THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

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

In the Matter of:	:	
	:	
SYLVIA J. ROLINSKI,	:	
	:	
Respondent.	:	Board Docket No. 19-BD-067
	:	Disciplinary Docket No. 2015-D231
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 430573)	:	

REPORT OF THE AD HOC HEARING COMMITTEE

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

Table of Contents

I. INTRODUCTION AND SUMMARY 1

II. PROCEDURAL HISTORY 3

III. FINDINGS OF FACT PERTINENT TO RESOLUTION OF THE CHARGES IN THIS PROCEEDING 6

A. RESPONDENT'S LEGAL PRACTICE AND OFFICE STAFF 6

Findings of Fact 1-18

B. PROBATE DIVISION OPERATIONS, PRACTICES AND CIRCUMSTANCES PERTINENT TOTHE ISSUES IN THIS PROCEEDING 11

Findings of Fact 19-44

C. CHRONOLOGY OF EVENTS IN RESPONDENT'S GUARDIANSHIP OF MS. RUTH TOLIVER-WOODY LEADING TO THE DISCIPLINARY CHARGES IN THIS PROCEEDING 29

Findings of Fact 45-94

D. CHRONOLOGY OF EVENTS IN RESPONDENT'S GUARDIANSHIP OF MR. JAMES H. WILLIAMS LEADING TO THE DISCIPLINARY CHARGES IN THIS PROCEEDING 49

Findings of Fact 95-116

E. OTHER CIRCUMSTANCES PERTINENT TO RESOLUTION OF THE CHARGES IN THIS PROCEEDING 65

1. Respondent's Time-Keeping Systems, Procedures and Practices 65

Findings of Fact 117-128

2. Respondent's Contacts with Ms. Toliver-Woody and Related Actions ... 69

Findings of Fact 129-141

3. Respondent's Contacts with Mr. Williams and Related Actions 76

Findings of Fact 142-143

4. Travel Times Between Respondent's Office and CBL, STM and Brinton Woods 78

Finding of Fact 144

5. Evidence Regarding Visitor Access and Control at Nursing Homes 80

Findings of Fact 145-148

6. Respondent's Transition from Paper Files to Computerized Files 81

Findings of Fact 149-151

7. Preparation of the December 23, 2014 Fee Petition and the August 7, 2015 Motion for Reconsideration 82

Findings of Fact 152-153

8. Respondent's Financial Status and ODC's Financial Motive Theory 85

Findings of Fact 154-157

F. THE CREDIBILITY OF RESPONDENT'S TESTIMONY REGARDING THE CIRCUMSTANCES OF EACH OF THE CHARGES AGAINST HER 86

Findings of Fact 158-*1* through 158-*62*

IV. RECOMMENDED CONCLUSIONS OF LAW 152

A. ISSUES RAISED BY RESPONDENT 152

1. Notice/Due Process 153

2. Res Judicata/Collateral Estoppel 161

3. Disciplinary Counsel's Conduct of this Proceeding 165

B. PRIOR RULINGS IN THE *RTW* AND *WILLIAMS* GUARDIANSHIPS 166

C. EVIDENTIARY ISSUES ARISING DURING THE HEARING 169

D. LEGAL AND EVIDENTIARY CONSIDERATIONS GENERALLY APPLICABLE TO THE HEARING COMMITTEE'S ANALYSIS OF THE CHARGES IN THIS PROCEEDING 173

E. THE CHARGES THAT CERTAIN STATEMENTS OR FEE PETITION ENTRIES BY RESPONDENT VIOLATE RULES 3.3(a)(1), 8.4(c) AND/OR 1.5(a) 182

F. THE CHARGES THAT FOUR OF RESPONDENT'S STATEMENTS IN COURT OR IN COURT FILINGS VIOLATED RULE 3.3(a)(1) AND/OR RULE 8.4(c) 219

G. ADDITIONAL THEORIES THAT MIGHT ESTABLISH RULE 3.3(a)(1) & 8.4(c) VIOLATIONS 229

H. ADDITIONAL RULE 1.5(a) CHARGES 240

I. THE RULE 8.4(d) CHARGES 243

V. RECOMMENDATION AS TO SANCTION 265

A. THE FACTORS TO BE CONSIDERED 265

B. ANALYSIS 266

1. Seriousness of the Misconduct 266

2. Misrepresentation or Dishonesty 266

3. Respondent's Attitude Toward the Underlying Misconduct 266

4. Prior Discipline 267

5. Mitigating and Aggravating Circumstances 267

6. Number of Violations 270

7. Prejudice to the Wards 271

C. RECOMMENDED SANCTION 271

VI. RESPONDENT'S DISABILITY ASSERTION 275

A. FINDINGS OF FACTS PERTINENT TO RESPONDENT'S DISABILITY ASSERTION 275

Findings of Fact 159-188

B. THE CONTROLLING JURISPRUDENCE 290

1. Qualifying Disability or Addiction 291

2. Substantial Cause 293
3. Substantial Rehabilitation 294
C. ANALYSIS AND RECOMMENDATION 295
VII. CONCLUSION 300
SEPARATE STATEMENT OF MR. BERNSTEIN IN PARTIAL DISSENT
APPENDIX -- NOTICE OF VIOLATIVE CONDUCT

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REPORT OF THE AD HOC HEARING COMMITTEE

I. INTRODUCTION AND SUMMARY

This disciplinary proceeding arises out of Respondent Sylvia J. Rolinski's service as the court-appointed guardian of an adult ward in each of two cases in the Probate Division of the Superior Court of the District of Columbia (Probate Division).

In the first guardianship giving rise to this proceeding, Respondent was appointed on February 14, 2002, as the Successor Conservator for Ms. Ruth Toliver-Woody in *In re Ruth Toliver-Woody*, INTVP No. 257-99, Probate Division, District of Columbia Superior Ct. (*RTW*), and as Successor Guardian on January 11, 2005. DX 7 at 84, DX 8 at 87. Ms. Toliver-Woody died on June 20, 2011, and the guardianship was terminated by Order filed January 23, 2012. Respondent filed her final Petition for Compensation on January 11, 2012, and the Probate Division's

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Memorandum Order Granting in Part and Denying in Part Guardian's final Petition for Compensation was filed on June 11, 2012. DX 47-49.

In the second guardianship giving rise to this proceeding, Respondent was appointed on May 28, 2013, as Guardian *Ad Litem*, on June 3, 2013 as Temporary Guardian, and on August 28, 2013 as Guardian for Mr. James H. Williams in *In re James H. Williams*, INTVP No. 2013-208, Probate Division, District of Columbia Superior Court (*Williams*). DX 51, 54, 57. Mr. Williams died on July 23, 2014, and the guardianship was terminated by Order filed on November 26, 2014. DX 69-70. Respondent filed her Petition for Compensation on December 23, 2014; ensuing orders, pleadings and briefs in the Probate Division and the District of Columbia Court of Appeals culminated in a decision by the Court of Appeals issued on July 7, 2017. *In re Williams*, No. 15-PR-1145, Mem. Op. & J. (D.C. July 7, 2017); *see* DX 82.

Respondent's filings and statements in the course of the two guardianships, as set forth fully in the Findings of Fact in Section III of this Report, have resulted in what appear to be charges by Disciplinary Counsel that Respondent violated Rule 1.5(a) of the District of Columbia Rules of Professional Conduct in 31 or more instances in *RTW*, Rule 3.3(a)(1) in 30 or more instances in *RTW*, Rule 8.4(c) in 30 or more instances in *RTW*, Rule 8.4(d) in 9 instances in *RTW*, Rule 1.5(a) in 21 instances in *Williams*, Rule 3.3(a)(1) in 22 instances in *Williams*, Rule 8.4(c) in 22

instances in *Williams*, and Rule 8.4(d) in 4 instances in *Williams*.[1] As discussed in Sections IV.D, E, F, G, H, and I of this Report, two members of the Hearing Committee recommend that the Board conclude that Disciplinary Counsel has established by clear and convincing evidence that Respondent violated Rule 8.4(c) in one instance and Rule 8.4(d) by making 11 late filings between 2005 and 2015 in the two guardianships. All three members recommend that the Board conclude that Disciplinary Counsel has established by clear and convincing evidence that Respondent has violated Rule 1.5(a) in one instance. The Hearing Committee unanimously agrees that Disciplinary Counsel has not established by clear and convincing evidence any other violations. As discussed in Section V of this report, the Hearing Committee recommends that the Board conclude that Respondent should be informally admonished. As discussed in Section VI of this Report, the Hearing Committee recommends that the Board conclude that Respondent has not established that the sanction for the aforesaid disciplinary infractions should be mitigated under *In re Kersey*, 520 A.2d 321 (D.C. 1986), and ensuing cases.

II. PROCEDURAL HISTORY

Disciplinary Counsel's investigation of Respondent was initiated by a letter to Disciplinary Counsel from Judge Kaye Christian of the Superior Court of the District of Columbia dated July 31, 2015. DX 87.[2] Judge Christian's letter

[1] The lack of total precision in calculating the number of charges in this Introduction and Summary and the possible significance of this circumstance is addressed in Section IV.A.1 of this Report.

[2] Disciplinary Counsel's exhibits in the first phase of the hearing are cited as "DX ___."

transmitted her Order dated July 28, 2015 in *Williams*. DX 75. Between August 7, 2015 and July 7, 2017, Respondent filed her Motion for Reconsideration of Judge Christian's ruling, Judge Christian denied the Motion for Reconsideration on September 14, 2015, Respondent filed an appeal of Judge Christian's ruling on her Fee Petition, Respondent and the District of Columbia briefed the appeal and the District of Columbia Court of Appeals resolved that appeal in a ruling dated July 7, 2017.

Disciplinary Counsel filed the Specification of Charges in this matter on November 8, 2019. DX 2 at 76-82.[3] At a prehearing conference on January 15, 2020, the evidentiary hearing in this matter was tentatively scheduled to commence on May 13, 2020. Prehearing Conference Tr. 28. The original Hearing Committee Chair in this proceeding recused herself by Order dated February 21, 2020. Following the appointment of the present Chair, the scheduling of the hearing in this matter by Order dated February 27, 2020 to commence on May 13, 2020, and issuance by the Board on Professional Responsibility (BPR) of Administrative Order 2020-03 dated April 2, 2020, the evidentiary hearing in this matter was continued *sine die* by Order dated April 7, 2020. Following the Board's issuance of

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Respondent's exhibits in the first phase of the hearing are cited as "RX ___." Disciplinary Counsel's exhibits in the *Kersey* phase of the hearing are cited as "DXK ___." Respondent's exhibits in the *Kersey* phase of the hearing are cited as "RXK ___." The transcripts of the evidentiary hearing in this matter are cited as "Tr. ___." Disciplinary Counsel's Proposed Finding of Facts, Conclusions and Recommendation as to Sanctions are cited as "DC PFFs & PCLs." Respondent's Proposed Findings of Fact and Proposed Conclusions of Law, two separate documents, are cited as "Resp. PFFs" and "Resp. PCLs," respectively.

[3] This Hearing Committee is not privy to the substance of any related proceedings prior to November 8, 2019.

Administrative Order 2020-7 dated June 29, 2020, the Hearing Committee ordered on August 28, 2020 that the evidentiary hearing would commence via video conference on November 10, 2020 and established other pre-hearing deadlines.

The hearing commenced on the specified date. On December 2, 2020, Disciplinary Counsel filed its Notice of Violative Conduct. This filing arose from the following concern of the Hearing Committee which it shared with the parties on November 10, 2020, prior to opening statements:

> The hearing committee . . . thinks that the Specification of Charges is not as clear as it might be in some -- at least some respects as to what the Disciplinary Counsel, Office of Disciplinary Counsel contends and will contend to be specific instances of knowing false statements to the court or incidents, other incidents of dishonesty. We just want to suggest to Disciplinary Counsel that she needs to be mindful of that concern and that, at an appropriate point in the case, the end of her case in chief, for example, most likely, we will expect a statement of exactly the situations, the occurrences, the circumstances -- number one, number two, number three, number eight, number eleven, whatever they may be -- that she and her office contends to be false statements or dishonest statements, knowing false statements or dishonest statements, so that there is no question that Respondent and her team, as they begin their case, know what they're defending against.

Tr. 9-10.[4]

The hearing ensued on a total of 32 partial or full hearing days with the merits phase concluding on February 18, 2021 and the taking of evidence regarding

[4] For ease of reference, we have attached to this Report a copy of the Notice of Violative Conduct on which we have superimposed numbering in the left-hand column beside each of the 62 instances underlying the charges in the Notice. Disciplinary Counsel confirmed at the end of its rebuttal case on the merits that the Notice comprised Disciplinary Counsel's entire array of charges against Respondent. Tr. 4115.

mitigating and aggravating sanction factors and regarding the factors set forth in *In re Kersey*, 520 A.2d 321 (D.C. 1987), and *In re Stanback*, 681 A.2d 1109 (D.C. 1996), concluding on April 28, 2021.[5] Final exhibit lists and exhibit compilations were filed on May 7, 2021, the last of the transcripts (which, *in toto*, comprise approximately 5000 pages of text) became available in mid-May 2021, and briefing was completed on August 27, 2021.

III. FINDINGS OF FACT PERTINENT TO RESOLUTION OF THE CHARGES IN THIS PROCEEDING[6]

A. RESPONDENT'S LEGAL PRACTICE AND OFFICE STAFF

1. After receiving undergraduate degrees in Social Work and Psychology, a master's degree in international affairs and economic policy, and her J.D., Respondent clerked for a Superior Court judge in 1987 and 1988 and then worked

[5] Scheduling was complicated by a number of factors, including properly incurred professional obligations of Respondent and her counsel during the five and one-half month hearing period (*see e.g.* Tr. 892-94, 1034, 1062, 1142, 2252); medical circumstances affecting Respondent (*see e.g.* Tr. 27, 118-20, 181-82, 320, 352-54, 379-80, 607, 748-49, 1145), Respondent's counsel's family (*see e.g.* Tr. 4619, 4755), and certain witnesses (*see e.g.* Tr. 1392-93); accommodations to Respondent's and Respondent's counsel's personal schedules (*see e.g.* Tr. 892, 3356-57, 3567-68); the unavailability of certain witnesses at various times for various reasons (*see e.g.* Tr. 28, 357, 894, 1034, 1667, 1815, 2296, 2723, 3916); security concerns and associated logistical difficulties around January 6, 2021 (*see e.g.* Tr. 1344-49) and around January 20, 2021 (*see e.g.* 2061-64, 2212-17) that affected the availability of counsel and witnesses; scheduling difficulties with expert witnesses (*see e.g.* Tr. 4435-38, 4465, 4619, 4756-58, 4833-34, 5195, 5271-74, 5322, 5324); the large number of witnesses (seven called by Disciplinary Counsel, 39 called by Respondent and one – Respondent – called by both parties); cancellation of previously scheduled hearing days due to the weather (Tr. 3191, 3328); and unavoidable personal and professional obligations of the members of the Hearing Committee that arose as the hearing in this matter wore on (*see e.g.* Tr. 207, 223, 354-55, 62, 643-44, 692, 892, 898, 2561, 3148, 3328, 3356, 4001, 4758, 4833-34).

[6] We make additional findings of fact in Section VI.A, *infra*, that are pertinent to the *Kersey* disability issue.

for one small and one medium-sized law firm, handling a variety of matters, including antitrust and environmental cases, international litigation, and personal injury and probate work. Tr. 2595-98, 2600, 2602-06 (Respondent). Respondent established her own firm in 1992 in order to concentrate further on litigation in Bulgaria and elsewhere in Eastern Europe and Africa. Tr. 2606-09, 2619-20 (Respondent).

Because of her psychology and social work background and as a way of maintaining contact with and helping out the court where she had clerked, Respondent joined the Fiduciary Panel of the Probate Division in 1992 (*see* FF 22¸ *infra*) and undertook, generally at the request of the Probate Division, one or two probate cases each year (except for approximately one year in 1992-1993 when she was chief of staff to the President of the General Assembly of the United Nations). Tr. 2609, 2611, 2616-17, 2631-32 (Respondent).

In February 2000, Respondent joined two other attorneys in a new firm and served as the managing partner of Rolinski, Terenzio & Suarez through 2005. Tr. 126-27, 2618-19 (Respondent). Mr. Terenzio and Mr. Suarez practiced from offices in Florida and Respondent had offices in Silver Spring, MD and Gaithersburg, MD. Tr. 2610-11, 2618-19 (Respondent); Tr. 4334 (Suarez). (Disciplinary Counsel agrees that Respondent "maintained a robust civil and international law practice . . . ." DC PFFs & PCLs at 1.)

Respondent has practiced primarily from office space over the garage of her home on River Road in Potomac, Maryland. Tr. 2610-11 (Respondent). This office

had an open floor plan with a row of cubicles on the left, a conference room, and Respondent's desk in the back right corner above the garage. Tr. 1223-25.

2. Danielle Espinet, Esquire, began working as an associate in Respondent's law firm in approximately 2002 or 2003. Tr. 1923-24.

3. Mr. Terenzio left the firm in December 2005 to pursue his interest in reproductive and egg donor legal issues in South America. Tr. 2725 (Respondent). Respondent was the managing partner of Rolinski & Suarez from January 2006 to February 2015, with Mr. Suarez continuing to practice from Florida. The firm's practice continued to include renewable energy, federal and state court litigation, surrogacy, egg donation, immigration, international trade, international and U.S. business representation (including emerging energy and carbon credits), United Nations affairs, trusts and estate management, estate planning, personal injury law, guardianship and conservatorship, and arbitrations among foreign banks. Tr. 127-28, 206, 2619-2726 (Respondent); DX 79 at 829; DX 88 at 1255. Respondent's practice continued to involve substantial international travel. Tr. 125-131, 2620-21, 2625-26, 2628-29 (Respondent).

4. Ms. Kathleen Ryan began babysitting for Respondent's son in late 2004, continued doing so through 2005 including on Saturdays, and worked on a full-time basis for Respondent in her office as well as caring for her son through August of 2007. Tr. 1209-10, 1218, 1223, 1234, 1243-46 (Ryan); Tr. 2946-48, 2961 (Respondent). During that period, Ms. Ryan travelled domestically and internationally with Respondent and Respondent's son. Tr. 1220-21 (Ryan).

5. Mr. Brian Baloga met Respondent while working at Respondent's son's day care center in 2005 and began to babysit for Respondent's son on a part-time basis on weekday evenings and Saturdays in approximately 2005 or 2006. Tr. 1988-92 (Baloga), 2957-70 (Respondent). Mr. Baloga continued to work for Respondent on an occasional basis through approximately 2015 to 2017. Tr. 1992-93; *see generally* FF 137.

6. Ms. Evelyn Padilla, who has an accounting background, began to work for Respondent on a part-time basis in approximately 2006 and then worked for Respondent on a "flexible" full-time basis – with administrative, calendaring, billing and telephone answering responsibilities – beginning in approximately 2007. Padilla Dep. Tr. 24-26, 45-46; *see also* FFs 9, 11, 117-122.

7. Beginning at some point in 2007 and continuing through early summer of 2008, Respondent spent considerable time as co-counsel on a complex banking case in Naples, Italy, a case that involved a great deal of international travel; the case was resolved favorably to the client of Respondent and her co-counsel Zahari Tomov of Bulgaria. Tr. 1502, 1517-24 (Tomov); Tr. 2623-28.

8. Mr. Tomov, Respondent's co-counsel in the banking litigation in Italy, subsequently engaged Respondent in a second complex case involving a Bulgarian company that was also resolved favorably to their client. Tr. 1525-28, 1537-38 (Tomov). This led to other significant cases for Respondent in Bulgaria. Tr. 1530 (Tomov).

9. Ms. Padilla left Respondent's employment in approximately 2007

because of a family health situation. Padilla Dep. Tr. 25, 46.

10. Ms. Espinet left the firm in 2009. Tr. 1923-24 (Espinet).

11. After working for the Assignment Office of the Circuit Court of Montgomery County, MD, from approximately 2010 through approximately 2015, Ms. Padilla again worked occasionally for Respondent on a part-time basis from approximately 2015 through approximately 2019. Padilla Dep. Tr. 19-20, 46.

12. Ms. Caitlyn Wilson began to intern in Respondent's office in September 2012, while she was in law school; she worked one or two days per week during the school year and the summers. Tr. 2642-43.

13. Ms. Cynthia Perkins worked for Respondent in some parts of 2013 and 2014 and again intermittently in 2018-2019, handling clerical and administrative tasks. (Tr. 1715-18).

14. Ms. Wilson graduated from law school in 2014 and joined Respondent's practice as an associate in August 2014. Tr. 2642-43, 2646; *see also* FF 153 (subsequently working with Respondent in 2015).

15. Respondent established the Rolinski Law Group in March 2015 after Mr. Suarez withdrew from the practice of law. Tr. 2725, 4334.

16. After working for the Assignment Office of the Circuit Court of Montgomery County, MD, from approximately 2010 through approximately 2015, Ms. Padilla again worked occasionally for Respondent on a part-time basis from approximately 2015 through approximately 2019. Padilla Dep. Tr. 20-21, 46.

17. Ms. Wilson accepted another position and left Respondent's law firm

in October 2016. Tr. 2642-43, 2646.

18. At least since 2017 and probably earlier, Respondent has served as the court-appointed guardian for all five of the wards whom the District of Columbia had placed in nursing care facilities in Massachusetts. Tr. 1948-49 (Patel); Tr. 2493-94 (Sousa); Tr. 2509-10 (Reynolds).

B. PROBATE DIVISION OPERATIONS, PRACTICES AND CIRCUMSTANCES PERTINENT TO THE ISSUES IN THIS PROCEEDING

19. Ms. Nicole Stevens joined the Probate Division as Assistant Deputy Register of Wills in October 2008 and became the Register of Wills and Director of the Probate Division in February 2020. Tr. 3779-80 (Stevens).

20. Between 2005 and 2015, the Probate Division of the Superior Court of the District of Columbia handled 7000 to 8700 cases annually. Tr. 3790. (Stevens). Until approximately 2010 there was only one Superior Court Associate Judge appointed to the Probate Division to handle the Division's caseload. Tr. 3788-90 (Stevens). Senior Judges handled summary hearings and reviewed and approved filings such as petitions for compensation filed by fiduciaries. Tr. 3788-89, 3819-20 (Stevens). The position of Presiding Judge of the Probate Division was established in 2008 and the position of Deputy Presiding Judge was added in the 2013-2015 period. An additional Associate Judge position was added in 2016, so that there are now four judges assigned to the Division at any given time. Tr. 3789 (Stevens).

21. An intervention proceeding is initiated when an adult resident of the District of Columbia is alleged to be "incapacitated," *i.e.*, mentally and/or physically

unable to care for himself or herself and/or his or her finances.[7] If the Probate Court finds the resident is incapacitated, it appoints a guardian and may also appoint a conservator.[8] D.C. Code §§ 21-2011(11), 21-2033, 21-2041; DX 202. Between 2005 and 2015, the Probate Division handled approximately 2,100-3,100 intervention cases annually. Tr. 3788 (Stevens).

22. The Probate Division appoints members of the D.C. Bar who are trained and/or experienced probate attorneys to serve on the Probate Court's Fiduciary Panel. The Panel members are available to be appointed as guardians *ad litem*, temporary guardians, guardians, conservators, attorney-visitors, and other fiduciaries. Tr. 756 (Brown-Johnson), 3808 (Stevens). Respondent became a member of the Fiduciary Panel in 1992. Tr. 2631 (Respondent).

23. A guardian *ad litem* is "an individual appointed by the court to assist the subject of an intervention proceeding to determine his . . . interests in regard to the guardianship or protective proceeding or to make that determination if the subject . . . is unconscious or otherwise wholly incapable of determining his . . . interest in the proceeding even with assistance." D.C. Code § 21-2011(9). A guardian *ad litem* is appointed pursuant to D.C. Code § 21-2033(a). Prior to the first hearing in a new

[7] An "incapacitated individual" is defined as "an adult whose ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that he or she lacks the capacity to manage all or some of his or her financial resources or to meet all or some essential requirements for his or her physical health, safety, habilitation, or therapeutic needs without court-ordered assistance or the appointment of a guardian or conservator" D.C. Code § 21-2011(11).

[8] A "conservator" is defined as "a person who is appointed by a court to manage the estate of a protected individual. . ." D.C. Code § 21-2011(3).

intervention proceeding, the guardian *ad litem* is expected to make an initial determination as to whether the subject can effectively communicate with counsel; understand the cause of incapacity; speak with treating physicians, nurses, and other health care professionals; and revisit the situation to determine the status prior to making representations in court. Tr. 1305-06, 1313, 1316 (Sloan).[9] There is no typical period of time between the hospital's petition to the court and the court hearing regarding appointment of a guardian *ad litem*; in 2013, a week could elapse between the filing of the petition and the initial hearing. Tr. 1313-16 (Sloan).

24. Prior to the court hearing on an intervention petition, it is also incumbent on the guardian *ad litem* to monitor changes in order to provide an up-to-date report to the court. Tr. 1316 (Sloan). Ms. Stevens, *see* FF 19, agrees that the number of visits needed varies, depending especially on the patient's condition. Tr. 3794 (Stevens). "There can be remarkable changes in individuals" from day to day. Tr. 1318 (Sloan). The potential guardian *ad litem* is obligated to monitor those changes; thus, it is not unusual for the potential guardian *ad litem* to visit the patient two or three times before the initial hearing. Tr. 1305-06, 1318-19 (Sloan).

25. The number and length of visits by a potential guardian *ad litem* to a

[9] Andrea Sloan, whose testimony the Hearing Committee found to be especially precise and helpful, was called by Respondent and testified by agreement of the parties as both an expert witness in the field of probate practice in the District of Columbia and as a fact witness experienced in Probate Division practice. Tr. 1302-04. She was recognized as an expert witness by the Hearing Committee. Tr. 1389. Ms. Sloan is a registered nurse, has been a member of the Probate Division's Fiduciary Panel since 1995, and has taught in the Probate Division's attorney and judicial training programs since 2007. She is a member of the Bar's Probate Section and was designated as that Section's Member of the Year in 2018. She has also advised the court on ethical issues in specific cases. Tr. 1299-1302, 1308 (Sloan). Ms. Sloan's testimony on a range of issues was not materially contradicted by any other witness in any instance.

potential ward is also affected by a number of other factors. Not everyone is familiar with medical vernacular, or has a nursing background, and some people take longer to read and understand medical records than others. Tr. 1316-17 (Sloan). It also depends on the availability of the health care personnel to speak to the guardian; Ms. Sloan has waited as long as an hour to speak with physicians involved in such cases. *Id*. "The individual doing that [*i.e.* the potential guardian *ad litem*] has to take sufficient time to meet the patient, to talk to whichever necessary health care providers there are, to contact family members or seek out family members if they're not readily available. It varies with every case. There is no set amount of time that it takes." Tr. 1316-17 (Sloan). "It's not just sitting there staring at a nonsensical person." Tr. 1401 (Sloan).

26. The first hearing in an intervention proceeding involves appointment of a temporary or health care guardian and establishment of future scheduling; it is conducted by the Judge-in-Chambers. Tr. 3794-95 (Stevens). These hearings would often not begin on time. While waiting, attorneys would confer and often settle the matter or agree on how to proceed. Devoting three (3) or more hours of time to speak to the Judge-in-Chambers was not abnormal. Tr. 1323, 1325-26 (Sloan). The Judge-in-Chambers venue was the "Wild Wild West," where any number of people might be present because the Judge-in-Chambers handled matters ranging from name changes to restraining orders and law enforcement requests for warrants. Attorneys routinely show up with prepared orders for the judge's consideration regarding appointment as the guardian *ad litem*. Even after receiving the parties' proposed

order, a judge might deal with other matters for an hour or more before turning to the proposed order. "The order then goes out to the clerk at the desk, who, in between shuffling all the other people through there, had to make copies and distribute them — make them, stamp them, distribute them, and that would come in line with all the other paperwork that was going on there." Tr. 1412 (Sloan). *See also* Tr. 1321-24, 1406 (Sloan).

27. A temporary guardian is appointed pursuant to D.C. Code § 21-2046 and serves in one of three capacities -- a health-care guardian, an emergency guardian, or a provisional guardian. As relevant here, a health-care guardian is one "whose authority is granted for [up to 180] days to provide substituted consent in accordance with section 21-2210 for an individual certified as incapacitated for a health-care decision." D.C. Code § 21-2011(8)(A)(ii). A temporary health care guardian has the powers and duties specified in D.C. Code § 21-2047.02(b) and D.C. Code§ 21-2046(c)(2).

28. A general guardian is "responsible for care, custody, and control of the ward," D.C. Code §§ 21-2041(a), 21-2047, and has a different role than a "conservator," "who is appointed . . . to manage the estate of a protected individual." D.C. Code § 21-2011(3). A general guardian may be any "qualified person" – preferably a family member and not necessarily an attorney – who has been appointed by the court to serve in that capacity. D.C. Code §§ 21-2011(8), 21-2043. A general guardian is required to maintain regular and reasonable contact with his or her ward, visiting at least monthly and maintaining "regular contact with service

providers." D.C. Code § 21- 2043(e)(3).

Additionally, a guardian "shall":

i. Become or remain personally acquainted with the ward and maintain sufficient contact with the ward to know of the ward's capacities, limitations, needs, opportunities, and physical and mental health;

ii. Take reasonable care of the ward's personal effects and commence protective proceedings, if necessary, to protect other property of the ward;

iii. Apply any available money of the ward to the ward's current needs for support, care, habilitation, and treatment;

iv. Conserve any excess money of the ward for the ward's future needs, but if a conservator has been appointed for the estate of the ward, the Guardian, at least quarterly, shall pay to the conservator money of the ward to be conserved for the ward's future needs;

v. Report in writing the condition of the ward and of the ward's estate that has been subject to the Guardian's possession or control, as ordered by the court on petition of any person interested in the ward's welfare or on any order of the court, but at least semiannually;

vi. Make decisions on behalf of the ward by conforming as closely as possible to a standard of substituted judgment or, if the ward's wishes are unknown and remain unknown after reasonable efforts to discern them, make the decision on the basis of the ward's best interests;

vii. Include the ward in the decision-making process to the maximum extent of the ward's ability; and

viii. Encourage the ward to act on his or her own behalf whenever he or she is able to do so, and to develop or regain capacity to make decisions in those areas in which

he or she is in need of decision-making assistance, to the maximum extent possible.

D.C. Code § 21-2047.

29. Section 2047 also identifies six permissive powers for a general guardian or limited guardian, as follows:

i. Receive money payable for the support of the ward under the terms of any statutory benefit or insurance system or any private contract, devise, trust, conservatorship, or custodianship;

ii. Take custody of the person of the ward and establish the ward's place of abode within or without the District, if consistent with the terms of any order by a court of competent jurisdiction relating to detention or commitment of the ward;

iii. Institute proceedings, including administrative proceedings, or take other appropriate action to compel the performance by any person of a duty to support the ward or to pay sums for the welfare of the ward, if no conservator for the estate of the ward has been appointed;

iv. Consent to medical examination and medical or other professional care, treatment, or advice for the ward, without liability, by reason of the consent for injury to the ward resulting from the negligence or acts of third persons, unless the Guardian fails to act in good faith;

v. Obtain medical records for the purpose of applying for government entitlements or private benefits and have the status of a legal representative under the District of Columbia Mental Health Information Act of 1978, effective March 3, 1979 (D.C. Law 2-136; § 7-1201.01 et seq.); and

vi. If reasonable under all of the circumstances, delegate to

> the ward responsibilities for decisions affecting the ward's well-being.

The Probate Division Education Committee and other professionals and experts developed the Superior Court of the District of Columbia Probate Attorney Practice Standards (the "Practice Standards"). Practice Standard Six provides: "The Guardian's primary duty and responsibility is to the ward. The paramount role of the Guardian is to ensure the health and well-being of the ward. . . . Monitoring of the ward may be delegated to other qualified persons, but the duty to be personally involved and aware of the Ward's condition remains that of the Guardian." The standard also provides that, when faced with the decision to either withhold or withdraw medical treatment, the guardian should review "the code requirements" and should "consider the wishes of the ward." DX 85 at 995.

30. This broad range of guardianship duties makes the work of guardians very time-consuming; as one Probate Panel member explained:

> You know, these cases require a lot of time. We were on call 24/7 for these cases. We get calls on holidays, when we're having dinner with our families and we're out of town and we're on vacation and you know, so I speak for myself, and most of my colleagues, we worked these cases very hard, take good care of our wards and do good work.

Tr. 1767 (Wright-Smith). Similarly, the Deputy General Counsel of the District of Columbia's Department on Disability Services, who has been the primary contact with the Probate Division on guardianship and substitute decision-making matters, has observed that guardians can "get calls 50 times a day" and that discharging guardianship duties is "a lot of work." Tr. 1971 (Patel).

31. A person who is appointed as a permanent guardian must file an Acceptance and Consent, thereby accepting responsibility for the ward and jurisdiction by the court and consenting to jurisdiction to be sued by third parties with a claim involving the ward. D.C. Code § 21-2045, DX 202 at 1625; D.C. SCR-PD Rule 321(a), DX 86 at 1155; Tr. 3796 (Stevens). The Acceptance and Consent also serves the administrative function of notifying Probate Division staff that a guardian has been appointed and that Letters of Guardianship should issue. Tr. 3798 (Stevens). The Probate Division will not issue Letters of Guardianship (*see, e.g.*, DX 60 at 619) until the Acceptance form is filed. *Id*. The Letters of Guardianship provide formal notice to third parties that the appointed guardian is responsible for the care of the ward. Tr. 3798-99 (Stevens).

32. The guardian is required to file the Acceptance form within 14 days of appointment. Tr. 3795-96, 3797 (Stevens). In Ms. Stevens' view, a failure to file the Acceptance and Consent "interferes with" and "slows the administration of justice" because certain other processes are triggered by the filing of the Acceptance and Consent. Tr. 3800-01 (Stevens). Thus, when an Acceptance and Consent is not timely filed, the Probate Division will immediately schedule a summary hearing without issuance of a notice of delinquency because of the short time involved, although, in the view of the Probate Division's Register of Wills and Director, the necessity of doing so is not "a big deal." Tr. 3800-01 (Stevens). In the view of the Probate Division's Register of Wills and Director, the Division does not have many

hearings for Acceptance and Consent and [a late Acceptance and Consent] is not "a big deal . . . in the scheme of things." Tr. 3801 (Stevens).

33. Beginning in approximately 2011, the Probate Division required guardians to file a guardianship plan within 90 days of appointment. Before approximately 2011, there was only a requirement for the filing of semiannual reports. Tr. 3802-03 (Stevens). The purpose of the guardianship plan is to make the guardian consider in advance short-term, interim, and long-term goals for the guardianship. It assures the court that the guardian has investigated and determined the ward's needs and the care necessary to meet those needs. The plan also is designed to assuage the concerns of interested third parties who are related to or have dealings with the ward. Like other required filings, in Ms. Stevens' view, the plan improves the efficiency with which the court can administer the guardianship program and timely compliance allows the court to devote more resources toward other programs that assist wards and fiduciaries. Tr. 3807-08 (Stevens).

34. Untimely compliance with the guardianship plan requirement affects the operation of the Probate Division because "[a]ny delinquent filing affects the operations of the Probate Court." Tr. 3804 (Stevens). Untimely compliance may invoke the summary hearing process; if a guardian is late in filing the guardianship plan, the court issues a delinquency notice. If the delinquency is not cured within 14 days, the case is automatically set for a summary hearing. Tr. 3804-05 (Stevens). Action by the Register of Wills and multiple Division staff members is required to schedule, prepare for, and conduct the summary hearings. Time, staff, and

technology have to be diverted from other important and necessary tasks. D.C. SCR-PD Rule 309, DX 86 at 1146; Tr. 3806-08, 3815-16 (Stevens).

35. Since 2008, guardians have been required by law to visit wards once a month. D.C. Code § 21-2043(e)(2); Tr. 439 (Respondent). Correlatively, a guardian also is required to report at least semi-annually in writing to the court about the condition of the ward and the ward's estate. D.C. Code § 21- 2047(a)(5), DX 202 at 1627. Guardians must swear to and verify the truth of the statements in the reports. *See, e.g.*, DX 10 at 96; *see also* D.C. SCR-PD Rule 3, DX 86 at 1026. The first Report of Guardian must be filed six months after the guardian's appointment, and each succeeding report must be filed at six-month intervals thereafter. D.C. SCR-PD Rule 328(a), DX 86 at 1163. A judge may enter a written order changing the due date of a Guardianship Report. Tr. 3825-26 (Stevens).[10]

In the time period relevant to this proceeding, if an attorney did not file a Report of Guardian on a timely basis, the court would issue a notice and, after two weeks, schedule a summary hearing at which the attorney would have to appear. Tr. 1768-69 (Wright-Smith). The Probate Division had two senior judges conducting summary hearings up to three times per week. Delinquent Reports of Guardians comprised the subject matter of the majority of such summary hearings. Tr. 3820, 3859-62 (Stevens).

As with any delinquent filing, an untimely Guardianship Report requires the

[10] We use the term "Guardianship Report" and "Report of Guardian" interchangeably; the terms refer to the same type of document.

involvement of multiple Division staff to set and prepare for a summary hearing. Tr. 3815-18 (Stevens). Ms. Stevens, the Probate Division Director, does not consider delinquent filings to be "burdensome," but they "can take up a lot of time" and "[t]ime for us is a scarce resource." Tr. 3816-17 (Stevens). In Ms. Stevens' view, "It's a lot of work – there's not a lot of clerks." "So, burden? Again, I wouldn't use that term. It is our job, but we don't want it – we don't want it to overwhelm us. And when people don't file timely, that can become an overwhelming process. . . . And constantly being late, that does – it does weigh on the system. I haven't seen it break the system, but it does weigh on the system. . . . [I]t can overwhelm the system." Tr. 3913-14 (Stevens).

36. Legal and other practitioners in the field agree that discharging the guardian's responsibilities with respect to seriously ill wards and their end-of-life issues is complicated and time-consuming. Tr. 1595-97 (Fein). Guardians and/or family members responsible for the ward are contacted by facility personnel about "every single time you change" the ward's medical care, and these conversations can be "lengthy" and "can last a really long time," especially because "the person who is making these decisions," such as a Guardian, is not medically trained and does not "have a lot of questions" and because the Guardian "get[s] calls from a number of different entities trying to keep you posted, trying to keep you apprised of things." Tr. 2171-87 (Maestripieri). With respect to situations involving serious illness,

> the toughest decisions I see guardians. . . mak[ing] are these end of life decisions that come up sometimes, where you are getting

> calls, you know, as you would for a family member, you get calls from a number of different entities trying to keep you posted, trying to keep you apprised of things. And you have to make ultimately a difficult decision, often for someone who has never been able to give you input about what they would have wanted that decision to be.

Tr. 1972 (Patel).

37. When a ward dies, a guardian must inform the Probate Court by filing a notice or suggestion of death "forthwith," a term which the court has interpreted to mean "immediately." D.C. SCR-PD 328(d), DX 86 at 1163; *see, e.g.*, DX 61; Tr. 3811-12; *see also* Tr. 1789-90 (Wright-Smith). In 2011, the Probate Division had a specific Suggestion of Death form. Tr. 3906 (Stevens). When the Probate Division learns that a ward has died but that a Suggestion of Death has not been filed, the Division initiates proceedings to address the situation, "because it is important that a suggestion of death be placed on the docket, because that calls – once that's docketed, it triggers other things like the final Guardianship Report to be filed . . . and other things." Tr. 3931-32 (Lilly). Failure to timely file the notice or suggestion of death causes the administrative side of the Probate Division to continue to operate as if the ward were still alive, which means that deadlines, ticklers, delinquency notices, and summary hearings will continue to be set and issued for required filings. The Division and interested third parties (*e.g.*, government agencies, creditors of the ward, and holders of the ward's assets) will be unaware of the ward's death and will not know that the process of addressing the ward's assets must begin. This could lead to government payors having to reclaim monies that were paid post-death,

complicate the final accounting of the ward's assets, and lead to other court processes being invoked. Tr. 3812-15, 3850-51 (Stevens). However, there is no indication in the record that any of these ill effects occurred between the due date of the notice of death in *Williams*, *see* FFs 108 & 109, and when it was ultimately filed. Within 60 days of the *termination* of the guardianship, a guardian must file the final Guardianship Report. D.C. SCR-PD Rule 328(d) (referring back to subsection (a)); DX 86 at 1163; DX 61.[11]

38. Guardians and other fiduciaries are entitled to "reasonable compensation" and must file a written petition with the court in order to be compensated for their time and expenses in providing legal and other services for a ward. D.C. Code §21-2047(d), §21-2060(a); D.C. SCR-PD Rule 308; DX 86 at 1143; DX 202 at 1630. They must verify the petition and must state in reasonable detail, *inter alia*, the character and summary of the services rendered, and the amount of time spent performing various tasks. D.C. SCR-PD Rule 308(b), DX 86 at 1143. If the ward has no assets (or depleted assets within the meaning of D.C. Code § 21-2060(a-1), the award of fees and/or expenses is paid from the District of Columbia Guardianship Fund. D.C. Code § 21-2060(b).

39. D.C. SCR-PD Rule 308(c)(1) provides, "A guardian's petition for compensation shall be filed no later than 30 days from the anniversary date of the

[11] Disciplinary Counsel mistakenly claims that Probate Rule 328(d) requires a guardian to file a Final Report of Guardian within 60 days *of a ward's death*, *see* PFF 10 in DC PFFs & PCLs at 5-6; a plain reading of Probate Rule 328(d) indicates that the final report is be filed "within 60 days *of the termination of the guardianship*." D.C. SCR-PD Rule 328(d) (referring back to subsection (a)) (emphasis added).

guardian's appointment, except that a guardian's final petition for compensation shall be filed no later than 60 days after termination of the guardianship." *See* DX. 86 at 1143. The court is required to "enter an order disposing of any request for payment from the Guardianship Fund . . . or a motion for reconsideration of an order for payment from the Guardianship Fund, within 30 days of the filing of such request." D.C SCR-PD Rule 308(i)(1); *see* DX 86 at 1143. Judges sitting in the Probate Division on a full-time assignment often do not review fee petitions; instead, fee petitions are routinely assigned to Senior Judges. Practitioners were aware that some judges would allow travel, and some would not. Tr. 1332, 1468-69 (Sloan). When an attorney submits a fee petition the judge who will consider it is unknown and likely will have nothing to do with the probate case itself. Tr. 1333-1336, 1405, 1468-1469, 1471 (Sloan).

