appeal of the outstanding orders. FF 217. *In re Travers*, 764 A.2d 242, 248 (D.C. 2000) (attorney's flagrant violation of a court order violates Rule 8.4(d)).

As a consequence of the foregoing analysis, the Hearing Committee concludes as follows.

1. We find based on the foregoing, that with respect to his representation of Tadessi Beraki, Bar Counsel failed to prove by clear and convincing evidence that Respondent violated any rules.

2. We find that with respect to his representation of Josephine Gitau, Bar Counsel has proved by clear and convincing evidence that Respondent violated the following rules:

a. Rules 1.1(a) and 1.1(b): Respondent failed to provide competent representation to his client. In this regard, Respondent failed to submit promised documentation to USCIS in support of the lapsed I-130 petition (FF 50 – 51); told Ms. Gitau that she did not need to attend the February 13, 2006 hearing (FF 57, 60); failed to attend the February 13, 2006 hearing himself (FF 61), resulting in a deportation order (FF 61 – 66); failed to help his client revise an affidavit to be supplied to the court (FF 72-73); failed timely to file a motion to reopen a removal order (FF 75); and failed expeditiously to file an I-360 widow's petition, resulting in prejudice to his client (FF 55, 83);

b. Rule 1.3(a): Respondent failed to represent his client zealously and diligently within the bounds of the law. In this regard, Respondent failed to provide promised documentation to USCIS, apparently because of a prioritization scheme driven by the "imminence" of a client's deportation (FF 50 – 54); failed expeditiously to file an I-360 widow's petition, resulting in prejudice to his client (FF 55, 83); told Ms. Gitau she did not need to attend the February 13, 2006 hearing (FF 57, 60); and failed to attend the February 13, 2006 hearing himself (FF 61), resulting in an *in absentia* deportation order (FF 61 – 66);

c. Rules 1.3(b)(1) and 1.3(b)(2): Respondent intentionally failed to seek the lawful objectives of his client and intentionally prejudiced or damaged his client during the course of the professional relationship. Although we find that Respondent did not act malevolently with the specific purpose of prejudicing his client, in our

view he acted with culpable indifference toward Ms. Gitau's interests. In *In re Mance*, 869 A.2d 339 (D.C. 2005), the Court indicated that this Rule does not require proof of intent "in the usual sense of the word." Rather, "[n]eglect ripens into an intentional violation when the lawyer is aware of his neglect of the client matter." (quoting *In re Lewis*, 689 A.2d 561, 564 (DC 1997)). Intent can also be established if the attorney is "demonstrably aware" of the neglect or if the neglect was "so pervasive that they must have been aware of it." *See Reback*, 487 A.2d at 240; *see also In re Robertson*, 612 A.2d 1236, 1250 (D.C. 1992) (attorney must have "knowingly created a grave risk" and understood that prejudice or damage was "substantially certain to follow from his conduct"); *In re Haupt*, 444 A.2d 317, 322 (D.C. 1982) (per curiam) (adopting Hearing Committee findings) (neglect was so "persistent, prolonged, and pervasive" that the attorney must have been aware of it). In making such a determination, we must consider the "entire mosaic" of Respondent's conduct. *In re Ukwu*, 926 A.2d 1106, 1118 (D.C. 2007). We find that the pervasiveness of Respondent's neglect is sufficient to establish intent within the meaning of the Rules.

d. Rule 1.3(c): Respondent failed to act with reasonable promptness in representing his client. In this regard, Respondent failed to provide promised documentation to USCIS, apparently because of a prioritization scheme driven by the "imminence" of a client's deportation (FF 50–54); failed expeditiously to file an I-360 widow's petition, resulting in prejudice to Ms. Gitau (FF 55, 83); failed expeditiously to file a motion to reopen the removal proceeding after issuance of the *in absentia*

order (FF 73-78); and failed timely to submit papers to ICE and thus forced Ms. Gitau to do the same on her own behalf (FF 53-54);