40. The Probate Division has never adopted a uniform set of rules for what is compensable and what is not for fiduciary panel work. Tr. 1330, 1333 (Sloan). "[I]ndividual judges who review these cases can differ on the standards that they apply." Tr. 1331 (Sloan). Judges do not have a shared or common standard as to whether travel is compensable; "[t]here are judges who allow for travel and judges who don't. . . ." Tr. 1332 (Sloan). Similarly, "[t]here is one judge who doesn't believe that reading medical records is billable as a legal fee." Tr. 1331 (Sloan). There is also no consistency among the judges as to how to report travel time; in the 2005-2014 period, Ms. Sloan would sometimes break out travel in her fee petitions and "would indicate travel was included. . . ." Tr. 1473 (Sloan). On at least one

occasion, one judge approved categories of reimbursement that he had previously rejected. *See* DX 15, RX 22. "There is no consistency. This is the point. There is no consistency among the judges. . . .The judges are inconsistent in what they approve and how the – and their requirements, and they're inconsistent in every possible way." Tr. 1471 (Sloan). With respect to fee petitions seeking compensation for a guardian's activities while visiting with a ward in a facility, "[t]here is no standard requiring that an individual document on an ongoing basis . . . the folks that they have spoken with at an institution." Tr. 1492-93 (Sloan). In the years since the events at issue in this proceeding, judges reviewing Probate Division fee petitions "have drastically changed the requirements" and now generally require "a great deal of detail" and "a great deal of precision," which "was not the case in 2013." Tr. 1326-27 (Sloan).

41. In his 2011 opinion regarding compensation procedures in the Probate Division, Judge Ronald Wertheim recounted the history of Probate Court judges' reimbursement of attorneys' travel expenses. He noted Judge Lopez's 2004 opinion in *In re Demitro*, in which Judge Lopez approved compensating attorneys for travel under certain conditions. Judge Wertheim noted, however, that even after *Demitro*, Probate Division judges continued to diverge as to whether and, if so, under what circumstances travel was compensable:

> The compensability of travel time and expenses for Court-appointed professionals in Probate intervention cases, from the Guardianship Fund or from the subject's assets, has long been a matter primarily of judicial discretion. **Absent a formal rule on the subject, the resulting variations in rulings on otherwise indistinguishable facts has been a matter of concern to both**

> **bench and bar. . . . The *Demitro* precedent was followed thereafter by many but not all Probate judges, with variations continuing based upon such differences as whether both travel time and mileage expense could be claimed or whether travel from a suburban office outside the District could be included**.

In re Brenda J. Wilson and In re Irene Mason, 139 DWLR 2753 (Dec. 16, 2011) (Wertheim, J.) (Sup. Ct. D.C.) (emphasis added); DX 219 at 2248.

42. The Probate Attorney Practice Standards advised fiduciaries to "[m]aintain billing records created at the time service was rendered and documented by the guardian or conservator indicating the date and time of the service, the task or service provided, expenses incurred, other contacts involved in performing the task or service and the identification of the person who performed the task being billed . . . ." Standard 8.1 of the Probate Attorney Practice Standards, DX 85 at 1006. These Practice Standards "don't go into the detail of the billing" and billing remains "a huge, huge issue of contention in the Probate Division." Tr. 1331 (Sloan).

43. Over at least the past 10 or 15 years, a committee of Probate Division judges and practitioners has been attempting to develop standards for the compensation of Probate Division practitioners. The committee has issued recommendations to the court, but the court has not yet acted on them. Tr. 1330-32 (Sloan). Probate Division practitioners have complained over the years on their listserve and in other settings about the Division's inconsistent handling of fee requests, including by Judge Long and Judge Christian. Tr. 1588, 1592, 1609 (Fein); Tr. 1764-66 (Wright-Smith).

44. Ms. Neha Patel, Esquire, holds the position of Deputy District Counsel at the Department of Disability Services ("DDS") which provides support to adults with developmental and intellectual disabilities. Tr. 1942-44 (Patel). DDS is concerned about the discord between the fiduciary panel and Probate Division judges, which has caused longstanding fiduciary members to self-report that this is the reason they have foregone their fiduciary practices. Tr. 1953 (Patel). There has never been a booklet or any sort of rules setting uniform standards for compensation of guardians through fee petitions. Tr. 1959 (Patel). Ms. Patel receives telephone call complaints from fiduciary panel attorneys regarding travel treatment cuts and clerical tasks, *e.g.*, should a private practice solo practitioner get compensated for mailing an envelope. Tr. 1960-61 (Patel).

Since 2015, Ms. Patel has sat on the working panel referred to in the preceding Finding of Fact that is attempting to develop Probate Division compensation guidelines or standards. Other standing members of the committee include a representative from Legal Counsel for the Elderly; a couple of representatives from the Office of the Attorney General's ("OAG's") Civil Enforcement Division (who handle trusts and Medicaid paybacks for 29 trusts); three or four members of the fiduciary panel; Ms. Patel as Deputy District Counsel at the Department of Disability Services; two or three judges who have served at the Probate Division; and one member from the Register of Wills Office. Tr. 1961-62 (Patel). The working panel has been studying the issue for five years, but its work has been interrupted by the COVID-19 pandemic. Tr. 1952, 1955 (Patel).

The purpose of the committee is to review the fee petition process overall, how they are submitted, what kinds of guidelines are being provided to judges about how those fee petitions should be granted, cut, changed, or denied with the goal of effecting some consistency in terms of what is being provided, paid, what are payable tasks, and making recommendations to the court about the rate at which some of those tasks should be compensated. Tr. 1954 (Patel). The committee has been working on such issues as how much detail is required in fee petitions and standards for when the guardian may appear in court to explain specific fee requests before the petition is reduced or denied. Tr. 1961-62 (Patel). The committee has also looked at standardized rates for compensation when a guardian attends various hearings.

C. CHRONOLOGY OF EVENTS IN RESPONDENT'S GUARDIANSHIP OF MS. RUTH TOLIVER-WOODY LEADING TO THE DISCIPLINARY CHARGES IN THIS PROCEEDING

45. A request for the establishment of a conservatorship for Ms. Ruth Toliver-Woody was filed in the Probate Division on October 4, 1999. Ms. Shirley Riley, Ms. Toliver-Woody's niece, was appointed as General Guardian and Conservator on November 9, 1999. DX 5 at 78-79; Tr. 1848 (Riley).

46. Ms. Riley was replaced as conservator by Respondent on February 12, 2002. DX 5 at 75, DX 6 at 80-81.

47. Ms. Toliver-Woody was admitted to the Carolyn Boone Lewis Health Care Center (CBL), a nursing home in Southeast Washington, D.C., on September 15, 2004. Tr. 3041. CBL received extremely poor ratings from the Centers for

Medicare and Medicaid Services during this period. RX 41; RX 42; Tr. 845-48 (Brown-Johnson). However, CBL was located very close to Ms. Riley's home and thus convenient to Ms. Riley for visits. Tr. 438. Ms. Toliver-Woody also preferred being close to Ms. Riley's home, with whom she had lived until being moved to CBL. Tr. 2966, 2981.

48. Respondent was appointed Successor Guardian for Ms. Toliver-Woody on January 11, 2005. She was also ordered to ". . . report on the status of the subject by February 15, 2005." DX 8 at 87-88; Tr. 2736-37. Respondent filed that report, her First Report of Guardian, on January 28, 2005. DX 9.

49. In the view of Ms. Stevens, the Director of the Probate Division, under the January 11, 2005 Order Respondent's next Report of Guardian was due on July 12, 2005, because the applicable statute requires semiannual reports and because Judge Lopez's Order did not change the date on which the semiannual report was due. Tr. 2823-25 (Stevens). Ms. Sloan holds the same view. Tr. 1479. Two members of the Hearing Committee are convinced by the testimony of Ms. Stevens and Ms. Sloan that the reports were due in July and January of each year.[12] The Probate Division issued a Guardianship Report Delinquency Notice on July 15, 2005. DX 5 at 69 (entry 205). On August 1, 2005, the court issued a notice of summary hearing. DX 5 at 69 (entry 204).

50. Respondent filed her second Report of Guardian on August 11, 2005, covering approximately the preceding six months. DX 5 at 68 (entry 200); DX 10.

[12] Mr. Bernstein disagrees in his separate statement with this Finding of Fact.

51. Respondent filed a Petition for Extraordinary Compensation for Fees and Costs from Subject's Assets and the Guardianship Fund on June 29, 2007. DX 5 at 63 (entry 147); DX 11. In this Petition, Respondent sought compensation for services and expenses arising out of both Respondent's conservator work and her guardianship work over approximately the preceding five and one-half years in the total amount of $12,227.30. DX 11 at 98, 99, 104 *et seq*. Respondent sought compensation for services at the rate of $80.00 per hour instead of her then-customary hourly rate of $295.00. DX 11 at 98. The Invoice attached to this Petition included approximately 205 entries for "Professional Services Incurred," for a total of $10,088.50, DX 11 at 104-12, and approximately 223 entries for "Expenses Incurred" for a total of $2,138.80, DX 11 at 113-22. The Invoice included an expense on June 1, 2004 in the amount of $100.00 for "Computer Services", an expense on January 15, 2006 in the amount of $150.00 for "Technology Fee," and an expense on October 15, 2006 in the amount of $450.00 for "Technology Fee." DX 11 at 118, 120, 121. Disciplinary Counsel charges that these three entries each violate Rule 1.5(a).

52. In his Order signed on July 17, 2007 and docketed on July 18, 2007, Judge Hamilton, adopting the recommendation of a Probate Division Auditing Branch Manager, approved compensation for services in the amount of $9,800.00 and deferred an award of expenses, stating, "[t]he expenses need further explanation, as they appear high. What is a Technology Fee?" DX 5 at 62 (entry 140); DX 12.

53. The Probate Division issued a Guardianship Report Delinquency

Notice on July 17, 2007. DX 5 at 63 (entry 142). The Probate Division's Docket Sheet for the *RTW* matter, DX 5, contains no references to the filing of Guardianship Reports or the issuance of Guardianship Report delinquency notices after the filing of the second report on August 11, 2005 as set forth in FF 50. *See* DX 5 at 63-68.

54. Respondent filed her fifth Report of Guardian on August 8, 2007. DX 5 at 62 (entry 133); DX 13.

55. Respondent filed a Supplement to Petition for Extraordinary Compensation for Fees and Costs from Subject's Assets and the Guardianship Fund on November 23, 2007. DX 5 at 61 (entry 128); DX 14. In that filing, in response to Judge Hamilton's inquiry regarding the "Technology Fee," Respondent stated that her accounting and billing programs and computer systems "require professional third party maintenance," that "this office assesses this fee to all clients as a one-time fee. . . ." DX 14 at 132. In an order dated and docketed on December 21, 2007, Judge Hamilton allowed $249 in expenses. DX 5 at 61 (entry 123).

56. The Probate Division issued a Guardianship Report Delinquency Notice on January 16, 2008, and a summary hearing was held on March 4, 2008. DX 5 at 61 (entry 122); *id*. at 60 (entry 116). That hearing was continued to and held on March 18. DX 5 at 60 (entries 113, 116-117). On that same day, the docket sheet reflects an "Order Vacating S/H Failure/File Guard Rpt." signed by Judge Burgess. *Id*. at 59 (entry 112).

57. Respondent had filed her sixth Report of Guardian on February 12,

2008. DX 5 at 60 (entry 119); DX 16.[13] Disciplinary Counsel charges that Respondent violated Rule 3.3(a)(1) and Rule 8.4(c) because her statement in this Report that she visited the Ward one time by telephone during the reporting period and her statement in her June 25, 2009 Fee Petition, FF 62, that she visited the Ward once in person for 4 hours during the same reporting period are inconsistent.

58. The Probate Division issued a Guardianship Report Delinquency Notice on July 15, 2008. DX 5 at 58 (entry 97).

59. Respondent filed her seventh Report of Guardian on July 25, 2008. DX 5 at 58 (entry 95); DX 17.

60. Respondent and Judge Burgess exchanged letters between July 30, 2008 and August 11, 2008, regarding the appropriate number of visits by a guardian to an adult ward. DX 18, 19, 20.

61. Respondent filed her eighth Report of Guardian on January 7, 2009. DX 5 at 56 (entry 77); DX 21. Disciplinary Counsel charges that Respondent's statement in this Report that she visited the Ward three times during the reporting period is false and violates Rule 3.3(a)(1) and Rule 8.4(c) in one or more respects.

62. Respondent filed a Petition for Compensation of Counsel from Guardianship Fund, Memorandum of Points and Authorities in Support Thereof on June 25, 2009. DX 5 at 55 (entry 63); DX 23. In this Petition, Respondent sought compensation for services and expenses between July 2007 and February 2009 in

[13] This is the first filing containing a statement or invoice entry alleged by Disciplinary Counsel to be false and therefore violative of Rule 3.3(a)(1) and/or Rule 8.4(c) in one or more respects. This and all other Rule 3.3(a)(1) and Rule 8.4(c) charges are discussed in Sections IV.E. & F, *infra*.

the total amount of $5,578.41. DX 23 at 180, 189-94. Respondent again sought compensation for services at the rate of $80 per hour. DX 23 at 180, 186. The Invoice attached to this Petition included approximately 68 entries for "Professional Services," in the amount of $4,720.00, DX 23 at 189-92, and approximately 38 entries for "Additional Charges" in the amount of $858.41. DX 23 at 192-94. The invoice attached to this Petition includes the following entry: "1/24/08, SJR, Meeting, Meeting with RTW, 4.00 Hrs." DX 23 at 190. Disciplinary Counsel charges that this entry violates Rules 1.5(a), 3.3(a)(1) and/or 8.4(c) because it conflicts with Respondent's statement in her sixth Report of Guardian, FF 57, that she visited Respondent one time by telephone during the period covered by this Petition and because the visit did not last four hours.

63. Respondent filed her ninth Report of Guardian on July 9, 2009 and it was entered on the docket on July 10, 2009. DX 5 at 53 (entry 59); DX 25. Disciplinary Counsel charges that Respondent's statement in this Report that she visited the Ward three times during the reporting period is false and violates Rule 3.3(a)(1) and Rule 8.4(c) in one or more respects.

64. Judge Long ruled on Respondent's June 25, 2009 Fee Petition, FF 62, in her Order that was signed on July 27, 2009 and docketed on July 29, 2009. DX 5 at 54 (entry 56); DX 24. Adopting the recommendation of a Supervisory Auditor, Judge Long approved compensation for services in the amount of $4,720.00 and compensation for expenses in the amount of $858.41, with a total amount of $5578.41, the amounts requested by Respondent. DX 24 at 195-96.

65. Judge Long issued an Order Appointing Student Visitor on September 14, 2009. DX 5 at 54 (entry 55); DX 26.

66. In a letter to Respondent dated September 30, 2009, the Administrator of the Carol Boone Lewis nursing home "suggest[ed] that as her guardian you may wish to visit her occasionally." DX 27.

67. The Student Visitor Report was filed on November 10, 2009. DX 5 at 54 (entry 54); DX 28. In her Report, the Student Visitor responded "No" to the question "Do you recommend any further action?" and did not make any recommendation in the section titled "Recommendations." The Student Visitor also reported, "The ward has considerable debt with the nursing home creating tension between the successor guardian and the nursing home staff" and added that these problems arose under the prior conservator/successor guardian. DX 28 at 206. The Student Visitor also reported, "The niece [*i.e.* Ms. Riley] reports the ward needs eye surgery . . . . The guardian also reported the need for eye surgery and reports discussing this issue with the doctor and that it is in process of being taken care of." DX 28 at 209.

68. Ms. Toliver-Woody had laser surgery on her right eye on approximately November 18, 2009 and on her left eye on approximately December 17, 2009. DX 36 at 397, 398; Tr. 2166-68. In the surgery follow-up consultation on January 13, 2010, she was diagnosed as having glaucoma, and an appointment at the Glaucoma Clinic of the Washington Hospital Center was scheduled for March 3, 2010. DX 36 at 399-400. At the March 3, 2010 consultation, "end stage glaucoma" in her left eye

was diagnosed. DX 36 at 401.

69. The Probate Division issued a Guardianship Report Delinquency Notice on January 13, 2010. DX 5 at 54 (entry 51).

70. Respondent filed her tenth Report of Guardian on January 27, 2010. DX 5 at 53 (entry 50); DX 29. Respondent stated in this Report that she visited the Ward three times during the reporting period. DX 29 at 213. Disciplinary Counsel charges that this statement is false and violates Rule 3.3(a)(1) and Rule 8.4(c) in one or more respects. Respondent also stated in this Report that Ms. Toliver-Woody "has Glaucoma and needs laser surgery." DX 29 at 213.

71. Respondent filed a Petition for Compensation of Counsel from Guardianship Fund, Memorandum of Points and Authorities in Support Thereof on April 19, 2010. DX 5 at 53 (entry 48); DX 30. In this Petition, Respondent sought compensation for services and expenses between March 29, 2009 and January 31, 2010, the period that included Ms. Toliver-Woody's eye surgeries. DX 30 at 217, 225-30; *see also* FFs 67 & 68. Respondent again sought compensation for services at the rate of $80 per hour in the total amount of $7,672.00 and also sought $1,674.47 for expenses. DX 30 at 217, 221. The Invoice attached to the Petition included approximately 104 entries for "Professional Services," in the amount of $7,672.00, DX 30 at 225-29, and approximately 28 entries for "Additional Charges" in the amount of $1,674.74. DX 30 at 229-30. Disciplinary Counsel charges that the following seven entries in the invoice submitted with this Fee Petition are false and violate Rules 1.5(a), 3.3(a)(1) and/or 8.4(c) in one or more respects:

8/14/2009	SJR	Visit RTW	4.5 Hrs.	[DX 30 at 227]
12/18/2009	SJR	Client Meeting	5.0 Hrs.	[DX 30 at 28]
11/6/2009	SJR	Client Meeting	5.0 Hrs.	[DX 30 at 28]
10/12/2009	SJR	Client Meeting	5.0 Hrs.	[DX 30 at 228]
12/17/2009	SJR	Client Meeting	3.0 Hrs.	[DX 30 at 229]
12/8/2009	SJR	Client Meeting	3.0 Hrs.	[DX 30 at 229]
11/23/2009	SJR	Client Meeting	3.0 Hrs.	[DX 30 at 229]

72. In his Order signed on April 26, 2010 and docketed on April 27, 2010, Judge Hamilton, adopting the recommendation of a Probate Division Auditing Branch Manager, approved compensation for services in the amount of $7,672.00 and compensation for expenses in the amount of $1,674.74, the amounts requested by Respondent. DX 5 at 53 (entry 45); DX 31.

73. Respondent filed her eleventh Report of Guardian on July 12, 2010. DX 5 at 53 (entry 42); DX 32. In this Report, Respondent reported, "Ms[.] Toliver-Woody has Glaucoma. Ms. Toliver-Woody needs additional eye surgery. I have provided my consent as her guardian on multiple occasions over the past year directly with the doctor, the nurses at Carolyn Boone and in conversations with Ms. Toliver-Woody with regards to her previous eye surgery." DX 32 at 232; *see also* DX 35 at 347 (handwritten consent for glaucoma surgery dated 12 July 2010); *see also* Tr. 2988-89, 2995. Respondent also reported, in the Social or other Case Worker section of the Report, "Ruth Mukami (new)." DX 32 at 233; *see also* Tr. 3062.

74. A hearing on the Student Visitor's November 10, 2009 Report (FFs 65, 67) was conducted before Judge John Campbell on August 20, 2010. DX 5 at 53 (entry 41); DX 33. At the hearing, Judge Campbell stated "…the only purpose of this hearing is because of some concern expressed by a student visitor working for the court about whether or not it was easy to contact Ms. Rolinski or not. And that is the only purpose of this hearing, I think." DX 33 at 239; *see also* FF 66.

75. The August 20, 2010 hearing was attended by Respondent and Ms. Riley and by Ms. Ruth Mukami, Ms. Toliver-Woody's new social worker at CBL, and Mr. Rogers Morgan, a financial administrator at CBL. DX 33 at 238. Those who spoke at this hearing were not placed under oath. DX 33. Ms. Mukami and Mr. Morgan accused Respondent of "…misuse of her funds…," ostensibly supported by "stacks and stacks of papers to prove that…." DX 33 at 245. The nursing home representatives offered no evidence of these charges at this hearing or subsequently. DX 33 at 245-50. We find Ms. Mukami's testimony regarding "stacks and stacks of paper to prove that" not to be credible, especially in light of FF 79. Respondent noted that Ms. Toliver-Woody's "estate has been depleted," that she had raised questions about the nursing home's care of Ms. Toliver-Woody, and that "the institution is profoundly annoyed with me." DX 33 at 246-48. Ms. Riley confirmed Respondent's representations. DX 33 at 249-50. In response to the allegations, Judge Campbell noted that "[i]t's not here for an evidentiary hearing or about anything that anybody has or hasn't done," stated that "the Court is not in the business of doing any kind of collection work for the nursing home" and rejected the nursing home's request for

further inquiry into the financial issues it was attempting to raise. DX 33 at 251. In light of the non-financial concerns expressed at the hearing, Judge Campbell observed, "But I certainly think it's worth, as I said, appointing a visitor from our fiduciary panel to take a look at the situation, and see if he or she has any concerns, and set a further status hearing." DX 33 at 254.

76. At the hearing, Judge Campbell also asked for information regarding Respondent's availability for contacts, including visits:

> The Court: . . . What about that, Ms. Rolinski, because there is an obligation to visit monthly.
>
> Ms. Rolinski: . . . [O]ur reportings to the Court reflect the visits. . . . And I have been there on numerous occasions as the contemporaneous timekeeping notes reflect. . . . In other words when we file with the Court, our motions for compensation, we generate invoices, just like every other law firm, and we keep contemporaneous time. And it is reflected in those filings with regard to the Court.
>
> * * * * *
>
> Judge Campbell: Let me say, Ms. Rolinski, that the – the statute – the provisions about visiting, for example, every month, doesn't say you or your designee, all right. It does say Guardian. If there's a circumstance where the Guardian cannot visit and believes for some reason that that the visits are not needed, then typically, the Guardian petitions the Court to relax that requirement for the Guardian. But it's not – I don't think it's a question of designees.
>
> Ms. Rolinski: We did that a long time ago with Judge Burgess. And I offered to him at the time because of my international travel that I could either step down, or I think it was at the time when the conservatorship was closing.

> Judge Campbell: Was there an order? I'm sorry if I don't know.
>
> Ms. Rolinski: I don't know that there was an order, but I recall that we had communicated, written letters back and forth. And that ultimately, he asked that I visit on three occasions, and that –
>
> Judge Campbell: Three times a year?
>
> Ms. Rolinski: During the reporting period. So that would be for each guardianship appearance, so three times during the six months….
>
> Ms. Rolinski: **There is a letter from Judge Burgess that I have.**
>
> Judge Campbell: I'd like to know that. I'd like to see that….

DX 33 at 243-44, 254-55, 256 (emphasis added). Ms. Mukami then claimed that "… (i)n regards to signing in … I went through those logs yesterday. I spent two hours. I didn't see her signature or the other lady she is talking about." DX 33 at 257. When asked by Judge Campbell whether she signed in when at the nursery home, Respondent stated, "Sometimes I do, sometimes if there is no one there, I just go up to the second floor . . ." DX 33 at 256-57.

77. Judge Campbell scheduled another status hearing for October 22, 2010 and issued his Order Appointing Visitor on August 30, 2010. DX 5 at 52 (entry 40); DX 33 at 257; DX 34. The Attorney Visitor, C. Hope Brown, Esquire, submitted her Report of Visitor on October 14, 2010. DX 5 at 52 (entry 35); DX 36.

78. At the October 22, 2010 hearing, those who spoke at the hearing were not placed under oath. DX 37. The following exchange took place with respect to

the visiting issue:

> Judge Campbell: All right, Ms. Rolinski, is there anything else you want to say about the visits, the visitations, the visiting situation?
>
> Ms. Rolinski: Just that, your Honor, the last time we were here you asked me to – I had recalled that there was communication from Judge Burgess.
>
> Judge Campbell: **I found the communication from Judge Burgess**.
>
> Ms. Rolinski: Okay, based on that, he asked me to visit at least three times. Four would be better was his exact terminology.

DX 37 at 415-16 (emphasis added). Ms. Brown, the Attorney Visitor, added, "I don't know what went on on the weekend, so I can't report about the weekends." DX 37 at 414. Ms. Brown further stated, "It's my understanding from the visits – the interviews that I had with staff members who attend to Ms. Woody that they rarely saw . . . Ms. Rolinski. . . She did indicate to me that on occasion she just went right up [to see Ms. Woody without signing into the logbook]. But in talking with members of the staff there, those staff members that I talked to, did not see her and did not know her." DX 37 at 414.

79. With respect to the financial issues raised by the nursing home, Ms. Brown reported:

> And there had been tensions between the parties based on money issues. But after my review of the records and my understanding of what went on with the money, it appears that – there doesn't seem to be anything that was – it wasn't obvious to me that there was any wrong doing [sic] with respect to the money.

> Clearly the money had been accounted for here in Court.
>
> * * * *
>
> But it's clear based on what my review of the accounting has been that the . . . all the money was accounted for.

DX 37 at 413, 414; *see also* Tr. 3050-54.

80. Judge Campbell then heard the parties regarding re-appointing Ms. Riley as the co-guardian and took the matter under advisement. DX 37 at 425.

81. The Probate Division issued a Guardianship Report Delinquency Notice on January 14, 2011. DX 5 at 51 (entry 29).

82. Respondent filed her twelfth Report of Guardian on January 25, 2011. DX 5 at 51 (entry 28); DX 38. In this Report, Respondent reported that Ms. Toliver-Woody "had eye surgery during this reporting period due to her Glaucoma. Respondent also reported, "She will see a cardiovascular and thoracic surgeon for blood circulation to the brain issues." DX 38 at 428.

83. Ms. Toliver-Woody had cardiovascular surgery on March 29, 2011 and remained on a ventilator thereafter. Tr. 3089-92 (Respondent).

84. Ms. Toliver-Woody was moved to the St. Thomas More Nursing and Rehabilitation Center in Hyattsville, MD (STM) on April 11, 2011. Tr. 547-48, 3089, 3097-98 (Respondent).

85. Respondent filed her revised twelfth Report of Guardian on April 12, 2011. DX 5 at 51 (entry 28); DX 40.

86. Respondent filed a Consent Petition for Compensation of Counsel from Guardianship fund, Memorandum of Points & Authorities in Support Thereof on

May 6, 2011. DX 5 at 50 (entry 23); DX 41. In this Petition, Respondent sought compensation for services and expenses between February 1, 2010 and January 31, 2011. DX 41 at 438. Respondent again sought compensation for services at the rate of $80 per hour, plus expenses, in the total amount of $8,988.97. DX 41 at 438. The Invoice attached to the Petition included approximately 121 entries for "Professional Services," in the amount of $8,144.00, DX 41 at 438, 444-49, and approximately 21 entries for "Additional Charges" in the amount of $844.97, DX 41 at 449-50. Disciplinary Counsel charges that the following six entries in the invoice submitted with this Fee Petition are false and violate Rules 1.5(a), 3.3(a)(1) and/or 8.4(c) in one or more respects:

7/12/2010	SJR	Visit RTW w/Niece	5.0 Hrs. [DX 41 at 446]
8/20/2010	SJR	Attend court hearing	4.1 Hrs. [DX 41 at 446]
9/30/2010	SJR	Client Meeting Mtg at Nursing Home With Adult Subject	3.5 Hrs. [DX 41 at 447]
10/22/2010	SJR	Court Appearance Status Hearing	5.0 Hrs. [DX 41 at 447]
11/22/2010	SJR	Client Meeting Mtg at Nursing Home With Adult Subject	4.8 Hrs. [DX 41 at 448]
1/7/2011	SJR	Client Meeting Mtg at Nursing Home With Adult Subject	4.8 Hrs. [DX 41 at 448]

87. In his Order dated May 18, 2011 and docketed on May 20, 2011, Judge Hamilton, adopting the recommendation of a Probate Division Auditor, DX 42, approved compensation for services in the amount of $8,144.00 and compensation

for expenses in the amount of $419.97. DX 5 at 50 (entry 20); DX 43.

88. Ms. Toliver-Woody died on June 20, 2011. Tr. 572-73, 2583, 3087 (Respondent).

89. The Probate Division issued a Guardianship Report Delinquency Notice on July 18, 2011. DX 5 at 50 (entry 17).

90. Respondent filed her final Report of Guardian on August 10, 2011. DX 5 at 49 (entry 13); DX 44. In this Report, Respondent reported that "Ward passed away at St. Thomas More Facility, MD" after surgery at the United Medical Center and that "Ward had complications after cardiovascular surgery and was on a vent until she passed away." DX 44 at 458-59. Ms. Sloan testified that this "gives the court notice that the individual has died," and added, "So letting the court know that the individual has died is the purpose. The Guardianship Report achieved that purpose and the court could proceed to termination." Tr. 1454, 1455 (Sloan). Respondent also stated in her final Report of Guardian, "Multiple personal and tel. conferences with facilities, hospital, family and Adult Subject to coordinate care and funeral and burial arrangements." DX 44 at 459.

91. In the Probate Division's Summary Hearing Order form docketed on August 26, 2011, Judge Gardner checked boxes stating that the summary hearing was "[h]eld and disposed. The Court finds that the delinquent item has been filed." He added, "The guardianship reports for this case are due on 7/12 and 1/12 of each year." DX 5 at 49 (entry 12); DX 45.

92. Respondent filed a Consent Petition for Compensation of Counsel from

Guardianship fund, Memorandum of Points & Authorities in Support Thereof . . . & Petition to Terminate Guardianship, on January 11, 2012. DX 5 at 49 (entry 9); DX 46. In this Petition, Respondent sought compensation for services and expenses between January 7, 2011 and August 25, 2011. DX 46 at 466. Respondent again sought compensation for services at the rate of $80 per hour, plus expenses, in the total amount of $19,315.00. DX 46 at 466, 475-89. The invoice attached to the Petition included approximately 356 entries for "Professional Services," in the amount of $18,760.00, DX 46 at 475-89, and approximately 14 entries for "Additional Charges" in the amount of $555.00 DX 46 at 489. Disciplinary Counsel charges that the following thirteen entries in the invoice submitted with this Fee Petition are false and violate Rules 1.5(a), 3.3(a)(1) and/or 8.4(c) in one or more respects:

1/7/2011	SJR	Client Meeting Mtg at Nursing Home With Adult Subject	4.8 Hrs. [DX 46 at 475]
4/5/2011	SJR	Client Mtg at UNC	5.0 Hrs. [DX 46 at 479]
4/13/2011	SJR	Client Meeting	5.0 Hrs. [DX 46 at 480]
5/10/2011	SJR	Client Meeting At STM	4.0 Hrs. [DX 46 at 484]
5/27/2011	SJR	Client Meeting	5.0 Hrs. [DX 46 at 485]
6/1/2011	SJR	Client Meeting	4.8 Hrs. [DX 46 at 485]
6/2/2011	SJR	Client Meeting	5.0 Hrs. [DX 46 at 485]

6/3/2011	SJR	Visit Client	5.9 Hrs. [DX 46 at 486]
6/9/2011	SJR	Visit Client	5.8 Hrs. [DX 46 at 486]
6/10/2011	SJR	Visit Client	4.8 Hrs. [DX 46 at 486]
6/13/2011	SJR	Client Meeting	5.5 Hrs. [DX 46 at 486]
6/15/2011	SJR	Client Meeting	5.3 Hrs. [DX 46 at 487]

ODC also charges that entries on the invoice for "various 0.3 and 0.4 charges for calls from St. Thomas More" are false and violate Rule 3.3(a)(1) and/or Rule 8.4(c) in one or more respects. *See* ODC's Notice of Violative Conduct (filed December 2, 2020).

93. In an Order docketed January 23, 2012, Judge Campbell ordered the *RTW* guardianship terminated. DX 5 at 48 (entry 5); DX 48.

94. On June 11, 2012, Judge Long issued a Memorandum Order Granting in Part and Denying in Part Guardian's Consent Petition for Compensation of Counsel from Guardianship fund, Memorandum of Points & Authorities in Support Thereof filed on November 15, 2011 & Petition to Terminate Guardianship. DX 5 at 48 (entry 2); DX 49. Judge Long wrote that she had "revisit[ed] the entire history of [the] guardianship" because of "certain prominent time claims that seemed dubious . . . [including] claims for multi-hour, marathon 'client conferences' at a time when the Ward was on a ventilator in hospice care [and because the] instant fee request is particularly large, for only a few months of potentially compensable time." DX 49 at 511-12.

Judge Long further observed that "Rolinski did not inform the Superior Court

of the Ward's death at that time, as the Probate Rules required her to do so . . . until she filed her twelfth (and thus final) Guardianship Report on August 10, 2011." DX 49 at 513. After reviewing "Applicable Legal Principles," DX 49 at 514-15, Judge Long turned to the "Performance of the Fiduciary," including "questions about the attentiveness of Rolinski toward the Ward," citing the correspondence between Respondent and Judge Burgess and finding a statement by Respondent in that exchange to be "startling." DX 49 at 515-16; *see generally* FF 35. Judge Long also stated that the Student Visitor and the Attorney Visitor reported to the court that Rolinski was not performing well, DX 49 at 517-20, and then discussed those proceedings in detail. DX 49 at 517-24; *see also* FFs 74-80. In the course of this discussion, Judge Long stated that "In retrospect, Rolinski's assertion concerning a permission letter is stunning" and that "Judge Campbell directed Rolinski to produce this 'permission letter' [*i.e.*, the correspondence from Judge Burgess] at the next hearing. She failed to do so." DX 49 at 521-22. Judge Long also stated, "This Court infers that no 'permission letter' actually exists and that Rolinski knowingly made a false statement to Judge Campbell in open court." DX 49 at 522; *but see* FF 78. Judge Long also stated, "Notably, at the October 22 hearing, Rolinski never mentioned the letter from Judge Burgess that allegedly granted her permission to delegate to Espinet her duty to visit the Ward." DX 49 at 523; *but see* FF 78 (transcribed discussion in which Judge Campbell identifies "correspondence" from Judge Burgess that Respondent had referenced).

Judge Long then turned to "Examination of the Time Expenditures and

Reimbursement Claim." DX 49 at 524. Judge Long divided the various entries on Respondent's invoice into the categories of "Post-Death Time Claims," "Questionable 'Client Meetings,'" "Excessive or unexplained time claims for telephone calls, emails, and legal work," and "Reimbursement for Expenses." DX 49 at 524-30. Judge Long disallowed all "Post-Death Time Claims," DX 49 at 524-26, and disallowed $3,688.00 for "conspicuously high billing for multi-hour 'client meetings'" beginning on and subsequent to April 5, 2011, including entries for April 5, 2011, May 10, 2011, June 3, 2011, and others during Ms. Toliver-Woody's last month, "reject[ing] the billings for such time as not credible and not worthy of payment." DX 49 at 527-28.

In the "Excessive or unexplained time claims for telephone calls, emails, and legal work" section, Judge Long stated, "One of the chief reasons why the fee demand is so high is the excessive amount of time claimed for telephone calls to nurses [during the last few months of Ms. Toliver-Woody's life]. . . . Each and every call is billed for .30 hour ($24 per twenty-minute call). It is highly unlikely that each and every such call uniformly filled twenty minutes of conversation when the subject matter of the call is described as 'status'" DX 49 at 528. Judge Long ultimately "infer[red] that such billings are not necessary or reasonable." *Id*. Judge Long also disallowed all claims for legal research and drafting an unfiled motion. DX 49 at 529. In the "Reimbursement for Expenses" section, Judge Long allowed most of the claimed expenses. DX 49 at 529-30.

In the final section of her Order, "Application of Percentage Discount for

Determination of Final Compensation for Professional Services," Judge Long concluded,

> There are so many time entries of a questionable nature that it is not practical for the Court to parse each one individually. . . . It suffices to say that several large categories of time expenditures are unjustified." DX 49 at 531.
>
> * * * * *
>
> Most importantly, as one appellate court has emphasized, "it 'is not for the [trial court] to justify each dollar or hour deducted from the total submitted by counsel . . . [but] counsel's burden to prove and establish the reasonableness of each dollar, each hour above zero.'"

DX 49 at 531-32 (citations omitted, emphasis in original). Judge Long thereupon applied a discount of 75% to the portion of the compensation request that she had not already specifically disallowed. DX 49 at 532.

D. CHRONOLOGY OF EVENTS IN RESPONDENT'S GUARDIANSHIP OF MR. JAMES H. WILLIAMS LEADING TO THE DISCIPLINARY CHARGES IN THIS PROCEEDING

95. On May 28, 2013, the George Washington University Hospital (GWUH) petitioned the Probate Division for the appointment of a temporary guardian for Mr. James H. Williams. DX 50 at 541 (entry 61); DX 51. By Order of the same date, a hearing on the petition was set down for 4:00 pm on June 3, 2013. DX 52 at 551. Ms. Sloan (*see* n.9, *supra*) was appointed as counsel for Mr. Williams, DX 52 at 551, and Respondent was listed as the Guardian *ad Litem* who should be contacted by the listed telephone number and who should "assist the subject in determining the subject's interests in regard to the proceeding" and "make the

determination of the subject's interests in this proceeding if the subject is unconscious or otherwise wholly incapable of determining his/her interests even with assistance." DX 52 at 552.

96. The hearing was held as scheduled on June 3, 2013, before Judge Alprin. DX 50 at 540 (entry 54); DX 53 at 553-60. After hearing from the GWUH representative, appointed counsel for Mr. Williams, and Respondent as Guardian *ad Litem*, the GWUH representative asked "if the GAL is willing to stay on as Guardian or as his temporary guardian, or if she's interested in doing so…," to which Judge Alprin added, "that's normally what I do. If the guardian wants to," and the Respondent responded: "Sure, it would be my pleasure." DX 53 at 559.

97. Judge Alprin signed an Order that was filed in the Office of Judge-in-Chambers on the same date appointing Respondent as Mr. Williams' "health care guardian for a period not to exceed 90 days from the date of this order." DX 50 at 540 (entry 53); DX 54 at 562; *see also* FF 143.

98. On July 19, 2013, GWUH filed a Petition for a General Proceeding seeking the appointment of Respondent as Mr. Williams' "permanent guardian/conservator." DX 50 at 540 (entry 51); DX 55 at 564-70, 576.

99. A hearing on GWUH's Petition was held on August 28, 2013 before Judge Fisher. DX 50 at 539 (entry 44); DX 56 at 593-601. Respondent participated by telephone. DX 56 at 593, 600-01. The hearing commenced "at approximately 11:15 a.m." and "concluded at approximately 11:25 a.m." DX 56 at 593, 601. In the course of the hearing, Gloria Willingham, who had replaced Ms. Sloan as counsel

for Mr. Williams, DX 50 at 539 (entry 48), stated, ". . . [W]e recommend Ms. Rolinski. She's done outstanding work." DX 56 at 598. Judge Fischer thereupon asked Respondent if she were able to accept the proposed appointment, Respondent responded affirmatively, and Judge Fischer thereupon stated, "All right. Then, I would appoint you as the guardian for Mr. Williams. We'll get an order that will be completed in just a short while and get copies of that order to all parties, including yourself, in the next day or so." DX 56 at 598-99. Judge Fischer's Findings of Fact, Conclusions of Law, [and] Order Appointing Sylvia Rolinski, Esquire, as Guardian was entered on August 28, 2013, the same date as the hearing. DX 50 at 538 (entry 43); DX 57. The Order further provided:

> The guardian is hereby notified of the following required filings:
>
> 1. An acceptance and consent to jurisdiction is to be filed by the guardian within fourteen (14) days of the date of the guardian's appointment. . . .
> 2. A guardianship plan is to be filed by the guardian no later than ninety (90) days from the date of the guardian's appointment in INT cases only. . .
> 3. Guardianship reports are to be filed by the guardian every six months from the date of the guardian's appointment hereof.

DX 57 at 606.

100. Respondent thereupon turned to filing the Acceptance and Consent. She was in New York City at the time with her son and therefore, she telephoned Brian Baloga at the office (*see* FF 5) and asked him to fill out an Acceptance form and file it. Tr. 2006. He found such a form in another case file, whited out the information on that form, filled it out as Respondent directed him while she remained

on the phone, and mailed it to the court, although he had the impression that Respondent would have preferred for him to hand file it. Tr. 2007-12. Mr. Baloga recalled that "it did take a long time for me to get all that done . . . a really long time." Tr. 2009, 2011.

101. On September 18, 2013, the Probate Division issued a Summary Hearing Notice for "Failure to File the Accept[ance] and Consent as Guardian" and scheduled a Summary Hearing for October 11, 2013 before Judge Gardner. DX 50 at 538 (entry 40).

102. On October 11, 2013, the day of the Summary Hearing, Respondent attempted to find the Acceptance form on the court's website. When she could not find it online, she telephoned and sought assistance from Vicki Wright-Smith, Esquire, a probate practitioner who has served on the Probate Division's Fiduciary Panel. Tr. 733 (Respondent); Tr. 1759-60. (Wright-Smith). Ms. Wright-Smith confirmed to Respondent that she too was having difficult locating forms on the court's website. Tr. 1772-73. In their telephone conversation, Ms. Wright-Smith told Respondent that she would try to find the form while Respondent remained on the line; this "went on for a while" but Ms. Wright-Smith was unable to find the form online. Tr. 733, 1773. Ms. Wright-Smith then told Respondent that she would send Respondent a blank copy of the form that she had in her files: "And that's what I ended up doing. I ended up sending her a blank one. I sent it by fax and I sent it by e-mail." Tr. 1773; *see also* Tr. 733, 1792, 3545. At the hearing, Ms. Wright-Smith identified RX 79 as the fax and Acceptance form that she sent to Respondent. Tr.

1773. Ms. Sloan was unable to say whether it would be unusual for an attorney to expend two hours on preparing and filing the Acceptance. Tr. 1481-84; *see generally* FF 113, regarding DX 73 at 687.

103. The summary hearing was held before Judge Gardner as scheduled, on Friday, October 11, 2013. DX 50 at 537 (entry 37); DX 58 at 609-15. Respondent participated by telephone because a tree near her home downed by a storm prevented her from driving to the court. DX 57 at 611. After an Assistant Deputy Register of Wills informed the court that the Clerk's Office had not received the Acceptance, Respondent informed Judge Gardner that she had filed the Acceptance "right after I was appointed," that she had intended to bring her copy to court that morning, that she had spoken with the Clerk's office who could not find the Acceptance and Consent, and that she would bring her file copy to the Probate Division's Clerk's office the following Tuesday, the following Monday being a holiday. DX 58 at 612. Respondent filed the Acceptance on Tuesday, October 15, 2013. DX 50 at 537 (entry 36); DX 60. *See also* FF 113, *infra*, containing entry on invoice of 3 hours for this hearing; *see also* Section III.F., *infra* (regarding the credibility of Respondent's testimony about this hearing).