e. Rule 1.4(a): Respondent failed to keep his client reasonably informed about the status of her matter and/or to promptly comply with reasonable requests for information. In this regard, Respondent failed to provide Ms. Gitau with papers relating to her bond proceedings or her I-130 proceedings (FF 43-44); failed to advise Ms. Gitau of the status of her I-130 submission (FF 51); failed to provide Ms. Gitau with a copy of her file (FF 52); failed timely to inform Ms. Gitau of developments in her matters despite his client's specific request for information, forcing the client to take action on her own (FF 53 – 54); failed to respond to Ms. Gitau's requests for assistance in preparing an affidavit in support of a motion to reopen the *in absentia* order (FF 72 – 73); failed timely to tell Ms. Gitau the status of her deportation proceeding (FF 76 – 77); and repeatedly and consistently failed to respond in a timely manner to Ms. Gitau's inquiries and requests, and failed to provide her with copies of documentation relating to developments in her case;

f. Rule 1.4(b): Respondent failed to explain a matter to the extent reasonably necessary to permit his client to make informed decisions regarding the representation. In this regard, Respondent repeatedly and consistently failed to respond in a timely manner to Ms. Gitau's inquiries and requests, and failed timely to provide her with copies of documentation relating to developments in her case (FF 51-53, 72-78);

g. Rule 1.5(b): Respondent failed to provide his client with a writing setting forth the basis or rate of his fee (FF 40);

h. Rule 1.7(b)(4): Respondent engaged in a conflict of interest because he continued to represent his client when his professional judgment on behalf of his client was or may have reasonably been affected by his own interests in that he continued to represent Ms. Gitau in a challenge to the *in absentia* deportation order based notwithstanding his own culpability in connection with its issuance (FF 68 – 82);

i. Rule 1.7(c): Respondent failed to disclose to his client the existence and nature of his possible conflict of interest and the possible adverse consequences of such representation, when he failed to advise Ms. Gitau that she could seek to vacate the *in absentia* deportation order based on his ineffective assistance (FF 67 – 68).

j. Rule 8.1(a): Respondent knowingly made false statements of material fact in connection with a disciplinary matter, in that he falsely claimed he told Ms. Gitau that she had to attend the hearing in February 2006 (FF 58 – 59, 71, 80); falsely claimed that he tried to attend the February 2006 hearing by telephone (61-65); and falsely claimed that Ms. Gitau did not attend the hearing because she seemed to be concerned that she did not want to make the three hour trip to Kansas City (*see* BX 15 at 228). BX 30 at 576. FF 88, 91.

k. Rule 8.4(c): Respondent engaged in conduct involving dishonesty, fraud, deceit, and/or misrepresentation in that he denied receipt of the February 13, 2006 notice of hearing in connection with his motion to reopen (FF 79 – 80); falsely claimed he told Ms. Gitau that she had to attend the hearing in February 2006 (FF 58 – 59, 71, 80); falsely claimed that he tried to attend the February 2006 hearing by

telephone (61-65); and falsely claimed that Ms. Gitau did not attend the hearing because she seemed to be concerned that she did not want to make the three hour trip to Kansas City (*see* BX 15 at 228). BX 30 at 576. FF 88, 91;

l. Rule 8.4(d): Respondent engaged in conduct that seriously interferes with the administration of justice. Respondent made numerous false statements in his July 26, 2006 answer to the ethical complaint, which he also filed with the BIA in defense of the allegations that he had rendered ineffective assistance of counsel to Ms. Gitau (FF 91) and in denied receipt of the February 13, 2006 notice of hearing in connection with his motion to reopen (FF 79 – 80).

3. We find that with respect to his representation of Cane Mwihava, Bar Counsel has proved by clear and convincing evidence that Respondent violated the following provisions of the Rules of Professional Conduct:

a. Rule 1.1(a): Respondent failed to provide competent representation to his client in that he failed to file an I-130 petition (FF 102-07); failed to attend a removal hearing and failed timely to obtain a continuance of that hearing (FF 120-25); failed timely to file a BIA appeal brief (FF 130-31); failed timely to supply files to successor counsel and failed timely to withdraw from the representation (FF 132-33);

b. Rule 1.1(b): Respondent failed to serve a client with the skill and care commensurate with that generally afforded to clients by other lawyers in similar matters in that he failed to file an I-130 petition (FF 102-07); failed to attend a removal hearing and failed timely to obtain a continuance of that hearing (FF 120-25); failed timely to file a BIA appeal brief (FF 130-31);

c. Rule 1.3(a): Respondent failed to represent his client zealously and diligently in that he failed to file an I-130 petition (FF 102-07); failed to attend a removal hearing and failed timely to obtain a continuance of that hearing (FF12-25); and failed timely to file a BIA appeal brief (FF 130-31);

d. Rules 1.3(b)(1) and 1.3(b)(2): Respondent intentionally failed to seek the lawful objectives of his client and intentionally prejudiced or damaged his client during the course of the professional relationship in that he failed to file an I-130 petition (FF 102-07); failed to attend a removal hearing and failed timely to obtain a continuance of that hearing (FF 120-25); and failed timely to file a BIA appeal brief (FF 130-31);

e. Rule 1.3(c): Respondent failed to act with reasonable promptness in representing his client in that he failed to file an I-130 petition (FF 102-07); failed to attend a removal hearing and failed timely to obtain a continuance of that hearing (FF 120-25); and failed timely to file a BIA appeal brief (FF 130-31);

f. Rule 1.4(a): Respondent failed to keep his client reasonably informed about the status of his matter in that he misrepresented to his client that he had filed an I-130 petition on his behalf (FF 107);

g. Rule 1.4(b): Respondent failed to explain a matter to the extent necessary to permit his client to make informed decisions regarding the representation in that he misrepresented to his client that he had filed an I-130 petition on his behalf (FF 107);

h. Rule 1.7(b)(4): Respondent represented a client with respect to a matter in which his professional judgment on behalf of the client would be or reasonably might be adversely affected by the lawyer's own personal interest (FF 127-28);

i. Rule 1.15(b): Respondent failed to deliver to his client the advance funds he had received for unincurred costs or to render a full accounting regarding those funds (FF 133);

j. Rule 1.15(d): Respondent failed to safe keep funds that his client had advanced for costs that were not incurred (FF 133);

k. Rule 1.16(d): Respondent failed to return unearned fees and advanced payments for costs that were not incurred and to surrender papers and property after his client terminated the representation (FF 108);

l. Rule 8.1(a): Respondent knowingly made a false statement of fact in connection with a disciplinary matter (FF 109-12); falsely claimed that he did not represent his client in connection with an I-130 proceeding (FF 116, 135) and misrepresented the status of a BIA appeal (FF 136);

m. Rule 8.4(c): Respondent engaged in conduct involving dishonesty, fraud, deceit, and/or misrepresentation in that he misrepresented to the court the reasons for his unavailability at a removal hearing (FF 121); and

n. Rule 8.4(d): Respondent engaged in conduct that seriously interfered with the administration of justice in that he misrepresented to the court the reasons for his unavailability at a removal hearing (FF 121), and he failed to appear in court at the removal hearing resulting in an order to remove his client (FF 124, 125). **,**

4. We find that with respect to his representation of Cane Mwihava, Bar Counsel has failed to prove that Respondent engaged in misappropriation in violation of Rule 1.15(a). *See supra* at 89 n.20.

5. We find that with respect to his representation of Yeneneh Hailu, Bar Counsel has proved by clear and convincing evidence that Respondent violated the following provisions of the Rules of Professional Conduct:

a. Rule 1.1(a): Respondent failed to provide competent representation to his client in that he neglected to attend a master calendar hearing and misinformed his client of the time of that hearing, resulting in an order to remove his client (FF 145-52), and then failed timely to take meaningful or expeditious action to reopen or vacate the removal order or otherwise to address the order with the urgency reasonably required under the circumstances (FF 153, 157, 159-66);

b. Rule 1.1(b): Respondent failed to serve a client with the skill and care commensurate with that generally afforded to clients by other lawyers in similar matters in that he neglected to attend a master calendar hearing and misinformed his client of the time of that hearing, resulting in an order to remove his client (FF 145-52), and then failed timely to take meaningful or expeditious action to reopen or vacate the removal order or otherwise to address the order with the urgency reasonably required under the circumstances (FF 153, 157, 159-66);

c. Rule 1.3(a): Respondent failed to represent his client zealously and diligently in that he neglected to attend a master calendar hearing and misinformed his client of the time of that hearing, resulting in an order to remove his client (FF 145-52), and then failed timely to take meaningful or expeditious action to reopen or

vacate the removal order or otherwise to address the order with the urgency reasonably required under the circumstances (FF 153, 157, 159-66);