104. The Probate Division issued a Guardian Plan Delinquency Notice on December 2, 2013 and, on December 20, 2013, scheduled a Summary Hearing for January 31, 2014 before Judge Gardner. DX 50 at 536 (entry 30).

105. Respondent filed the Guardianship Plan on December 20, 2013. DX 50 at 536 (entry 27); DX 63.

106. The summary hearing was held before Judge Gardner as scheduled, on January 31, 2014; Respondent participated by telephone due apparently to winter weather conditions. DX 50 at 536 (entry 26); DX 64 at 631-37. Respondent attributed her late filing of the Guardianship Plan to "a month long jury trial . . . . and it just fell off my radar screen." DX 64 at 634, 635. The ensuing Summary Hearing Order noted that "[t]he guardianship reports for this case are due on 2/28 and 8/28 of each year." DX 65.

107. Respondent filed her Report of Guardian (1st Report) on February 28, 2014. DX 50 at 535 (entry 24); DX 66. In this Report, in the section titled "Dates of personal visits with Adult Subject, Respondent responded "8/30/13, 9/11/13, 10/17/13, 11/12/13, 12/15/13, 1/28/14, 2/18/14." DX 66 at 640. In the section titled "Other contacts with Adult Subject and/or staff at the facility," Respondent responded, "Yes, telephone calls with medical staff; case manager; social worker; financial office regarding his ongoing care and plan of care. Attend care plan conference at facility." DX 66 at 640. In a subsequent section inquiring about care-planning meetings, Respondent reported "Yes. The initial annual care plan meeting and monthly plan of care meeting with case manager." DX 66 at 641.

108. Mr. Williams died on July 23, 2014. Tr. 683; DX 67.

109. Respondent filed a Praecipe Notice of Death on August 20, 2014. DX 50 at 535 (entry 23); DX 67. Respondent testified that preparation of the Notice took an hour "finding it, preparing it, reviewing it, confirming it with the birth certificate, and submitting it on CaseFile Express." Tr. 1091; *see also* 3487.

Respondent also testified without contradiction that she is familiar with at least one other instance in which an attorney billed 1.2 hours for filing a Notice of Death. Tr. 1091-92.

110. The Probate Division issued a Guardianship Report Delinquency Notice on October 24, 2014. DX 50 at 535 (entry 21).

111. Respondent filed her Report of Guardian (2nd and Final Report) on November 12, 2014. DX 50 at 535 (entry 20); DX 68. In this Report, she listed visits on "3/12/14, 4/7/14, 5/15/14, 5/16/14, 6/25/14, 7/16/14, 7/22/14" as well as "telephone calls with social worker, nursing staff, doctors, IPS preparation, hospice." DX 68 at 646.

112. Judge Fischer issued an Order terminating the *Williams* guardianship on November 26, 2014. DX 50 at 535 (entry 19); DX 69.

113. Respondent filed her only Petition for Compensation of Court-Appointed Counsel from Guardianship Fund, Memorandum of Points and Authorities in Support Thereof in *Williams* on December 23, 2014. DX 50 at 535 (entry 17); DX 70.[14] In this Petition, Respondent sought compensation for services and expenses in the total amount of $33,374.00 and sought compensation for services at the rate of $90 per hour. DX 73 at 676. The invoice attached to the Petition

[14] The Petition was denied without prejudice by Order dated February 27, 2015, because of service deficiencies. DX 50 at 534 (entry 15); DX 72. Respondent filed an Amended Fee Petition, titled Per Court Order Dated February 27, 2015: Petition for Compensation of Court-Appointed Counsel From Guardianship Fund, Memorandum of Points and Authorities in Support Thereof, with a corrected certificate of service on March 23, 2015. DX 50 at 534 (entry 14); DX 73. As counsel for Mr. Williams from the beginning of the proceedings (*see* FF 95), Ms. Sloan was served with a copy of this Fee Petition, DX 73 at 681, and did not interpose any objections to it. Tr. 1325 (Sloan).

included approximately 522 entries for "Guardianship (Professional Services)" in the amount of $31,662.00, DX 70 at 658-70, and 22 entries for "Guardianship (Expenses)" in the amount of $1,712.00 DX 70 at 670-71.[15] Disciplinary Counsel charges that the following nineteen entries in the invoice submitted with this Fee Petition are false and violate Rules 1.5(a). 3.3(a)(1) and/or 8.4(c) in one or more respects:

6/1/2013	SR[16]	Meeting Client Meeting	3.8 Hrs. [DX 70 at 658]
6/2/2013	SR	Meeting w/client	2.8 Hrs. [DX 70 at 658]
6/3/2013	SR	Attend Court Hearing	3.0 Hrs. [DX 70 at 658]
6/19/2013	SR	Meeting w/Client	3.0 Hrs. [DX 70 at 659]
8/28/2013	SR	Attend Hearing Attend Court Hearing	3.0 Hrs. [DX 70 at 661]
8/30/2013	SR	Meeting with Mr. Williams At B Woods	3.0 Hrs. [DX 70 at 661]
9/10/2013	SR	Meeting with Mr. Williams At B Woods	3.0 Hrs. [DX 70 at 661]
10/11/2013	SR	Attend Hearing Attended Ct. Hearing	3.0 Hrs. [DX 70 at 662]
10/17/2013	SR	Meeting w/Mr. Williams	3.0 Hrs. [DX 70 at 662]

[15] As discussed in Section IV.E, *infra*, the identical invoices attached to the December 23, 2014 and March 23, 2015 Fee Petitions contain 19 entries that Disciplinary Counsel alleges violate Rules 1.5(a), 3.3(a)(1) and/or 8.4(c) in one or more respects.

[16] "SR" are the initials for "Sylvia Rolinski" and indicates that the service was provided "By" Respondent.

		at B Woods		
11/12/2013	SR	Meeting w/Mr. Williams at B Woods	3.0 Hrs.	[DX 70 at 663]
12/5/2013	SR	Meeting w/Mr. Williams at B Woods	3.0 Hrs.	[DX 70 at 663]
1/18/2014	SR	Meeting w/Mr. Williams at B. Woods	1.5 Hrs.	[DX 70 at 664]
1/28/2014	SR	Meeting w/Mr. Williams at B Woods	3.0 Hrs.	[DX 70 at 664]
4/7/2014	SR	Meeting with Client	2.5 Hrs.	[DX 70 at 666]
5/15/2014	SR	Meeting Mtg with client,	3.0 Hrs.	[DX 70 at 667]
		drop off personal effects		
5/16/2014	SR	Meeting mtg w/ client	3.0 Hrs.	[DX 70 at 667]
6/25/2014	SR	Meeting with Client	2.5 Hrs.	[DX 70 at 668]
8/18/2014	SR	Conference Care Conference	0.8 Hrs.	[DX 70 at 669]

ODC also charges that that the following two entries or group of entries in the invoice submitted with this Fee Petition violate Rule 1.5(a):

10/11/2013	SR	call to Vicki (*see* FF 102)	0.6 Hrs.	[DX 73 at 687]
10/11/2013	SR	Correspondence to Vicki	0.6 Hrs.	[DX 73 at 687]
10/11/2013	SR	Rewrite consent form	1.0 Hrs.	[DX 73 at 687]

8/20/2014 SR Draft and file Suggestion of Death 1.1 Hrs. [DX 73 at 694]

114. On July 28, 2015, Judge Christian issued an Order ruling upon Respondent's Amended Fee Petition. Judge Christian noted that the Fee Petition had been filed "more than ten months after the petition was due to the Court." DX 75 at 699; *see also* DX 50 at 534 (entry 12). In the first section of the Order, Judge Christian reviewed the "Background and Performance History of Fiduciary," DX 75 at 700-03, set forth the statutory requirements for a guardian (*see also, e.g.*, FFs 28, 32-33), asserted that Respondent's "performance fell far below even the most rudimentary expectation," noted that court appearances involved Respondent's performance and not the ward's status, reported that the October 11, 2013 hearing (*see* FF 103) lasted four minutes, found Respondent's explanation at that hearing that the Clerk's Office must have erred in not recording her Acceptance and Consent form "questionable," recounted the January 31, 2014 hearing (*see* FF 106), found several claimed visits in late 2013 to be "particularly dubious" in light of Respondent's allegedly "previous false representations to the Court" according to Judge Long's conclusions in her June 11, 2012 Order about Respondent's statements in that hearing, "questioned the validity of . . . her time entries throughout the fee petition in the instant matter," and found "a pattern of disrespect coupled with various misrepresentation and a general lack of candor toward the Court. . . ." as evidenced by Respondent's dilatory notice to the court in *RTW* of Ms. Toliver-Woody's death. *Id*. at 700-03.

In the introductory portion of the second section of the Order, titled "Ms. Rolinski's Fee Petition," Judge Christian observed that "Ms. Rolinski's fee petition is fraught with typos, vagueness, and a general lack of candor" and that "[a]s the 'fee applicant,' Ms. Rolinski 'bears the burden of . . . documenting the appropriate hours expended and hourly rates.'" DX 75 at 703 (citation omitted). The court also noted that Respondent had filed her *Williams* Fee Petition six months after its due date and without a motion for leave to file late, as Judge Long had noted Respondent had done in *RTW*. *Id*. at 704-05. The court also noted that Respondent had filed untimely or otherwise deficient fee petitions in several other guardianship cases. *Id*. at 705, n.3.

Judge Christian then turned to specific entries in the Fee Petition. In a section titled "Invoices for Nondescript Services Prior to Appointment as Guardian are Improper and Therefore Denied," Judge Christian denied claims for dates preceding the *Williams* guardianship. *Id*. at 706. In a section titled "Invoices for an Excessive Amount of Legal Research for Which Counsel is Already Presumed to Have Knowledge is [*sic*] Impermissible and Cannot be Compensated," Judge Christian denied claims for legal research because the judge normally does not grant compensation for legal research. *Id*. at 706-07. In sections titled "Failure to Adequately Provide the 'Character and Summary' of Telephone Calls/Emails/Meetings and How Those Telephone Calls/Emails/Meetings Benefitted the Ward Restricts the Attorney's Ability to be Compensated" and "Billing for Clerical Work is Not Permitted and Cannot be Compensated Even at a

Reduced Rate," Judge Christian denied "excessive and unexplained time claims for telephone calls, emails and meetings" emphasizing that "[t]he key problem in Ms. Rolinski's invoice is that she consistently fails to provide even a cursory explanation of the services she performed and therefore, the Court is unable to make a reasonableness determination between services that are excessive and services that are legitimate," explaining that "[c]ourts have denied compensation when attorneys 'billed for time spent dealing with individuals whose roles in the case are never explained." *Id*. at 708 (citations omitted). Judge Christian then specified and denied groups of entries that she considered unexplained and examples of poor judgment on Respondent's part, again referencing Judge Long's June 2012 Order. *Id*. at 709, 709-13 (telephone call entries, "none [of which] provide a sufficient description of her work for which the Court is able to make a reasonableness determination and evaluate how such long hours benefitted the Ward"), 713-15 (email and document review entries that "do not reveal the subject matter of the email, the reasonableness of the email being sent, or how the email benefitted the Ward" and that "oftentimes peculiarly amounted to a time entry of 0.3 or 0.4 hours" with the result that "skepticism abounds throughout numerous other entries"), 715-17 (meeting entries that "do not articulate the individuals present; the nature of the discussion; the purpose of the meeting; or how the meeting benefitted the ward"), 717-19 (client meeting entries that extend beyond the statutory requirement that the guardian "know of the ward's capacities, limitations, needs, opportunities, and physical and mental health" and which, in light of "Mr. Williams' fragile mental

state coupled with Ms. Rolinski's history of judicial chastisement for unsubstantiated client meetings in previous case" were disallowed if in excess of "one hour per month"), 719-21 (entries for clerical tasks).

In a section titled "Gross Overbilling for Time Spent on Court Hearings Where Ms. Rolinski Appeared Via Telephone is Inappropriate, Unethical, and Will Not be Compensated," Judge Christian first addressed court hearings on June 3, 2013, August 28, 2013, and October 11, 2013; Judge Christian noted that "[a]ll of Ms. Rolinski's entries for attending court hearings are conspicuously for three hours" and stated, "[s]he should be aware that travel to and from the courthouse is not compensable and therefore, her time entry of three hours is unreasonable, inflated, and should be reduced to the actual time spent on the hearing," citing a prior decision by the same judge. *Id*. at 721-22. Judge Christian also noted that the docket sheet showed that Respondent had participated in the August 28, 2013 and October 11, 2013 hearings by telephone. *Id*. at 722. Judge Christian also disallowed Respondent's entries for handling a small claims case for Mr. Williams. *Id*. at 722. In a section titled "Block-Billing is not Permissible," Judge Christian disallowed any entry that consisted of "'block-billing," 'aggregate,' or 'blended' time claims,'" which she defined as "blending together under a block of time, multiple tasks that are not separated from each other as to how much time was devoted to each specific task." *Id.* at 723. In a short sub-section in a section titled "Expenses," Judge Christian disallowed nearly all of the entries for "Legal Research," "Postage," "Parking" and "Electronic Filings." *Id*. at 723-25. Finally, in a section titled "Post-

Death Claims," Judge Christian "exercise[d her] discretion to deny compensation for any work performed after the date of the Ward's death [on July 23, 2014]," referring to Judge Long's disallowance of post-death entries in *RTW*. *Id*. at 725-27.

Thereupon, "tak[ing] into account Ms. Rolinski's previous misleading interactions with the Court in *Estate of Ruth M Toliver-Woody*, her unprofessional pattern of tardy fee petition submissions to the Court; the excessive and ambiguous nature of remaining time entries; and the minimal benefit to the Ward for many of the time claims," Judge Christian "impose[d] a discount of 85%" on entries not previously specifically disallowed. *Id*. at 728 (footnote omitted).

115. Respondent filed her Petitioner's Motion for Reconsideration on August 7, 2015. DX 76. In her accompanying memorandum of Points and Authorities, Respondent noted that "predetermined, truncated categorized activities" are common to all electronic billing programs, acknowledged that their lack of detail was insufficient in Judge Christian's view and committed to providing more detailed information in her attached, revised invoice and in future invoices. DX 76 at 733-34.

Respondent then repeatedly stated that her goal was to establish that she "did excellent work that was necessary for the well-being of the Ward and benefitted the Ward," and that her "relationship with and care of Mr. Williams was exemplary and . . . consistent with the Guardian statute," and that she had discharged her guardianship duties with "care and attentiveness." DX 76 at 734, 735, 736. Respondent then recounted her initial work on the guardianship petition with Mr.

Pattendon, the GWUH case manager, their continuing efforts to secure a placement for Mr. Williams at the Brinton Woods Health and Rehabilitation Center in Washington, DC, the ensuing problems of Mr. Williams' occasional attempts to abscond, and the circumstances associated with the dispute with Mr. Williams' landlord and his Small Claims Court action – all of which, she emphasized "directly benefitted Mr. Williams. . . ." DX 76 at 736-39. Respondent then turned to demonstrating that the legal research, telephone calls, emails, and meetings with GWUH and Brinton Woods staff constituted "quality legal work performed on behalf of James Williams" and were "of an exceptionally high quality." DX 76 at 741-45, 747-48, 749. Respondent also noted that in the future her block billing would always include "a full itemization of discreet tasks. . . ." DX 76 at 747. Respondent, acknowledging that she was "profoundly disturbed" by Judge Christian's views of her compensation requests, noted in her Conclusion that "as painful as it was to read, the Court's Order was constructive and enabled Petitioner to immediately institute changes. . . ." DX 76 at 748.

Respondent attached a number of documents to her Memorandum, including a statement of the benefits to Mr. Williams of her services, DX 76 at 754-58; a revised invoice, DX 76 at 760-81; a declaration from Obi Agusiobo, a Clinical Nursing Oversight manager at Brinton Woods regarding Respondent's interactions with Mr. Williams and Brinton Woods staff, DX 76 at 783-84; other declarations and court documents regarding her efforts on Mr. Williams' behalf to resolve the dispute with the landlord and a financial problem at Citibank. DX 76 at 786-801;

and documents pertaining to funeral arrangement that she made for Mr. Williams. DX 76 at 801-08.

Judge Christian denied the Motion for Reconsideration by Order dated September 14, 2015. DX 50 at 534 (entries 11, 10); DX 77.

Disciplinary Counsel charges that the following two statements in the Motion for Reconsideration violate Rules 3.3(a)(1) and 8.4(c):

> Respondent always has and always will consistently record time contemporaneously with her actions in order to ensure that an accurate record of Petitioner's work is recorded. [DX 76 at 742, n. 5]
>
> The August 28, 2013 hearing for permanent guardianship also encompassed three hours. Parties had a particularly long wait in the Probate Division hearing room prior to the hearing. This allowed the parties to confer. [DX 76 at 746.]

116. Respondent filed a Notice of Appeal on September 25, 2015. DX 50 at 534 (entry 9); DX 78. In her brief, which was filed on January 19, 2016, Respondent acknowledged that the invoice entry of 3 hours for the October 11, 2013 hearing, FF 113 & DX 70 at 662, was erroneous. The Court of Appeals issued its decision on July 7, 2017, affirming in part and reversing in part. DX 50 at 533 (entry 2); DX 82 at 959. The Court of Appeals affirmed Judge Christian's exercise of discretion with respect to specific entries that she disallowed in the categories of "Vagueness" and "Noncompensable Work," DX 82 at 961-65, and reversed Judge Christian's application of the 85% discount on entries not specifically disallowed because the Court was "not persuaded that this record supports it," because the Court was "not persuaded it was justified or appropriate" and because "it seems from the record

before us at this point in the case that appellant put in a significant amount of time and effort as Mr. Williams' guardian and achieved some results of substantial benefit to him, including the placement at Brinton Woods." DX 82 at 965. The Court of Appeals remanded for the Probate Division to grant Respondent's Fee Petition in the amount of $5,152.30. DX 82 at 966.

E. OTHER CIRCUMSTANCES PERTINENT TO RESOLUTION OF THE CHARGES IN THIS PROCEEDING

1. Respondent's Time-Keeping Systems, Procedures and Practices

117. Respondent's law firm used the TimeSlips and eBillity automated billing programs during the period of Ms. Padilla's employment. Padilla Dep. Tr. 27-28. Respondent had begun using a non-automated version of TimeSlips when she first began practicing and the Rolinski, Terenzio & Suarez adopted TimeSlips shortly after its formation. Tr. 2752-53, 2923-25 (Respondent). Respondent keeps time sheets on the right-hand side of her desk and records her time on them throughout the day. Tr. 247 (Respondent); Tr. 2688 (Wilson). At the end of the week she would add to the time sheets any additional work reflected in other notes such as meeting notes that had not yet been entered on the time sheets because of not being at her desk at such points. Tr. 241-42, 247-49.

118. Ms. Padilla entered time into the programs from a handwritten time sheet which Respondent kept next to her desk or would bring with her if she left the office. Ms. Padilla observed that Respondent maintained contemporaneous notes of billable activities. When Respondent was done with her time sheets, she would put them in an inbox from which Ms. Padilla or other employees retrieved them in order

to enter the data. Time sheet entries were checked off after they were entered into the system. After the data had been entered, the time sheets were placed in a binder. Padilla Dep. Tr. 28-30.

119. Ms. Padilla observed that Respondent also kept a calendar on her desk and that Respondent was very particular in putting dates on the calendar and was adamant about the calendar being complete. Probate Division matters were included on Respondent's calendar. Padilla Dep. Tr. 48-49. The calendar showed a month at a time. Tr. 382 (Respondent).

120. Respondent recorded her time contemporaneously on time sheets when working at her desk and, when working away from her desk, on time sheets or scraps of paper, draft forms, or other documents, later transferring that information onto her timesheets. Padilla Dep. Tr. 28, 30; Tr. 134, 145-47 (Respondent); Tr. 2688 (Wilson). Respondent did not always keep a record of her time for legal work she performed for clients paying by the hour, for work that she did on weekends or for other work on fiduciary matters, especially in the guardianship matters. Tr. 190-91; 236-39; 241-42 (Respondent).

121. Other firm employees also entered information from Respondent's completed time sheets into the electronic billing program. Tr. 137-38, 684 (Respondent); Tr. 2693 (Wilson). Respondent sometimes entered her own time into the billing program. Tr. 2692-93. After the time was entered into the firm's billing program, the hard copy of the time sheets would be placed into notebooks maintained at the firm. Tr. 198-99 (Respondent).

122. The TimeSlips billing program had some shortcomings, including generic task designations, Padilla Dep. Tr. 58, and defaulting, as an entry was being made, to the previously saved entered date. Padilla Dep. Tr. 59-60. Consequently, if a TimeSlips user did not sort the data, the invoice would then present the data in the order in which it was entered according to what TimeSlips calls "a slip entry number," and not in chronological order of the date of service. Tr. 3021-22 (Respondent); Tr. 3953-55 (TimeSlips reseller and certified consultant Schaller). For example, some entries in Respondent's April 19, 2010, Petition for Compensation were out of order due to entry order setting, Tr. 3953-60 (Schaller), as were some entries in Respondent's final invoice in *RTW*. Tr. 2926-27 (Respondent). Before an invoice was submitted, Ms. Padilla, and other staff members would check to make sure entries were accurate, and Ms. Padilla and Respondent would review the invoice together. Padilla Dep. Tr. 59.

123. Respondent and Ms. Wilson began to look for a new billing program at the end of 2012. Tr. 2927, 2758 (Respondent); *see also* Tr. 2651 (Wilson) (Respondent using Timeslips at the time Wilson began interning for her, which was in late 2012, FF 12), 2652 (Wilson) (Wilson assisted in the search for a new system). Respondent transitioned from the TimeSlips billing program to the e-Billity billing program during 2013 and 2014. Consequently, time in the *Williams* guardianship was apparently recorded in both TimeSlips and eBillity at various points in time. Tr. 2686-87 (Wilson); Tr. 3237 (Respondent); *see also* Tr. 2662-63 (Respondent). Both TimeSlips and eBillity had preexisting pull-down menus for categories of work.

These descriptive boxes had character limits. Tr. 663-66, 3222 (Respondent).

124. Most of the clients of Respondent's firm paid for legal services with a flat fee or through a contingency fee arrangement. Tr. 128-29; 131 (Respondent). Respondent's law firms also had clients who paid hourly fees. Tr. 128-29; 131. Respondent's typical billing process was to fill out a paper timesheet by hand. The time sheet contained a column for the date, a column for the client's name, a column for a brief description of legal services, and a column for the time spent providing the service at six-minute increments. Tr. 132-34; 151-52.

125. In general, when preparing a bill, Respondent would generate or ask an employee to generate a draft invoice based on the information input into the billing system from time sheets. Tr. 138, 194-95 (Respondent); 2654-58 (Wilson). The billing program would generate an invoice according to the date parameters typed in by the person generating the bill; Respondent could be the one generating the bill sometimes. Tr. 204, 206 (Respondent). Ms. Wilson does not recall Respondent ever adding time or a hearing date if she did not have a written document to draw from, and Respondent did not ever ask Wilson to adjust an entry that was on her time sheets. Tr. 2656, 2658 (Wilson). Respondent frequently emphasized to staff the importance of accuracy in the firm's billings. Tr. 2658 (Wilson). No one checked for overlapping time parameters to prevent double billing. Tr. 204-06.

126. When finalizing invoices, Respondent would take the draft invoice generated from the billing program and check it by looking at her time sheets, her calendars, notes, emails, Guardian Reports, filings, bank statements and other

writings, a process that was sometimes repeated. Tr. 2756-57 (Respondent); Tr. 2695-97 (Wilson).

127. Before filing the petition with the court, Respondent would not conduct another line-by-line review of the final invoice entries; nor would she compare the entries to her actual time sheets. Rather, she would scan the invoice to see "generally did it look right." Tr. 194-96, 3663-64 (Respondent). If something looked "askew" she would follow up by going back to her file or other source materials. Tr. 196, 198 (Respondent).

128. Respondent began to institute changes in her preparation of Fee Petitions and attached invoices after Judge Christian's Order, establishing a "shadowing" procedure under which one staff member contemporaneously observes and checks another staff member's entries onto the invoice. Tr. 417-18.

2. Respondent's Contacts with Ms. Toliver-Woody and Related Actions

129. Beginning in approximately August 2005, after Respondent's January 11, 2005 appointment as Successor Guardian, FF 48, she and Ms. Riley visited Ms. Toliver-Woody at CBL together "quite a few times." These joint visits mostly took place on the weekends due to Ms. Riley's job, and usually on Saturdays because of Ms. Riley's personal preferences. In these joint visits, Respondent ". . . rarely signed in and . . . didn't see security . . . there," and Ms. Riley observed that the CBL staff "would allow [Respondent] to walk on through." Tr. 2966-67 (Respondent); Tr. 1887 (Riley). Respondent also observed that the weekend personnel at [CBL] differed from the weekday personnel. Tr. 2970 (Respondent). After visits when Ms.

Riley did not accompany Respondent, Respondent would report the visit to Ms. Riley. Tr. 1848-49, 1882, 1888 (Riley); Tr. 439 (Respondent).

130. Respondent and Ms. Riley normally planned their joint visits in advance, especially if some situation required that they see Ms. Toliver-Woody together. Even though the joint visits were prearranged between Respondent and Ms. Riley, Respondent would not typically contact the facility because Respondent wanted to see the real environment without providing the facility the ability to clean up in advance. Tr. 2979-80 (Respondent). This "issue-driven" approach enabled them to discover at various times that Ms. Toliver-Woody's clothing was inadequate, that the furniture in her room was dangerous and that the television was dysfunctional but could be replaced with one from Respondent's home. Tr. 2976-78 (Respondent).

131. In their joint visits, Ms. Riley and Respondent met in CBL's parking lot and then spent a couple of hours with Ms. Toliver-Woody. Tr. 1876-78 (Riley).

132. At all times relevant to this case, CBL had a desk to the right of the entrance which was sometimes staffed by CBL personnel. Tr. 513-14, 1083 (Respondent); Tr. 1928 (Espinet); Tr. 1421 (Sloan). Respondent routinely did not sign in when she entered CBL; on some occasions, CBL staff waved her in, without making her sign in. Tr. 514, 1083, 2966-67 (Respondent). Ms. Espinet does not recall signing in at CBL. Tr. 1928-30 (Espinet). In her visits to CBL, Ms. Sloan also sometimes did not sign in and observed that "[t]here was nothing to stop an individual from going directly to visit the patient or client if they wanted to, and at

that time, the sign-in procedures in most nursing homes, that I can recall, were very loosey-goosey." Tr. 1421-22 (Sloan). Respondent made the same observation at other nursing homes. Tr. 2967 (Respondent). In response to a subpoena from ODC, the Custodian of Records at CBL stated in an Affidavit, "Carolyn Boone Lewis no longer has visitor logs from 2002-2011" because "the visitor logs from that period would have been purged in the normal course of business as they are more than 6 years old." DX 84 at 969.

133. Ms. Toliver-Woody called Respondent the "white curly-haired little lady that came to visit her" and rarely remembered her name. Ms. Toliver-Woody would tell Ms. Riley when Respondent had visited. Tr. 1849, 1882, 1888 (Riley). Respondent was frequently at the facility checking in on Ms. Toliver-Woody and thereafter apprising Ms. Riley of her status. Tr. 1851 (Riley).

134. Ms. Padilla (*see* FFs 6, 9, 11) knew of Ms. Toliver-Woody and Ms. Riley, her niece. Ms. Padilla would hear Respondent on the phone with Ms. Riley and would sometimes get telephone calls from Ms. Riley and transfer them to Respondent. Usually, the calls with Ms. Riley were regarding Respondent's visits to Ms. Toliver-Woody. Ms. Padilla did not work directly on the *RTW* matter since she was on the administrative side of the office. However, Ms. Padilla would overhear conversations about Respondent and Ms. Ryan going to visit Ms. Toliver-Woody at the medical facility. Respondent would tell Ms. Padilla that she was getting ready to leave to visit Ms. Toliver-Woody, and Ms. Ryan and Respondent's son would all be going together. These visits would happen frequently, but Ms. Padilla did not know

when they would get back from the visits. Ms. Danielle Espinet would visit Ms. Toliver-Woody on behalf of Respondent if Respondent was unable to visit. Padilla Dep. Tr. 36-37, 41.

135. During Ms. Ryan's employment from approximately early 2005 until August 2007 (*see* FF 4), she traveled to Washington, D.C. with Respondent on weekends to babysit Respondent's son while Respondent visited Ms. Toliver-Woody at Carolyn Boone Lewis. Ms. Ryan took Respondent's son to various activities in the city during Respondent's meetings with Ms. Toliver-Woody. These visits typically took place on Saturdays, would occur every six to eight weeks, and lasted between two and three hours. Ms. Ryan only remembers Respondent visiting Ms. Toliver-Woody on the weekends. Tr. 1236-37, 1245-46, 1266, 1275-76 (Ryan); Tr. 525, 2946-48 (Respondent).

136. Ms. Espinet (*see* FFs 2, 10) occasionally visited Ms. Toliver-Woody when Respondent traveled out of the country, including during Respondent's Italian bank case (*see* FF 7). Ms. Espinet called Respondent to brief her on Ms. Toliver-Woody's condition while Respondent, Respondent's son, and Ms. Ryan were out of the country. Tr. 1255-57 (Ryan). Ms. Ryan overheard Respondent speaking with Ms. Espinet by telephone regarding her visits to Ms. Toliver-Woody. Also Ms. Ryan, while working for the law firm on a Monday or Tuesday after her visit to Ruth Toliver-Woody would hear Respondent discuss Ms. Toliver-Woody's heath status with Ms. Espinet. Tr. 1238-39, 1243 (Ryan).

137. Beginning in approximately the Fall of 2008, Mr. Baloga (*see* FF 5)

replaced Ms. Ryan on the weekend visits, traveling on Saturdays and Sundays with Respondent and her son to visit Ms. Toliver-Woody at CBL. Tr. 1994 (Baloga); Tr. 525, 2960-61 (Respondent). These occasions occurred every couple of months or seven or eight times per year and continued through approximately the Spring of 2011. Mr. Baloga estimates he made roughly 20 such visits with Respondent and her son. Respondent sometimes dropped off Mr. Baloga and her son at the hospital cafeteria across the street from CBL or dropped Mr. Baloga and her son off in D.C. where they would attend museums, play sports at nearby schools, go to Alexandria, or spend time on the national mall. Respondent would spend the entire afternoon at CBL during these visits. Tr. 1995-2001, 2004-05, 2013-14 (Baloga); Tr. 2961-64 (Respondent).

138. Before and during the period of Ms. Toliver-Woody's eye surgeries on November 18 and December 17, 2009, and glaucoma diagnoses on January 13 and March 3, 2010 (*see* FF 68), Respondent consulted with Ms. Toliver-Woody on numerous occasions, including "a lot of discussions about" Ms. Toliver-Woody's apprehensions about eye surgery and surgery in general and about Respondent's own history of similar, successful eye surgeries. Tr. 3002-04, 3019-28 (Respondent); *see also* DX 30 at 227-28. In these visits, Respondent conferred not only with the ward but also "with staff, with Shirley Riley, with everyone concerned, social work case management, the medical professionals, her primary care provider Botello, [and] the surgeon's office." Tr. 3026 (Respondent); *see generally* Tr. 3019-28.

139. After Ms. Toliver-Woody's cardiovascular surgery and intubation on

March 29, 2011 (*see* FF 83) and subsequent transfer to STM and placement on a ventilator on April 11, 2011 (*see* FFs 83 & 84), Respondent, sometimes along with Ms. Riley, handled all end-of-life issues, while keeping Ms. Riley, who left the decision-making up to Respondent, informed. Tr. 1851, 1889-95 (Riley); Tr. 1688 (Feinberg); Tr. 604-06, 2582-84, 3099-3100, 3104-05, 3107-15 (Respondent); *see also* DX 46 at 478-89. Respondent considered it "part of my job . . . to discern, especially because she's an older person, what her wishes were if she were to meet a catastrophic health circumstance." Tr. 2970 (Respondent). Respondent spent a great deal of time on these issues, which she had never handled before; had numerous telephone calls daily with STM personnel, who often initiated such calls; visited Ms. Toliver-Woody and facility personnel approximately 10 times; and consulted several times with a friend and attorney, Judy Feinberg, because of her concerns about the attitude of the STM personnel, increasing pressure for a resolution of the situation, the jurisdictional issues arising out of a District of Columbia ward being in a Maryland nursing home, religious complications and the overall seriousness of the end-of-life decisions, which left Respondent shaken. Tr. 1671, 1674-79 (Feinberg); Tr. 604-05, 2576-78, 2970-77, 3102-29 (Respondent). Respondent tends to be very thorough in seeking information during such calls. Tr. 2512-13 (Reynolds); Tr. 2494-98 (Sousa).

140. Circumstances such as those of Ms. Toliver-Woody at STM require constant communications between facility personnel and persons involved with and/or responsible for the patient. At STM, a responsible party is contacted every

time there is a change of status or condition, or a need for additional medical procedures or information from blood work or other lab work; such contacts can occur several times a day. Telephone and email communications may be initiated by doctors, specialists, nurses, charge nurses, social workers, support staff, the billing department, managers and other administrators. Not all such communications are recorded in the facility's records. Tr. 2073, 2076-78 (Taylor); Tr. 2121-26 (McNeil); RX 78C. This is consistent with practices at other similar facilities. Tr. 2172-79 (Maestripieri); Tr. 1557-61 (Hashmat). Similarly, care plan meetings and meetings regarding end-of-life issues in circumstances such as Ms. Toliver-Woody's can be numerous and lengthy because of the difficulty of the issues and, often, the large number of participants, especially if the facility's ethics committee has to be involved because of disagreement among other participants. Tr. 2127-35 (McNeil); Tr. 2185-87 (Maestripieri); Tr. 1563-70 (Hashmat).

141. When Respondent visited Ms. Toliver-Woody on weekdays, she normally took with her a blank Report of Guardian form so that she could record information obtained from various facility personnel. Tr. 2982-83 (Respondent). These notes would then be filed so that she would have the information required in the Reports of Guardian and so that she had "a contemporaneous time recording that on this date I was there. . . . and the amount of time that I was at the facility." Tr. 2983 (Respondent); *see also* Tr. 2983 (Report form seeks doctors' names) 2985 (Report form evolved over time, seeking "more robust information"). After such information was entered on the Reports and the invoices attached to the Fee

Petitions, the original notes were disposed of at the time or during the later purging of her paper files. Tr. 2984 (Respondent); *see also* FFs 149-151.

3. Respondent's Contacts with Mr. Williams and Related Actions

142. Following GWUH's May 28, 2013 Petition for the appointment of a Guardian *ad Litem* for Mr. Williams (*see* FF 95), consistent with the duties and expectations of attorneys being considered for appointment as a Guardian *ad Litem* (*see* FFs 23, 24) and as reflected in entries in her December 23, 2014 Fee Petition (DX 70 at 658; FF 113) which ODC has not challenged, Respondent took at least 22 measures during what she considered to be a "hectic" period to investigate Mr. Williams' situation and prepare for the initial hearing scheduled for June 3, including an initial trip to the hospital to see Mr. Williams, who was unresponsive, and to review the hospitals records; consultations with Mr. Williams' court-appointed attorney, Ms. Sloan; conferences with various GWUH medical staff and other personnel regarding Mr. Williams' condition, prospects and possible transfer to a nursing home; review of court records and electronic and paper medical files; attempts to find family members; and additional contacts with Mr. Williams on June 1 and June 2, 2013 to be able to report to the court accurately regarding Mr. Williams' evolving condition. Tr. 674, 687-90, 3243-45, 3248-54, 3257-84 (Respondent); DX 70 at 658.[17]

143. After being reappointed as Mr. Williams' Guardian *ad Litem* at the

[17] Disciplinary Counsel has challenged the June 1 and June 2, 2013 hospital visits but not the May 30, 2013 hospital visit. *See* FF 113.

conclusion of the June 3 hearing (*see* FFs 95, 96, 97), Respondent undertook, with the assistance of the GWUH social worker, to find – and then obtain admittance to – an appropriate nursing home for Mr. Williams. Tr. 3317-20, 3417-18 (Respondent). As reflected in an additional 20 entries in her December 23, 2014 Fee Petition which ODC has not challenged, these efforts included a June 4, 2013 telephone contact with the Brinton Woods Health and Rehabilitation Center near Dupont Circle in the District of Columbia, review of a Brinton Woods admissions package on June 10, 2013, receipt of an admissions email on June 19, 2013, and a meeting with Mr. Williams on the same day. DX 70 at 659; Tr. 3417-18 (Respondent).[18] Subsequently, as established by the convincing and credited testimony of Brinton Woods nurse manager Obiora Agusiobo – testimony that was essentially unchallenged by ODC on cross examination or by any other evidence:

> Mr. James Williams . . . came to facility from George Washington Hospital in June 2013.
>
> *******
>
> Ms. Rolinski was in touch with the Brinton Woods staff and medical professionals on a regular and routine basis throughout the time she was Mr. Williams' Guardian. She came to Brinton Woods no less than once a month though on some occasions more often as the needs mandated. . . . When she came to Brinton Woods, she would meet with me, the in-house billing personnel, the in-house Medicaid/Medicare coordinators located on the first floor, the social worker . . . the medical professional staff and of course Mr. Williams.

[18] The June 19, 2013 contact with Mr. Williams also is challenged by Disciplinary Counsel. *See* FF 113.

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> Ms. Rolinski advocated very actively and strongly on Mr. Williams' behalf especially during the hospice and end of life period.
>
> Myself and other professionals at Brinton Woods had extensive conversations with Ms. Rolinski about advance directive and do not resuscitate (DNR) issues.

RX 13 at 196-97 (Declaration of Obi Agusiobo adopted at hearing, Tr. 1802-13). Mr. Agusiobo added that "[i]t would not be unusual" for guardians to visit their wards for hours at a time. Tr. 1808, 3452.

4. Travel Times Between Respondent's Office and CBL, STM and Brinton Woods

144. Respondent's home and office are located near the end of River Road in Potomac, MD. Tr. 2949, 2951 (Respondent). DX 227A consists of six Google maps prepared at ODC's request during the course of the hearing by Christine Chicherio, a senior law clerk in the Office of ODC. Tr. 4019, 4029 (Chicherio). The first map indicates that, depending upon the route, the driving distance from Respondent's home to CBL is 31.6-41.8 miles and that the driving time on the day the map was created is 47-50 minutes. DX 227 A at 2310. The second map indicates that, depending upon the route, the driving distance from Respondent's home to STM is 21.5-25.8 miles and that the driving time on the day the map was created is 42-49 minutes. DX 227A at 2311. The third map indicates that, depending upon the route, the driving distance from STM to Ms. Feinberg's home is 16.3-17.8 miles and that the driving time on the day the map was created is 36-48 minutes. DX 227A at

2312. The fourth map indicates that, depending upon the route, the driving distance from Ms. Feinberg's home to Respondent's home is 8.9-9.7 miles and that the driving time on the day the map was created is 15-18 minutes. DX 227A at 2313. The fifth map indicates that, depending upon the route, the driving distance from Respondent's home to GWC is 19.6-19.7 miles and that the driving time on the day the map was created is 32-42 minutes. DX 227A at 2314. The sixth map indicates that, depending upon the route, the driving distance from Respondent's home to the Brinton Woods facility is 19.2-26.3 miles and that the driving time on the day the map was created is 39-50 minutes. DX 227A at 2315. All of the maps were printed down at 10:00 am on February 5, 2021, a Friday. Tr. 4033-35 (Chicherio); DX 227A at 2310-15. DX 227B consists of turn-by-turn directions for all of the routes shown on the maps in DX 227A. Tr. 4036-39 (Chicherio). Ms. Chicherio did not investigate whether Google maps were available for periods prior to the onset on Covid 19. Tr. 4052. Ms. Chicherio is aware that Google maps contain a feature showing traffic delays such as the one shown on RX 100E[19]. Tr. 4063 (Chicherio). The maps in DX 227A show only driving times between two addresses and do not take into consideration time for parking and the like. Tr. 4065 (Chicherio).[20]

[19] The Hearing Committee admits RX 100E which was identified and described by the witness without objection of Disciplinary Counsel.

[20] We discuss in Sections III.F and IV.E, *infra*, the extent to which, if any, the evidence set forth in this Finding of Fact assists in our assessment of the credibility of various aspects of Respondent's testimony and the honesty of certain time entries in her Fee Petitions challenged by Disciplinary Counsel.

5. Evidence Regarding Visitor Access and Control at Nursing Homes[21]

145. Nursing homes most typically and historically have not had any policies in place regarding visitor logbook use, training, administration, backup procedures or archiving mechanisms. There typically are no policies or procedures in place at nursing homes requiring that the facility verify the identity of the signer of the visitor logbook nor are there policies or procedures for a double identification system in conjunction with visitor logbooks.[22] The practice of double identification is never used. Tr. 2329-31; RX 92 at 1570-71.

146. Both security and accountability for visitors in nursing homes have been notoriously very limited. There are no threshold visiting management systems in place at nursing homes. Nursing home facilities are open to the public and visitor traffic is not tracked while at the facility. The use of visitor logbook entries provides no reliable tracking of visitors while on the premises especially as visitors and vendors often do not sign into the logbook. Tr. 2334-38; RX 92 at 1571.

147. Both front desk administrators and personnel have multiple roles to fill which results in gaps in coverage contributing to the unreliability of visitor logbooks

[21] The Findings of Fact in this section derive from the testimony of Maureen Wallersedt, a witness called by Respondent and tendered as an expert on visitor access and control at nursing facilities. Ms. Wallersedt has 39 years of experience in nursing and in the administration of nursing facilities. The Committee regards her as qualified by education, training and experience to provide an opinion on that subject. Ms. Wallersedt submitted a report, DX 92, as well as providing testimony. Her opinion corroborates the testimony of Respondent, Andrea Sloan and Danielle Espinet, that one could enter CBL without signing in. Disciplinary Counsel did not present any evidence that called into question the testimony of Ms. Wallersedt or the others on this subject.

[22] An example of a "double identification system" would be a requirement to sign into a logbook and to present a form of identification, such as a driver's license. Tr. 2414 (Kimener).

as a record of visitors. RX 92 at 1571.

148. Visitor logbooks are notoriously unreliable as a record of who enters or exits a facility and are not consistent with standards and best practices. Visitor logbooks are not viewed as reliable by nursing home facilities as a record of everyone who enters or exits a facility because they are incomplete.[23] Tr. 2337-40, 2348; RX 92 at 1571.

6. Respondent's Transition from Paper Files to Computerized Files

149. One of Mr. Baloga's ongoing assignments in Respondent's office was to scan files of older, closed cases into Respondent's computer system so that the paper files could be discarded. Tr. 1992, 2026 (Baloga). These efforts began in approximately 2010 and continued through approximately 2014 or 2015, with the goal of the office becoming completely paperless. Tr. 2018-19, 2023, 2025 (Baloga). Respondent's office became fully paperless for current cases by 2015 or 2016. Tr. 3217-18 (Respondent).

150. Mr. Baloga had prior experience in scanning and used the system in a way which allowed the information in the scanned files to be indexed and retrieved, enabling the disposal of the paper files. Tr. 1993, 2023-24 (Baloga). Mr. Baloga does not recall whether any of the documents that he scanned derived from the *RTW* files

[23] Respondent also proffered the testimony of Kevin Kimener, as an expert on the design and operation of security systems for various types of facilities. Mr. Kimener's education and experience might well qualify him to give an opinion on this subject. However, the Hearing Committee does not assign any weight to his testimony, because it is not based on any detailed analysis of the sign-in systems at issue in this case. His outlook and experience is not shaped by professional association with health care facilities, nor is it helpful to the Hearing Committee in evaluating the evidence about whether or not Respondent visited the relevant facilities as she claimed to have done.

and believes that files in cases open in 2014 were not scanned. Tr. 2021-23, 2026 (Baloga). He also believes that he scanned time sheets "very, very seldomly, if . . . ever. . . ." Tr. 2027 (Baloga).

151. Respondent's files in *RTW* were never maintained electronically, and the RTW records filled a couple of file cabinets. Tr. 3199-3200 (Respondent). After the *RTW* matter was completed, the file cabinets were placed in the basement of Respondent's office building in Gaithersburg and then moved to her garage at her home. Tr. 3201-02, 3205 (Respondent). After the passage of approximately three years from the completion of the matter in January 2012 (*see* FF 93), and "years after" Ms. Toliver-Woody's death in June 2011 (*see* FF 88), Respondent contacted Ms. Riley and determined that Ms. Riley did not want any of the papers in the file. Respondent thereupon had the *RTW* files shredded. Tr. 3199-3200, 3207, 3652-54; *see also* Tr. 3208, 3210. (Respondent).

7. Preparation of the December 23, 2014 Fee Petition and the August 7, 2015 Motion for Reconsideration

152. With respect to the timesheets underlying the Fee Petition and attached invoice, the handwriting in Respondent's timesheet of 3 hours for the initial court hearing on June 3, 2013 in *Williams*, RX 77A at 1294, is Respondent's, and the pink check mark reflects that Ms. Wilson entered the time into the eBillity computer program. Tr. 2661-62 (Wilson). The handwriting in the notations on Respondent's timesheets for August 28, 2013, is Respondent's. Tr. 2665 (Wilson). These notations include "prep for ct hearing .6" and "c w/court hearing .4". RX 77A at 1308. The handwriting in the notations on Respondent's timesheet for October 11, 2013 of

"TC-J. Gardner's chambers" and "TC Ct appearance" is Respondent's, and Ms. Wilson believes that the figures in the Time column for these two activities are .3 hours and .4 hours, respectively. Tr. 2668; RX 77A at 1319. The handwriting in the notation on Respondent's timesheet for June 18, 2014 of "care conf 6/18" is Respondent's and Ms. Wilson believes that the figure in the Time column for this activity is .8 hours. Tr. 2669-70; RX 77A at 1374. Ms. Wilson believes that the different times entered on the *Williams* Fee Petition invoice, DX 70 at 661 & 662 and FF 113, for the August 28, 2013 and October 11, 2013 court hearings and that the August 18, 2014 date entered on the Fee Petition invoice for the June 18, 2014 care conference, DX 70 at 669 and FF 113, resulted from data entry errors that she made. Tr. 2704-06. We credit Ms. Wilson's testimony, as she used the timekeeping systems over the course of four years and was unusually familiar with how they functioned because of her involvement in transitioning from TimeSlips to EBillity. FFs 12, 14, 17, 121, 123). (Disciplinary Counsel contends that "a 2018 Declaration from Caitlyn Wilson that made no mention of any data entry errors, much less the errors Respondent now states that Ms. Wilson made." PFF 124 in DC PFFs & PCLS at 44, citing DX 93 at 1328-31. We reject Disciplinary Counsel's PFF 124 because it is misleading: The declaration in question primarily addresses the errors made in the certificate of service; it also recounts Respondent's and Ms. Wilson's search for a new billing program. It simply does not address the preparation of the invoice attached to the declaration. Hence, we decline to draw the inference that Disciplinary Counsel seems to suggest. Disciplinary Counsel also attacks the declaration of Ms.

Padilla on the same ground. PFF 123 in DC PFFs & PCLs at 43, citing DX 93 at 1326-27. This declaration consists primarily of information about Ms. Padilla's employment history and Respondent's character for honesty and other personal qualities; it also simply does not address the preparation of the invoice attached to the declaration. Hence, we decline here also to draw the inference that Disciplinary Counsel seems to suggest.)

153. Ms. Wilson and Respondent worked together in the preparation of the Motion for Reconsideration of Judge Christian's July 28, 2015 Order regarding Respondent's Fee Petition in *Williams*, with Ms. Wilson taking the lead on drafting the petition and analyzing the underlying paperwork because she was the person who had entered the time in *Williams* and felt bad about the situation. Tr. 983-85, 3532-33 (Respondent); Tr. 2659, 2675 (Wilson); *see also* FF 115. Ms. Wilson was shocked by Judge Christian's Order, observed that Respondent "was shaken to the core by this" and recalls Respondent repeatedly renewing her emphasis on accuracy. Tr. 2673-75, 2680-81 (Wilson). They undertook an "all-hands-on-deck" "around the clock" effort over the next ten days permitted for the filing of motions for reconsideration because they "had so little time and so much data to go through," including time sheets, Respondent's calendar, the Guardianship Reports, court records, and notes. Tr. 2676, 2714 (Wilson); Tr. 988, 3666 (Respondent). They cut the amount of the invoice by "thousands of dollars . . . as a courtesy . . . to try to comply with Judge Christian's specific requirements," even though they believed all of the entries reflected work that had been done. Tr. 2675-79 (Wilson); Tr. 984,

3364-65, 3666 (Respondent).

8. Respondent's Financial Status and ODC's Financial Motive Theory

154. At the conclusion of the Italian banking litigation, FF 7, Respondent and her co-counsel received a substantial contingency fee. Tr. 1523 (Tomov); Tr. 2622-24 (Respondent). Their second case (*see* FF 8) also resulted in a fee in the millions of dollars. Tr. 1528. Tomov was aware at the time of Respondent's real estate investments in Bulgaria and "absolutely sure" based on his own financial experience that Respondent had no debt and no financial problems between 2007 and 2014. Tr. 1537-42 (Tomov).

155. Respondent has invested some funds from her contingency fees in real estate, including an equity-positive property on the West Side in New York City and other properties in New York State, New Jersey, Florida, France and Bulgaria. Her overall equity in her real estate holdings is seven figures or more. Tr. 3712-13, 3717 (Respondent).

156. In August 2012, after the conclusion of *RTW* (*see* FF 93) and before the commencement of *Williams* (*see* FF 95), Tr. 3732 (Respondent), Respondent was involved in litigation involving her office building in Gaithersburg, MD and arising out of the entry of a confessed judgment; Respondent convincingly described this as a "predatory banking action" by a lender attempting to extract a higher interest rate on the financing of the property. Tr. 3703-04, 3709-12, 3719-20, 3727 (Respondent). The confessed judgment was vacated by consent and the case was dismissed with prejudice on January 29, 2013. Tr. 3722-32 (Respondent); *see also*

DX 225 (confessed judgment introduced by ODC); RX 102, 103 at 1668 (pleading and 1/29/2013 Order introduced by Respondent). At the time Respondent had hundreds of thousands of dollars of equity in the property. Tr. 3712 (Respondent). This litigation did not cause Respondent any financial distress. Tr. 3732 (Respondent).

157. Ms. Perkins (*see* FF 13), who handled clerical and administrative tasks for Respondent in 2013 and 2014, including accounts payable, was not aware of Respondent having any disputes with vendors over nonpayment or any debts in 2013 or 2014. Tr. 1715. Disciplinary Counsel did not adduce any other evidence even vaguely suggesting that Respondent was under any personal or professional financial pressure at any time relevant to the events at issue in this proceeding and therefore the Hearing Committee concludes that Respondent was not influenced by any financial pressure during the *RTW* guardianship or the *Williams* guardianship.

F. THE CREDIBILITY OF RESPONDENT'S TESTIMONY REGARDING THE CIRCUMSTANCES OF EACH OF THE CHARGES AGAINST HER

In this Section III.F of our Findings of Fact, we make findings of fact in FF 158-*1* through FF 158-*62* with respect to the credibility of Respondent's testimony on each group of charges against her on which she was examined by Disciplinary Counsel and/or her attorney.[24] Before commencing our analysis and setting forth our

[24] The 62 charges discussed in this section are listed in Disciplinary Counsel's Notice of Violative Conduct filed on December 2, 2020, which is discussed in Section IV.A.1, *infra*. As will be explained in the ensuing discussion in this Section III.F, Respondent was examined on most but not all of her actions (*i.e.* time entries, statements in court filings, statements in court hearings) underlying the 62 charges.

findings of fact with respect to the credibility of her testimony about each of the 62 entries or statements underlying each of the 62 charges in the Notice of Violative Conduct, we provide this introductory overview of certain points that inform our credibility analysis. We do so in order to avoid having to repeat these points again and again in our item-by-item analysis of her credibility on the charges on which she was examined. Each of the six points in this discussion is incorporated by reference into each of our credibility analyses in FF 158-*1* through FF 158-*62*, *infra*.

First, many of Disciplinary Counsel's charges consist of allegations that Respondent charged excessive time for "visits" and "meetings" with her wards. Throughout the evidentiary hearing, as will be explained in the ensuing analysis of Respondent's testimony about each alleged false statement or entry, Disciplinary Counsel consistently challenged Respondent to demonstrate that the meetings took place and that the meetings lasted as long as Respondent had claimed in her various Guardian Reports and/or Fee Petition invoices. For example, in the Specification of Charges, Disciplinary Counsel alleges:

> Respondent continued to claim that she had meetings with Ms. Toliver-Woody that lasted 3.5 to 5.9 hours per visit, including nine visits when Ms. Toliver-Woody was on a ventilator.

DX 2 at 9.[25] As set forth in FFs 83, 84, & 88, Ms. Toliver-Woody had surgery on March 29, 2011, and was on a ventilator until her death on June 20, 2011. Disciplinary Counsel alleges that two client "visits" and nine client "meetings"

[25] The Specification intermittently misspells "Toliver-Woody" as "Tolliver-Woody," including in the portion quoted here. We have corrected the spelling in this excerpt.

claimed in Respondent's January 11, 2012 Petition for Compensation, DX 46, either did not occur or did not last as long as Respondent claimed. Disciplinary Counsel makes similar charges regarding client visits or client meetings claimed in three earlier Fee Petitions and a Guardianship Report in *RTW* and in Respondent's sole Fee Petition in *Williams*. There are a total of 39 such charges in the Notice of Violative Conduct (specifically Numbers 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 32, 34, 36, 37, 39, 40, 41, 42, 43, 44, 45, 46, 47, and 48).

Thus many of Disciplinary Counsel's charges turn to a great extent on the meaning of "meeting" and "visit." Disciplinary Counsel seems to treat claims of "client meetings" as representing that the entire claimed time was spent one-on-one with the client. PFFs 119-120 in DC PFFs & PCLs at 42. However, a client "visit" frequently necessitates more activity than meeting with the client. FFs 23-25 (duties of person being considered for appointment as guardian *ad litem*), FF 28 (statutory requirement for "regular contact with service providers"), FFs 36 & 140 (guardian's duties during ward's end-of-life period). The same observations may be made with respect to all of the claimed meetings and visits. To perform her statutory duties, as set forth in FFs 28 & 29, the guardian must, in every case, spend the necessary time to review facility records and interact with facility personnel. FFs 24-25, 30. There is no Probate Division, Superior Court or other rule of general application that requires the guardian to set out in detail all that she did on each meeting and visit. FFs 40-44. (The pertinent portions of Probate Division Rule 308 require that fee

petitions include "the character and summary of the service rendered; the amount of time spent; the basis of any hourly rate(s) of compensation; . . . [and] the benefits that accrued to . . . the subject" but do not specify a requisite degree of explanatory detail.)

It is therefore not illogical to construe the words "meeting" and "visit" to comprehend all the tasks that Respondent performed at the relevant care facility. *See* FFs 139 & 140. It is apparent that some judges may find some or all such entries insufficient for compensation, but whether Respondent had provided adequate support for her Fee Petitions in the view of the probate judges is not the issue before this Hearing Committee in this proceeding. We are required to determine – at this point in our analysis – whether Respondent's testimony is credible, so that we can then include each such credibility determination with the other evidence and applicable legal principles in our ultimate resolution in Sections IV.E, F, G, H, and I *infra*, of each charge against her, charges which turn primarily on honesty *vel non* or on unreasonableness as defined by Rule 1.5(a) under a clear and convincing evidence standard with the burden of proof on Disciplinary Counsel, not on unreasonableness in the view of the Probation Division with the burden of proof on the Fee Petition applicant.

Disciplinary Counsel also contends that Respondent testified that she "would separate out third-party interactions *only* when she had to go to a different floor from where the ward resided," citing Tr. 3611:15-3613:22. PFF 116 in DC PFFs & PCLs at 40 (emphasis added). The Hearing Committee does not read the cited testimony

as making such an assertion. Rather, Respondent plainly stated in her answer that she was testifying about "this particular case [*i.e.* visit and associated entry]." Tr. 3613. Returning to the example of the claimed visits in the June 12, 2011 Fee Petition in *RTW*, the claimed client visits and meetings did not always consist only or entirely of conversations with the ward or even vigils at her bedside. Rather it was the guardian's duty to review medical and facility records, discuss issues with facility medical and other personnel, and to address and discuss end-of-life issues. FFs 36, 140. These efforts were made more complicated in the *RTW* matter because Ms. Toliver-Woody, a District of Columbia ward, was at a Maryland hospital during her last days, thus raising questions whether Ms. Toliver-Woody's end-of-life issues were governed by District of Columbia or Maryland Law, FF 139, and in the *Williams* matter because Mr. Williams had Medicaid issues, was worried about his personal possessions and the dispute with his landlord, and also had a problem with his Citibank account. FFs 115, 142 & 143.

We note also that common English usage of the terms "visit" and "meeting" can include travel and visit-related activities, tasks and conferences. "I visited my grandmother" can mean not only that "I talked with my grandmother in person" but also can mean "I drove to my grandmother's house. I conferred with her caregiver. I asked the neighbors if they had observed any problems or had any concerns. I checked to see if she had food in the refrigerator and that her laundry was being done. I did some shopping for her. I then took her shopping for some personal items, which took much longer than I had expected. I mowed the lawn. We chatted in the

living room and on the front porch. I then drove home." Indeed, Judge Long also "interpreted[ed] the term 'meetings' as the ordinary usage of that word," recognizing that "[i]t is possible that Rolinski was not actually conducting any 'meetings' or conversations with the Ward, but was merely sitting at her bedside (with or without family present)" and then denied such claims on policy and/or statutory grounds, not on the basis of the honesty or falsity of such claims as is the issue in this proceeding. DX 49 at 528.[26]

Second, Respondent claims that she included travel time to and from the wards' various nursing facilities in seeking compensation for meetings and visits. It is undisputed that each ward's nursing facilities were some distance from Respondent's office. RX100A is a map showing some of the relevant points; DX227A and 227B provide Google turn-by-turn travel information and approximate times between relevant points. *See* FF 144. These maps are helpful as an overview of the travel time issue. The Hearing Committee does not, however, accord great weight to the Google travel times: there is no evidence as to how those were calculated, what data was used to calculate them, or what kind of traffic conditions were assumed for the estimated travel times, and neither party adduced any evidence as to traffic conditions at the time and on the date of ward meetings claimed in the Fee Petitions or about Respondent's driving habits. Nor has Disciplinary Counsel identified any inconsistencies between Respondent's testimony about certain driving

[26] We address the ultimate question of the honesty or dishonesty of the "meeting," "visit" and "hearing" entries and statements in Sections IV.E and IV.F of this Report. *See also* n.29, *infra*.

times associated with certain entries on the one hand and other testimony or other evidence on the other hand. The most that can be said is that nothing in the maps is inconsistent with Respondent's testimony, as we note at various points in our ensuing credibility assessments. In sum, and again speaking at this point generally and with respect only to our assessment of various instances of Respondent's testimony, there is nothing inherently incredible in Respondent's assertions that she included travel time and parking in her visits or meetings with her wards.

Third, as will be seen in the ensuing analyses, Respondent consistently testified that she did not bill for visits to wards that she made on weekends. *See, e.g.*, Tr. 445-49. We have reviewed Respondent's calendars – *e.g.* RX 99B – and have found that none of the visits to Ms. Toliver-Woody claimed by Respondent and challenged by Disciplinary Counsel in this proceeding occurred on a Saturday or Sunday. Indeed, Disciplinary Counsel concedes that Respondent did not bill in any of her Fee Petitions for any Saturday visits. PFF 66 in DC PFFs & PCLs at 25 (citing DX 232; DX 203 at 1633-37; Tr. 4021:15-4022:5, 4023:5-11); *see also* Tr. 4025 (testimony of Disciplinary Counsel Senior Law Clerk that "[t]hey [Respondent's visits to her wards claimed in fee petitions] did not occur on the weekend"). Respondent's assertions about making weekend visits are further supported by Mr. Baloga's and Ms. Ryan's testimony. FF 135, 137. Both of these witnesses testified from personal knowledge. And both of these witnesses corroborated Respondent's testimony, but were also careful to qualify any statements depending upon the strength of their recollections. *See* Tr. 1994-2001 (Mr. Baloga stating that he would

be with Respondent's son either Saturday or Sunday while Respondent went to the CBL health facility and explaining that "[i]t wouldn't have been during the week because I would have been working at my other job"); Tr. 2013-14 (Mr. Baloga "think[ing] that's true" that the timeframe when he and Respondent's son went into D.C., while he understood Respondent was visiting the ward, was from the fall of 2008 through 2011); Tr. 1275-76 (Ms. Ryan testifying that she "would say" and that she "believe[s]" Respondent made Saturday trips to visit a client beginning in early 2005). The corroboration by other credible witnesses of Respondent's testimony about the weekend visits provides another indicium of Respondent's overall truthfulness.

Fourth, also at frequent issue here are compensation claims for "hearings." Like "visit" and "meeting," the term "hearing" is subject to different interpretations. It might refer only to the relatively short time in which a given issue is being heard by a judge. That narrow view does not reflect the reality of Superior Court practice, nor indeed the reality of most "hearings." The lawyer must get to the courthouse. Once in the courthouse, it is common knowledge[27] that the lawyer must wait her turn on the calendar. FF 26. During the waiting time, she may confer with witnesses and other lawyers involved in her matter. She may seek to clarify issues and procedures with court personnel. She may get insight from talking to other lawyers who have matters set for that day. *See generally* FF 26. When the actual "hearing" is over,

[27] The Committee notes the common knowledge of lawyers and other participants in the judicial process in this jurisdiction. *See* Fed. R. Evid. 201.

lawyers and parties may have to wait for a copy of the judge's order. *See, e.g.*, FF 26. These considerations are relevant to the Committee's assessment of Respondent's credibility. The normal activities that surround, and are logically connected to, a hearing are familiar to lawyers and to judges and others who review fee petitions. Additionally, as in other analyses, we give significant weight to Ms. Sloan's testimony, whose knowledge, clarity and openness provided us with helpful context.[28] FFs 39-43. Specifically, Ms. Sloan and others explained that the Probate Division has never adopted a uniform set of rules for compensable fiduciary work, that individual judges differ on whether travel is compensable, and that there is no requirement for documenting the people the attorney has spoken to on an ongoing basis. And as to travel, Judge Wertheim's 2011 opinion (FF 41) demonstrates further variations in allowance of travel time, highlighting Judge Lopez's 2004 opinion in doing so. [29]

Fifth, Respondent called six witnesses during the merits phase who had the opportunity to observe Respondent in a broad range of circumstances and testified to her truthfulness and/or honesty.[30]

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[28] *See* n.9, *supra.*

[29] Of course, throughout this Finding of Fact section regarding Respondent's credibility the Committee also looks to other evidence that corroborates or undercuts Respondent's account of particular hearings, just as in Sections IV.E and IV.F setting forth our recommended Conclusions of Law we consider all the evidence that supports or counters Disciplinary Counsel's charges and all of Disciplinary Counsel's legal theories, including the contention that not disclosing that travel is included in the time claimed in various entries is *per se* dishonest. *See also* n.26, *supra*.

[30] Such testimony may be found at Tr. 1232 (Ryan); Tr. 1524-26, 1531-32 (Tomov); Tr. 1685-87 (Feinberg); Tr. 1780 (Wright-Smith); Tr. 1900 (Riley); Tr. 2200 (Hayes); Tr. 4335 (Suarez); Tr.

Finally, Disciplinary Counsel sets forth a number of Proposed Findings of Fact and Proposed Conclusions of Law regarding Respondent's alleged "shifting explanations" for her billing entries and with respect to other issues:

> i. PFFs 115-117 in DC PFFs & PCLs at 40-41 and PCLs in DC PFFs & PCLs at 66-69 & 77-78 (Respondent's defense that time entries for ward visits included travel and other tasks when she did not disclose this in her Fee Petition invoices);
>
> ii. PFFs 118-119 in DC PFFs & PCLs at 41-42 (absence of travel explanation in Motion for Reconsideration in *Williams*);
>
> iii. PFFs 120-121 in DC PFFs & PCLs at 42 and PCLs in DC PFFs & PCLs at 66-67 (Respondent's testimony re: block billing);
>
> iv. PFF 122 in DC PFFs & PCLs at 43 (Respondent's reference to data entry errors in Motion for Reconsideration without providing specifics);
>
> v. PFFs 123-124 in DC PFFs & PCLs at 43-44 (Respondent's submission of declarations from Ms. Padilla and Ms. Wilson not mentioning data entry errors);
>
> vi. PFFs 125-130 in DC PFFs & PCLs at 44-47 and PCLs in DC PFFs & PCLs at 69-70 (Respondent's testimony re: entries in her *Williams* Fee Petition for September 2013 filing of Acceptance form and January 28, 2014 visit to Mr. Williams);
>
> vii. PFFs 131-133 in DC PFFs & PCLs at 47 and PCLs in DC PFFs & PCLs at 70 (Respondent's explanations of the August 18, 2014 care conference in *Williams*);
>
> viii. PFFs 134-137 in DC PFFs & PCLs at 47-48 (Respondent's explanations for erroneous entry for the August 28, 2013 hearing

4374 (Schafer); Tr. 4381 (Maestripieri); Tr. 4416 (Singham); Tr. 4429-31 (Sremac). Respondent offered more such witnesses but the Hearing Committee imposed a limit for case management reasons. Order dated October 29, 2020 at 1-2.

in *Williams*); and

ix. PFF138 in DC PFFs & PCLs at 48-49 (Respondent's testimony re: the October 11, 2013 hearing in *Williams*).

We have addressed the foregoing item v in FF 152. We address the foregoing items vi, vii, viii and ix involving specific invoice entries in our analysis of Charges No. 51, 49, 35 and 38, respectively, in Sections IV.E & IV.F. We focus here on Disciplinary Counsel's more sweeping "shifting explanations" assertion encompassed in the foregoing items i-iv.

Respondent testified that she included travel time in her Fee Petitions, based on what she understood to be an acceptable practice. *E.g.*, Tr. 3608-09. (We analyze each such instance of testimony where applicable in FF 158-*1* through FF 158-*62*, which begin after this final overview point.) In its PFFs 115-119 in DC PFFs & PCLs at 40-42 (items i and ii, *supra*), Disciplinary Counsel attempts to establish that that testimony is fatally undercut by the absence of such information in her invoices and Motion for Reconsideration. In its PFF 117, Disciplinary Counsel contends generally that Respondent "evaded" answering questions about her billing practices, and in its PFF 118, Disciplinary Counsel notes that in her Motion for Reconsideration in *Williams*, Respondent "did not contend that her multiple-hour meetings with the ward included travel and meeting with third parties." PFFs 117 & 118 in DC PFFs & PCLs at 40-41. Disciplinary Counsel renews these contentions in its PCLs in DC PFFs & PCLs at 67-68.

We think that Disciplinary Counsel's evasive accusation amounts to nothing more than a disappointed complaint that Respondent did not accede to Disciplinary

Counsel's theory and associated broad, accusatory questions that did not elicit the desired admission. Disciplinary Counsel's argument on the basis of Respondent's Motion for Reconsideration and appellate briefing does not address the fact that there was not, at the relevant time, any Superior Court rule that denied compensation for travel to care facilities where a ward was living and no rule that required that travel time be stated separately in fee petitions. FFs 39-43. Respondent's testimony about the reasons she felt entitled to claim for travel is therefore understandable and it is unrebutted. Moreover, Disciplinary Counsel's assertion that Respondent's testimony is fatally undercut by the absence of references to travel in the Motion for Reconsideration and appeal is not convincing because Respondent focused in that Motion and Memorandum almost exclusively on the quality and benefits of her work, and in her appellate brief Respondent focused on the quality and benefits of her work, as well as Judge Christian's departure in Respondent's view from "routine practice in the Probate Division," the "ample evidence in the record to support the reasonableness of Appellant's fee request" and "[t]he trial court's err[or] as a matter of law" and abuse of discretion. FFs 115-116; DX 79 at 830-36, 843-44, 844-48; *see also* DX 79 at 849-50 (variance from routine Probate Division practice), 851-66 (abuse of discretion), 867-75 (Judge Christian's charge of a lack of candor and disrespect by Respondent). In addition, Respondent did in fact cite in her appellate brief case law authority for the compensation of travel time. DX 79 at 860.

We certainly recognize and agree that differing statements or non-statements about a given issue in this or any other proceeding must be examined carefully and,

if truly differing, are often a reliable and even determinative indicator of false testimony. Here, however, Disciplinary Counsel has not shown that Respondent had any reason under the circumstances to think that she needed to break out travel or state that she had included travel in her entries. Nor does anything said or not said in the appellate brief conflict with Respondent's testimony in this proceeding. Consequently, we cannot draw the adverse inference that Disciplinary Counsel seeks. (Disciplinary Counsel has adduced a related theory involving travel time which we address *infra*.)

In its PFFs 120-121 (item iii, *supra*), Disciplinary Counsel points out that Respondent has defined "block billing" as not setting out separate components of an entry while stating elsewhere that block billing "only occurs when a billing attorney lists multiple legal services provided during a block of time without allotting a specific time for each service." Disciplinary Counsel fails to note that Judge Christian defined block billing in the same way as Respondent has. DX 75 at 723. Disciplinary Counsel also fails to disclose that the second purported statement appeared in Respondent's brief in the Court of Appeals and has not established that Respondent was aware of or adopted that description. Consequently, we do not see this as a significant indicium of "shifting explanations." Similarly, in its PFF 122 (item iv, *supra*), Disciplinary Counsel takes Respondent to task for not providing details about the "typos" and "data entry errors" that she claimed were in her Motion for Reconsideration. Respondent and Ms. Wilson's failure to provide examples may have been unwise tactically or an unfortunate oversight in light of Disciplinary

Counsel's accusation now, but there is no inconsistency here between her statements in the Motion and her testimony that some entries were typos or other data entry errors.

In sum, we are not persuaded by Disciplinary Counsel's weak "shifting explanations" theory in its PFFs 115-122. Having now concluded our general overview of our appraisal of Respondent's credibility, we turn now in this FF 158 to our analysis of and Finding of Fact regarding the credibility of each instance of Respondent's testimony regarding the circumstances underlying Disciplinary Counsel's charges.[31]

158-*1*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that either a statement in her sixth Guardian Report dated February 12, 2008 (DX 16 at 163) that she contacted the ward one time by telephone in the preceding period or the entry in the invoice attached to her June 25, 2009 Fee Petition in *RTW* of 4 hours for a visit to the client on 1/24/08 (DX 23 at 190) violates Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a)[32]

Respondent testified that this visit occurred, that January 24, 2008 was a Thursday (which is accurate) and that the entry is not inconsistent with the statement in her February 12, 2008 Guardianship Report (DX 16 at 163), and that in the preceding 6-month period she had had one client visit by telephone, because the

[31] We emphasize that in this Section III.F, consisting of FF 158-*1* through FF 158-*62*, we are addressing only the factual issue of the credibility of Respondent's testimony. The credibility of her testimony is a different issue from – although, obviously, an important aspect of – the ultimate legal issue of whether Disciplinary Counsel has proven each of the one or more charges arising out of the 62 groups of charges by clear and convincing evidence. We address those legal issues in Section IV of this Report.

[32] We address in Section IV.E, *infra*, the propriety of such a charge as this "either-or" charge.

Report was revised between January 25, 2008 and February 6, 2008, as evidenced by the change of dates in the Verification (DX 16 at 165), to include the visit on the prior day, and therefore the Report should also have been corrected from "The contact was done by telephone" to "and contact was done" by telephone. *Compare* Tr. 420-423, *with* DX 16 at 163.

We credit Respondent's testimony. Pointing to documentary evidence, Respondent carefully explained the basis for her recollection of the in-person visit. *See also* Tr. 2756-58, 3490. The documentary evidence includes DX 23 at 190, a billing entry for a meeting with the ward, and the resulting change of the date on her Guardianship Report. Respondent's concession that the relevant part of the Guardianship Report "should [have included] 'and contact was done'" by telephone further reinforces our credibility determination. (We consider in Section IV.E.1, *infra*, the evidentiary and legal significance of the purported contradiction relied upon by Disciplinary Counsel.)

158-*2*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that the entry in her June 25, 2009 Fee Petition of 4 hours for a visit to the ward on January 24, 2008 (DX 23 at 190) violates Rules 3.3(a)(1), 8.4(c) and 1.5(a)

In addition to the testimony summarized with respect to the preceding charge, Respondent testified that the 4 hours included travel time from her home in Potomac, MD to CBL in Southeast Washington, review of the records at the facility pertaining to the ward, and return travel. Tr. 463-64. Respondent also testified that her guardianship responsibilities included determining the ward's wishes in the event of a catastrophic health circumstance, that Ms. Toliver-Woody's dementia worsened

over time, that she had numerous discussions with Ms. Toliver-Woody regarding the eye surgeries (*see* FFs 68, 70, 73), that the length of her visits was dictated by whatever the need was at the time and that visits that included Ms. Riley tended to take more time. Tr. 2970-78, 3003-06.

We credit Respondent's testimony here. Respondent first sought to clarify how Disciplinary Counsel was using the word "meeting." This helped generate specific testimony about this charge and helped elucidate some of the parties' disagreements. Following this clarification, Respondent detailed her efforts when "visiting" the ward, testimony that is corroborated by her responsibilities as a guardian as set forth in D.C. Code § 21-2047 (*see* FFs 28 & 29). As discussed in the introductory overview of this Section III.F, we credit Respondent's assertions that she included her travel time in terms such as "visit," "meeting" and "hearing."[33] And, as also discussed in the overview, we find no basis in the maps produced by the parties or in any other evidence adduced by Disciplinary Counsel for discrediting Respondent's testimony on the travel time involved in her visits to her wards.

158-*3*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that the statement in Respondent's eighth Guardian Report dated January 7, 2009 in *RTW* (DX 21 at 174) that she visited the ward three times in the preceding six-month period violates Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a)

Respondent testified that one of the three visits was done by attorney Danielle Espinet, *see* FFs 2 & 10 (describing when Ms. Espinet started and ended her

[33] As previously noted, the ultimate legal question of whether including travel time in the "meeting" and "visit" entries is dishonest is addressed in Section IV.E.

employment with Respondent), and that that visit was invoiced. Respondent testified that she visited the ward two additional times in the reporting period because Judge Burgess had suggested additional visits and because the ward had been diagnosed with glaucoma, as reflected in the nursing home's Social Progress note of December 4, 2008. Tr. 444-45, 450. Respondent testified that the other two visits were not invoiced in her June 23, 2009 Fee Petition (DX 23) because she did not charge for any weekend visits. Tr. 445-449; *see also* Tr. 384, 459.

We credit Respondent's testimony. Respondent first recalled Judge Burgess' letter (DX 20), which suggested that Respondent visit the ward at least three and probably four times. *See* FF 60. She then explained that Ms. Espinet made the first visit, which is reflected in the invoice attached to Respondent's June 25, 2009 Fee Petition. DX 23 at 192. Disciplinary Counsel did not challenge this point; rather, it merely asserted that Ms. Espinet did not visit for 3.2 hours and that she included travel time in her billing. As to the other two alleged visits, Disciplinary Counsel did not refute Respondent's assertion that she did not bill for weekend visits. Respondent maintained this position – each time it was brought up – in a clear, direct manner and without any hesitation, equivocation or other indication of untruthfulness or unreliability.

158-*4*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that the statement in her ninth Guardian Report in *RTW* dated July 10, 2009 (DX 25) that she visited the ward three times in the preceding six-month period violates Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a) because they are not claimed in her April 19, 2010 Fee Petition

Respondent explained that each of these visits noted in her ninth Guardian Report are not reflected in her April 19, 2010 Fee Petition (DX 30) because she did not invoice for weekend visits in fee petitions. Tr. 474. In response to whether the three visits were reflected in the Fee Petition, Respondent explained that the "visit on April 1, 2009 [a Wednesday] was captured," and that the weekend visits she did with Mr. Baloga were not. Tr. 474. The Fee Petition notes a "telephone conference with RTW" on April 1, 2009 (DX 30 at 225) and Respondent testified: "So I had my April 1, 2009 [visit], actually Danielle was with Ruth Toliver-Woody." Tr. 473. Disciplinary Counsel did not subsequently ask Respondent to identify the number of, or specific weekend visits she made during this period.

We credit Respondent's testimony for the reasons set forth in the introductory overview. Guardian Reports covered a six-month period, and we credit Mr. Baloga's testimony that he and Respondent made regular weekend visits "every couple of months or seven or eight times per year." FF 137. His testimony supports a finding that Respondent visited the ward on the weekend at least three times in a given six-month period. In addition, the fact she did not invoice for weekend visits mirrors her other hearing testimony. *See, e.g.*, Tr. 384, 445-449, 459. And the fact that the visits in the Petition do not match the visits in the Guardian Report is not a sufficient reason to discredit her or Mr. Baloga's testimony. *See also* Section IV.E.1 (regarding

assessment of purportedly inconsistent statements), *infra*.

158-*5*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that the entry in her April 19, 2010 Fee Petition in *RTW* of 4.5 hours for a visit to the ward on 8/14/09 (DX 30 at 227) violates Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a)

Respondent was not examined with respect to the entry underlying this charge.

158-*6*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that the statement in her tenth Guardian Report in *RTW* dated January 27, 2010 that she visited the ward three times in the preceding six-month period (DX 29 at 213) violates Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a) because the statement is inconsistent with the seven visits claimed in the same period in her April 19, 2010 Fee Petition (DX 30)

Disciplinary Counsel did not examine Respondent with respect to the statement in the tenth Guardian Report underlying this charge.[34]

158-*7*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that the entry in her April 19, 2010 Fee Petition in *RTW* of 5 hours for a client meeting on 12/18/09 (DX 30 at 228) violates Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a)

Respondent testified that this entry included travel time of an hour or an hour and a half each way, as well as her time at the facility. Tr. 543, 3023. Respondent also testified that her home and office are on River Road, that River Road is one lane each way, that River Road is often congested and that the trip between her home and either CBL or STM could take an hour or an hour and a half each way. Tr. 2951-52. Respondent also testified that this meeting and the meetings covered by Disciplinary Counsel's charges 8-12 were related to Ms. Toliver-Woody's laser eye surgeries,

[34] Respondent's testimony regarding six of the seven entries in the April 9, 2010 Fee Petition is analyzed in the ensuing six items, FF 158-*7* through FF 158-*12*.

including seeing her on the day of one of the surgeries, and were necessitated by the circumstances in this period, such as more interactions with staff, with Ms. Riley, with the surgeon's office and with other medical providers. Tr. 3019-20, 3022, 3024, 3026.

We credit Respondent's testimony. As pointed out in the introductory overview, Respondent's testimony regarding driving times between her home/office and Mr. Toliver-Woody's care facilities is not inconsistent with the maps introduced by the parties. FF 144. Moreover, while testifying on this and the other five visits at issue in the April 19, 2010 Fee Petition, Respondent, as we observed and listened to her, did not attempt to evade Disciplinary Counsel's questions; instead, she was careful not to overstate, noting that she could not say why certain meetings took longer than others but credibly stating that each meeting was dictated by the issues at hand. Respondent also provided context regarding Ms. Toliver-Woody's eye surgeries – the first on December 17, 2009. This context is further supported by her time records (*e.g.*, DX 30 at 227 noting telephone conferences about eye surgery) and by the Student Visitor Report (DX 28 at 209).

158-*8*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that the entry in her April 19, 2010 Fee Petition in *RTW* of 5 hours for a client meeting on 11/6/09 (DX 30 at 228) violates Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a)

Respondent testified that she did not spend 5 hours with the ward during this visit, implying in our view that the five hours in this entry, as she had just testified, included travel time. Tr. 544, 543. Otherwise, Disciplinary Counsel did not examine Respondent with respect to this particular entry.

We thus have no basis on which to discredit Respondent's brief and essentially unchallenged testimony here, especially in light of the points that we have identified in our FF 158-*7* discussion.

158-*9*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that the entry in her April 19, 2010 Fee Petition in *RTW* of 5 hours for a client meeting on 10/12/09 (DX 30 at 228) violates Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a)

Respondent testified, "Right, the same answer." Tr. 544. Respondent also testified that some of these entries are out of chronological order because of problems with the TimeSlips billing software. Tr. 544, 3021-22. This testimony was confirmed by one of her staff persons and by the seller of the TimeSlips program. FF 122.

We credit Respondent's testimony here for the reasons set forth in FF 158-*7*, *supra*, and in light of FFs 117-123 (regarding Respondent's time-keeping and invoice procedures) and FF 138 (regarding her frequent contacts with Ms. Toliver-Woody during the period of the eye surgeries and consideration thereof).

158-*10*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that the entry in her April 19, 2010 Fee Petition in *RTW* of 3 hours for a client meeting on 12/17/09 (DX 30 at 229) violates Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a)

Respondent testified that this was a post-surgery visit after the laser surgery and that the entry includes more tasks than meeting with the ward. *See* Tr. 545.

We credit Respondent's testimony here, largely for the reasons set forth in FF 158-*7* through 158-*9*, *supra*. Moreover, Disciplinary Counsel does not dispute that Ms. Toliver Woody had eye surgery on that date. Also, Respondent testified several

times, without contradiction, to visiting Ms. Toliver-Woody on this date after her surgery. Respondent's credibility here is further strengthened by her unrebutted testimony of sharing her own eye surgery experiences with Ms. Toliver Woody and encouraging her to proceed with it when Ms. Toliver Woody expressed hesitation. FF 138; Tr. 3002-04. Respondent's personal knowledge of the type of surgery being considered for Ms. Toliver Woody and their conferences about the procedure are consistent with visiting Ms. Toliver Woody immediately thereafter.

158-*11*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that the entry in her April 19, 2010 Fee Petition in *RTW* of 3 hours for a client meeting on 12/8/09 (DX 30 at 229) violates Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a)

Respondent testified "The same answer as before." Tr. 546.

We credit Respondent's testimony here, largely for the reasons set forth in FF 158-*7* through 158-*10*. Again, Disciplinary Counsel did not pursue further examination on this entry and thus has not come close to undercutting Respondent's testimony here.

158-*12*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that the entry in her April 19, 2010 Fee Petition in *RTW* of 3 hours for a client meeting on 11/23/09 (DX 30 at 229) violates Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a)

Respondent testified, "The same answer as before." Disciplinary Counsel did not pursue any further examination on this meeting. Tr. 546. Respondent testified generally in her case about the series of meetings with Ms. Toliver-Woody in the second half of 2009, Tr. 3019-28 & FF 138, confirming that they related to the eye surgery and included many conferences with various medical, administrative and

other CBL personnel. FF 138.

We credit Respondent's testimony here, largely for the reasons set forth in FF 158-*7* through 158-*11*. The context again demonstrates that this visit involved Ms. Toliver-Woody's impending laser eye surgery. Disciplinary Counsel has not come close to disproving or even raising any material doubts about this and the other surgery-related visits Respondent testified to at the hearing.

158-*13*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that the entry in her May 6, 2011 Fee Petition in *RTW* of 5 hours for a visit to the client on 7/12/10 (DX 41 at 446) violates Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a)

Respondent testified that the glaucoma diagnosis in January 2010 after the laser eye surgery in 2009 and the confirmatory end-stage glaucoma diagnosis in March 2010 (FF 68) that eventuated in the glaucoma eye surgery in November 2010 necessitated a number of visits with the concerned ward before the surgery. Tr. 3028. Respondent also testified that Ms. Mukami had stated that Respondent was at CBL on 7/12/10 even though she had not signed the sign-in log. Tr. 453, 3065.

We credit Respondent's testimony here. Respondent's testimony is supported by other testimonial and documentary evidence – specifically Ms. Mukami's testimony at the hearing before Judge Campbell and an authorization dated July 12, 2010 signed by both Respondent and Ms. Mukami, in which Respondent consented to eye surgery for Ms. Toliver-Woody. DX 35 at 347; *see* FF 76. Disciplinary Counsel appears not to seriously contest that Respondent attended a meeting on this date. *See* PFF 49 in DC PFFs & PCLs at 18-19 (citing DX 33 at 243). *But see* PFF 64 in DC PFFs & PCLs at 24 ("Even if Respondent met with Ms. Toliver-Woody

on July 12th . . . ."). As to whether Respondent spent five hours at this meeting, we credit Respondent's testimony that she included travel time in this entry.

158-*14*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that the entry in her May 6, 2011 Fee Petition in *RTW* of 4.1 hours for a court hearing on 8/20/10 (DX 41 at 446) violates Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a)

Respondent testified that the 4.1 hours for the hearing before Judge Campbell, FFs 74-77, included travel time to and from court and meeting with Ms. Riley before and after the hearing, as well as the hearing itself. Tr. 548-49.