d. Rules 1.3(b)(1) and 1.3(b)(2): Respondent intentionally failed to seek the lawful objectives of his client and intentionally prejudiced or damaged his client during the course of the professional relationship in that he neglected to attend a master calendar hearing and misinformed his client of the time of that hearing, resulting in an order to remove his client (FF 145-52), and then failed timely to take meaningful or expeditious action to reopen or vacate the removal order or otherwise to address the order with the urgency reasonably required under the circumstances (FF 153, 157, 159-66);

e. Rule 1.3(c): Respondent failed to act with reasonable promptness in representing his client in that he failed timely to take meaningful or expeditious action to reopen or vacate the removal order or otherwise to address the order with the urgency reasonably required under the circumstances (FF 153, 157, 159-66);

f. Rule 1.4(a): Respondent failed to keep his client reasonably informed about the status of his matter and promptly comply with reasonable requests for information in that he failed to provide his client with files upon request (FF 169-71);

g. Rule 1.4(b): Respondent failed to explain a matter to the extent necessary to permit his client to make informed decisions regarding the representation in that he misinformed his client of the time of a hearing (FF 146-47), and he failed to (i) advise his client that he waited for over a month to file a motion to reopen, (ii) provide a copy of the motion to his client, or (iii) advise his client that the Immigration Court had rejected the motion (FF160);

h. Rule 1.5(b): Respondent failed to communicate in writing to his client the basis or rate of his fee (FF 144, 167);

i. Rule 1.7(b)(4): Respondent represented a client with respect to a matter in which his professional judgment on behalf of the client would be or reasonably might be adversely affected by the lawyer's own personal interest (FF 158, 170);

j. Rule 8.1(a): Respondent knowingly made a false statement of fact in connection with a disciplinary matter in that he misrepresented the circumstances leading to his failure to attend a master calendar hearing (FF 154-56);

k. Rule 8.4(c): Respondent engaged in conduct involving dishonesty, fraud, deceit, and/or misrepresentation in that he misrepresented the circumstances leading to his failure to attend a master calendar hearing (FF 154-56); and

l. Rule 8.4(d): Respondent engaged in conduct that seriously interferes with the administration of justice in that he failed to attend a master calendar hearing and misinformed his client of the time of that hearing, resulting in an order to remove his client (FF 145-52), and filed a false notarization form with the immigration court (FF 163).

6. We find that with respect to his representation of Dawit Shifaw, Bar Counsel has proved by clear and convincing evidence that Respondent violated the following provisions of the Rules of Professional Conduct:

a. Rules 1.1(a) and Rule 1.1(b): Respondent failed to provide competent representation to his client in that he failed to obtain “title and all pertinent documents” related to the sale of the Laundromat equipment (FF 205); failed to

ensure that UCC lien releases were timely filed (FF 212); and failed to promptly remedy the UCC filing issue once it was discovered (FF 215);

b. Rule 1.3(a): Respondent failed to represent his client zealously and diligently within the bounds of the law in that he failed to obtain "title and all pertinent documents" related to the sale of the equipment (FF 205); failed to ensure that UCC lien releases were timely filed (FF 212); and failed to promptly remedy the UCC filing issue once it was discovered (FF 215);

c. Rules 1.3(b)(1) and 1.3(b)(2): Respondent intentionally failed to seek the lawful objectives of his client and intentionally prejudiced or damaged his client during the course of the professional relationship in that he failed to obtain "title and all pertinent documents" related to the sale of the equipment (FF 205); failed to ensure that UCC lien releases were timely filed (FF 212); and failed to promptly remedy the UCC filing issue once it was discovered (FF 215);

d. Rule 1.3(c): Respondent failed to act with reasonable promptness in representing his client in that he in that he failed to obtain "title and all pertinent documents" related to the sale of the equipment (FF 205); failed timely to file UCC lien releases (FF 212); and failed to promptly remedy the UCC filing issue once it was discovered (FF 215);

e. Rule 1.4(a): Respondent failed to keep his client reasonably informed about the status of his matter and/or to promptly comply with reasonable requests for information, in that he repeatedly and unreasonably failed to respond to numerous requests for information and documents relating to the representation (FF 191,