We credit Respondent's testimony. As discussed in the introductory overview of this Section III.F, Respondent has demonstrated that she believed she could combine, in a time entry, the actual length of a "hearing" (or "visit") with other events surrounding that hearing (or visit). Disciplinary Counsel's contention that Respondent did not identify travel or meeting with Ms. Riley, does not in our mind sufficiently negate what Respondent believed she was allowed to include. Correlatively, Disciplinary Counsel has not rebutted that Respondent met with Ms. Riley before and after the hearing, nor demonstrated that these conferences, along with the hearing itself and travel time, could not have amounted to 4.1 hours.[35]

158-*15*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that the entry in her May 6, 2011 Fee Petition in *RTW* of 3.5 hours for a client meeting on 9/30/10 (DX 41 at 447) violates Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a)

Respondent was not examined with respect to this entry.

[35] The cautionary observation set forth in n.31, *supra*, is applicable here also, of course.

158-*16*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that the entry in her May 6, 2011 Fee Petition in *RTW* of 5 hours for a court hearing on 10/22/10 (DX 41 at 447) violates Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a)

Respondent testified that "[t]his is the same answer that I had provided you previously" and further stated that the May 6, 2011 Fee Petition was approved in full by Judge Hamilton. Tr. 556-57.

We credit Respondent's testimony here about the follow-up hearing before Judge Campbell, FFs 78-80, largely for the reasons set forth in connection with FF 158-*14*, and in the introductory overview. In light of all those considerations, Disciplinary Counsel has not refuted that Respondent included various tasks within her term "Court Appearance," DX 41 at 447, nor did it question her on what she did or did not do during the alleged five hours, other than attend the hearing.

158-*17*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that the entry in her May 6, 2011 Fee Petition in *RTW* of 4.8 hours for a client meeting on 11/22/10 (DX 41 at 448) violates Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a)

Respondent was not examined with respect to this entry.

158-*18*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that the entry in her May 6, 2011 Fee Petition in *RTW* of 4.8 hours for a client meeting on 1/7/11 (DX 41 at 448) and an entry in her January 11, 2012 Fee Petition of 4.8 hours for a client meeting on 1/7/11 (DX 46 at 475) are duplicative and therefore violate Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a)

Respondent acknowledged that the entry in her May 6, 2011 Fee Petition is a duplication of the entry in the January 11, 2012 Fee Petition and stated that she did not catch it. Tr. 596-97. Respondent further testified that the TimeSlips program

should have avoided this repetition and that its failure to do so was another factor leading her and Ms. Wilson to begin considering a different billing program. Tr. 597, 2926-28.

We credit Respondent's testimony here that the duplicate entry was an unintentional mistake. Respondent expanded on her problems with TimeSlips and how it contributed to her entries appearing out of order; Disciplinary Counsel did not challenge this explanation. (Disciplinary Counsel does not appear to challenge the occurrence of this visit or its length and, in any event, did not ask further questions here nor adduce any evidence, whether professional standards or otherwise, suggesting an appropriate amount of time for a guardian generally to have spent in such a situation or for Respondent to have spent in this particular situation.)

158-*19* to *29*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charges that the following 11 entries in her January 11, 2012 Fee Petition in *RTW* violate Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a):[36]

5 hours for a client meeting on 4/5/11 (DX 46 at 479)

5 hours for a client meeting on 4/13/11 (DX 46 at 480)

4 hours for a client meeting on 5/10/11 (DX 46 at 484)

5 hours for a client meeting on 5/27/11 (DX 46 at 485)

4.8 hours for a client meeting on 6/1/11 (DX 46 at 485)

[36] The precise wording of each entry in this group of entries in the invoice attached to Respondent's January 11, 2012 Fee petition is set out in FF 92. As reflected in the following summary and analysis of her testimony, Respondent was not examined at any meaningful length or depth about each of the entries individually. Accordingly, in order to avoid a great deal of repetition that would result from an entry-by-entry review of the challenged entries on the January 11, 2012 Fee Petition, we analyze the credibility of all her testimony about these 11 entries together.

5 hours for a client meeting on 6/2/11 (DX 46 at 485)

5.9 hours for a client meeting on 6/3/11 (DX 46 at 486)

5.8 hours for a client meeting on 6/9/11 (DX 46 at 486)

4.8 hours for a client meeting on 6/10/11 (DX 46 at 486)

5.5 hours for a client meeting on 6/13/11 (DX 46 at 486)

5.3 hours for a client meeting on 6/15/11 (DX 46 at 487)

Respondent testified that these visits followed and concerned Ms. Toliver-Woody's cardiac surgery on March 29, 2011 and transfer to STM on or about April 11, 2011 before Ms. Toliver-Woody's demise approximately two months later on June 20, 2011. Respondent also stated that the entries include travel time, described her and Ms. Riley's visits to Ms. Toliver-Woody during this period, stated that she and Ms. Riley had at least two meetings with STM's ethics board regarding end-of-life issues, and added that she repeatedly met by herself with various STM medical staff, the medical director, the social worker, the case manager and the discharge manager who "wanted to terminate her life," "[t]o pull the plug, to cease services to her" and took care of related paperwork while there. Tr. 547, 603-5, 3086-93, 3097-3102, 3104-11, 3123-24. Respondent characterized these time entries as approximate within a few minutes. Tr. 3123.

We credit Respondent's testimony that each of these meetings took place and that, including travel time, they each took the approximate length of time stated on the invoice. Neither Disciplinary Counsel nor Respondent's counsel conducted specific or detailed examination about the length of time or subject matter of

individual entries in this group of entries. However, Respondent provided specific context to demonstrate the need for the visits surrounding Ms. Toliver-Woody's cardiac surgery. Respondent recalled this period in a manner that indicates an effort to genuinely remember as much as she could more than 10 years later about what happened – providing detail when she recalled it and noting the more general nature of her recollection at other points. *Compare* Tr. 3086-87 (Respondent detailing the steps leading up to the transfer to St. Thomas More), *with* Tr. 3091 (Respondent acknowledging that she "think[s]" and that it was her "recollection" that Ms. Riley endorsed the DNR). We give weight to Respondent's carefulness and apparent sincerity during this segment of her testimony. In contrast, Disciplinary Counsel typically challenged Respondent with a leading question such as "You didn't meet with Ms. Toliver-Woody when she was on a ventilator for 4.8 hours [on June 1, 2011], right?" but did not follow up with any other examination or, later, with any other evidence pertinent to a given date. Tr. 603-04. We also take into consideration the circumstances that this was a trying, hectic period for Respondent and Ms. Toliver-Woody and that the end-of-life issues being addressed at this time were time-consuming because of their complexity, the associated emotion, and the difficulty but necessity of conferring with other parties involved in Ms. Toliver-Woody's care. FFs 140 & 141.

We note that most of the claimed meetings in this period do not appear on her 2011 calendar (RX 99B) but attribute this to the rapidly evolving situation. FFs 139 & 140.

We also note, with respect to the June 1, 2011 entry (item 23), that Disciplinary Counsel asked whether Respondent, on June 1st, "met" with Ms. Toliver-Woody for 4.8 hours while Ms. Toliver-Woody was on a ventilator. Respondent answered that "this is the same answer to the other questions." Tr. 603. Respondent then elaborated that the entry included traveling from Potomac to Hyattsville, Maryland and back; checking on Ms. Toliver-Woody's body and "receptiveness;" and speaking to the medical staff, the social worker, the discharge planner, and/or the medical director. *Id.* Respondent further asserted that she felt an increased pressure to address the end-of-life issue around June 1st. Tr. 3114-15. Respondent also tentatively recalled that the ethics committee meetings took place in June. Tr. 3115. Disciplinary Counsel also questioned Respondent on another June 1, 2011 entry – 1.8 hours for "Meeting with NMS administration re: medicine," DX 46 at 485 – and asked why she separated out multiple meetings in this entry yet did not do so for others. Respondent explained that she believes NMS to be the parent company of STM and that she broke out this meeting because it was separate from her "meeting with the client and the medical staff[,] and the administration is the financial arm of – that's how I take it, of St. Thomas More." Tr. 3615. Disciplinary Counsel did not pursue this point with any of several possible lines of examination, and therefore we find this explanation credible in light of the absence of any material challenge from Disciplinary Counsel and in light of the other considerations set out above and incorporated herein.

158-*30*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that "various 0.3-hour and 0.4-hour charges for calls from St. Thomas More" during the final period of the *RTW* guardianship violate Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a)[37]

Respondent testified that these calls were largely initiated by the STM staff or consisted of calls that she placed in response to a message; occurred sometimes multiple times on the same day from different staff members; and included issues such as blood sugar level, other diabetes concerns, blood pressure changes, medications, and proposed actions. Respondent stated that in these calls she examined staff about the information they were conveying. She also noted that other entries for such calls are for less or more than .3 or .4 hours, that the calls were consistent with the protocols testified to by her expert witnesses on end-of-life protocols, and that the number of such calls increased toward the end of Ms. Toliver-Woody's life. Tr. 598-602, 3124-29.

We credit Respondent's testimony. Respondent's explanations of the purpose, subject matter, number and the frequency of such calls are consistent with the responsibilities of a guardian in such a situation, as convincingly detailed by Dr. Heshmat and Ms. Maestripieri, FF 140, and also by Ms. Wright-Smith and Ms. Patel. FF 30. Here also, Disciplinary Counsel did not press Respondent on her explanation and recall and did not adduce any other evidence that might contradict her testimony – *e.g.* from St. Thomas More personnel that they did not have numerous contacts

[37] Consistent with the specific, limited scope of this Section III.F, as emphasized in n.31, *supra*, we forbear from addressing here the propriety and even the meaning of such a charge as "various 0.3-hour and 0.4-hour charges for calls" and, instead, address that question in the course of our legal analyses in Section IV.E, *infra*.

with Respondent and/or that they did not initiate very many of any such contacts and/or that one or more such calls could not have occurred for one reason or another. For the foregoing reasons, as well as the observations pertinent here that are set out in the introductory overview, we see in this record no possible basis on which to discredit Respondent's testimony about these calls.

158-*31*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that the entry in her December 23, 2014 Fee Petition in *Williams* of 3.8 hours for a client meeting on 6/1/13 violates Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a)

This testimony pertains to Disciplinary Counsel's first charge arising from the *Williams* guardianship, a visit by Respondent to Mr. Williams on June 1, 2013, following events on May 28, 2013 (a Tuesday) – *i.e.*, the filing by GWUH of the initial Petition for Appointment of Temporary Guardian, the appointment of Respondent as Guardian *ad Litem* and the ensuing scheduling of a hearing on June 3, 2013 (a Monday). FFs 95, 96, 143. Disciplinary Counsel does not challenge the first 16 entries in the Fee Petition pertaining to Respondent's actions before June 1st, including a first visit to Mr. Williams and first examination of medical records on May 30th (a Thursday), attempts to find and speak with family members, and communications with the court and with Ms. Sloan, the court-appointed attorney for Mr. Williams. DX 70 at 658. Respondent testified that she did not meet only with Mr. Williams for "three hours"; rather, the time entry includes meeting with the staff, "all the work I did at GW" and travel. Specifically, Respondent recalled searching for family members on GWUH's database ("using their eight prong program") and meeting with the medical staff because Mr. Williams' diagnosis was evolving;

Respondent also noted that Mr. Williams' rehydration modulated the severity of his dementia. Tr. 687-89, 3273-78; *see also* Tr. 2586 (Respondent explaining that part of her job was assessing his condition and complying with other statutory requirements); Tr. 3369-70. Respondent further noted that any time she went to the hospital to meet with staff or medical professionals, she would also look in on Mr. Williams. Tr. 3273-74; *see also* Tr. 3278 (successive visits between May 28th and before June 3rd hearing necessary to "make representations about him losing his independence" and having someone making decisions on his behalf); Tr. 3278-79, 3282-83 (Respondent testifying about entry in DX 76 at 761 regarding meeting with Social Worker, apparently on both June 1 and 2, 2013).

Respondent asserted that Judge Christian erred in concluding that Respondent first met with Mr. Williams on June 1, and in concluding that it was "'particularly shocking'" that Respondent billed 3.8 hours for visiting Mr. Williams "'who at the time was unconscious.'" Tr. 3300-02 (Respondent pointing out that the invoice before the court at the time showed that June 1 was not the first time Respondent visited, and that the 3.8 hours included more than just sitting by an unconscious ward); *see also* DX 70 at 658.

We credit Respondent's testimony. We first credit that Respondent met with the ward for a second time on Saturday, June 1. Respondent's visit on June 1st is reflected on her TimeSlips sheet (DX 97 at 1367) and on her revised invoice attached to her Motion for Reconsideration (FF 115), the latter of which indicates, for example, that she spoke with Mr. Pattenden (a social worker) on the phone about

locating family members and met with him that same day. DX 76 at 760-61. We have also found that Respondent visited Mr. Williams during this "'hectic' period" "to be able to report to the court accurately regarding Mr. Williams' evolving condition." FF 142; *see also* Tr. 1318-19 (Ms. Sloan stating that two or three visits before the first hearing are not necessarily unreasonable or excessive if the condition of the individual may be changing and that, if the subject's condition were changing, "it would be incumbent on the guardian ad litem and the counsel to visit the individual as needed more than once to monitor that change and give an up-to-date report [to] the court."). Disciplinary Counsel has not adduced any evidence that might refute the length of the time in the entry. For all these reasons, we credit that this entry included more than meeting with the ward, as also described in DX 76 at 761, including travel time, notwithstanding that this was not explained in her Motion for Reconsideration. *Id.*

158-*32*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that the entry in her December 23, 2014 Fee Petition in *Williams* of 2.8 hours for a client meeting on 6/2/13 violates Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a)

Respondent testified that the 2.8 hours included travel time from Potomac to GWUH. Tr. 689-90. In light of the upcoming hearing, Respondent testified, she wanted to observe if Mr. Williams was recovering so that she would know what to tell the court. Respondent also stated she was still "looking for family." Tr. 690; *see also* Tr. 2586 (Respondent explaining that part of her responsibilities at this stage was assessing his condition in terms of his capacity and other statutory requirements). Respondent further elaborated on Mr. Williams' condition when she

saw him on June 2, when she concluded that he could not live independently in the community. This led to discussing nursing home options. Tr. 3279-80. Respondent also described asking about Mr. Williams' documentation to see if he was on Medicare, Medicaid, or other insurance. Tr. 3280-82; *see also* Tr. 3278-79, 3282-83 (Respondent testifying about entry in DX 76 at 761 regarding meeting with Social Worker, apparently on both June 1 and 2, 2013).

Incorporating our analysis in FF 158-*31*, we credit Respondent's testimony here. Though Respondent's notes describe this meeting only as "with Adult Subject" (DX 76 at 761), Disciplinary Counsel has not rebutted Respondent's recollection of the specific events that transpired. We again credit Respondent's testimony that this entry included her travel time.

158-*33*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that the entry in her December 23, 2014 Fee Petition in *Williams* of 3 hours for a court hearing on 6/3/13 violates Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a)

Respondent testified that "the hearing was for three hours." Tr. 704. (We address the string of 3.0 hour entries throughout 2013 – *see also* FF 158-*34* through FF 158-*41* – in Section IV.E, *infra*.) She also testified that the hearing itself did not take 3 hours, that the 3.0 hour time entry included time in the Judge in Chambers room, and that this time entry did *not* include travel time. Tr. 3299 (Respondent recalling she "didn't include travel" and that "it was a Judge in Chambers, and we were there for a lengthy period of time"). Respondent elaborated that a Judge in Chambers appearance can take all day or more. Tr. 3306-07. On June 3, as Respondent recalled, Mr. Pattenden (the GWUH social worker), Ms. Yoder (the

GWUH representative), Ms. Sloan, and Respondent met in advance of the hearing to establish a plan to submit to the court. Tr. 3309. Respondent again emphasized that they were there for "a very lengthy amount of time," which included the discussion time and the scheduled hearing at 4:30 pm. Tr. 3285, 3310, 3375-76; *see also* Tr. 3375 (Respondent stating they met earlier to plan out what to say). Respondent also stated that she had to wait for the Order to be processed, filed and docketed before receiving a copy of it. Tr. 3376.

We credit Respondent's testimony. Disciplinary Counsel estimates that the hearing lasted 11 minutes and that the order was signed and scanned into the court's docketing system about an hour after the scheduled start. DC PFFs & PCLs at 71; *see also* DX 53 (transcript of hearing consists of 6½ pages); DX 229; Tr. 3853-55 (Order appointing Respondent as Guardian *ad litem* was entered at 5:37 pm on June 3, 2013 and docketed the next day). But Disciplinary Counsel did not adduce any evidence regarding when the attorneys and GWUH personnel arrived at the Judge in Chambers waiting area for their pre-hearing conference; did not call the courtroom clerk who entered the Order into the court's electronic records system, Ms. Saporteza, Tr. 3963; did not cross-examine Respondent regarding her statement that "we were there for a lengthy period of time"; or adduce any other evidence as to when Respondent actually received her copy of the Order. Additionally, we have credited Ms. Sloan's testimony that Judge in Chambers preparatory conferences, waiting periods, formal proceedings and post-hearing waits for receipt of the Order can last for 3 hours or more, depending on the circumstances on any given day. FF

26. As to the specifics of what happened on June 3, Disciplinary Counsel has not rebutted any aspect of Respondent's recollection of what occurred or of the time spent on the various tasks.

158-*34*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that the entry in her December 23, 2014 Fee Petition in *Williams* of 3 hours for a client meeting on 6/19/13 violates Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a)

Respondent testified that this visit, like others in Disciplinary Counsel's Notice of Violative Conduct, is reflected in her Report of Guardian (1st Report), which is drawn from her draft guardianship report. Tr. 3502. Respondent then pointed to the 3.0 entry in her time records in DX 97 at 1367. Tr. 3503-04. Respondent further explained that a 3.0 entry for a meeting with a ward included both travel time and meeting with the ward and others, "unless I separate[d] it out." Tr. 3733. Respondent asserted that each of the thirteen client meetings listed in the December 2, 2020 Notice of Violative Conduct, beginning with this June 19, 2013 meeting, took place. *See* Tr. 3503-17.

We credit Respondent's testimony that she performed the services for which she sought compensation. Respondent's time records include a 3-hour entry for this date. DX 97 at 1367. Respondent's calendar also includes a notation to Williams. RX 77B at 1424. Respondent's testimony about this and other visits to Mr. Williams and about her other tasks during these visits is strongly confirmed by the essentially unchallenged and convincing testimony of former Brinton Woods nurse manager Obiora Agusiobo confirming that Respondent conferred with Mr. Williams and also with Brinton Woods personnel "on a regular and routine basis throughout the time

she was Mr. Williams' Guardian. . . . no less than once a month though on some occasions more often as the needs mandated. . . ." FF 143.[38] We further find credible Respondent's assertion of the "meeting" taking 3 hours. We find that it included her travel time, testimony that Disciplinary Counsel has not rebutted. Indeed, Disciplinary Counsel simply has not adduced any evidence in support of its naked assertion that Respondent did not spend 3 hours in connection with this first post-appointment meeting with her ward.

158-*35*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that the entry in her December 23, 2014 Fee Petition in *Williams* of 3 hours for a hearing on 8/28/13 violates Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a)

Respondent agreed that the hearing was scheduled for 11:00 am, that it was "brief," that the transcript shows that it started at approximately 11:15 am and ended at approximately 11:25 am, and that she appeared by telephone. Tr. 714-16 (discussing DX 56, the transcript of the August 28, 2013 hearing); Tr. 3411-12. Respondent testified that the 3-hour entry was "a data entry error" in her original Fee Petition and attached invoice and in her Motion for Reconsideration and attached revised invoice – errors that she did not catch until preparing her reply brief in the appeal. Tr. 719, 740; *see* DX 81 at 944. Respondent further testified that the data entry error consisted of typing a 3 without a preceding decimal point. Tr. 719 ("[T]hat's what it seems it is."); Tr. 740-41. Respondent further elaborated that her time sheet says "'telephone call, court, .3.' It does not say 'attend court hearing 3.0.'"

[38] FF 143 and Mr. Agusiobo's testimony are incorporated by reference into FF 158-*36* and FFs 158-*39* through 158-*49*.

Tr. 740; *see* DX 97 at 1381. Thus, Respondent reasoned, "it was thought that the .3 for the October hearing was because when you hit 'enter' it's a whole number." Tr. 740. Respondent also explained that the August 28, 2013 notes on her calendar, DX 95 at 1340-41, showing telephone numbers for Judge Campbell and Judge Fisher, reflect that she first called Judge Campbell's chambers and then called Judge Fisher to participate in the hearing. Tr. 743-45; *see also* Tr. 3411-12, 3415-16.

In response to questions about the .4 and .6 notations on her TimeSlips sheets for August 28, 2013, DX 97 at 1381, Respondent testified that those represented, respectively, preparing for the hearing (the .6 notation of "prep for ct hearing") and the conference/hearing with the court (the .4 notation of "c w/court hearing"). Tr. 718. Respondent noted that these sheets do not contain a 3.0 hour notation for the hearing. Tr. 719. When Disciplinary Counsel asked whether the .4 and .6 charges were related to the data entry error (converting .3 to 3.0), Respondent said "No. . . . that's [*i.e.* the alleged data entry error] what [Ms. Wilson] deduced happened. My time records reflect that on 8/28 at [DX 96 bates stamp 1381] it says: conference with court regarding hearing. It's .4." Tr. 742; *see also* Tr. 3416-17 (identifying .4 and .6 entries as "errors in the bill that [Ms. Wilson] testified to"). Respondent further pointed out that the words "conference with court" were not typed in – thus she did not catch the 3.0 entry. Tr. 743.

We credit Respondent's testimony that this was a data entry error in her original and revised Fee Petition and invoice. Specifically, we credit that Respondent did not mean to charge 3 hours for the hearing; Disciplinary Counsel argues that

Respondent's time sheet and calendar demonstrate a .4 entry for participating by phone, PFF 134 in DC PFFs & PCLs at 47-48, but we conclude that Disciplinary Counsel is mistaken because Respondent convincingly explained that the .4 entry related to a conversation with the court about the forthcoming hearing, not the hearing itself. Disciplinary Counsel adduced no evidence rebutting Respondent's or Ms. Wilson's testimony that the eBillity software automatically recorded a whole number if no decimal point was entered and that this was a data entry error on her part. *See* FF 152; Tr. 2667-69, 2702-05. (A corollary aspect of testimony about this entry – Respondent's statement in her Motion for Reconsideration about this hearing and the associated Fee Petition invoice entry – is considered in FF 158-*53*).

158-*36*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that the entry in her December 23, 2014 Fee Petition in *Williams* of 3 hours for a client meeting on 8/30/13 violates Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a)

Respondent testified that this entry could have been a typographical error, given that there is no time slip for it. Tr. 1017-18 (discussing DX 70 at 661). Respondent further explained that "if it reflected 3 hours, it would have included my travel time." Tr. 1018; *see also* Tr. 1087-88 (including travel is "allowed"). Respondent had "some recollection" that she was still in New York and then stated that she knew she came back "because my son had to start his first day of school, and then we went back to New York." Tr. 1018; *see also* Tr. 3504-05 (Respondent recalling that August 30 was the day her son set up his locker at his school in Potomac and that afterwards they went to see Mr. Williams). But Respondent ultimately concluded that she did not know how the 3.0 time entry ended up in her

billing system. Tr. 1019. When asked about where the information would come from to support the 3.0 time entry, Respondent explained that, generally, all time entries came from her time slips. But when Respondent did an audit, she found a couple of entries which were not found on her time slips, "and there were typographical errors." Tr. 1018-19.

We credit Respondent's testimony. Respondent's recollection that she helped her son prepare for the new school year on August 30, 2013, before visiting Mr. Williams provides convincing support for her memory of and testimony about this alleged visit. Respondent's calendar includes a notation of "8-3:30 Bullis locker set up" for Friday, August 30, 3013. RX 99B at 1763. This visit was reported on Respondent's February 28, 2014 Report of Guardian (1st Report). DX 66 at 640. As to the length of the visit, we have previously credited Respondent's explanations about entries including travel time. Here, as in so many other instances, Disciplinary Counsel adduced no evidence that might contradict, let alone refute Respondent's testimony about the occurrence or the length of this alleged visit to Mr. Williams. *See also* n.38, *supra.*

158-*37*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that the entry in her December 23, 2014 Fee Petition in *Williams* of 3 hours for a client meeting on 9/10/13 violates Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a)

Respondent testified to her time entries in a different case (RX 23 at 242) for September 10, specifically to a .3 entry with a "T/C to petition" description, and a 2.9 entry with a "Travel to & Visit/Interview Subject/Multiple calls" description. Tr. 2824-25; *see also* Tr. 3379-80. Also, in discussing whether Respondent's September

10 calendar entry was connected to a visit with Mr. Williams, Respondent asserted that the calendar entry was "part of the redacted section where I was visiting another ward in Washington, D.C." Tr. 3505-06. Thus, Respondent was not directly examined by Disciplinary Counsel with respect to this entry and therefore there is no basis in the record for a credibility finding.

158-*38*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that the entry in her December 23, 2014 Fee Petition in *Williams* of 3 hours for a hearing on 10/11/13 violates Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a)

This hearing addressed Respondent's apparent failure to file the Acceptance of her appointment as Mr. Williams' Guardian. FFs 101, 103. Respondent agreed that she participated by telephone in this hearing on her failure to file the Acceptance. Tr. 721, 725-26. Respondent further acknowledged that there was no time slip for 3 hours for this hearing. Tr. 728. In explaining the 3.0 hours entry, Respondent pointed to her time slips indicting a telephone call to chambers asking permission to attend by phone and explained that when the matter was called, she "was already on the phone with the courtroom clerk, which is a different location in the courtroom than chambers." Tr. 728-30 (discussing DX 70 at 662 and referencing time sheets located at RX 77A at 1319). Respondent explained that the .3 "TC – J. Gardner chambers" notation represented the first telephone call to chambers, and that the following .4 "TC – Ct appearance" notation was for the hearing. Tr. 3434 (discussing RX 77A at 1319). Respondent explained that her handwritten notes, in contrast to her invoice entries (DX 70 at 662), did not have "rest [*sic*, *i.e.* ref] court appearances." Tr. 730 (apparently discussing RX 77A at 1319); *see also* RX 77A 1319. She further

explained,

> [I]t didn't flag for me because my slip doesn't say rest [*sic*, *i.e.* ref] court appearances. And I didn't catch it. I think it's – a slip, you know, my conversations with Ms. Wilson: if you don't put a point in front of a number, when you hit 'enter' it automatically generates a whole number, meaning 3.0 instead of .3.

Tr. 730-31. Respondent also pointed out, "[I]t doesn't show a synopsis of your entry before it gets committed to the program. And that's just what we think happened. I can't tell you, I didn't enter the time, but I did not recognize it on review." Tr. 731. When examined again on this entry later in the proceeding, Respondent reiterated that the other two entries related to the hearing were correct; she was then asked, "Is this another error [of] billing data entry of Ms. Wilson's that she acknowledged in her testimony," to which Respondent answered, "Yes, it is." Tr. 3434-35 (discussing RX 77A at 1319).

We credit Respondent's testimony that this was a data entry error by Ms. Wilson. Respondent's handwritten entries (0.3 and 0.4) and her explanation of them significantly support her assertions that this 3.0 hours entry was not made intentionally. Ms. Wilson also credibly testified to this point, noting that the volume of entries was "at least hundreds. . . . I think thousands is accurate" and assuming responsibility for the error. Tr. 2673, 2704-06. Ms. Wilson's truthfulness in this regard is further supported by her admission that she does not know precisely how this error occurred or was overlooked. FF 153; Tr. 2704-06. Disciplinary Counsel adduced no other evidence that might convincingly rebut Respondent's testimony as supported by Ms. Wilson's testimony and by the associated entries.

158-*39*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that the entry in her December 23, 2014 Fee Petition in *Williams* of 3 hours for a client meeting on 10/17/13 violates Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a)

Respondent testified that she did not know whether she had a 3-hour meeting with Mr. Williams on October 17, 2013. Tr. 1020-21. The 3 hours, Respondent stated, "would have encompassed my travel time, back and forth." Tr. 1021. Respondent noted that Mr. Williams was still residing at this time in the Brinton Woods nursing facility in the DuPont Circle area. *See* Tr. 1021 (identifying the facility as "Brenton Woods"). Respondent did not have a time slip for that visit in DX 97. Tr. 1022-23; *see also* RX 77A at 1317-23. Respondent further stated that her 2013 calendar supports this visit "and other things that I did for Mr. Williams." Tr. 1086-87. Respondent further stated that the calendar visit for October 17 stated "'Williams visit.'" Tr. 3506 (discussing RX 99B at 1765).

We credit Respondent's testimony. Respondent's 2013 calendar includes a notation on Thursday, October 17 for "Williams visit," which Disciplinary Counsel appears not to dispute. RX 99B at 1765; PFF 102 in DC PFFs & PCLs at 36. This visit was also reported on Respondent's February 28, 2014 Report of Guardian (1st Report). DX 66 at 640. And, as in FF 158-*36* through FF 158-*37* and FF 158-*40* through FF 158-*49*, we note that Respondent's testimony is strongly supported by Mr. Agusiobo's testimony. FF 143. Finally, Respondent again acknowledged matters which she could not recall, further strengthening her credibility. *See also* n.38, *supra*.

158-*40*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that the entry in her December 23, 2014 Fee Petition in *Williams* of 3 hours for a client meeting on 11/12/13 violates Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a)

Respondent acknowledged that her time sheet (DX 97) does not reflect a visit on November 12. Tr. 1085. But Respondent noted that her 2013 calendar contains an entry on November 12, 2013 of "9:00 a.m. Williams." Tr. 1086, 3506; *see also* RX 77B at 1433. Respondent responded "Absolutely" when asked whether each of the 13 visits on Disciplinary Counsel's December 2, 2022 Notice took place. Tr. 3502; *see also* Tr. 1086-88. Respondent further asserted that travel was included and that it was allowed to be included. Tr. 1087-88.

We credit Respondent's testimony. This visit was reported on Respondent's February 28, 2014 Report of Guardian (1st Report). DX 66 at 640. Respondent's calendar includes an entry on Thursday November 12, 2013 of "9 AM . . . Williams." RX 77B at 1433. Respondent's recollections of the visits, the calendar entry and the testimony were not rebutted by Disciplinary Counsel. We again find Disciplinary Counsel's reliance on the absence of a TimeSlips notation insufficient to rebut Respondent's recollections. FF 120. And we again credit Respondent's testimony about travel time. *See also* n.38, *supra*.

158-*41*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that the entry in her December 23, 2014 Fee Petition in *Williams* of 3 hours for a client meeting on 12/5/13 violates Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a)

Respondent acknowledged that there is no entry on her 2013 calendar and no TimeSlips notation for a client visit on December 5, 2013 but noted that this would

have been her "mandatory monthly meeting, which would have been on the guardian report. . . . and on the draft guardian report." Tr. 1086, 3507.

We credit Respondent's testimony. This visit was reported on Respondent's February 28, 2014 Report of Guardian (1st Report). DX 66 at 640. We also note that Respondent's calendar includes an entry on Wednesday December 12, 2013 of "10:30 Williams." RX 77B at 1436. Respondent's testimony is also consistent with Mr. Agusiobo's testimony about the frequency and regularity of her monthly visits to Mr. Williams and Brinton Woods personnel, FF 143, which is incorporated here by reference as in FF 158-*36* and FF 158-*39* through FF 158-*40*, and FF 158-*42* through FF 158-*49*, *infra.* The absence of time sheet or calendar entries does not offset Disciplinary Counsel's failure to adduce any other evidence that Respondent's brief testimony here was false.

158-*42*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that the entry in her December 23, 2014 Fee Petition in *Williams* of 1.5 hours for a client meeting on 1/18/14 violates Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a)

Respondent acknowledged that her TimeSlips notation for January 18, 2014 could be read as "R. Williams" rather than "J[ames] Williams" but believes that the notation is meant to refer to James Williams, even though she conceded that she is "not sure." Tr. 3508, 3607; DX 97 at 1411. When asked about this time sheet entry appearing to say "R. Williams," Respondent stated that it refers to J. Williams, as she believed her representation of her other "Williams" client – Cecil Williams – had been completed by this time. Tr. 3508-09. She added, "I don't know why it says R, or if it's not a completed J. You know, my script is like that." Tr. 3509.

Respondent also testified that she has a contemporaneous time sheet for this date. Tr. 3678.

We credit Respondent's testimony. The existence of the time sheet entry is not contested by Disciplinary Counsel. We do not assign much weight to whether Respondent wrote an R or a J or a J carelessly, as Disciplinary Counsel did not adduce any evidence that Respondent had an "R. Williams" client or that Respondent had not completed her work on the C. Williams matter – minor uncertainties but ones that could have been easily resolved from Probate Division records. We note that this alleged meeting occurred on a Saturday and that a Saturday meeting would be consistent with Respondent being in trial throughout January of 2014. Tr. 3509-10, 3550-51; DX 64 at 634-35 (transcript of January 31, 2014 hearing). We also note that this meeting does not appear on her February 28, 2014 Report of Guardian (1st Report), DX 66 at 640, but that Respondent was in trial daily during this period, *see* Tr. 3510-11 (discussing DX 2 at 15), and that she needed to get in a monthly visit to Mr. Williams at some point. *See* FF 35. *See also* n.38, *supra*.

158-*43*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that the entry in her December 23, 2014 Fee Petition in *Williams* of 3 hours for a client meeting on 1/28/14 violates Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a)

Respondent testified that she met with Mr. Williams on this day, notwithstanding her attorney's statement in an email to Disciplinary Counsel that the entry was a typographical error because "on January 28, 2014 SJR was in U.S. District Court in Maryland for a jury trial and could not have visited the ward." Tr. 3674 (discussing DX 207 at 1725); Tr. 3675-76, 3678. Respondent testified she was

not aware of her attorney's email, noted that she was not copied on it, and stated that upon finding her 2014 calendar, she recalled that, after the trial had recessed for the day and before going to her co-counsel's office, she had visited Mr. Williams to tell Mr. Williams that the landlord-tenant action had been dismissed. Tr. 3674-78; *see* FF 115. Respondent acknowledged that she did not have a TimeSlips notation for this visit but noted that her calendar supports the visit, pointing to the entry for Tuesday January 28, 2014 of "'9:00 Williams mediation D.C. Superior Court'" as "the return date . . . for the Williams landlord and tenant small claims matter that had been resolved." Tr. 1086, 3510; *see also* RX 77B at 1437.

We credit Respondent's testimony. We find that Respondent was not aware of her counsel's submission. Disciplinary Counsel's cursory examination of Respondent on this point did not begin to undermine Respondent's account, and her willingness to testify as to what she presently recalls even though it contradicts her attorney's submission substantiates her truthfulness here. Tr. 1086, 3510-11, 3674-78. This visit was reported on Respondent's February 28, 2014 Report of Guardian (1st Report). DX 66 at 640. Respondent's testimony is also corroborated by the calendar entry for January 28, 2014, which states "9:00 Williams. Mediation DC Superior Ct." RX 77B at 1437. Finally, Disciplinary Counsel has, once again, adduced no evidence that this visit to convey positive news about a matter worrying Mr. Williams did not occur or could not have occurred. *See also* n.38, *supra*.

158-*44*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that the entry in her December 23, 2014 Fee Petition in *Williams* of 3 hours for a client meeting on 2/18/14 violates Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a)

Respondent acknowledged that she did not have a TimeSlips notation supporting this visit and did not look for this visit on her 2014 calendar, as she thought she did not still have this calendar. Tr. 1086-87; *but see* RX 99B at 1772 (2/18/2014 calendar). Respondent testified that this meeting occurred and that "[t]his is one of my mandatory monthly meetings" with the ward. Tr. 3511-12. She added, "it's context for me that the February 18 meeting was my mandatory meeting . . . ." Tr. 3513.

We credit Respondent's testimony. This visit was reported on Respondent's February 28, 2014 Report of Guardian (1st Report). DX 66 at 640. We have previously found that a monthly meeting occurred despite no time sheet or calendar entry. We do so here also. Respondent's recollection of this monthly meeting and her explanation of "context" were not convincingly rebutted by Disciplinary Counsel. *See also* n.38, *supra*.

158-*45*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that the entry in her December 23, 2014 Fee Petition in *Williams* of 2.5 hours for a client meeting on 4/7/14 violates Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a)

Respondent testified that it was "incorrect" that her time records do not support a visit on April 7, as well as on five later visits. Tr. 1089-90. When Disciplinary Counsel asked Respondent to read the dates on which she personally visited Mr. Williams, as reflected on her Report of Guardian (2nd and Final Report) (DX 68 at 646), Respondent recited several but not April 7. Tr. 1090. Respondent testified that she had "returned from being out of town," that it was her "habit" to visit the ward after being out of town for a period of time, that the "time to have

another meeting with him was ripe" and that this was the "monthly meeting for the month of . . . . April." Tr. 3512-13.

We credit Respondent's testimony. The absence of one date among several is not telling in itself. Disciplinary Counsel points out that neither Respondent's billing records nor her calendars support a visit on this date, DC PFFs & PCLs at 65-66, but Respondent's November 12, 2014 Report of Guardian (2nd and Final Report) includes a ward visit on April 7, 2014. Respondent's recollection of visiting after being out of town for a long period was not rebutted by Disciplinary Counsel. Here, a visit on April 7 is consistent with her unrebutted testimony about her practice of visiting Mr. Williams and other wards after being out of town for an extensive period and with the Probate Division's requirement of monthly visits by Guardians to their wards. FF 35. *See also* n.38, *supra*.

158-*46*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that the entry in her December 23, 2014 Fee Petition in *Williams* of 3 hours for a client meeting on 5/15/14 violates Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a)

Respondent testified that it was "incorrect" that her time records did not support a visit on May 15, as well as on five other visits. Tr. 1089-90. When Disciplinary Counsel asked Respondent to read the dates on which she personally visited Mr. Williams, as reflected on her Report of Guardian (2nd and Final Report) (DX 68 at 646), Respondent included May 15. Tr. 1090 (discussing DX 68 at 646). Respondent further pointed out that her time sheets include "5/15, Williams, meeting with client, drop off personal effects, 3," a notation that had previously been mistakenly redacted when the time sheets were first produced to Disciplinary

Counsel. Tr. 3513-14 (discussing RX 97B at 1581).

We credit Respondent's testimony. Disciplinary Counsel again notes that neither her time entries nor her calendars support a visit on this date. DC PFFs & PCLs at 65-66. However, the inclusion of a ward visit on this date in her Report of Guardian (2nd and Final Report), DX 68 at 646, and the 3-hour notation in her time sheets for this date of "meeting with client, drop off personal effects," RX 97B at 1581, provide convincing documentary support for her testimony. *See also* n.38, *supra*.

158-*47*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that the entry in her December 23, 2014 Fee Petition in *Williams* of 3 hours for a client meeting on 5/16/14 violates Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a)

Respondent testified that it was "incorrect" that her time records did not support a visit on May 16, as well as on five other visits. Tr. 1089-90. When Disciplinary Counsel asked Respondent to read the dates on which she personally visited Mr. Williams, as reflected on her Report of Guardian (2nd and Final Report) (DX 68 at 646), Respondent included May 16. Tr. 1090 (discussing DX 68 at 646). Respondent further explained that after the May 15 visit and other tasks, there was a "subsequent meeting" with the client on May 16th for 3 hours. Tr. 3513-14 (discussing RX 97B at 1581). Respondent further pointed out that her TimeSlips time sheets include "the subsequent meeting on the 16th, and it was meeting with client, 3," a notation that had previously been redacted when the time sheets were first produced to Disciplinary Counsel. Tr. 3513-14 (discussing RX 97B at 1581).

We credit Respondent's testimony. Disciplinary Counsel again points out that

neither her time entries nor her calendars record a visit on this date. DC PFFs & PCLs at 65-66. However, the inclusion of a ward visit on this date in her Report of Guardian (2nd and Final Report), DX 68 at 646, and the notation in her time sheets of "5/O, Williams, mtg w/ client, 3" directly below the one just discussed (5/15), with a circle in place of a date – a notation that Disciplinary Counsel did not examine Respondent on or otherwise challenge – RX 97B at 1581, provide convincing documentary support for her testimony. *See also* n.38, *supra*.

158-*48*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that the entry in her December 23, 2014 Fee Petition in *Williams* of 2.5 hours for a client meeting on 6/25/14 violates Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a)

Respondent testified that it was "incorrect" that her time records did not support a visit on June 25, as well as on five other visits. Tr. 1089-90. When Disciplinary Counsel asked Respondent to read the dates she personally visited Mr. Williams, as reflected on her Report of Guardian (2nd and Final Report) (DX 68 at 646), Respondent mentioned several, but did not mention June 25. Tr. 1090. In elaborating on the thirteen visits from June 19, 2013 through June 25, 2014, Respondent explained that she got this information from her draft guardian reports or from her time entries. Tr. 3489-90; *see also* Tr. 3490 (explaining that upon doing a final fee petition, "we would do a look to the file, the calendar, all documents, to make sure we were capturing the time").

Respondent also pointed to a "contemporaneous note" of a "telephone call I received with regard to setting up the care conference . . . on Wednesday, so they're giving me advance notice of that." Tr. 3514-15 (discussing RX 97A at 1580).

Respondent stated that the note represented the telephone call from "Obi" for the care conference that was going to be held in his office. Tr. 3514. It will be recalled that Mr. Obiora Agusiobo was a nurse manager at the Brinton Woods facility when Mr. Williams resided there and that his testimony has been incorporated into FFs 158-*36* through 158-*37* and FFs 158-*39* through FFs 158-*49*, including this FF 158-*48*. Tr. 1801; FF 158-*34* & n.38. As to how Respondent knew this note represented this timeframe, given that there is no "June 25" on the note, Respondent explained that "when you look at what June 25, 2014 is, that's that Wednesday. It's a Wednesday," which is the day of the week indicated on the note. Tr. 3515. Respondent explained that this note was on a slip from Ms. Espinet's "From the desk of Danielle M. Espinet, Esq." note pad because "we just used them in the office rather than throwing them away." Tr. 3515-16; RX 97A at 1580. Respondent explained that she wrote the address of Brinton Woods because "it's going to be in his office, and that the admissions director, I think . . . had some information that she wanted . . . at that address." *Id.* Respondent stated that she found this note in her file, and that this is the kind of note she might have written down that later got translated into either a time slip or a billing entry. Tr. 3517.

We credit Respondent's testimony. Disciplinary Counsel again points out that neither her time entries nor her calendars reflect a visit on this date. DC PFFs & PCLs at 65-66. However, Disciplinary Counsel did not undermine Respondent's explanation of the content of RX 97A at 1580 – specifically, that Respondent contemporaneously jotted down notes from a phone call setting up a care conference

on June 25, 2014. Though the note contains no date, Respondent credibly testified that the note reflected the scheduling of a meeting at Brinton Woods and a visit there with Mr. Williams on Wednesday, June 25, 2014. Disciplinary Counsel adduced no testimonial or documentary evidence even vaguely suggesting that Respondent testified falsely about the circumstances underlying this entry. *See also* n.38, *supra*.

158-*49*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that the entry in her December 23, 2014 Fee Petition in *Williams* of 0.8 hours for a care conference on 8/18/14 violates Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a)

Respondent testified that this entry was a typo, as it referred instead to a June 18, 2014 meeting (and not August 18, 2014), as demonstrated by her contemporaneous time notes. Tr. 3477-78, 3626-27, 3734-35; RX 77A at 1374; FF 152. When Disciplinary Counsel asked why she said, in her Reply Brief to the Court of Appeals, that this was an incorrect pulldown option instead of explaining the June 18 error, Respondent responded that she did not think "we clarified yet that it was a typographical error." Tr. 3627. Respondent explained that she had met with Brinton Woods staff after Mr. Williams' death and therefore assumed for a time that it was a pulldown choice in the post-death time period. *Id.*

Respondent further asserted, "Ultimately we corrected that on the record, that it is a, it looks to be a typographical error, because the entry is June 18, 2014 based on my contemporaneous time-slip." Tr. 3627; RX 77A at 1374. When asked what she was referring to, Respondent stated "in these [disciplinary] proceedings it has been corrected." Tr. 3628-29. When Disciplinary Counsel asked Respondent what she meant by saying she had not clarified it yet as a typographical error when she

had filed her Reply Brief to the Court of Appeals, Respondent explained that "for years now we've been trying to in a hyper way, in a Rubik's cube kind of way, analyze each and every of my 500 tasks that I billed for . . . and as best as I can tell when I look at my contemporaneous time record," it looks like a typographical error. Tr. 3627-28; *see also* Tr. 3628 ("But it is correct that I had a final meeting at Brinton Woods."). The Brinton Woods meeting, Respondent asserted, is reflected on the invoice. Tr. 3628.

We credit Respondent's testimony that this entry was a data entry error that was first discovered during these disciplinary proceedings. Respondent's testimony was confirmed by Ms. Wilson's testimony and not otherwise rebutted. FF 152. Respondent impressed us as assiduously and honestly attempting to recall this particular set of circumstances during her testimony. *See also* n.38, *supra*.

158-*50*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that her statement in the August 20, 2010 hearing before Judge Campbell that visits to Ms. Toliver-Woody were reflected in guardian reports and her statement that visits were reflected in petitions for compensation violated Rules 3.3(a)(1) and 8.4(c)

Respondent testified that she understood the Judge to be referring to her third Fee Petition, dated April 19, 2010, which was the last fee petition before the August 20, 2010 hearing, and which reported nine visits. Tr. 453-55, 512; *see also* Tr. 456-59; DX 33; FF 71.

We have reviewed the transcript of that hearing, DX 33, closely and have summarized it in detail in FFs 74-80. We have also reviewed the Guardian Reports and the Fee Petitions covering the periods leading up to the hearing. DX 30 at 217-

30; DX 32 at 232-35; DX 38 at 428-31; DX 41 at 438-54. Those examinations confirm Respondent's representations to Judge Campbell that visits to Ms. Toliver-Woody are set forth in those documents. Thus, we find no evidentiary basis, direct or circumstantial, for doubting Respondent's testimony in the hearing for this proceeding that she understood Judge Campbell to be inquiring about her April 19, 2010 Fee Petition, DX 30, that most immediately preceded the August 20, 2010 hearing. Thus we respectfully conclude that Judge Long was mistaken in her review of the August 20, 2010 hearing and that Judge Christian erred in her reliance on Judge Long's interpretation of that hearing. *See* FFs 74-80, 94, 114. Accordingly, we credit Respondent's testimony in this regard.

158-*51*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that her failure to correct her statement during the 10/11/13 hearing that she had already filed the Acceptance in *Williams* violated Rules 3.3(a)(1) Rule 8.4(c)

Respondent testified that while she was in New York City with her son, she telephoned Mr. Baloga, asked him to file the Acceptance form, and walked him through finding the form in another case file and filling it out. Tr. 721-23, 3421-26; *see also* FF 100. Respondent testified that at the October 11, 2013 hearing she indicated to the court that she believed the Acceptance had been filed but that, since it apparently did not appear on the docket, she would file it in court the next day. Tr. 3427, 3430-31. Respondent further testified that the statement to the court was true and therefore did not need to be corrected. Tr. 3445-46.

We credit Respondent's testimony. Respondent recalled with specificity the events and steps she took in describing to Mr. Baloga how to file the Acceptance.

This specificity adds significant credibility to her testimony. Her statement in the disciplinary hearing that she "indicated to the court that [she] believed [the Acceptance] had [been] filed," Tr. 3430, is synonymous with her statement before Judge Gardner that "I already did file it," DCX 58 at 63. After telling the court that she would file it the following Tuesday (on October 15) – the next available day as that Monday was a holiday – the docket indicates that she did just that. DX 58 at 64; DX 60; FF 103.

158-*52*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that her statement in her August 7, 2015 Motion for Reconsideration in *Williams* that Respondent "always has and always will consistently record time contemporaneously with her action in order to ensure that an accurate record of [her] work is recorded" violated Rules 3.3(a)(1) and 8.4(c)

Respondent testified that she keeps time sheets on the right hand side of her desk and records her time on them throughout the day. Tr. 247. She further testified that at the end of the week she would add to the time sheets any additional work reflected in other notes, such as meeting notes that had not yet been entered on the time sheets because of not being at her desk at such points. Tr. 241-42, 247-49; *see* FF 141.

We credit Respondent's testimony. There is substantial evidence in the record supporting Respondent's description of her time-keeping process. FFs 117-128. Disciplinary Counsel has not refuted that description. There is also no evidence that Respondent did not believe this statement when she made it. To the extent that Disciplinary Counsel relies on other charged violations to establish this charge, we address such contentions in Section IV.F, *infra*. Here, we have addressed only the

credibility of what little testimony Disciplinary Counsel elicited from Respondent that might pertain to the charge that the statement in question in the Motion for Reconsideration was false.

158-*53*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that her statement in her August 7, 2015 Motion for Reconsideration in *Williams* that the particularly long wait for the 8/28/13 hearing "allowed the parties to confer" when Respondent appeared by phone, wait was 15 minutes and hearing lasted 7 minutes violated Rules 3.3(a)(1) and 8.4(c)

Respondent agreed in her testimony that the August 28, 2013 hearing lasted about 10 minutes and that she participated by telephone. Tr. 714, 716-17. Respondent also agreed that her time slip shows .4 hours for the hearing. Tr. 718, 3415-16; DX 97 at 1381; RX 77A at 1308. Respondent asserted that the 3 hour entry in her Fee Petition (*see* FF 113; DX 70 at 661) was a data entry error. Tr. 719. (We have previously analyzed Respondent's testimony regarding the Fee Petition invoice entry itself for the August 28, 2013 hearing in our FF 158-*35*). Respondent testified that this statement appeared in her Motion for Reconsideration because "we had a very truncated period of time to file the motion for reconsideration, a ten day time period. And we hadn't figured out yet that this was a telephonic hearing; and it wasn't until years later that I got the transcript." Tr. 740. She further testified:

> [A]t the time we did this I thought it was still an in-person [c]ourt hearing and in these, as Andrea Sloan testified, in all these cases we all agreed to meet in advance and confer, and I was mistaken that this was one of those instances; whereas, later I realized and corrected in the Court of Appeals brief that it was telephonic attendance.

Tr. 3736-37.

We credit Respondent's testimony. As we have already found, the ten-day period between Judge Christian's Order and the filing of the Motion for Reconsideration was a hectic, rushed time for Respondent, FF 153, and this was one of hundreds of entries that she needed to assess. Respondent's good-faith attempts to address these concerns is substantiated in said Motion, where she "appreciate[d] and accept[ed] responsibility for the inadvertently perfunctory nature and typographical errors," in addition to "heed[ing] the criticism of the [c]ourt," and "openly embrac[ing] all of the criticism and comments of the [c]ourt." DX 76 at 730, 733, 734. We further credit that she "hadn't figured out yet that this was a telephonic hearing," Tr. 740; indeed, Ms. Sloan credibly testified that these cases included an in-person meeting in advance to confer. *See* FF 26. Respondent further credibly testified that she later "realized and corrected" the error in her brief to the Court of Appeals. Tr. 3737.[39]

158-*54*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that the entry in her December 23, 2014 Fee Petition (*see* FF 113) of 1.1 hours on 8/20/2014 to draft and file the Notice of Death in *Williams* constituted an excessive fee in violation of Rule 1.5(a)

Respondent testified that her work on the Notice of Death included "finding it, preparing it, reviewing it, confirming it with the death certificate and submitting

[39] We emphasize, once again, that here we are assessing only the credibility of Respondent's testimony about her statement in the Motion for Reconsideration. We address Disciplinary Counsel's points in its closing argument, Tr. 4149-51, and in its post-hearing papers, DC PFFs & PCLs at 71-72, about the evidentiary and legal significance of this statement in our analysis and resolution in Section IV.F, *infra*, of the disciplinary charge arising out of the statement in the Motion for Reconsideration.

it on CaseFile Express." Tr. 1091, 3487. Respondent also referred to another attorney, Mr. Pappan, being compensated for spending 1.2 hours on a Notice of Death, though she couched her recollection as "if my memory serves me correct." Tr. 1091-92.

We generally credit Respondent's testimony. Respondent credibly explained the steps she took leading up to her filing, and Disciplinary Counsel did not undermine that testimony with any testimonial or documentary evidence from Probation Division practitioners or others. Though we recognize that Respondent misremembered Mr. Pappan's compensation – he was compensated for 1.3 hours on a "Draft file and serve Acceptance of Temporary Guardianship," and not for 1.2 hours relating to a Notice of Death (RX 27 at 273) – this is of little weight to her credibility, as she acknowledged that her memory may not be serving her correctly. More importantly, Disciplinary Counsel did not offer any expert or practitioner testimony regarding the preparation and filing of a Notice of Death, nor did Disciplinary Counsel sufficiently rebut Respondent's testimony about the steps leading up to this filing.

158-*55.* Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that the entry in her December 23, 2014 Fee Petition (*see* FF 113) of 2.2 hours on 10/11/2013 (*see* DX 70 at 662) for finding and rewriting the Acceptance in *Williams* constituted an excessive fee in violation of Rule 1.5(a)

Respondent testified that she first looked for the Acceptance form on the Probate Division's website but could not find it there and then telephoned Vicky Wright-Smith, another Probate Division practitioner, to inquire whether the form

was on the website. Tr. 732-33, 3436-37. They then looked for it together for a while but were unsuccessful. Tr. 3437. Respondent also identified RX 79 as the fax that Ms. Wright-Smith eventually sent her with a copy of the Acceptance form. Tr. 3438. Respondent further testified that she also received a fillable form from Ms. Wright-Smith and that she believes that she used this form. Tr. 3439.

We credit Respondent's testimony describing the events leading up to ultimately filing the Acceptance on the basis of its detail, the absence of any refuting evidence, and its consistency with the testimony of Ms. Wright-Smith, who "remember[ed] her calling me . . . . [a]nd it did go on for a while" and who eventually "ended up sending her a blank one." Tr. 1773; *see also* RX 79 at 1491-92 (fax from Wright-Smith to Respondent transmitting copy of blank Acceptance form).

158-*56*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that the entries in her June 29, 2007 Fee Petition (*see* FF 51) in *RTW* for Technology/ASS fees constituted an excessive fee in violation of Rule 1.5(a)

Respondent testified that these charges were added at the suggestion of her firm's computer consultant and that the amount of the charges was determined by dividing the total expenses by the current number of firm clients. Tr. 404-10, 2767-68.

We credit Respondent's unrebutted testimony that she submitted these claims on the advice of her firm's computer consultant. There is no evidence that she did not have a computer consultant at the relevant time, there is no evidence that she did not divide the costs among her clients, and there is no other basis in this record for not crediting her testimony here.

158-*57*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that her delinquent Reports of Guardian in *RTW* (2nd, 5th, 6th, 7th, 10th, 12th, 13th and final) violated Rule 8.4(d)

Respondent testified that she believes that these Reports of Guardian were not filled out on time because she interpreted Judge Lopez's Order of January 12, 2005 as establishing the 15th of each August and February as the due date for the semi-annual Reports of Guardian. Tr. 312-13, 3546-47; *see also* DX 8; FF 48. She testified that the 2nd Report of Guardian filed on August 11, 2005, DX 10, was timely in her view for the same reason. *See* Tr. 311, 314. With respect to the 5th Report of Guardian filed on August 8, 2007, DX 13, Respondent testified that Judge Lopez's Order superseded the initial appointment date and established February 15 and August 15 of each year as the due dates. Tr. 399-400. Respondent testified that the 6th Report of Guardian filed on February 12, 2008, DX 16, was not late because it was filed three days before what she considers to have been the due date of February 15, 2008. Tr. 423. She also noted that, on a worksheet accompanying her June 29, 2007 Fee Petition, DX 11, and Judge Hamilton's July 18, 2007 Order with respect to that Fee Petition, DX 12, the Probate Division's Auditing Branch stated that "[t]he fiduciary has timely filed the required account(s) or report(s) with [t]he [c]ourt." DX 12 at 125; Tr. 425-26. Similarly, Respondent testified that she did not deem the 7th Report of Guardian, DX 17, that she filed on July 25, 2008 to be late because she viewed Judge Lopez's January 12, 2005 Order as moving the initial appointment date to February 15th. She also believed that the Probate Division's Auditing Department held the same view. Tr. 433. Respondent was not directly examined

about the timeliness or delinquency of her 10th Report of Guardian filed on January 27, 2010. DX 29; *see* Tr. 539-42. With respect to the delinquency notice DX 5 at 51 (entry 30), for her 12th Report of Guardian, filed on January 25, 2011, DX 38, Respondent testified that she feels that the Probate Division's calendar was incorrect because Lopez's Order modified the schedule with the February 15th date. Tr. 560-61. Respondent was not directly examined about the timeliness or delinquency of her 13th and Final Report of Guardian filed on August 10, 2011. DX 44; Tr. 3136-39; *see* 3836-47 (Wilson). Respondent acknowledged that Probate Division Rule 328(a) provides, "The first report shall be due six months from the date of appointment of the guardian with each succeeding report due at six month intervals thereafter." DX 86 at 1163; Tr. 614. Respondent believes that the Report of Guardian form used by the Probate Division over the years is "a superficial document that has no consequence to the state of health of the ward, to services provided to the ward" and that despite the Division's efforts "to make it, I think, a little more substantive[,] . . . it's still even today a very superficial document." Tr. 271-72.

We credit Respondent's unrebutted testimony that she believed that Judge Lopez had modified the schedule for her Reports of Guardian. Respondent consistently maintained this belief as she submitted her Reports of Guardian based on that schedule. We also credit that Respondent believed that the Report of Guardian Form at the time was a superficial document, often seeking irrelevant information. We do so based on Respondent's experience with the Probate process,

regardless of whether we may agree or disagree with her view.[40]

158-*58*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that her failure to file and/or her delinquent filing of the Suggestion of Death in *RTW* violated Rule 8.4(d)

Respondent testified that she notified the Court twice of Mr. Toliver-Woody's death – in her Final Report of Guardian, DX 44, and again in a request to terminate the guardianship – but did not file the Probate Division's Suggestion of Death form. Tr. 575-76. She further testified that her statement in the Final Report of Guardian was accepted by the Probate Division's Duty Office, who found it to be sufficient notice of Ms. Toliver-Woody's death and deemed it to be a Suggestion of Death. Tr. 579, 612-13. Respondent acknowledged that a delinquency notice for the Suggestion of Death was issued on July 18, 2011. Tr. 579; DX 5 at 50 (entry 17); *see also* Tr. 610-16. Respondent acknowledged that Probate Division Rule 328(d) provides, "Upon the death of an individual for whom a guardian is appointed, the guardian shall file a suggestion of death forthwith . . . ." DX 86 at 1163; Tr. 615.

We credit Respondent's testimony. Specifically, we credit that she believed that her Report of Guardian (13th and final) (filed on August 10, 2011) indicating the ward's death was sufficient notice in lieu of the actual Suggestion of Death. This is supported by the docket sheet (DX 5 at 49), which notes the Final Guardian Report was accepted "w/ suggestion of death."

[40] We emphasize, once again, that here and in FFs 158-*58* through FF 158-*62* we are making only a credibility determination, as distinguished from our analysis in Section IV.I, *infra*, of Disciplinary Counsel's Rule 8.4(d) charges on the basis of all the available evidence, including this testimony and the applicable case law.

158-*59*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that her delinquent Acceptance in *Williams* violated Rule 8.4(d)

Respondent testified that a guardian's statement at a hearing that he or she accepts appointment as a Guardian serves as an Acceptance. Tr. 278. She stated further that a written Acceptance is "still required by the rules. . . . [but] is . . . irrelevant from the point of view of 'did I accept?' . . . because I already did it on the record." Tr. 278-79; *see also* Tr. 649. Respondent acknowledged that the August 28, 2013 Order appointing her as Mr. Williams' Guardian also provided that the acceptance and consent to the jurisdiction of the court was to be filed within 14 days of the appointment. Tr. 712-13; DX 57 at 606. Respondent described her telephone call with Mr. Baloga while she was in New York City in which she guided him in filling out and mailing the Acceptance and Consent form to the Court and acknowledged that it was apparently not received by the Division within 14 days of her appointment as Guardian for Mr. Williams, and. Tr. 720-723, 3421-26; *see also* FFs 100, 158-*51*.

We credit Respondent's testimony. Notwithstanding Respondent's belief that accepting the appointment as a Guardian serves as an Acceptance, she nonetheless understood her requirement to file an Acceptance form and thus contacted Mr. Baloga to walk him through how to file it. This was so because she was in New York at the time and thus not in a position to file it. *See* FF 100. Acknowledging that she received a delinquency notice, as we have previously found (FFs 101-103), Respondent learned at the summary hearing that the Clerk's Office had not received

the Acceptance form and she then filed the Acceptance on the following workday. FF 103.

158-*60*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that her delinquent Guardian Plan in *Williams* violated Rule 8.4(d)

Respondent acknowledged that the August 28, 2013 Order appointing her as Mr. Williams' Guardian also provided that a Guardianship Plan was to be filed within 90 days of the appointment, that she did not file the Guardianship Plan by its due date, that the Schedule of Mandatory Filing Deadlines issued in *Williams* specifies that the Guardianship Plan was to be filed "no late[r] than ninety (90) days from the date of the guardian's appointment," and that she filed it on December 20, 2013. Tr. 712-13, 991-93, 997-98; DX 61; DX 63. Respondent believes that this late filing did not have "an effect per se on anyone. There was no one interested in Mr. Williams." Tr. 3460. Respondent acknowledged that "the guardianship [report] was filed late" and recounted that "I was congested with my trial schedule at that time. It was not a deliberate or derelict act. I just couldn't quite get to it." Tr. 3551.

We credit Respondent's testimony, specifically that Respondent admits she was delinquent. Respondent also did not hide her gratuitous rationalization that her delinquency in filing it did not have any effect on the probate process. This admission enhances our view of her credibility on this point. We further credit Respondent's testimony about her reason for her late filing, – her preoccupation with preparation for a trial in a separate matter, *see* Tr. 3458-59; FF 106 – testimony not rebutted by Disciplinary Counsel.

158-*61*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that her delinquent Report of Guardian (2nd and Final Report) in *Williams* violated Rule 8.4(d)

Respondent identified DX 68 as her Report of Guardian (2nd and Final Report) in *Williams*, which she filed on November 12, 2014. Tr. 3487. Respondent originally testified that the court terminated the Guardianship in January of 2015. Tr. 3487. But upon Disciplinary Counsel calling her attention to DX 69, Respondent agreed that the termination occurred on November 26, 2014. Respondent then noted that her filing of her Report of Guardian (2nd and Final Report) on November 12 preceded the termination on November 26, and she believed it was not late. Tr. 3487-88, 3551; *see also* FF 37 (describing when a Final Report of Guardian is due, citing Probate Rule 328(a) and (d)).

We credit Respondent's testimony about what the record indicates. While Respondent's 2nd Report of Guardian was due on August 28, 2014, she filed a Notice of Death in *Williams* prior to that date on August 20, 2014. FF 109. In light of his passing, it seems not to have been unreasonable for Respondent to apparently believe she could submit a single Report of Guardian (2nd and Final Report), rather than draft two separate reports, and there is no evidence to the contrary. We also find that Respondent's stipulation to November 26 as the correct date of the termination further enhances her credibility.

158-*62*. Credibility determination of Respondent's testimony regarding Disciplinary Counsel's charge that her delinquent Suggestion/Notice of Death in *Williams* violated Rule 8.4(d)

Respondent acknowledged that the Schedule of Mandatory Filing Deadlines

issued in *Williams* on October 15, 2013 specifies that a Suggestion of Death form is to be filed "forthwith" and "immediately upon death." Tr. 610-11, 1029-30; DX 61. Respondent further testified that Mr. Williams died on July 23, 2014, that she thought that she filed the suggestion of death about 20 days later, and upon seeing her Praecipe Notice of Death observed that it was filed on August 20, 2014. Tr. 1029, 3485-86; DX 67. Respondent feels that the timing of this filing did not interfere with the administration of justice. Tr. 3551.

We credit Respondent's testimony. The documentary evidence establishes that Mr. Williams died on July 23, 2014, and that Respondent filed her Notice of Death on August 20, 2014 (FFs 108 & 109). Like her testimony about her delinquent Guardianship Plan, Respondent's acknowledgement of her late filing provides another (minor) indicium of her overall credibility. Respondent's view that her filing did not interfere with the administration of justice is basically irrelevant to our later analysis of Charge No. 62 arising out of this delinquency because Rule 8.4(d) does not include an intent or other mental element. (We consider that view again in the course of our sanctions analysis in Section V.B.3, *infra*.)

IV. RECOMMENDED CONCLUSIONS OF LAW

A. ISSUES RAISED BY RESPONDENT

In addition to the normal post-hearing filings in District of Columbia disciplinary proceedings of proposed findings of fact, proposed conclusions of law and recommendations regarding sanction, Respondent also filed, in accordance with a briefing schedule agreed upon by the parties, a pleading titled Respondent's Brief

on Certain Legal Issues. Tr. 5473-75 (April 28, 2021); Order of May 3, 2021. Respondent filed her brief on June 1, 2021 and addressed three issues which she titled "The Sufficiency or Insufficiency of the Specification and the December 2, 2020 Notice," "The Preclusive Effect of the District of Columbia Court of Appeals Decision in *In re Williams*" and "The Relevance of the Conduct of the Office of ODC in this Matter." Disciplinary Counsel filed its Opposition to Respondent's Brief on Certain Legal Issues on June 28, 2021, and Respondent filed her Reply Brief on Certain Legal Issues on July 23, 2021. We turn now to analysis of these three issues and provide our recommendations as to the disposition of each of them. As discussed hereinafter, Respondent had raised these issues at various points earlier in this disciplinary proceeding.

1. Notice/Due Process

As recounted in Section II of this Report, early in the evidentiary hearing the Hearing Committee asked Disciplinary Counsel to clarify its charges against Respondent; Disciplinary Counsel thereupon filed its Notice of Violative Conduct, and Respondent then set forth her concerns about what she considered the inadequate notice to her of the charges against her:

> On November 10, 2020, the Committee advised ODC that: ". . . the specification of charges is not clear." Transcript of Proceedings, November 10, 2020, YouTube at 4:10. . . . Candidly, on November 20, 2020, ODC responded by conceding that ". . . we cannot say with specificity what (Respondent) did or didn't do." YouTube at 20:53
>
> One day late [in being filed], after over five years of proceedings, ODC filed a Notice of Violative Conduct (the

"Notice") which re-packaged its defective Specification into an ambivalent filing in the alternative striking both for the absence of declarative sentences and specific charges, and the failure to include a verification consistent with Rule 7.1 requirements. Notably, the Notice was unaccompanied by any request for leave to amend the Specification or leave to late file.

* * * * *

Having been previously compelled to abandon some of the most blatantly erroneous errors by Judges Long and Christian, ODC now – in the face of Respondent's overwhelming evidence – seeks to straddle the fence and shift first to Respondent the burden mid-hearing of discerning the actual charges asserted by ODC, and second to shift to the Committee the task of determining specifically which allegedly violative conduct ODC actually asserts is well-founded.

ODC declines to meaningfully respond to the Committee's admonition because ODC in good faith cannot. The evidence marshalled and produced by Respondent – the great weight of which is under oath and already subject to ODC's examination or cross-examination – is uncontroverted even after ODC has rested its case. Indeed, of the dozens of witnesses available to ODC, it chose a single non-party witness whose halting testimony had the singular effect of discrediting once and for all the missing double hearsay sign-in log on which ODC had predicated the entirety of its core surviving Toliver-Woody claim.

* * * * *

In its Notice, however, ODC unsatisfactorily identifies 62 events without any specific contention of misconduct accompanying each entry. Instead, ODC lumps 49 of those events under the wholly-inadequate bundled heading of "Dishonesty and/or Knowing and/or Knowing False Statement and/or Excessive Fee. . . ."

ODC then "further identifies" four events under the heading "Dishonesty and/or Knowing False Statement to the

> Court," . . . notwithstanding that the Specification did not identify any one of those four events.
>
> * * * * *
>
> . . . ODC now concedes, ODC ". . . cannot say with specificity what (Respondent) did or didn't do." Orally to the Committee, mid-hearing, and now in writing, especially with respect to 49 events in its Section A category, ODC acknowledges that it cannot state on the record – much less plead under oath – with specificity the elements of dishonesty or of false statements. Instead, it dumps a chronology on Respondent and the Committee, apparently with the hope that Respondent and the Committee will sift through the chronology to determine what Respondent "did or didn't do."

Respondent's Response and Objections to Disciplinary Counsel's Notice of Violative Conduct, at 1-2, 9, 10-11 (December 8, 2020) (citations and footnote omitted).

Disciplinary Counsel filed its Response to Respondent's December 7 (*sic*), 2020 Filing on December 14, 2020, in which it argued:

> [T]he fact that Respondent is vigorously attempting to contest that the conduct set forth in ODC's December 2, 2020 Notice establishes certain rule violation[s] suggests that the content of the Notice comes as no surprise to her and that she has had ample time to consider and mount a defense.
>
> * * * * *
>
> . . . General notice is sufficient.
>
> * * * * *
>
> . . . Disciplinary Counsel did not have to identify only one way in which Respondent's conduct violated Rules 3.3, 8.4(c) or 1.5.
>
> * * * * *

> . . . [T]he misconduct Disciplinary Counsel alleged in its December 2, 2020 Notice does not involve violation of additional rules. Rather, the misconduct alleged merely serves as additional examples supporting the rule violations already set forth in the Specification, i.e., violations of Rules 3.3(a), 8.4(c) and 1.5(a).
>
> * * * * *
>
> Even if the Specification and DX 218 did not provide Respondent with sufficient notice, Disciplinary Counsel's December 2, 2020 Notice did, particularly given the more than 30-days break in the case and particularly in light of the defenses that Respondent is already developing . . . .

Id. at 2, 4, 10, 11 (citations omitted).

Respondent renewed and expanded upon her arguments in her Motion in Limine, and for Dismissal in Part and for Other Relief and her supporting Memorandum of Points and Authorities in Support of Respondent's Motion in Limine, Motion to Dismiss and for Other Relief (December 24, 2020):

> . . . ODC purports to construe the Committee's admonition as an invitation to a free-for-all commenced by a Specification the specifics of which await an evidentiary hearing which serves in part as the sort of discovery device which is otherwise unavailable.
>
> Rather than presenting witnesses, or admissible documentation, ODC stubbornly clings to the contention that a Respondent must address in his defense any of a full range of potential charges – from failure to include sufficient specificity in a bill to knowing dishonesty – and must do so with respect to any purported fact to which 15 years of documents alludes, notwithstanding the refusal of ODC to identify the specific event or statement in the Specification.
>
> * * * * * *
>
> Until the current hearing, the issue of Technology Fees has

never been raised.

* * * * *

> . . . ODC cannot represent to the Committee much less prove that Respondent did not undertake the visits that are reflected in Respondent's submissions to Probate Court. Since ODC does not purport to have offered a scintilla of evidence about the length of visits or the reasonableness of the length of the visits, ODC cannot escape its absolute obligations by continuing to bury an alternative ambiguous or qualified statement its inability to allege or prove specific misconduct.

Memorandum at 3-4, 9, 20.

Respondent renewed and expanded upon these arguments in her Proposed Conclusions of Law:

> . . . ODC's proposed conclusions [of law] contain numerous new charges and theories which cannot be found in the Specification, the Notice, or both. ODC now asserts that:
>
> It is a violation of the disciplinary rules to fail to break out in invoices travel time for visits to wards. ODC Proposed Conclusions, at 66-69, 77-78. That charge was not made in the Specification or the Notice.
>
> It is a violation of the disciplinary rules to have failed to correct a statement to Judge Gardner that her office had a "record of the filing of" the Acceptance Form. ODC Proposed Conclusions, at 72-73. That charge was not made in the Specification or the Notice.
>
> It is a violation of the disciplinary rules to fail to break out in invoices end of life meeting[s for visits with wards]. ODC Proposed Conclusions, at 77-78. That charge was not made in the Specification or the Notice.
>
> Charges for work that was not done, or overcharges, violate Rule 1.5(a). ODC identified only three specific charges under heading "C. Excessive Fee" in the December 2 Notice.

> The technology fee violates rule 1.5(a). ODC Proposed Conclusions, at 81. That charge was not made in the Specification.
>
> Missing deadlines can constitute a separate violation of Rule 1.3(c) and is wrongful conduct. ODC Proposed Conclusions, at 83. ODC concedes that failure to comply with court-imposed deadlines was ". . . not charged as a separate violation . . . ." *Id*.

Resp. PCLs at 7-8 (footnote omitted).

We think that Respondent has raised a number of legitimate concerns, concerns which are among several that have troubled us throughout this proceeding. We did not address these concerns before this point in time because Board Rule 7.16 provides, in pertinent part, that "the Hearing Committee shall include in its report to the Board a proposed disposition and the reasons therefor. The Board will rule on all such motions in its disposition of the case."

"Due process demands more than vague and unspecified conclusions without clear charges of misconduct." *In re Bielec*, 755 A.2d 1018, 1025 (2000) (per curiam) (court does not find "any evidence in the record which describes the specific charges against him or the ethical violations that form the basis for his suspension"). The lawyer is entitled to "fair notice of the ethical violations for which [s]he consequently would face discipline." *Id.* In disciplinary cases, we thus look to whether a respondent had adequate notice of both the charged Rule violations and the conduct giving rise to those charges. *In re Barber*, 128 A.3d 637, 641-42 (D.C. 2015) (per curiam); *see also In re Winstead*, 69 A.3d 390, 397 (D.C. 2013). When considering notice and whether a violation of due process occurred, we are not limited to the Specification but may also consider the subsequent filings in the record and the

evidence that was presented at the hearing. *See In re Kanu*, 5 A.3d 1, 7 (D.C. 2010); *In re Austin*, 858 A.2d 969, 976 (D.C. 2004); *In re Fay* 111 A.3d 1025, 1031 (D.C. 2015) (per curiam); *In re Morten*, Board Docket No. 18-BD-027, at 99-100 (HC Rpt. Feb. 23, 2021), *adopted by the Board*, Order, at 1-2 (BPR May 7, 2021).

Respondent relies on *Bielec* in support of her due process contention, highlighting *Bielec's* warnings that "'vague and ambiguous language is inadequate to satisfy due process requirements,'" and that Disciplinary Counsel must "'detail what the respondent, in fact, did that might constitute misconduct and a disciplinary violation.'" Resp. Br. on Certain Legal Issues at 7 (quoting *Bielec*, 755 A.2d at 1025).[41]

Notwithstanding its reciprocal posture, a fuller picture of *Bielec* is helpful. *Bielec* stemmed from a U.S. trustee's complaint in a bankruptcy matter against the respondent and another attorney. As to the respondent, the complaint averred that he had signed a fee disclosure as local counsel for the debtor's attorneys, and that he

[41] In addition to *Bielec*, Respondent cites two cases that do not support her position, and indeed support a contrary view. In *United States v. Mermelstein*, 487 F.Supp.2d 242 (E.D.N.Y. 2007), the court held that an indictment for health care fraud adequately informed the defendant of the nature and cause of the accusation, particularly when viewed alongside the bills of particulars that the prosecutor provided. In *Connolly v. Rewerts*, No. 1:19-CV-701, 2019 WL 4667700 (W.D. Mich. 2019), the court held that a state court defendant had adequate notice of the charges even though the initial charging papers may have been vague because later prosecution filings and evidence presented at trial satisfied the requirement that "sufficient notice of the charges is given in some manner." (internal quotations omitted). These practical approaches to the notice requirement seem apt in the present case. *See also Barber*, 128 A.3d at 641-42 (finding no due process violation where the opposition to the respondent's motion to dismiss "identified the factual allegations in the Specification that supported the particular rule violations of which [the respondent] claimed to be uncertain," and where then-Bar Counsel briefly went through the charges and relevant facts at the outset of the hearing); *Austin*, 858 A.2d at 976 (looking to then-Bar Counsel's post-hearing brief in finding no due process violation).

had never met the bankruptcy petitioner. *Bielec*, 755 A.2d at 1020, 1025. Though he neither admitted nor denied the allegations, the respondent consented to the court enjoining him and striking his name from the role of attorneys admitted to practice before the court. *Id.* at 1020. When then-Bar Counsel requested reciprocal disbarment, the Court disagreed on due process grounds. *Id.* But unlike here, there was no evidence in *Bielec* describing the specific charges. And unlike here, there was no evidence outlining the ethical violations that formed the basis for the respondent's suspension. *Id.* at 1024. Indeed, the Court reinforced this immediately following the "vague and ambiguous language" warning quoted by Respondent. The complaint "never mention[ed] any disciplinary code violation," nor did it "detail any action on the respondent's part that indicates that he engaged in misconduct." *Id.*

By contrast, our case involves ample testimony, exhibits, and briefing, all centered on the specific instances of alleged misconduct nested under specific Rules in the December 2 Notice. And Respondent's assertions about travel time, block-billing, locating the Suggestion of Death, her billing program defaulting to whole numbers, and her experiences with "Judge in Chambers," among other subjects, confirm her understanding of what she needed to defend against.[42] The Notice did at least specify each instance of alleged misconduct by date and alleged event.

[42] The Court of Appeals distinguished *Bielec* in *In re Edelstein*, 892 A.2d 1153 (D.C. 2006) (imposing reciprocal discipline based on New York disbarment). In *Edelstein*, the Court looked to the record as a whole, including the various proceedings that led to the District of Columbia disciplinary proceedings and a supplemental affidavit from a prosecuting attorney in an earlier related proceeding, and a letter from an Assistant United States Attorney who had been involved in the case from which the disbarment proceeding arose. 892 A.2d at 1157-58. *Edelstein* is persuasive because, as here, fair notice was provided amply and in several forms.

Respondent has not, the Hearing Committee finds, had any difficulty in understanding the charges against her, nor in defending against them, notwithstanding the burden placed upon Respondent and the Hearing Committee by Disciplinary Counsel's seemingly careless approach to its notice responsibilities.

Accordingly, notwithstanding the burdens that Disciplinary Counsel's slip-shod charges placed upon Respondent and on the Hearing Committee – irresponsibly in our view – we think that Respondent gleaned a sufficient understanding over the tortured course of this proceeding of the charges against her and had a "meaningful opportunity to be heard" on them. *Fay*, 111 A.3d at 1031; *see Barber*, 128 A.3d at 641. Thus, we recommend that the Board conclude that Respondent eventually had adequate notice of the charges against her and thus deny her motion to dismiss for lack of adequate notice.

2. Res Judicata/Collateral Estoppel

Prior to the hearing, Respondent filed a Pretrial Motion to Dismiss all the charges on the basis of *res judicata*, collateral estoppel, and issue preclusion. Respondent argued that the allegations in the Specification of Charges "were expressly, correctly, and soundly rejected" in an unpublished Memorandum Opinion and Judgment by the Court of Appeals, *In re Williams*, No. 15-PR-1145, Mem. Op. & J (D.C. July 7, 2017). Resp. Pretrial Motion at 7 (Apr. 1, 2020). Respondent asserted that the Office of Disciplinary Counsel is in privity with the District of Columbia and that Disciplinary Counsel's interests were "adequately represented" in the prior action, Respondent's appeal of a fee petition reduction. *Id.* at 15-18. The

Hearing Committee denied Respondent's Motion in an Order issued on September 8, 2020.

Respondent raises the same argument in her post-hearing Brief on Certain Legal Issues. Specifically, Respondent argues that Disciplinary Counsel's allegations of dishonesty in the *Williams* matter are subject to ***res judicata***, collateral estoppel, or issue preclusion:

> [T]he December 2 Notice purports to identify four allegations of dishonesty in Section B, but tellingly declines to expressly assert dishonesty with respect to dozens of events identified in Section A. Coupled with ODC's concession on November 20, 2020 that ODC was and is unable to allege what Respondent actually did or didn't do with respect to those entries, the inability to distinguish those events from the consideration of those events in *In Re Williams*, and the rejection of any claim of lack of candor, mandates their rejection as evidence of dishonesty as a matter of preclusion.

Respondent's Brief on Certain Legal Issues, at 8-9. As to Respondent's alleged lack of candor, the Court of Appeals found that it was not appropriate to apply the percentage fee reduction on that basis:

> [T]o the extent the judge relied on appellant's reported lack of candor and history of untimely fee petitions in previous, separate cases to justify the final eighty-five-percent cut, the judge cited no authority justifying the imposition of such a penalty in this case and we are not persuaded it was justified or appropriate.

Williams, No. 15-PR-1145, at 7. The Court of Appeals, however, found no abuse of discretion in Judge Christian's disallowance of fees related to vague time entries and entries that were for "noncompensable work" under the Guardianship Act. *Id.* at 5.

Respondent's preclusion argument fails for two reasons. First, Disciplinary

Counsel is not bound by the prior judgment as it was neither a party nor in privity with a party. In the *Williams* case, the D.C. Attorney General appeared and argued in support of Judge Christian's order. Respondent contends that the Office of Disciplinary Counsel is in privity with the D.C. Attorney General. In support of this position, Respondent cites *Sczygelski v. U.S. Office of Special Counsel*, 926 F. Supp. 2d 238, 244-45 (D.D.C. 2013). Resp. Br. on Certain Legal Issues at 12-14. In that case, plaintiff sued the Office of Special Counsel in connection with the termination of his employment. The decision noted that the plaintiff had litigated and lost the same claims in a prior litigation arising out of his termination by the Customs and Border Protection Agency, and that these two entities were part of the same branch of the federal government and therefore were in privity with one another. *Id.* at 12-13 (quoting *Sczygelski*, 926 F.Supp.2d at 244-45).

Privies or parties in privity are those whose interests are sufficiently connected that they are akin to successors in interest. To be parties in privity in the *Williams'* appeal, the record would have had to establish that Disciplinary Counsel controlled or coordinated the Office of the Attorney General's litigation of Respondent's fee appeal. *See In re Robbins*, 192 A.3d 558, 565-66 (D.C. 2018) (per curiam). No such evidence exists in the record. Moreover, unlike the entities in *Sczygelski,* the two offices are distinct and not from the same branch of government. "The Office of Disciplinary Counsel (ODC) was created by the District of Columbia Court of Appeals to investigate and prosecute complaints of ethical misconduct against lawyers licensed to practice law in the District of Columbia who violate the D.C.

Rules of Professional Conduct." *Frequently Asked Questions for the Public: What is the Office of Disciplinary Counsel?* https://www.dcbar.org/attorney-discipline. In contrast, the D.C. Attorney General's Office is part of the Executive Branch of the D.C. government.

Second, claim preclusion arises when an issue has been actually litigated and determined, and was essential to the judgment, in a prior action between the same parties or those in privity with them. Res judicata and the collateral estoppel doctrine "render[] conclusive an issue of fact or law essential to a determination where there has been a final judgment on the merits that has been actually litigated by the same parties or their privies." *Robbins*, 192 A.3d at 565 (citing *In re Wilde*, 68 A.3d 749, 759 (D.C. 2013)).[43] Here, the relevant "issue" in the prior proceeding is arguably Judge Christian's generalized conclusion of "lack of candor." *See, e.g.*, DCX 75 at 703. The Court of Appeals decision, however, did not reverse that determination, nor address its constituent elements. Rather, as the quoted language above demonstrates, the Court simply held that Judge Christian's finding, even if valid, did not warrant an across-the-board percentage fee reduction. It is undisputed that Respondent's alleged violations of the D.C. Rules of Professional Conduct were not before the Court of Appeals in *Williams*; instead, the Court only considered whether Judge Christian had abused her discretion in disallowing most

[43] In *Robbins*, the Court found no preclusive effect, because, *inter alia*, D.C. Disciplinary Counsel was not in privity with Virginia Bar Counsel as there was "no evidence that [D.C.] Disciplinary Counsel participated in the [prior] Virginia proceedings or coordinated with Virginia's Bar Counsel to present consistent arguments." 192 A.3d at 566.

of Respondent's May 2013 to August 2014 Fee Petition. *Williams*, No. 15-PR-1145, at 1.

Accordingly, we recommend that the Board confirm that Disciplinary Counsel was not precluded by the Court of Appeals' decision in *In re Williams*, *supra*, from commencing and pursuing this disciplinary proceeding against Respondent.

3. Disciplinary Counsel's Conduct of this Proceeding

In the final section of her Brief on Certain Legal Issues, Respondent lists 15 instances in which she contends that Disciplinary Counsel acted improperly. *Id*. at 14-16. We share at least a couple of Respondent's concerns, especially with respect to Disciplinary Counsel's introduction of a Confessed Judgment filed in the Circuit Court of Montgomery County Maryland in a real estate dispute without also introducing the dismissal of the judgment. *See* FFs 156 & 157; *see also* DX 225 (confessed judgment introduced by Disciplinary Counsel); RX 102 (pleading to open and vacate confessed judgment); RX 103 at 1668 (January 29, 2013 Order vacating judgment). We had similar concerns regarding Disciplinary Counsel's attempt to examine Respondent on one part of a judicial decision without referring to another part of the same opinion that clarified the first part significantly. Tr. 1124-31. However, Respondent does not request any specific relief in this third section of her Brief on Certain Legal Issues and therefore there appears to be no need for any recommendation from the Hearing Committee to the Board.