198-99, 204, 212) and misrepresented the status of the matter to his client (FF 215);

f. Rule 1.5(b): Respondent failed to provide his client with a writing setting forth the basis or rate of his additional $550.00 fee (FF 201);

g. Rule 1.15(a): Respondent intentionally misappropriated his client's funds by withdrawing his client's escrowed funds without authorization and refusing to return them to his client (FF 193, 200-03);

h. Rule 1.16(d): Respondent failed to surrender papers and property to which his client was entitled (FF 198, 204, 205);

i. Rule 3.3(a): Respondent knowingly and repeatedly made false statements of fact to a tribunal or failed to correct a false statement of material fact previously made to a tribunal (FF 219);

j. Rule 3.4(c): Respondent knowingly disobeyed an obligation under the rules of a tribunal (FF 217);

k. Rule 8.1(a): Respondent knowingly made a false statement of fact in connection with a disciplinary matter by mischaracterizing the use of moneys taken out escrow (FF 195-96, 203);

l. Rule 8.4(c): Respondent engaged in conduct involving dishonesty, fraud, deceit, and/or misrepresentation (FF 219); and

m. Rule 8.4(d): Respondent engaged in conduct that seriously interfered with the administration of justice (FF 217, 219).

IV. RECOMMENDED SANCTION

Bar Counsel charges Respondent with violating a plethora of Disciplinary Rules. Those charges run the gamut from the minor to the very serious.

A. Respondent Should be Disbarred

Bar Counsel has proved by clear and convincing evidence that Respondent engaged in intentional misappropriation in the Shifaw matter. The presumptive sanction for intentional misappropriation, absent a showing of "extraordinary circumstances," is disbarment. *Addams*, 579 A.2d at 191; *Anderson*, 778 A.2d at 336 ("[D]isbarment will be presumptively required if the attorney's conduct demonstrated an unacceptable level of disregard for the safety and welfare of entrusted funds."). Accordingly, we recommend that Respondent be disbarred.

Even if we did not find that Respondent had engaged in intentional misappropriation, we still would recommend Respondent's disbarment. The imposition of sanctions in bar disciplinary matters is not an exact science, but depends on the facts and circumstances of each particular case. *In re Goffe*, 641 A.2d 458, 463 (D.C. 1994) (per curiam). Those facts and circumstances include: (1) the nature and seriousness of the misconduct; (2) the prejudice, if any, to the client which resulted from the misconduct; (3) whether the conduct involved dishonesty or misrepresentation; (4) the presence or absence of violations of other ethical rules; (5) whether the lawyer has prior discipline; (6) whether the lawyer acknowledges his wrongful conduct; and (7) any circumstances in mitigation or aggravation of the misconduct. *In re Jackson*, 650 A.2d 675, 678-79 (D.C. 1994) (per curiam). The Court has stated that the discipline imposed, although not intended to punish the lawyer, should serve to maintain the integrity of the legal profession, protect the public and 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 at 231.

Bar Counsel has proved a pattern of conduct that shows Respondent's fundamental indifference to the needs of his clients, and his apparent inability to adhere to court and administratively imposed deadlines. The record shows as well that Respondent repeatedly made misrepresentations of fact in the judicial and disciplinary processes, not so much because he intended to lie but because he seems unconcerned about speaking truthfully. When coupled with his history of disciplinary reprimands for similar misconduct and his failure meaningfully to acknowledge responsibility for his mistakes, his misconduct or his misrepresentations in these consolidated matters, we are convinced that the only rational result is a recommendation that Respondent be disbarred.

Respondent's dishonesty was material to these proceedings, including his responses to the ethical complaints and his testimony at the hearing, and is a substantial aggravating factor. Dishonesty includes not only affirmative misrepresentations but also a failure to disclose when there is a duty to do so. "Concealment or suppression of a material fact is as fraudulent as a positive direct misrepresentation." *In re Reback*, 487 A.2d 235, 239-40 (D.C. 1985) (per curiam) (citation omitted), *adopted in pertinent part*, 513 A.2d 226, 229 (D.C. 1986) (*en banc*); *In re Steele*, 868 A.2d 146, 150, 154 (D.C. 2005) (attorney violated Rule 8.4(c) when he repeatedly advised his client that he filed an opposition to the employer's motion for summary judgment, when in fact he had not done so); *In re Ontell*, 593 A.2d 1038 (D.C. 1991) (dishonesty when attorney lied to his client regarding the status of litigation). Giving false testimony during the course of the disciplinary proceedings is a substantial aggravating factor in determining an appropriate sanction for an attorney's misconduct. *See, e.g., In re Cleaver-Bascombe*, 986 A.2d

1191 (D.C. 2010) ("*Cleaver-Bascombe II*") (attorney disbarred for dishonesty of a flagrant kind, which included filing a false CJA voucher and false testimony at a disciplinary hearing that substantially aggravated the underlying misconduct).