B. PRIOR RULINGS IN THE *RTW* AND *WILLIAMS* GUARDIANSHIPS

As set forth in Section II, Procedural History, this disciplinary proceeding was initiated by a referral from the judge who had ruled upon Respondent's Fee Petition in *Williams*. DX 75. We have summarized – in what may be considered excessive detail – this July 28, 2015 Order of Judge Christian and Judge Long's June 11, 2012 Memorandum Order Granting in Part and Denying in Part Guardian's Petition for Compensation in *RTW*. FFs 94, 114. We have done so in order to assure that we have meticulously considered the rulings and other points made in those two Orders. The Orders are arguably relevant for providing the historical context of Respondent's Motion for Reconsideration and her appeal, and we have parsed them for any insights that they might provide into the Rule 3.3(a)(1) and Rule 8.4(c) false statement and dishonesty allegations and the Rule 1.5(a) unreasonable fee allegations that we must resolve.

Respondent has consistently complained about Disciplinary Counsel's reliance on the two Probate Division rulings. Immediately upon the resumption of this proceeding after the delay caused by the Covid-19 pandemic, Respondent brought her concerns and related contentions to the Hearing Committee's attention:

> Though the Specification is silent on it, both Judge Christian and Judge Long based their deeply-flawed analyses on an as yet unexplained misinterpretation of two hearings before Judge Campbell in the Toliver-Woody Proceeding. Apparently proceeding without the benefit of a written transcript of those two proceedings, Judge Long incorrectly concluded that Respondent had made a misrepresentation to Judge Campbell. Judge Christian adopted and relied on that groundless finding. Both Judges emphasized that the erroneous finding was a significant

> factor in their ultimate challenges to Respondent's fee petitions. *See, e.g.*, July 7, 2017 Order, at n. 19, and accompanying text.
>
> The transcripts themselves, however, exonerated Respondent entirely. The transcripts established without any ambiguity or contravention that Respondent was not merely candid and open with Judge Campbell, but on her own and without any prompting from the Court tendered the very documents in issue. Not surprisingly, Judge Campbell himself raised no concerns with Respondent about her entirely accurate statements. ODC, for its part – with the transcripts in hand – does not assert any misconduct with respect to the erroneous findings at the heart of the July Order.

Respondent's Memorandum of Points and Authorities in Response, Partial Opposition and Objections to the Pretrial Statement of the Office of Disciplinary Counsel (August 7, 2020) at 2-3 (footnotes omitted). In light of FFs 74-80, including especially Judge Campbell's statement that "I found the communication from Judge Burgess" (FF 78), we are convinced, as Respondent has insisted, that Judge Long was mistaken in her view (FF 94) that Respondent had made a false statement to Judge Campbell at the August 20, 2010 hearing.

In any event, we are unable to accord the two rulings any binding effect and also do not give them much evidentiary weight. The Board's observation in *In re Pye*, Board Docket No. 09-D-077 (BPR Jan. 26, 2012), provides us significant guidance. In *Pye*, the Probate Court found that Respondent, the Personal Representative of an estate,

> . . . rounded-up the requested fee and that he devoted more time to the matter than was warranted. . . . It also disallowed some expenses and further reduced Respondent's fee as a sanction for "gross overbilling and lack of documentation." . . . The Hearing Committee concluded, **based on the Probate Court decision**,

> that Respondent had charged an unreasonable fee and that he had violated Rule 1.5(a).

Id. at 19-20 (emphasis added). The Board disagreed with the hearing committee because it was

> . . . reluctant to follow that conclusion lest we establish a precedent that any time the Probate Court disallows a portion of a fee request as unreasonable, a rule violation follows automatically, particularly where an additional payment is provided by the heirs or a third party. Among other things, **the factors bearing on whether a request for a fee is unreasonable in a Probate proceeding may not be the same as those applicable in a disciplinary proceeding.**

Id. (emphasis added).

The Board's decision and cautionary observation in *Pye* are especially pertinent in this proceeding. First, the Probate Division judge in the *Williams* ruling posited that the "'fee applicant' . . . 'bears the burden of documenting . . . the appropriate hours expended and hourly rates.'" DX 75 at 703 (citation omitted); FF 114. In the present proceeding, however, Disciplinary Counsel, not Respondent, bears the burden of proof. Second, the Probate Division focused primarily on making a "reasonable determination" about Respondent's Fee Petition entries on the basis of its various compensation policies and views and not primarily, with the exception of one or two cursory observations, on falsity, dishonesty and excessiveness *vel non*. FF 114; *see* DX 75 at 706. Third, the Court of Appeals reviewed the Probate Division's fee deductions in *Williams* for an abuse of discretion; in contrast, of course, in this disciplinary proceeding, the standard of proof is clear and convincing evidence of a Rule violation, and the only issues before the Hearing Committee are

falsity, dishonesty and excessiveness *vel non* and not appropriateness, preferred record-keeping and billing practices in our view or the view of others or compliance with the policy views of one or more judges in the Probate Division. Fourth, the Probate Division did not take testimony from Respondent or others and did not therefore have the opportunity we have had to assess the credibility of Respondent's testimony regarding the charges that have evolved into this proceeding.

For all these reasons we conclude that we neither owe, nor are permitted any deference – let alone rigid adherence – to the Probate Division's June 11, 2012 ruling in *RTW* or its July 28, 2015 ruling in *Williams*. Nevertheless, we note in Section IV.E, *infra*, a few instances where the Probate Division's analysis may provide insight or caution with respect to particular entries or statements charged as offenses in the Notice of Violative Conduct.

C. EVIDENTIARY ISSUES ARISING DURING THE HEARING

1. On February 11, 2021, Disciplinary Counsel filed a Proffer, which included a request for the admission of two declarations subsequently marked as DX 222 and 230. Proffer at 6-9. Disciplinary Counsel presently seeks the inclusion in the record of only one of those two exhibits, DX 222.[44] The Hearing Committee took the question of the admission of DX 222 under advisement. Tr. 4017. DX 222 is a sworn Affidavit dated September 27, 2019 by Assistant Disciplinary Counsel Caroll Donayre Somoza. In the affidavit, Ms. Somoza verifies that in the presence of

[44] Disciplinary Counsel appears to have withdrawn DX 230 (Declaration of Bernard Manahan), as it is not cited in its briefing and is marked as "Excluded" on its final Exhibit List Form. Disciplinary Counsel cites DX 222 in its Proposed Findings of Fact. PFF 144 in DC PFFs & PCLs at 50.

Respondent's counsel, on April 30, 2018, she asked Respondent for any "'financial records'" to support the time entries in invoices she submitted to the court which included "notes pertaining to visits or tasks performed, anything to substantiate entries on her invoices, etc." DX 222 at 2. On December 28, 2018, when proposed exhibits for a scheduled hearing date were exchanged, Disciplinary Counsel was served RX 43 which were documents that Ms. Somoza asserts should have been produced in response to her April 30, 2018 request. *Id*. at 3. We admit DX 222, but do not give much weight to the exhibit given the absence of clear and convincing evidence establishing a knowing, intentional delay in Respondent's production of RX 43. Respondent's counsel indicated to Ms. Somoza that they "would look and, if she had them, they would produce the notes." DX 222 at 2. The declaration does not suggest that a time-deadline for production of the notes was agreed upon at the April meeting, and we decline to read a lack of cooperation into a production that occurred approximately eight months later, especially when, as stated by Ms. Somoza, Respondent had explained that "she did not know if she still had [the notes]" and her counsel responded that they would look for them. *Id*.

2. Disciplinary Counsel's February 11, 2021 Proffer also included written responses by witness Nicole Stevens, the Register of Wills and Director of the Probate Division for the D.C. Superior Court, to four questions which Disciplinary Counsel had sought to ask Ms. Stevens when it called her in its rebuttal case. Proffer at 1-6. Prior to that, when Respondent was notified of Disciplinary Counsel's proposed witnesses in its rebuttal case pursuant to an oral order of the Hearing

Committee, Respondent had filed on February 8, 2021 a Motion to Preclude the Office of Disciplinary Counsel[’s] Rebuttal Case. Before Ms. Stevens’ testimony on February 9, 2021, the Hearing Committee ruled that her testimony regarding practices and policies in the Probate Division was not proper rebuttal because it should have been adduced in Disciplinary Counsel’s case in chief, which included much other testimony on that topic. Tr. 3771; *see also* FFs 19-44 (based largely on the voluminous testimony on such issues in Disciplinary Counsel’s case-in-chief). The Hearing Committee further ruled that examination of Ms. Stevens regarding the impact of delinquent filings on the Probate Division would be allowed because, even though it “preferably would have been covered” in Disciplinary Counsel’s case-in-chief, it was “a point of emphasis or the lack of said same . . . in the Respondent’s case . . . .” Tr. 3771-72. We have carefully reviewed the transcript testimony of Ms. Stevens and observe that Ms. Stevens was given much leeway in her testimony during Disciplinary Counsel’s direct and re-direct examination, with the Chair overruling several of Respondent’s objections. *See* Tr. 3795, 3798, 3799-3800, 3805, 3811, 3813-14, 3819, 3822, 3830-31, 3838, 3848-49, 3913. Ms. Stevens’ written responses also do not warrant inclusion in the record because they lack relevance, *see* Question 1 (Proffer at 3), are already addressed in Ms. Stevens’ transcribed testimony, *see, e.g.*, Tr. 3800-09, and therefore are cumulative, *see* Question 2 (Proffer at 4), or are addressed in statutes and exhibits already in the record, *see* Questions 3 and 4 (Proffer at 5-6 (citing D.C. Code § 21-2048, DX 202 at 1629, D.C. Code § 21-407, DX 202 at 1626-1628, D.C. Code § 20-701, Probate Rule 308, DX

86 at 1143, Probate Rule 225, and DX 86 at 1129)).

3. After Disciplinary Counsel completed its rebuttal evidence regarding the charges against Respondent, and again after the completion of evidence regarding sanction and mitigation issues, the parties and the Hearing Committee addressed a number of exhibits whose admissibility had not been resolved. Tr. 4094-4114 (Feb 10, 2021), 5459-67 (April 28, 2021). The Hearing Committee also ordered the parties to each file a final, complete set of exhibits and to identify any remaining disagreements or uncertainties about the exhibits. Tr. 5468-5470. In its Order dated May 3, 2021, which established the post-hearing briefing schedule, the Hearing Committee formally set May 7, 2021 as the deadline for the filing of the final exhibit lists, final set of exhibits and any related statements or submissions. On May 7, 2021, Disciplinary Counsel filed a Notice Regarding Unresolved Exhibit List Issues and on May 10, 2021, Respondent filed a Status Report on Exhibit and Exhibit Lists.

On May 14, 2021, the Committee issued an Order admitting RX 97A (Respondent's handwritten note, *see* Tr. 3514-3517); RX 103 (Redacted Case Information, *Old Line Bank v. Rolinski & Suarez LLC*, Case No. 366755V (Confessed Judgment, Circuit Court for Montgomery County)); RX 105 (additional character witnesses' declarations), and RX 106 (additional character witness declaration). The Order resolved the exhibit issues mentioned in Respondent's Status Report and admitted several exhibits in ODC's Notice Regarding Unresolved Exhibit List Issues.

The following, remaining exhibits identified in ODC's Notice Regarding

Unresolved Exhibit List Issues were also admitted by the Committee, as reflected in the Respondent's signed Exhibit List Forms (filed on May 26, 2021): RX 99B (Respondent's chart regarding Respondent's calendar was admitted, except for cover page, over objection on February 10, 2021, Tr. 4101); RX 102 (Defendants' motion to open and vacate confessed judgment was admitted over objection on February 4, 2021, Tr. 3724); RX 208 (Dr. Patricia Gomez document production was moved into evidence by Disciplinary Counsel and admitted over Respondent's objection on April 5, 2021, Tr. 4927); RX 210 (Dr. Harry Quigley document production was admitted on April 2, 2021, Tr. 4857), and RX 211 (Dr. Newell Hargett document production was moved into evidence by Disciplinary Counsel and admitted over Respondent's objection on April 5, 2021, Tr. 4927[45]).

D. LEGAL AND EVIDENTIARY CONSIDERATIONS GENERALLY APPLICABLE TO THE HEARING COMMITTEE'S ANALYSIS OF THE CHARGES IN THIS PROCEEDING

The fundamental principle of disciplinary proceedings is familiar but nevertheless worth repeating: "Disciplinary Counsel shall have the burden of proving violations of disciplinary rules by clear and convincing evidence." Board Rule 11.6. The Court of Appeals has also emphasized the corollary to this basic principle – that the burden of proof cannot be shifted to the respondent in a disciplinary proceeding at any point in the proceeding or for any reason. In *In re Thorup*, 432 A.2d 1221 (D.C. 1981), "the Hearing Committee accepted a copy of

[45] The transcript does not reflect an objection at the time of admission, but Disciplinary Counsel noted Respondent's objection in its subsequent pleading. Disciplinary Counsel's Notice Regarding Unresolved Exhibit List Issues at 3.

the docket from [the client's] criminal case into evidence and ruled that the docket established that a prima facie case against respondent. . . . The Committee then switched the burden to respondent to explain his actions. . . ." *Id.* at 1225. The Court of Appeals rejected and condemned this approach:

> We cannot accept [the] argument that [Disciplinary] Counsel's burden was met by the mere introduction of the docket sheet. To adopt this position we would be required to engage in . . . second-guessing and Monday morning quarterbacking . . . . The Hearing Committee was not correct in accepting the docket entries as establishing the charge and then shifting the burden to respondent to explain his actions.

Id. at 1226.

In addition to the similarity between this proceeding and the one addressed in the portion of *Thorup* summarized above, this proceeding also involves circumstances similar in many important respects to the circumstances in two recent decisions by the Board – *In re Padharia*, Board Docket No. 12-BD-080 (BPR Apr. 7, 2017) and *In re Reid*, No. 17-BD-072 (BPR Dec. 8, 2020).[46]

In *In re Padharia*, the number of continuance requests and nearly identical, boilerplate statements of reasons fostered skepticism about the truthfulness of those statements. *Padharia*, Board Docket No. 12-BD-080, at 10-12. The Board approved the hearing committee's approach:

> We may be skeptical that a boilerplate, template motion used in

[46] Disciplinary Counsel did not file exceptions in the Court of Appeals to either of these rulings. The Court of Appeals adopted the Board's sanction recommendation in *In re Padharia*, 235 A.3d 747 (D.C. 2020) (per curiam).

> every instance an extension was requested fully and accurately set forth the reason the extension was needed, but **skepticism is insufficient to prove, and does not excuse Disciplinary Counsel from presenting, the clear and convincing evidence necessary to establish an ethical violation**.

Id. at 13 (emphasis added) (quoting HC Rpt. at 95). The Board thereupon "adopt[ed] the Hearing Committee's determination that there was not sufficient evidence that Respondent violated Rules 3.3(a) or 8.4(c) with respect to these fourteen cases." *Id*.[47] In the present matter, the Hearing Committee members, like Judge Long and Judge Christian, are suspicious and skeptical of a number of entries with the same amount of time for meetings and other tasks, but we remain mindful of the approach and conclusions of the hearing committee in *Padharia* and the approach and rulings of the Board in *Padharia*, the latter of which we consider binding on us as a Hearing Committee.

A second aspect of *Padharia* is also highly pertinent here. With respect to the Rule 4.4(a) charges against Padharia involving the same fourteen continuance motions, the Board reported that

> **Disciplinary Counsel concedes that "it is impossible to identify which of Respondent's overdue submissions were filed solely for the purpose of delaying proceedings," but nevertheless argues that based on circumstantial evidence and Respondent's testimony, "at least some of them were."**

Id. at 15-16 (emphasis added). The Board found that none of the fourteen charges

[47] The Board also observed in *Padharia*, "Prosecuting in bulk is not the typical approach, and it presents unique challenges for the disciplinary system." *Id*. at 1. The size of the record in this matter, the length of the post-hearing papers, the length of this Report, and the time spent by the parties and by the volunteer Hearing Committee members all appear to far exceed the corresponding circumstances in *Padharia* that troubled the Board.

was proven. *Id*. In the present proceeding, Disciplinary Counsel has also acknowledged that **"we cannot say with specificity what she did and didn't do."** Tr. 1075 (emphasis added). We recognize that this concession by Disciplinary Counsel quite arguably requires under *Padharia* a conclusion of law that Disciplinary Counsel has not proven any of the 62 groups of charges against Respondent. Nevertheless, as will be seen hereinafter, we address the charges against Respondent one-by-one in order to determine with particularity whether Disciplinary Counsel has proven by clear and convincing evidence that a specific entry or statement violates a specific Rule.

In re Reid involved a more complicated situation than *Padharia*. Reid, an attorney employed by an e-discovery firm, was the project manager for a document review and related tasks at a large firm involved in a complex and time-sensitive litigation. Reid was charged with submitting false time sheets which contained, the hearing committee noted, "'very high hours'" of about 75 hours per week. *Reid*, Board Docket No. 17-BD-072, at 2, 4-6, 18. Disciplinary Counsel relied, *inter alia*, on the relative infrequency of Reid's use of his Kastle building entry card on days when he charged for work in the law firm's offices on the project. *Id*. at 16-17. Disciplinary Counsel also argued for inferences that the Board found to "invite speculation rather than establish proof," such as an inference that "the reason [Reid's] 51 absences were not noticed was because [Reid] must have left the document review door unlocked at night." *Id.* at 21-22. The Hearing Committee in *Reid* pointed out that

> Disciplinary Counsel did not call any witnesses with personal knowledge of [Reid's] work on the Project who testified [Reid] was not present at work on any day on which he billed time. Nor did Disciplinary Counsel call any witness with personal knowledge of [Reid's] work on the Project who testified that [Reid] overbilled on any given day.

In re Reid, Board Docket No. 17-BD-072, at 36 (HC Rpt. Sept. 26, 2019).

The Board rejected Disciplinary Counsel's contentions regarding the Kastle key records, and we quote at length from the Board's ruling because of its particular pertinence to this proceeding:

> For multiple reasons, the Hearing Committee found that the absence of [Reid's] Kastle card use from the Building Log was not credible evidence that [Reid] did not work on a particular day. *See, e.g.*, FF 111-14. As a result, the Committee gave little weight to Disciplinary Counsel's chart which suggested that on days where the Building Log recorded [Reid's] Kastle card "taps," he averaged 7.57 taps. . . .
>
> . . . [T]he Hearing Committee noted it was undisputed that one could move around the Dickstein building without having used one's Kastle card. FF 112. Kastle card use was not needed on Mondays to Fridays between 7 a.m. and 6 p.m. to enter the Dickstein building, or at any time of day to exit the building. . . . [*Reid*, Board Docket No. 17-BD-072, at 16-17.]
>
> * * * * *
>
> Disciplinary Counsel must establish a violation of the Rules of Professional Conduct by clear and convincing evidence. . . . Clear and convincing evidence requires a degree of persuasion higher than a mere preponderance of the evidence; it is "evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." . . . [*Id*. at 19 (citations omitted).]
>
> * * * * *

. . . **[M]any of Disciplinary Counsel's positions invite speculation rather than establish proof.** *See, e.g.*, ODC Br. at 16 (a "more likely explanation"), 24 ("the most logical inference"). [*Id*. at 21 (emphasis added).]

* * * * *

. . . **[S]uch an inference is not logically drawn from the facts, but calls for pure speculation. . . . Disciplinary Counsel's assertion that the Board should infer the [Reid] *must* have left the document review office unlocked is not supported by any evidence in the record and is entirely speculative.** *See, e.g.*, *In re Luxenberg*, Board Docket No. 14-BD-083, at 21 (BPR July 6, 2017) (dismissing charges) ("particularly inappropriate" where Hearing Committee "arrived at its conclusion by speculation, without regard to the full facts.") [*Id*. at 22-23, (footnote omitted) (emphasis in original and added).]

* * * * *

We believe the Hearing Committee properly concluded that even *if* the Summary Log were reliable, "a discrepancy between the hours reflected on the summary report and the hours billed by [Reid] on any given day is not clear and convincing evidence of fraudulent overbilling" because the Summary Log does not account for time spent working outside of Relativity and there was *no* evidence it was improper to bill for time spent in the office but not logged onto Relativity. HC Rpt. at 54. While the hours billed were significant, that alone, given the context of a significant number of documents that remained to be reviewed by only a few attorneys, does not constitute clear and convincing evidence of misconduct. In sum, we reach the same conclusions from the subsidiary facts as did the Committee:

Disciplinary Counsel's case is based on documents that, upon close inspection and a review of the full record, are not clear and convincing evidence of alleged fraud. . . . No witness who worked with [Reid] on the Project and had personal knowledge of [Reid's] work on the Project testified that [Reid] fraudulently overbilled. **On this record, it would be speculation to conclude**

> **that [Reid] fraudulently overbilled on any given day. Evidence that [Reid] billed very high hours on the Project is not sufficient to establish, even under a preponderance standard, a scheme or course of conduct to defraud. . . .**" [*Id.* at 24-25 (emphasis in original and added).]
>
> * * * * *
>
> . . . Disciplinary Counsel points to the large number of hours included in [Reid's] time sheets, but **Disciplinary Counsel failed to establish that the hours submitted were, <u>in fact</u>, false**. [*Id*. at 25 (emphasis added).][48]

As will be seen in our ensuing analysis, we bear in mind the Board's admonition about observing the line between reasonable inferences and speculation.

Correlatively, in the present proceeding Disciplinary Counsel relies heavily on the alleged absence of records in CBL's visitor logbooks of nearly all of the ward visits claimed by Respondent and/or in Respondent's calendars. However, Disciplinary Counsel did not introduce the logbooks into evidence and did not call any security or other employees who regularly staffed CBL's visitor admissions desk during the time period relevant to the *RTW*-related charges against Respondent. Nor did it call any other CBL nursing, social work, or administrative personnel who were regularly present at CBL and could reasonably have been expected to have seen

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[48] Harking back to *Padharia*, the Board added:

> Although the Hearing Committee in *Padharia* was skeptical that "a boilerplate, template motion used in every instance an extension was requested fully and accurately set forth the reason the extension was needed," **skepticism is not clear and convincing evidence of an ethics violation and Disciplinary Counsel may not rely on skepticism to meet its burden of proof.**

Id. at 25-26 (citing and quoting *Padharia*, Board Docket No. 12-BD-080, HC Rpt. at 95).

Respondent if she had been at CBL on weekdays during the time period relevant to the *RTW*-related charges against Respondent. Instead, it relies upon the transcript of the unreliable, unconvincing and mostly hearsay testimony of the CBL employee Ruth Mukami at the August 20, 2010 hearing before Judge Campbell that she had seen Respondent at CBL once, on July 12, 2010, that she had reviewed the log books without finding Respondent's signatures, and that nurses at CBL had told her that they had not seen Respondent at CBL. *See* FFs 75-76; Tr. 453, 3065; DX 33 at 243. Indeed, Disciplinary Counsel did not even call Ms. Mukami as a witness in this proceeding. At the October 22, 2010 hearing Ms. Brown, the Attorney Visitor reported that CBL staff members said that they "rarely saw" Respondent and acknowledged that "I don't know what went on on the weekend, so I can't report about the weekends." FFs 77-78. The Hearing Committee finds this hearsay evidence from Ms. Brown, the secondhand hearsay testimony from Ms. Mukami in the August 20, 2010 hearing and the associated evidentiary lacunae unreliable and unconvincing, especially in light of the information provided by expert witness Wallersedt about the unreliability of nursing home visitor logbooks and other aspects of nursing home visitor access and control. FFs 145-148. In contrast, as set forth in FF 143, the firsthand testimony from the nurse manager at Brinton Woods was found by the Hearing Committee to be both reliable and helpful, as pointed out in connection with our recommended resolution of several groups of charges arising out of the *Williams* guardianship, *infra*. Finally, as in *Reid* and as Respondent has pointed out, in this proceeding, Disciplinary Counsel did not "present a single

witness with firsthand knowledge of the claims related to visits or telephone calls." Resp. PCLs at 2.

In essence, Disciplinary Counsel is relying pervasively on what is sometimes called "negative evidence" – *i.e.*, if a given event occurred a percipient witness would have seen or heard it. "The only requirement is that the witness should have been so situated that in the ordinary course of events he would have heard or seen the fact had it occurred." 2 Wigmore, Evidence, § 664 (3d ed. 1940). In the present proceeding, however, Disciplinary Counsel failed to adduce evidence that the hearsay declarants who allegedly did not observe Respondent at CBL were so situated that they would necessarily have seen her if she had visited the facility. Nor did Disciplinary Counsel present the kind of record-keeping evidence that is a necessary predicate for reaching a reliable conclusion based on the absence of an entry in a business: For example, Rule 803(7) of the Federal Rules of Evidence provides:

> (7) *Absence of a Record of a Regularly Conducted Activity.* Evidence that a matter is not included in a record described in paragraph (6) if:
>
> (A) the evidence is admitted to prove that the matter did not occur or exist;
>
> (B) a record was regularly kept for a matter of that kind; and
>
> (C) the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness.

This test is clearly not met on the record in this proceeding, where Disciplinary

Counsel, who did not introduce the logs that Ms. Mukami testified about, also did not introduce evidence that the logs were regularly kept or any evidence indicating the reliability of the logs. *See Chesapeake & Delaware Canal Co. v. U.S.*, 250 U.S. 123 (1919), for a classic example of a record that was admissible on the issue of the occurrence or non-occurrence of an event.

Finally, we return to issues raised by Respondent's testimony about the meaning or scope of "meeting" and "visit" and "hearing." There is no Superior Court or other rule requiring that travel time be stated separately, or that it cannot be the basis for claiming compensation. FFs 40-44. And, as discussed in the introductory portion of our assessments in FF 158 of Respondent's credibility, a discussion which we incorporate here by reference, those terms do frequently and can reasonably include associated activities. Nevertheless, we are fully aware of Disciplinary Counsel's theory that Respondent's use of the three terms to encompass more than actually meeting with the ward or participating in a court hearing constituted a calculated strategy of misleading any judges who did not allow claims for some or all travel time to meetings and to court, or waiting time in court, or who were unsympathetic to compensation claims for conferring with CBL or STM personnel or with professional colleagues, and we address Disciplinary Counsel's theory at the end of Subsection E, to which we now turn.

E. THE CHARGES THAT CERTAIN STATEMENTS OR FEE PETITION ENTRIES BY RESPONDENT VIOLATE RULES 3.3(a)(1), 8.4(c) AND/OR 1.5(a)

The first 49 Guardian Report statements or Fee Petition entries listed in Disciplinary Counsel's December 2, 2020 Notice of Violative Conduct arise out of

Respondent's assertions in her Guardian Reports or Fee Petitions that she provided a certain service to her ward, and her claims in her Fee Petitions that she provided certain services and that those services involved a certain amount of time. In addition to alleging that each of the 49 statements or entries is untrue in one way or another (and thereby violative of Rules 3.3(a)(1) and 8.4(c)), Disciplinary Counsel also charges that each such false entry in a Fee Petition constitutes an unreasonable fee in violation of Rule 1.5(a) because the service did not occur at all or because it did not take as long as Respondent claimed.

Rule 3.3(a)(1) prohibits a lawyer from knowingly "mak[ing] a false statement of fact . . . to a tribunal or fail[ing] to correct a false statement of material fact[.]"[49] Rule 1.0(f) provides, "'Knowingly,' 'known,' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."

Rule 8.4(c) prohibits a lawyer from "engag[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation." Dishonesty encompasses conduct that evinces "a lack of honesty, probity, . . . integrity . . . and straightforwardness." *In re Shorter*, 570 A.2d 760, 767-68 (D.C. 1990) (internal citation omitted). Reckless dishonesty can violate the Rule. "An attorney who recklessly maintains inadequate

[49] Disciplinary Counsel notes that

> [u]ntil 2007, Rule 3.3(a)(1) provided that a lawyer shall not knowingly "make a false statement of *material* fact or law [.]" (emphasis added). To the extent that some instances of Respondent's misconduct occurred during the time-period when the Rule applied to only "material" false statements is of no moment here. All of the statements at issue were material, *i.e.*, reporting on visits to the ward orally or in writing or submitting claims for payment.

DC PFFs & PCLs at 64, n.16. We agree.

time records, and consciously disregards the risk that she may overcharge a client [or the taxpayer] also engages in dishonesty within the meaning of Rule 8.4(c)." *In re Cleaver-Bascombe*, 892 A.2d 396, 404 (D.C. 2006) ("*Cleaver-Bascombe I*"). The Court of Appeals explained these principles further in *In re Ukwu*, 926 A.2d 1106 (D.C. 2007):

> Rule 8.4(c) is not to be accorded a hyper-technical or unduly restrictive construction. In *In re Hager*, 812 A.2d 904 (D.C.2002), we stated:
>
> We have given a broad interpretation to Rule 8.4(c), as recapitulated recently in *In re Arneja*, 790 A.2d 552, 557 (D.C. 2002). "[Dishonesty] encompasses 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) (citation omitted); *accord*, *Slattery*, *supra*, 767 A.2d at 213. *See In re Carlson*, 745 A.2d 257, 258 (D.C.2000) (per curiam) (dishonesty may consist of failure to provide information where there is duty to do so); . . . . "Dishonesty" is also the most general term in Rule 8.4(c), "encompassing fraudulent, deceitful, or misrepresentative behavior," *In re Wilkins*, 649 A.2d 557, 561 (D.C.1994) (per curiam), but also applying to conduct not covered by the latter three terms, which describe "degrees or kinds of active deception or positive falsehood." *Shorter*, *supra*, 570 A.2d at 768. Indeed, it has been suggested that sufficiently reckless conduct is enough to sustain a violation of the rule. *Jones-Terrell*, *supra*, 712 A.2d at 499.
>
> *Id*. at 916; *see also In re Cleaver-Bascombe*, 892 A.2d 396, 404 (D.C.2006) ("an attorney who recklessly maintains inadequate time records, and consciously disregards the risk that she may overcharge a client (or here, the CJA fund), also engages in dishonesty within the meaning of Rule 8.4(c).") . . . .

Ukwu, 926 A.2d at 1113.

We apply these principles of knowing and reckless dishonesty in the ensuing analysis of the Rule 3.3(a)(1) and 8.4(c) charges against Respondent listed in Disciplinary Counsel's December 2, 2020 Notice of Violative Conduct. At the conclusion of that analysis, we apply additional perspectives delineated by the Court of Appeals in *Ukwu* and other cases.

Rule 1.5(a) provides, "A lawyer's fees shall be reasonable." The Rule then lists 8 "factors to be considered" in analyzing whether a fee is reasonable. We have taken all of these factors into consideration as we have analyzed the Rule 1.5(a) aspect of the Fee Petition entries discussed in this subsection of this Report, but we have focused on factors 1, 4, 5 and 6.[50]

In order to avoid repeating throughout this subsection an additional, important consideration pertaining to the Rule 1.5(a) charges, we provide the following information at this point and incorporate it into each of our Rule 1.5(a) analyses hereinafter. Disciplinary Counsel adduced no evidence – either from experts on attorney billing in general or on Probate Division billing specifically or from experienced probate, guardianship or other practitioners about the amount of time commonly needed for particular tasks – that might support its 52 Rule 1.5(a) charges;

[50] Factor 1 consists of "the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly." Factor 4 involves "the amount involved and the result obtained." We think that "the result obtained," in the particular guardianship context, is particularly important in resolving certain other charges addressed in this Section. Factor 5 involves "the limitations imposed by the client or by the circumstances" and Factor 6 turns on "the nature and length of the professional relationship with the client." As discussed hereinafter with respect to certain charges, the "circumstances" and the "nature of the relationship" are, in our view, crucial factors. The other factors carry little weight in a situation such as this, where the hourly rate of the fee is set by statute and the client/ward did not have the final say in the selection of the guardian.

Respondent, on the other hand, did adduce some such evidence. Additionally, we have found that the Probate Division has failed over the decades to adopt any guidance, standards or requirements for billing by guardians. FF 40-44. Correlatively, there are significant, inconsistent, contradictory and on occasion self-contradictory variances in the views of the judges who were ruling on Probate Division fee petitions regarding what is compensable and what information should be provided in fee petitions and accompanying invoices, including but not limited to whether travel time should be broken out in an invoice entry and the amount of detail expected in invoice entries involving visits to clients in nursing or other health care facilities. FFs 40-44. In short, in the period at issue in this proceeding, there were no consistent or reliable understandings among judges, administrators, and practitioners in the Probate Division about specific requirements, general standards, or accepted or even acceptable practices – let alone formal, express, clear and unambiguous rules – regarding compensation of guardians. Thus there are no Probate Division or other standards in the record in this matter clearly delineating what is or is not a false billing entry.[51] We have also concluded, for the reasons discussed in Section IV.B (Prior Rulings in the *RTW* and *Williams* Guardianships), that the rulings by Judge Long and Judge Christian, FFs 94 & 114, not only have no binding effect on our analysis but also, unless otherwise pointed out, provide little or no assistance to our

[51] We agree of course with Disciplinary Counsel that "[i]t is unreasonable for a lawyer to charge for work that has not been performed. *Cleaver-Bascombe I*, 892 A.2d at 403." DC PFFs & PCLs at 80.

assessment of whether Disciplinary Counsel has proven by clear and convincing evidence any of its first 56 charges.[52]

We turn now to a charge-by-charge analysis of the first 49 Guardianship Report statements or Fee Petition entries in the Notice of Violative Behavior, albeit hampered by the impreciseness and ambiguity of these charges, as discussed in Section IV.A.1 (Notice/Due Process).[53] In each of the ensuing 49 analyses in this subsection E, as well as in our analyses of Charges No. 50-62 of the Notice of Violative Conduct, we incorporate by reference each of our credibility assessments in FFs 158-*1* through 158-*62* of Respondent's testimony about the particular charge and underlying entry or statement as well as the important legal and evidentiary principles gleaned from *In re Thorup*, *In re Padharia* and *In re Reid*, *supra*, as discussed in Section IV.D.

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[52] Judge Long and Judge Christian did not directly address whether Respondent's acts and omissions seriously interfered with the administration of justice, the gravamen of charges 57-62, but we have considered their observations with respect to any of the acts and omissions underlying those charges that they addressed.

[53] Indeed, underscoring the impreciseness and ambiguity of the Notice of Violative Conduct, Respondent appears to interpret the Notice as containing only three Rule 1.5(a) charges, nos. 54, 55 and 56, apparently overlooking that Section A of the Notice is titled, "Dishonesty and/or Knowing False Statement and/or Excessive Fee." *See* Resp. PCLs at 28; *cf*. DC PFFs & PCLs at 80-81 & DC Reply at 19 ("Respondent charged an unreasonable fee by charging for visits that did not occur and overbilling for multiple-hour visits and hearings that took less time than charged."). Our resolution of these charges, as discussed in the remainder of this Section IV.E, obviates the need, as a matter of fundamental fairness, to afford Respondent an opportunity to respond to Rule 1.5(a) charges 1-49.

As noted previously, for ease of reference, we have attached to this Report a copy of the Notice of Violative Conduct on which we have superimposed numbering in the left-hand column beside each of the 62 groups of charges in the Notice.

1. Disciplinary Counsel's charge that either the statement in Respondent's sixth Guardian Report dated February 12, 2008 (DX 16 at 163) that she contacted the ward one time by telephone in the preceding period or the entry in Respondent's June 25, 2009 Fee Petition in *RTW* of 4 hours for a visit to the client on 1/24/08 (DX 23 at 190) violates Rules 3.3(a)(1), 8.4(c) and 1.5(a) because the statement and the entry are inconsistent

We have credited Respondent's testimony regarding this entry for the reasons set forth in FF 158-*1*, *supra*, including her explanation of the intended meaning of the entry. Disciplinary Counsel conceded that "we don't know" whether a visit or a telephone call did or did not occur on January 24, 2008. Tr. 4165-66.

This form of allegation raises the issue whether Disciplinary Counsel can ever be excused from affirmatively proving that a given statement or claim is false by showing that it is necessarily inconsistent with another statement or claim. The principle of culpability based on necessarily inconsistent statements is codified in, *e.g.*, 18 U.S.C. § 1623, part of the Crime Control Act of 1970. *See generally Dunn v. United States*, 442 U.S. 100 (1999). That section permits prosecution for perjury if the accused made two statements under oath in an official proceeding and the statements are "inconsistent to the degree that one of them is necessarily false." 18 U.S.C. § 1623(c). In such a case, the indictment need not specify and the government need not prove which of the statements is false.

The § 1623 standard is rigorous: "Even though two declarations may differ from one another, the § 1623(c) standard is not met unless, taking them in context, they are so different that if one is true there is **no way** that the other can also be true." *United States v. Porter*, 994 F.2d 470, 473 (8th Cir. 1993) (internal quotation marks

omitted) (emphasis added). Of course, federal criminal statutes are not binding in this proceeding, but we think that § 1623 provides helpful guidance.

A Report of Guardian tells the reviewing Probate Division judge that the guardian has made a certain number of visits that indicate that an adequate amount of attention to the ward – in the particular judge's view or under Probate Division rules – has been provided by the guardian. FF 35. A Fee Petition, on the other hand, is based on a guardian's review of her records to determine how much compensation she should request. The Probate Division's review process, in that instance, focuses on factors like whether the claimed visit was helpful to the ward, whether the time spent on the matter was spent efficiently and whether certain tasks or expenses are not allowable *per se* in a particular judge's view. The assertion in a Report of Guardian of a certain number of visits to a ward during a certain period of time does not necessarily mean that *only* that number of visits occurred. Disciplinary Counsel has thus not established that the two statements at issue in this charge are necessarily inconsistent and can in no way both be true. Accordingly, we recommend a Conclusion of Law that, for all the reasons set out hereinabove and in FF 158-*1*, Disciplinary Counsel has not proved by clear and convincing evidence that one of these two statements necessarily violated Rules 3.3(a)(1), 8.4(c) or 1.5(a).

2. Disciplinary Counsel's charge that the entry in Respondent's June 25, 2009 Fee Petition of 4 hours for a visit to the ward on January 24, 2008 (DX 23 at 190) violates Rules 3.3(a)(1), 8.4(c) and 1.5(a)

We have credited Respondent's testimony regarding this entry, including specific information regarding the factors affecting the extent of any given visit to

the ward. *See* FF 158-*2*. Disciplinary Counsel has adduced no clear and convincing evidence that this visit did not occur or that the visit did not encompass 4 hours. And, as pointed out in the preceding discussion of Charge No. 1, Disciplinary Counsel conceded that "we don't know" whether a visit or a telephone call did or did not occur on January 24, 2008. Tr. 4165-66. Accordingly, we recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that this entry violated Rules 3.3(a)(1), 8.4(c) or 1.5(a).

3. Disciplinary Counsel's charge that Respondent's statement in her eighth Guardian Report in *RTW* dated January 7, 2009 (DX 21 at 174) that she visited the ward three times in the preceding six-month period violates Rules 3.3(a)(1), 8.4(c) and 1.5(a)

Disciplinary Counsel points out that Respondent's available calendars do not reflect these visits. DC PFFs & PCLs at 76. The presence or absence of a calendar entry is, of course, one relevant piece of evidence as to whether or not an event occurred, but it is not dispositive in and of itself and, instead, must be balanced against all other relevant evidence or lack thereof.

Disciplinary Counsel makes one sweeping assertion with respect to this charge and with respect to Charges 4-12 regarding visits allegedly occurring before July 10, 2010: "These visits did not occur, and Respondent knew they had not occurred when she requested payment for them. PFF 59." *Id.* at 75. Disciplinary Counsel bases this assertion primarily on its PFF 59, which presents Disciplinary Counsel's view of the October 22, 2010 hearing before Judge Campbell, at which the Attorney Visitor, Ms. Brown-Johnson, presented her report. *Id.* at 75. We have not adopted Disciplinary Counsel's PFF 59 and have not been persuaded by the

statements at the October 22, 2010 hearing relied upon by Disciplinary Counsel because (i) they were not made under oath, (ii) they were not subject to cross-examination, (iii) the information provided by Ms. Brown-Johnson consisted of generalized hearsay statements from purported but unidentified CBL staffers and therefore have no indicia of reliability, (iv) Disciplinary Counsel did not call any such staffers to testify before us and Respondent, (v) Ms. Brown-Johnson stated that she had no information pertinent to possible weekend visits, and (vi) Judge Campbell did not ultimately rule on the visitation question before him but took the matter under advisement. FFs 78 & 80.

We have also carefully considered Disciplinary Counsel's other contentions set forth at pages 75-78 of DC PFFs & PCLs. Most of those contentions consist of little more than conclusory assertions ("These visits did not occur"; "Respondent's requests for compensation for multiple-hour visits to see Ms. Toliver-Woody . . . constitute knowing false statements and dishonesty. . . .") or distort the record ("Respondent and her witnesses testified that she would visit Ms. Toliver-Woody on the weekends, but none of the visit dates set out in her petitions for compensation were on weekends" when actually Respondent testified only that she did not bill for the many weekend visits, *see* Tr. 190). (We address Disciplinary Counsel's argument at DC PFFs & PCLs at 77-78 in Section IV.F, *infra*.)

In light of the foregoing considerations and because we have credited Respondent's testimony regarding this entry, *see* FF 158-*3*, and because, as just pointed out, Disciplinary Counsel has adduced no clear and convincing evidence that

Ms. Espinet's visit did not encompass 3.2 hours or that the other two visits did not occur, we recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that this statement violated Rules 3.3(a)(1), 8.4(c) or 1.5(a).

4. Disciplinary Counsel's charge that Respondent's statement in her ninth Guardian Report in *RTW* dated July 10, 2009 (DX 25) that she visited the ward three times in the preceding six-month period violates Rules 3.3(a)(1),8.4(c), and 1.5(a) because they are not claimed in her April 19, 2010 Fee Petition

Disciplinary Counsel points out that Respondent's available calendars do not reflect these visits. DC PFFs & PCLs at 76. We have also taken into consideration and incorporate here Disciplinary Counsel's overall argument and our conclusion regarding it as set forth in the discussion of Charge No. 3, *supra*. We have credited Respondent's testimony regarding this entry. FF 158-*4*. Disciplinary Counsel has not established that these visits did not occur, and thus we recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that this statement violated Rules 3.3(a)(1), 8.4(c) or 1.5(a).