Finally, Respondent has previously been disciplined in three separate client matters, some of which involve conduct strikingly similar to that proven in the instant cases. BX 111, 112. In sum, the gravity of Respondent's misconduct, as supported by the above factors and facts and circumstances, mandates his disbarment.

B. Respondent Should be Ordered to Pay Restitution as a Condition of Reinstatement

D.C. Bar R. XI, § 3(b) states that "the Court or the Board may require an attorney to make restitution either to persons financially injured by the attorney's conduct or to the Clients' Security Trust Fund . . . or both, as a condition of probation or of reinstatement." *See also In re Rogers*, 902 A.2d 103, 104-05 (D.C. 2006)*; In re Bingham*, 881 A.2d 619, 622 (D.C. 2005). The Court and Board also can order disgorgement as a result of disciplinary violations. *See Hager*, 812 A.2d at 922-23. However, if the Court or Board orders restitution or disgorgement, it can only do so as a condition of probation or reinstatement and may not order unconditional restitution or disgorgement. *Id.; see also Rogers*, 902 A.2d at 104-05. Furthermore, restitution is limited to "a payment by the respondent attorney reimbursing a former client for the money, interest, or thing of value that the client has paid or entrusted to the lawyer in the course of representation" and does not include "consequential damages, which are more appropriately determined in a civil adjudication." *In re Robertson*, 612 A.2d 1236, 1239-40 (D.C. 1992). Finally, restitution is not limited to reimbursing clients who are harmed by an attorney's misconduct, but also may be ordered for third parties who are similarly harmed. *See In re Bettis*, 855 A.2d 282, 289 (D.C. 2004) (ordering attorney to pay restitution to third party medical

provider); *In re Clarke*, 684 A.2d 1276, 1281 (D.C. 1996) ("Because respondent promised by his signature on the authorization and assignment to pay his client's medical bills out of the proceeds of settlement, the enforcement of such a promise is an appropriate use of the restitution provision of [Rule] XI, § 3(b)").

In this case, Respondent misappropriated moneys belonging to Davit Shifaw. Accordingly, Respondent should be required, as a condition of reinstatement, to make restitution to Davit Shifaw in the amount of $550, with interest at the legal rate. *See In re Ryan*, 670 A.2d 375, 378 n.6 (*citing In re Dietz*, 633 A.2d 850 (D.C. 1993)). Respondent should also be required to make restitution for unearned fees and unincurred costs paid to him, with interest at the legal rate, to his former clients (with the exception of Mr. Beraki) or to the Clients' Security Trust Fund to the extent that the Fund has paid any moneys out to Respondent's former clients or may do so in the future.

V. CONCLUSION

For the reasons stated, the Hearing Committee concludes the following:

1. It finds by clear and convincing evidence that Respondent violated Rules 1.1(a), 1.1(b), 1.3(a), 1.3(b)(1), 1.3(b)(2), 1.3(c), 1.4(a), 1.4(b), 1.5(b), 1.7(b)(4), 1.7(c), 3.3(a), 3.4(c), 1.15(a), 1.15(b), 1.15(d), 1.16(d), 8.1(a), 8.4(c), and 8.4(d), and D.C. Bar R. XI, § 2(b)(3);

2. It recommends that Respondent be disbarred; and

3. It recommends, as a condition of reinstatement, that Respondent be ordered to make restitution of $550, with interest at the legal rate, to Dawit Shifaw, and restitution for unearned fees and unincurred costs, with interest at the legal rate, to his former clients (with the exception of Mr. Beraki) or to the Clients' Security Trust Fund to the extent that the Fund has paid any monies out to Respondent's former clients or may do so in the future.

AD HOC HEARING COMMITTEE

_____/RCB/_____
Robert C. Bernius, Esquire, Chair

_____/JB/_____
John Barker

_____/JGC/_____
Justin G. Castillo, Esquire

Dated: February 4, 2011

This Report and Recommendation was prepared by Mr. Bernius.