5. Disciplinary Counsel's charge that the entry in Respondent's April 19, 2010 Fee Petition in *RTW* of 4.5 hours for a visit to the client on 8/14/09 (DX 30 at 227) violates Rules 3.3(a)(1), 8.4(c) and 1.5(a)

Disciplinary Counsel points out that Respondent's available calendars do not reflect this visit. DC PFFs & PCLs at 76. We have also taken into consideration and incorporate here Disciplinary Counsel's overall argument and our conclusion regarding it as set forth in the discussion of Charge No. 3, *supra*. Because neither Respondent nor any other witness was examined with respect to the entry underlying

this charge and because Disciplinary Counsel has introduced no evidence other than the absence of the calendar entry that this visit did not occur or did not encompass 4.5 hours, we recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that this entry violated Rules 3.3(a)(1), 8.4(c) or 1.5(a). It is important to keep in mind, with respect to this charge and with respect to charges 7-12 (*i.e.*, the charges arising out of the April 19, 2009 Fee Petition), that the medical records from CBL show that the concerns about Ms. Toliver-Woody's vision arose in the summer of 2009 and that this circumstance and responses thereto continued through the end of 2009 and into 2010. DX 36 at 396-401; Tr. 2164-68 (Maestripieri); FF 68. We have also taken into consideration the ongoing concerns about and associated need to closely monitor conditions at CBL and take remedial measures, the nature of Respondent's relationship with Ms. Toliver-Woody and the associated need to confer about her medical and vision issues with CBL personnel. *See, e.g.*, FFs 47, 68, 71, 73, 129-130 & 138; *see also* FF 158-*10*. Accordingly, we recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that this entry violated Rules 3.3(a)(1), 8.4(c) or 1.5(a).

6. Disciplinary Counsel's charge that Respondent's statement in her tenth Guardian Report in *RTW* dated January 27, 2010 that she visited the ward three times in the preceding six-month period (DX 29 at 213) violates Rules 3.3(a)(1), 8.4(c) and 1.5(a)

Disciplinary Counsel points out that Respondent's available calendars do not reflect these visits. DC PFFs & PCLs at 76. We have also taken into consideration and incorporate here Disciplinary Counsel's overall argument and our conclusion

regarding it as set forth in the discussion of Charge No. 3, *supra*. Respondent was not examined with respect to the entry underlying this charge. *See* FF 158-*6*. As we have previously pointed out, there is also no necessary inconsistency here between three visits being reported in the tenth Guardian Report and seven visits being claimed in the subsequent Fee Petition. We have also taken into consideration the ongoing concerns about and associated need to closely monitor conditions at CBL and take remedial measures, the nature of Respondent's relationship with Ms. Toliver-Woody and the associated need to confer about her medical and vision issues with CBL personnel. *See, e.g.*, FFs 47, 68, 71, 73, 129-130 & 138; *see also* FF 158-*10*. Accordingly, we recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that this statement violated Rules 3.3(a)(1), 8.4(c) or 1.5(a).

7. Disciplinary Counsel's charge that the entry in Respondent's April 19, 2010 Fee Petition in *RTW* of 5 hours for a client meeting on 12/18/09 (DX 30 at 228) violates Rules 3.3(a)(1), 8.4(c) and 1.5(a)

We have taken into consideration and incorporate here Disciplinary Counsel's overall argument and our conclusion regarding it as set forth in the discussion of Charge No. 3, *supra*. Disciplinary Counsel also points out that Respondent's available calendars do not reflect this visit. DC PFFs & PCLs at 76. Disciplinary Counsel adduced no other evidence regarding this claimed visit other than that some of the seven entries at issue in the April 19, 2010 Fee Petition are out of order chronologically.

We have credited Respondent's careful and detailed testimony regarding this

post-surgery visit with Ms. Toliver-Woody. *See* FF 158-*7*. Respondent, an employee in her office, and the seller of the TimeSlips program convincingly explained the non-chronological entries. FF 122. We have also taken into consideration Respondent's ongoing concerns about and the associated need to closely monitor conditions at CBL and take remedial measures, the nature of Respondent's relationship with Ms. Toliver-Woody and the associated need to confer about her medical and vision issues with CBL personnel. *See, e.g.*, FFs 47, 68, 71, 73, 129-130 & 138; *see also* FF 158-*10*. And, as noted in FF 158-*7*, Respondent's time record noting the surgery, DX 30 at 227, and the November 10, 2009 Student Visitor Report regarding the upcoming eye surgery, DX 28 at 209, support at least the likelihood that this post-surgical visit occurred as claimed. For the foregoing reasons, we recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that this entry violated Rules 3.3(a)(1), 8.4(c) or 1.5(a). (We analyze the reoccurrence of claims of 5.0 hours for this charge and charges 8 and 9 in Section IV.G, *infra*.)

8. Disciplinary Counsel's charge that the entry in Respondent's April 19, 2010 Fee Petition in *RTW* of 5 hours for a client meeting on 11/6/09 (DX 30 at 228) violates Rule 3.3(a)(1), 8.4(c) and 1.5(a)

Disciplinary Counsel points out that Respondent's available calendars do not reflect this visit. DC PFFs & PCLs at 76. We have also taken into consideration and incorporate here Disciplinary Counsel's overall argument and our conclusion regarding it as set forth in the discussion of Charge No. 3, *supra*. Disciplinary Counsel did not substantively examine Respondent with respect to this charge and

did not adduce any other evidence regarding it. We have also taken into consideration the need during this period to confer about Ms. Toliver-Woody's medical and vision issues with CBL personnel. *See, e.g.*, FFs 47, 68, 71, 73, 129-130 & 138; *see also* FF 158-*10*. The November 10, 2009 Student Visitor Report regarding the upcoming eye surgery also supports at least the likelihood that this visit occurred as claimed. For the same reasons set forth with respect to Charges No. 5 and 7, we recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that this entry violated Rules 3.3(a)(1), 8.4(c) or 1.5(a).

9. Disciplinary Counsel's charge that the entry in Respondent's April 19, 2010 Fee Petition in *RTW* of 5 hours for a client meeting on 10/12/09 (DX 30 at 228) violates Rules 3.3 (a)(1), 8.4(c) and 1.5(a)

This is another charge arising from the April 19, 2010 Fee Petition and involving the circumstances during the pre-eye-surgery period. Disciplinary Counsel points out that Respondent's available calendars do not reflect this visit. DC PFFs & PCLs at 76. We have also taken into consideration and incorporate here Disciplinary Counsel's overall argument and our conclusion regarding it as set forth in the discussion of Charge No. 3, *supra*. Respondent was not examined specifically on this charge but convincingly explained, as did others, the idiosyncrasies of the TimeSlips billing software. *See* FF 158-*9*; Tr. 543-44, 3021-22. We have also taken into consideration the need during this period to confer about Ms. Toliver-Woody's medical and vision issues with CBL personnel. *See, e.g.*, FFs 47, 68, 71, 73, 129-130 & 138; *see also* FF 158-*10*. Disciplinary Counsel produced no meaningful

evidence on this charge specifically. For the foregoing reasons, we recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that this entry violated Rules 3.3(a)(1), 8.4(c) or 1.5(a).

10. Disciplinary Counsel's charge that the entry in Respondent's April 19, 2010 Fee Petition in *RTW* of 3 hours for a client meeting on 12/17/09 (DX 30 at 229) violates Rules 3.3(a)(1), 8.4(c) and 1.5(a)

Disciplinary Counsel points out that Respondent's available calendars do not reflect this visit. DC PFF & PCL at 76. We have also taken into consideration and incorporate here Disciplinary Counsel's overall argument and our conclusion regarding it as set forth in the discussion of Charge No. 3, *supra*. We have credited Respondent's testimony regarding this entry regarding a day-of-surgery visit. FF 158-*10*. We have also taken into consideration the nature of Respondent's relationship with Ms. Toliver-Woody. *See, e.g.*, FFs 138-139. Disciplinary Counsel produced no evidence specifically addressing this entry or contradicting the nature of Respondent's relationship with Ms. Toliver-Woody. We think that a claim of 3 hours for this day-of-surgery visit is consistent with a couple of hours of travel time along with briefly touching base with someone who has just come out of surgery. Accordingly, we recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that this entry violated Rules 3.3(a)(1), 8.4(c) or 1.5(a). (We discuss in Section IV.G, *infra*, the recurrence of claims of 3.0 hours for this charge and charges 11 and 12.)

11. Disciplinary Counsel's charge that the entry in Respondent's April 19, 2010 Fee Petition in *RTW* of 3 hours for a client meeting on 12/8/09 (DX 30 at 229) violates Rules 3.3(a)(1), 8.4(c) and 1.5(a)

Disciplinary Counsel points out that Respondent's available calendars do not reflect this visit. DC PFF & PCL at 76. We have also taken into consideration and incorporate here Disciplinary Counsel's overall argument and our conclusion regarding it as set forth in the discussion of Charge No. 3, *supra*. Disciplinary Counsel did not pursue any examination of Respondent beyond establishing that she had made this entry claiming a visit about a week before Ms. Toliver-Woody's second laser eye surgery (testimony that we credited, FF 158-*11*), and the record contains no other evidence with regard to this entry specifically. We have also taken into consideration the nature of Respondent's relationship with Ms. Toliver-Woody and the associated need to confer about her medical and vision issues with CBL personnel, all of which is consistent with a three-hour visit. FFs 47, 68, 71, 73, 129-130 & 138. Accordingly, we recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that this entry violated Rules 3.3(a)(1), 8.4(c) or 1.5(a).

12. Disciplinary Counsel's charge that the entry in Respondent's April 19, 2010 Fee Petition in *RTW* of 3 hours for a client meeting on 11/23/09 (DX 30 at 229) violates Rules 3.3(a)(1), 8.4(c) and 1.5(a)

Disciplinary Counsel points out that Respondent's available calendars do not reflect this visit. DC PFF & PCL at 76. We have also taken into consideration and incorporate here Disciplinary Counsel's overall argument and our conclusion regarding it as set forth in the discussion of Charge No. 3, *supra*. This is another

surgery-related visit entry with respect to which we have credited Respondent's testimony, a circumstance that Disciplinary Counsel did not address at the hearing or in its post-hearing papers. *See generally* FFs 158-*7* through 158-*12*. We have also taken into consideration the nature of Respondent's relationship with Ms. Toliver-Woody and the associated need to confer about her medical and vision issues with CBL personnel. FFs 47, 68, 71, 73, 129-130 & 138. Accordingly, we recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that this entry violated Rules 3.3(a)(1), 8.4(c) or 1.5(a).

13. Disciplinary Counsel's charge that the entry in Respondent's May 6, 2011 Fee Petition in *RTW* of 5 hours for a visit to the client on 7/12/10 (DX 41 at 446) violates Rules 3.3(a)(1), 8.4(c) and 1.5(a)

In light of the documentary evidence cited in FF 158-*13* in the course of our analysis of the credibility of Respondent's testimony about this entry, we believe that Disciplinary Counsel does not dispute that this visit occurred. As in preceding analyses of this series of charges, we have also taken into consideration the nature of Respondent's relationship with Ms. Toliver-Woody and the associated need to confer about her medical and vision issues with CBL personnel. *See, e.g.*, FFs 47, 68, 71, 73, 129-130 & 138; *see also* FF 158-*10*. The 5 hours claimed for this visit includes travel time that has not been shown by Disciplinary Counsel to be implausible, and Disciplinary Counsel has adduced no evidence that Respondent did not spend considerable time with Ms. Toliver-Woody at a time when she was worried about another, even more serious round of eye surgery (for glaucoma). Correlatively, Disciplinary Counsel has adduced no evidence from CBL medical and

other personnel that Ms. Toliver-Woody was not up to a long visit on this date or generally in this period. In light of all the foregoing factors, we recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that this entry violated Rules 3.3(a)(1), 8.4(c) or 1.5(a).

14. Disciplinary Counsel's charge that the entry in Respondent's May 6, 2011 Fee Petition in *RTW* of 4.1 hours for a court hearing on 8/20/10 (DX 41 at 446) violates Rules 3.3(a)(1), 8.4(c) and 1.5(a)

Disciplinary Counsel argues that this entry is false because the hearing transcript is only 24 pages long and the purported inclusion of travel time and of conferences with Ms. Riley is misleading. DC PFFs & PCLs at 78. We have credited Respondent's testimony that the 4.1 hours included travel time. *See* FF 158-*14*. The August 20, 2010 hearing before Judge Campbell addressed the Student Visitors Report that had been filed more than nine months before. FFs 67, 74-77. The transcript of the hearing clearly establishes that Respondent was present in person at the hearing. DX 33. Disciplinary Counsel has adduced no other evidence that Respondent did not spend 4.1 hours on this hearing, including travel time, waiting time, the hearing itself and consultation with Ms. Riley. Accordingly, we recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that this entry violated Rules 3.3(a)(1), 8.4(c) or 1.5(a).

15. Disciplinary Counsel's charge that the entry in Respondent's May 6, 2011 Fee Petition in *RTW* of 3.5 hours for a client meeting on 9/30/10 (DX 41 at 447) violates Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a)

Disciplinary Counsel did not examine Respondent with respect to this entry (*see* FF 158-*15*), did not adduce any evidence that this was not a monthly visit

required by D.C. Code § 21-2043(e)(2) (*see* FF 35) which fell during the pre-glaucoma surgery period, did not adduce any evidence to contradict Respondent's testimony that Ms. Toliver-Woody was worried about undergoing glaucoma eye surgery, and did not address this charge in its post-hearing papers. Consequently, we recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that this entry violated Rules 3.3(a)(1), 8.4(c) or 1.5(a).

16. Disciplinary Counsel's charge that the entry in Respondent's May 6, 2011 Fee Petition in *RTW* of 5 hours for a court hearing on 10/22/10 (DX 41 at 447) violates Rules 3.3(a)(1), 8.4(c) and 1.5(a)

This entry arises from the follow-up hearing on October 22, 2010 that Judge Campbell ordered at the end of the hearing on August 20, 2010. FFs 77-80. Disciplinary Counsel points out that the transcript indicates that the hearing lasted approximately 50 minutes if waiting time is included and argues that the purported inclusion of travel time is misleading. DC PFFs & PCLs at 78. We have credited Respondent's testimony regarding this entry, FF 158-*16*, and in light of the various considerations set out in that analysis, as well as the absence of any evidence other than the transcript regarding this entry or the underlying court hearing, we recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that this entry violated Rules 3.3(a)(1), 8.4(c) or 1.5(a). (We address in Section IV.G, *infra,* Disciplinary Counsel's contention that the inclusion of travel time is inherently misleading.)

17. Disciplinary Counsel's charge that the entry in Respondent's May 6, 2011 Fee Petition in *RTW* of 4.8 hours for a client meeting on 11/22/10 (DX 41 at 448) violates Rules 3.3(a)(1), 8.4(c) and 1.5(a)

Disciplinary Counsel points out that Respondent's calendar does not reflect this visit. DC PFFs & PCLs at 76. Because Disciplinary Counsel did not examine Respondent with respect to this charge (*see* FF 158-*17*), did not adduce any other evidence regarding this visit during the long lead-up period to the glaucoma surgery and did not adduce any more general evidence regarding travel times and the like that might undercut Respondent's testimony, we recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that this entry violated Rules 3.3(a)(1), 8.4(c) or 1.5(a).

18. Disciplinary Counsel's charge that the entry in Respondent's May 6, 2011 Fee Petition in *RTW* of 4.8 hours for a client meeting on 1/7/11 (DX 41 at 448) and an entry in her January 11, 2012 Fee Petition of 4.8 hours for a client meeting on 1/7/11 (DX 46 at 475) are duplicative and therefore violate Rules 3.3(a)(1), 8.4(c) and 1.5(a)

We have credited Respondent's testimony that the duplication in the January 11, 2012 Fee Petition of the entry in the preceding May 6, 2011 Fee Petition for meeting with her ward on January 7, 2011 was simply a mistake that she overlooked. FF 158-*18*. Disciplinary Counsel points out that Respondent's calendar does not reflect this visit, DC PFFs & PCLs at 76, but advances no other arguments regarding this specific claimed visit. As pointed out in FF 158-*18*, Disciplinary Counsel did not ask Respondent a single question about the purpose, length or content of this meeting. Additionally, Disciplinary Counsel adduced no specific evidence that this visit did not occur or that it did not take or could not have taken 4.8 hours in the view

and experience, for example, of other experienced Probate Division practitioners. Thus, other than the lack of a calendar entry, Disciplinary Counsel adduced no evidence that would cause us to reach a different conclusion about Respondent's credibility with regard to the erroneous repetition of the entry in a second Fee Petition or her submission of both of these entries, which the evidence does not establish to be reckless or knowing or anything other than a negligent oversight. Accordingly, we recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that this entry violated Rules 3.3(a)(1), 8.4(c) or 1.5(a).

19-29. Disciplinary Counsel's charges that the following 11 entries in Respondent's January 11, 2012 Fee Petition in *RTW* violate Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a):[54]

19. 5 hours for a client meeting on 4/5/11 (DX 46 at 479)

20. 5 hours for a client meeting on 4/13/11 (DX 46 at 480)

21. 4 hours for a client meeting on 5/10/11 (DX 46 at 484)

22. 5 hours for a client meeting on 5/27/11 (DX 46 at 485)

23. 4.8 hours for a client meeting on 6/1/11 (DX 46 at 485)

24. 5 hours for a client meeting on 6/2/11 (DX 46 at 485)

25. 5.9 hours for a client meeting on 6/3/11 (DX 46 at 486)

26. 5.8 hours for a client meeting on 6/9/11 (DX 46 at 486)

27. 4.8 hours for a client meeting on 6/10/11 (DX 46 at 486)

28. 5.5 hours for a client meeting on 6/13/11 (DX 46 at 486)

[54] For the reasons set forth in n.36, we analyze these 11 charges together.

29. 5.3 hours for a client meeting on 6/15/11 (DX 46 at 487)

This January 11, 2012 Fee Petition is Respondent's final fee petition in *RTW* and the one that led to Judge Long's June 11, 2012 ruling. FFs 92, 94. Noting that Respondent bore the burden of proof but without hearing from her, Judge Long disallowed claims for "conspicuously high billing for multi-hour 'client meetings'" on April 5, 2011, May 10, 2011 and June 3, 2011 (charges 19, 21, 25) as "not credible and not worthy of payment." FF 94. We understand Judge Long's concerns, but we are required by *Padharia* and *Reid* to assess these charges, like all the other charges, on the basis of whether Disciplinary Counsel has proved one or more of them beyond suspicion and skepticism and, instead, by clear and convincing evidence.

Disciplinary Counsel points out that some of these client meetings do not appear on Respondent's available calendars – specifically May 27, 2011 (No. 22), June 1, 2011 (No. 23), June 2, 2011 (No. 24), June 3, 2011 (No. 25) and June 10, 2011 (No. 27). DC PFFs & PCLs at 76. For the detailed reasons set out in our examination of Respondent's careful and specific testimony about these entries, we have credited her testimony that each of these meetings took place and that, including travel time, they each took the length of time stated on the invoice. FF 158-*19* through FF 158-*29*. The numerous factors and circumstances that we took into consideration during that review, including the functions normally discharged by a guardian during a client visit, are also applicable to our analysis here and are incorporated here by reference (as is the case throughout this Section IV legal analysis).

As was typical throughout Disciplinary Counsel's case, Disciplinary Counsel adduced no convincing proof that a given visit/meeting did not take place; no convincing evidence that a particular visit/meeting did not take the amount of time, including travel, claimed in any given entry; no cross-examination that raised specific or overall, general concerns about Respondent's honesty and truthfulness while testifying or about the accuracy of the occurrences and times claimed in the Fee Petition entries; and no other evidence, documentary or testimonial, that might raise questions about Respondent's testimony or demonstrate that a given visit/meeting did not occur or take the amount of time claimed.

Nor does Disciplinary Counsel even acknowledge in its DC PFFs & PCLs at 76-77, let alone address, the crucial circumstance that the visits claimed in the January 11, 2012 Fee Petition commenced immediately prior to Ms. Toliver-Woody's transfer to STM on April 11, 2011, following her unsuccessful cardiovascular surgery on March 29, 2011, and continued until five days before her death on June 20, 2011, a period in which the complicated and time-consuming end-of-life issues were being dealt with. FFs 83, 84, 88, 139, 140. Disciplinary Counsel also did not adduce any evidence from Probation Division practitioners or CBL or other facility personnel that such visits under such circumstances could not take so much time or are *prima facie* impossible or even unusual.

For the foregoing reasons we recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that any of the challenged entries in the January 11, 2012 Fee Petition – *i.e.*, the entries

underlying charges 19-29 – violates Rules 3.3(a)(1), 8.4(c) or 1.5(a).

30. Disciplinary Counsel's charge that "various 0.3-hour and 0.4-hour charges for calls from St. Thomas More" during the final period of the *RTW* Guardianship violate Rules 1.5(a), 3.3(a)(1) and 8.4(c)

Judge Long disallowed all claims for telephone calls on the January 11, 2012 Fee Petition as "not necessary or reasonable." FF 94. Disciplinary Counsel argues that the calls, even if they occurred, "did not take as long as Respondent claims" and adds, "[i]t would be unusual for the change-in-condition calls to [have] lasted 18 minutes." DC PFFs & PCLs at 79. Disciplinary Counsel bases this contention on its PFF 70, which contains the same wording. However, that PFF is based on a generalization by the medical director of the company that now owns CBL, which he joined in 2018, almost seven years after the period of the telephone calls at issue. Tr. 2110. In the testimony that Disciplinary Counsel cites, the physician, Dr. McNeil, was asked one question by Disciplinary Counsel about the normal length of a call about blood pressure or blood sugar, and the doctor limited his answer to a call about "a simple issue." Tr. 2144. Disciplinary Counsel also ignores that Dr. McNeil also testified that such calls can be placed by several different staff members, that such calls can occur "several times a day," and that end-of-life discussions "can be difficult." Tr. 2124-25, 2132. Thus Disciplinary Counsel's contention is not supported by its PFF 70 and it is further negated by our FF 36 regarding the time-consuming nature of a guardian's duties in a ward's end-of-life situation (a FF based on the testimony of three other impressive professionals), FF 139 regarding Respondent's efforts after Ms. Toliver-Woody was transferred to STM, and FF 140

regarding the frequency with which facility staff contact guardians about "every" development in end-of-life circumstances. Additionally, even if Dr. McNeil's testimony were reliable within its limited confines, such evidence about general custom or practice carries little weight when a specific set of circumstances and events is at issue. In sum, Disciplinary Counsel's argument, in our view, does not differ from or rise above the skepticism disallowed by the Board in *Padharia* or the speculation disallowed by the Board in *Reid*, as discussed in Section IV.D, *supra*.

Indeed, this "various 0.3 hour and 0.4 hour charges" accusation is the most extreme instance of the fundamental flaw under *Padharia* and *Reid* in Disciplinary Counsel's concession that "we cannot say with specificity what she did and didn't do," Tr. 1075, as we have discussed in Section IV.D, *supra*. Since Disciplinary Counsel has not identified which of the dozens of such entries in the January 11, 2012 Fee Petition it might specifically consider false and has not adduced evidence that any specific entry is false or excessive in one or more respects, it is impossible in our view, as a matter of fairness and due process and as a matter of evidentiary analysis, to find that any given such entry is false. In addition, we have credited Respondent's testimony regarding these entries in the January 12, 2010 Fee Petition. *See* FF 158-*30*.

Accordingly, we recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that any of the entries for "various 0.3 and 0.4 charges for calls from St. Thomas More" in the January 11, 2012 Fee Petition violated Rules 3.3(a)(1), 8.4(c) or 1.5(a).

31. Disciplinary Counsel's charge that the entry in Respondent's December 23, 2014 Fee Petition in *Williams* of 3.8 hours for a client meeting on 6/1/2013 (DX 70 at 658) violates Rules 3.3(a)(1), 8.4(c) and 1.5(a)

This entry encompasses Respondent's second visit to Mr. Williams after being appointed as his Guardian *ad Litem* on Tuesday May 28, 2013 and before the hearing scheduled for Monday, June 3, 2013. FF 95. We have found that preparing for such a hearing is complex and time-consuming and that Respondent undertook many such tasks both before her first visit to Mr. Williams at the GWUH and during the visit. FFs 23, 24, 142. We have also credited Respondent's detailed testimony about her work during this visit. FF 158-*31*. Disciplinary Counsel has adduced no evidence – direct or circumstantial – that this visit, including travel time, did not occur or that it did not last as long as claimed. Accordingly, we recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that this entry violated Rules 3.3(a)(1), 8.4(c) or 1.5(a).

32. Disciplinary Counsel's charge that the entry in Respondent's December 23, 2014 Fee Petition in *Williams* of 2.8 hours for a client meeting on 6/2/2013 (DX 70 at 658) violates Rules 3.3(a)(1), 8.4(c), and 1.5(a)

This entry encompasses Respondent's third visit to Mr. Williams and the hospital on Sunday, June 2, 2013. We have credited Respondent's specific recapitulation of her activities during this follow-up visit as consistent with the circumstances at the time and the need to have current information at the hearing the next day regarding Mr. Williams' mental and physical condition and the likely steps to be taken in the coming period. FF 158-*32*. Here again, Disciplinary Counsel has

adduced no evidence – direct or circumstantial – that this visit, including travel time, did not occur or that it did not last as long as claimed. We note that this was Respondent's third visit in three days to Mr. Williams and the hospital and that she emphasized her concern to provide the court at the hearing on the next day, June 3, 2013, with as current a report as possible on Mr. Williams' condition. FF 142. Accordingly, we recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that this entry violated Rules 3.3(a)(1), 8.4(c) or 1.5(a).

33. Disciplinary Counsel's charge that the entry in Respondent's December 23, 2014 Fee Petition in *Williams* of 3 hours for a court hearing on 6/3/13 (DX 70 at 658) violates Rules 1.5(a), 3.3(a)(1) and 8.4(c)

This entry encompasses the initial hearing at which Respondent and others provided information to the court regarding Mr. Williams and at which Respondent was appointed as Mr. Williams' Guardian *ad Litem*. We have credited Respondent's testimony about this hearing, FF 158-*33*, and have also taken into consideration Ms. Sloan's testimony. FF 26. There is no dispute that this hearing occurred, and Disciplinary Counsel has adduced no evidence – direct or circumstantial – that Respondent could not have spent three hours on this hearing. Accordingly, we recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that this entry violated Rules 3.3(a)(1), 8.4(c) or 1.5(a). (As noted in our FF 158-*33* credibility analysis and elsewhere, we address the string of 3.0 hour entries throughout 2013 in Section IV.G, *infra*.)

34. Disciplinary Counsel's charge that the entry in Respondent's December 23, 2014 Fee Petition in *Williams* of 3 hours for a client meeting on 6/19/13 (DX 70 at 659) violates Rules 1.5(a), 3.3(a)(1) and 8.4(c)

The visit underlying this entry followed 20 other tasks listed in the invoice attached to Respondent's December 23, 2014 Fee Petition after the June 3, 2013 hearing, none of which Disciplinary Counsel has challenged. DX 70 at 658-59. It appears to constitute her first monthly visit as required under the Probate Division's rules at this time. FF 35. It also appears to be her first visit to Mr. Williams at Brinton Woods following her numerous communications with Brinton Woods personnel that led to Mr. Williams' transfer to Brinton Woods in mid-June. DX 70 at 658-59; FF 143. It is also included in her TimeSlips notations and on her calendar. DX 97 at 1367; RX 77B at 1424. We have credited Respondent's testimony regarding this entry. FF 158-*34*. Here again, Disciplinary Counsel has adduced no evidence – direct or circumstantial – that this visit, including travel time, did not occur or that it did not last as long as claimed. Disciplinary Counsel also has provided no argument in its DC PFFs & PCLs regarding this specific charge. Accordingly, we recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that this entry violated Rules 3.3(a)(1), 8.4(c) or 1.5(a).

35. Disciplinary Counsel's charge that the entry in Respondent's December 23, 2014 Fee Petition in *Williams* of 3 hours for a hearing on 8/28/13 (DX 70 at 661) violates Rules 3.3(a)(1), 8.4(c), and 1.5(a)

On the basis of our detailed discussion in FF 158-*35*, we have credited Respondent's testimony that this entry of 3 hours was a typographical error and was meant to be .3 hours. As previously noted, Disciplinary Counsel adduced no

evidence rebutting Respondent's or Ms. Wilson's testimony that the eBillity software defaulted to a whole number if no decimal point was entered, that the program printed out entries on invoices in the order in which they were made, based on their slip entry number and not in chronological order, that they addressed the problem when they found it could not be cured, and that the entry at issue here was a data entry error on Ms. Wilson's part. FFs 122, 152 & 153. We have also found that Ms. Wilson's testimony in this regard is not inconsistent with her earlier declaration in this proceeding, as Disciplinary Counsel has contended. FF 152. Disciplinary Counsel adduced no other evidence – direct or circumstantial – that this hearing did not occur, that it did not last approximately .3 hours or that Respondent did not spend .6 hours preparing for the hearing and .4 hours on two telephone calls trying to be connected into the hearing, as set forth in FF 158-*35*. Accordingly, we recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that this entry violated Rules 3.3(a)(1) or 8.4(c).

The admittedly minor issue of whether Respondent's erroneous charge of $270 for 3 hours on the hearing, *see* FF 113 & DX 70 at 661, when she actually spent only 1.3 hours in connection with the hearing, *see* FF 158-*35*, which would have resulted in a charge of $117, actually raises a more uncertain question. In light of the fact that Rule 1.5(a) does not have an intent or other mental element and in light of the decision in *Cleaver-Bascombe I*, 892 A.2d at 403 ("charging any fee for work that has not been performed is *per se* unreasonable"), the Hearing Committee concludes that we must recommend a finding, however technical, of a Rule 1.5

violation, in this instance.

36. Disciplinary Counsel's charge that the entry in Respondent's December 23, 2014 Fee Petition in *Williams* of 3 hours for a client meeting on 8/30/13 (DX 70 at 661) violates Rules 1.5(a), 3.3(a)(1) and 8.4(c)

This entry arises from what appears to be Respondent's second visit in accordance with the Probate Division's monthly visit requirement. FF 35. Respondent's Report of Guardian (1st Report) includes a "personal visit[] with Adult Subject" on this date. DX 66 at 640. As discussed in FF 158-*36*, the details provided by Respondent about the events on this Friday provide significant support for her testimony and are unrebutted. Disciplinary Counsel adduced no other evidence relating to this charge. Accordingly, we recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that this entry violated Rules 3.3(a)(1), 8.4(c) or 1.5(a).

37. Disciplinary Counsel's charge that the entry in Respondent's December 23, 2014 Fee Petition in *Williams* of 3 hours for a client meeting on 9/10/13 (DX 70 at 661) violates Rules 1.5(a), 3.3(a)(1) and 8.4(c)

Respondent's Report of Guardian (1st Report) includes a visit to Mr. Williams on September 11, 2013. DX 66 at 640. We consider the variance between 9/11/13 on the Report and 9/10/13 on the invoice attached to the Fee Petition to be insignificant. As reflected in FF 158-*37*, Respondent was not meaningfully examined by Disciplinary Counsel with respect to this charge and, as usual, Disciplinary Counsel adduced no other evidence – direct or circumstantial – bearing on this charge. Accordingly, we recommend a Conclusion of Law that Disciplinary

Counsel has not proved by clear and convincing evidence that this entry violated Rules 3.3(a)(1), 8.4(c) or 1.5(a).

38. Disciplinary Counsel's charge that the entry in Respondent's December 23, 2014 Fee Petition in *Williams* of 3 hours for a hearing on 10/11/13 violates (DX 70 at 662) Rules 1.5(a), 3.3(a)(1) and 8.4(c)

We have credited Respondent's careful and detailed testimony regarding this entry and the related .3 and .4 notations entries on her TimeSlips worksheet. FF 158-*38*. We have also found that Respondent's testimony is consistent with and supported by Ms. Wilson's testimony that this entry was a data entry error on her part, not Respondent's. Tr. 2706; FF 158-*38*. In the absence of any other evidence, direct or circumstantial, regarding this charge, we recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that this entry violated Rules 3.3(a)(1), 8.4(c) or 1.5(a).

39. Disciplinary Counsel's charge that the entry in her December 23, 2014 Fee Petition in *Williams* of 3 hours for a client meeting on 10/17/13 (DX 70 at 662) violates Rules 1.5(a), 3.3(a)(1) and 8.4(c)

As pointed out in FF 158-*39,* where we credit Respondent's testimony about this entry, a 10/17/13 meeting with Mr. Williams is reflected both on Respondent's calendar and on her Report of Guardian (1st Report). RX 99B at 1765; DX 66 at 640. Disciplinary Counsel has adduced no evidence regarding either the occurrence *vel non* of this visit or its length. Accordingly, we recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that this entry violated Rules 3.3(a)(1), 8.4(c) or 1.5(a).

40. Disciplinary Counsel's charge that the entry in her December 23, 2014 Fee Petition in *Williams* of 3 hours for a client meeting on 11/12/13 (DX 70 at 663) violates Rules 1.5(a), 3.3(a)(1) and 8.4(c)

We have credited Respondent's testimony on this entry, FF 158-*40*, but that brief testimony is not particularly significant in our view. In light of the visit appearing on her calendar and on her Report of Guardian (1st Report), RX 77B at 1766, DX 66 at 640, as well as the absence of any other evidence regarding the claimed visit or its length, we recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that this entry violated Rules 3.3(a)(1), 8.4(c) or 1.5(a).

41. Disciplinary Counsel's charge that the entry in her December 23, 2014 Fee Petition in *Williams* of 3 hours for a client meeting on 12/5/13 (DX 70 at 663) violates Rules 1.5(a), 3.3(a)(1) and 8.4(c)

We have credited Respondent's brief testimony regarding the entry underlying this charge and have confirmed her testimony that this visit is included in her Report of Guardian (1st Report). FF 158-*41*, DX 66 at 640. This is yet another charge with respect to which Disciplinary Counsel did not meaningfully examine Respondent, adduce other pertinent evidence or refute Mr. Agusiobo's testimony. FF 143. Thus this charge, also, fails for lack of evidence. Accordingly, we recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that this entry violated Rules 3.3(a)(1), 8.4(c) or 1.5(a).

42. Disciplinary Counsel's charge that the entry in her December 23, 2014 Fee Petition in *Williams* of 1.5 hours for a client meeting on 1/18/14 (DX 70 at 664) violates Rules 1.5(a), 3.3(a)(1) and 8.4(c)

We have credited Respondent's testimony with respect to the entry

underlying this charge for the detailed reasons set out in FF 158-*42*, including our conclusions that the sloppily written TimeSlips notation refers to a visit with Mr. Williams on January 18, 2014 and that the absence of this meeting from her Report of Guardian (1st Report) is understandable since she reported another January visit in the Report. DX 66 at 640; *see also* our discussion in FF 158-*43*. Otherwise there is here, again, a total failure of evidence on Disciplinary Counsel's part. Accordingly, we recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that this entry violated Rules 3.3(a)(1), 8.4(c) or 1.5(a).

43. Disciplinary Counsel's charge that the entry in her December 23, 2014 Fee Petition in *Williams* of 3 hours for a client meeting on 1/28/14 (DX 70 at 664) violates Rule 1.5(a), 3.3(a)(1) and 8.4(c)

In the course of crediting Respondent's testimony about the events leading to the entry underlying this charge, we concluded that the absence of a TimeSlips notation is not significant in light of the unscheduled nature of this visit (notification of the successful resolution of a landlord-tenant and/or small claims action in Superior Court) and the circumstances of having to work that evening on trial preparation. FF 158-*43*. This visit is included in Respondent's Report of Guardian (1st Report). DX 66 at 640. In light of the strength of Respondent's testimony here, Mr. Agusiobo's observation of Respondent's frequent visits to Brinton Woods and her concern for Mr. Williams, FF 143, and the absence, yet again, of any other evidence regarding this charge, we recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that this entry

violated Rules 3.3(a)(1), 8.4(c) or 1.5(a).

44. Disciplinary Counsel's charge that the entry in her December 23, 2014 Fee Petition in *Williams* of 3 hours for a client meeting on 2/18/14 (DX 70 at 664) violates Rule 1.5(a), 3.3(a)(1) and 8.4(c)

For the reasons set out in connection with our crediting Respondent's testimony regarding the entry underlying this charge, FF 158-*44*, including the inclusion of this visit on her Report of Guardian (1st Report), DX 66 at 640, and in light of the all-too-common absence of any other evidence regarding this charge, we recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that this entry violated Rules 3.3(a)(1), 8.4(c) or 1.5(a).

45. Disciplinary Counsel's charge that the entry in Respondent's December 23, 2014 Fee Petition in *Williams* of 2.5 hours for a client meeting on 4/7/14 (DX 70 at 666) violates Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a)

We credited Respondent's testimony with respect to this charge on the basis of the specific – and unrebutted – extended overseas travel circumstance that she recounted, as well as the inclusion of this visit on her Report of Guardian (2nd and Final Report). FF 158-*45*; DX 68 at 646. The record contains no other evidence regarding this charge. Accordingly, we recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that this entry violated Rules 3.3(a)(1), 8.4(c) or 1.5(a).

46. Disciplinary Counsel's charge that the entry in Respondent's December 23, 2014 Fee Petition in *Williams* of 3 hours for a client meeting on 5/15/14 (DX 70 at 667) violates Rule 1.5(a), 3.3(a)(1) and 8.4(c)

For the same reasons set forth in FF 158-*46*, including the TimeSlips notation

of "5/15, Williams, mtg w/ client, drop off personal effects," together with the absence of any other evidence with respect to this charge, we conclude that Disciplinary Counsel has not disproven either the occurrence of the meeting with Mr. Williams or its length. Accordingly, we recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that this entry violated Rules 3.3(a)(1), 8.4(c) or 1.5(a).

47. Disciplinary Counsel's charge that the entry in Respondent's December 23, 2014 Fee Petition in *Williams* of 3 hours for a client meeting on 5/16/14 (DX 70 at 667) violates Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a)

In addition to crediting Respondent's testimony regarding the entry underlying this charge on the basis of, *inter alia*, the inclusion of a ward visit on this date in her Report of Guardian (2nd and Final report) and her explanation that this May 16, 2014 meeting was "subsequent" – which we understand to mean "a follow-up" – to her "drop-off [of] personal effects" the previous day, *see* FF 158-*47*, DX 68 at 646, RX 97B at 1581 (noting the previous "drop-off" meeting on May 15), Tr. 3514, we are faced once again with the absence of any evidence that this "subsequent" visit did not occur or did not last 3 hours. Accordingly, we recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that this entry violated Rules 3.3(a)(1), 8.4(c) or 1.5(a).

48. Disciplinary Counsel's charge that the entry in Respondent's December 23, 2014 Fee Petition in *Williams* of 2.5 hours for a client meeting on 6/25/14 (DX 70 at 668) violates Rule 3.3(a)(1), Rule 8.4(c) and Rule 1.5(a)

As we did in assessing the credibility of Respondent's testimony regarding

the entry underlying this charge, we find that Respondent's handwritten note regarding the scheduling of a "care conf mtg" at "11:00" with "OBI RN mngr" and "Karen Robinson admission" at "2131 O St NW Dupont Cir," provides convincing support that the meeting took place. FF 158-*48*; RX 97A at 1580. Since Respondent's recollection of the purpose of the meeting(s) is consistent with the note's content and since Disciplinary Counsel adduced no evidence undermining Respondent's interpretation or refuting the occurrence of the meeting or the length claimed by Respondent, we recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that this entry violated Rules 3.3(a)(1), 8.4(c) or 1.5(a).

49. Disciplinary Counsel's charge that the entry in Respondent's December 23, 2014 Fee Petition in *Williams* of 0.8 hours for a care conference on 8/18/14 (DX 70 at 669) violates Rules 3.3(a)(1), 8.4(c) and 1.5(a)

We have closely examined Respondent's relatively extensive testimony regarding the circumstances appurtenant to this charge and have credited it. Disciplinary Counsel has adduced no evidence or argument to refute Respondent's recounting or Ms. Wilson's supporting testimony that this entry involved a data entry error of "8/18/14" instead of "6/16/14," when the care conference actually occurred. FF 158-*49*. We also gave significant weight to Respondent's demeanor and openness during her testimony about this entry. Accordingly, we recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that this entry violated Rules 3.3(a)(1), 8.4(c) or 1.5(a).

F. THE CHARGES THAT FOUR OF RESPONDENT'S STATEMENTS IN COURT OR IN COURT FILINGS VIOLATED RULE 3.3(a)(1) AND/OR RULE 8.4(c)

The four statements at issue here – Nos. 50-53 in the Notice of Violative Conduct – did not involve assertions by Respondent that a certain length of time was spent with the ward or on a court appearance or submission and therefore do not raise questions under Rule 1.5(a) about the amount of time allegedly devoted to the service.

50. Disciplinary Counsel's charge that Respondent's statements to Judge Campbell in the August 20, 2010 hearing in *RTW* that visits to Ms. Toliver-Woody were reflected in Guardian Reports and Fee Petitions violated Rule 3.3(a)(1) and/or Rule 8.4(c)

Respondent was not examined closely by Disciplinary Counsel regarding this charge; as reflected in FF 158-*50*, she was asked only about her understanding of what Fee Petition Judge Campbell was referring to. Moreover, the pertinent Guardian Reports and Fee Petitions do in fact contain entries for such visits. DX 30 at 227-28; DX 32 at 232; DX 38 at 428; DX 41 at 446-48. Moreover, our close examination of the transcript and of other evidence about the hearing, FFs 74-80, including Judge Campbell's statement in the follow-up October 22, 2010 hearing establishing the correspondence with Judge Burgess regarding visits, confirms the accuracy of Respondent's statement. Accordingly, since Disciplinary Counsel has not established any inconsistency between the documents at issue and Respondent's statements in court to Judge Campbell, we recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that these statements by Respondent violated Rules 3.3(a)(1) or 8.4(c).

51. Disciplinary Counsel's charge that Respondent's alleged failure in the October 11, 2013 hearing in *Williams* to correct a statement that she had already filed the Acceptance violated Rule 3.3(a)(1) and/or Rule 8.4(c)

As reflected in FF 158-*51*, Respondent provided detailed testimony recounting her statements in the October 11, 2013 hearing and the basis for them. We have credited her testimony for the reasons set forth in FF 158-*51*. Because, as we have found, Respondent believed the acceptance had been filed by Mr. Baloga after she guided him through its preparation, she had no reason to believe that she had made any statement in court that needed to be corrected thereafter. FFs 101-103. Disciplinary Counsel has not adduced any other evidence that might refute Respondent's testimony or our crediting of it. Accordingly, we recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that Respondent's allegedly improper omission violated Rules 3.3(a)(1) or 8.4(c).

52. Disciplinary Counsel's charge that the statement in the Motion for Reconsideration in *Williams* that she "has always and always will consistently record time contemporaneously with her actions in order to ensure that an accurate record of my work is recorded" violated Rule 3.3(a)(1) and/or Rule 8.4(c)

Disciplinary Counsel contends that the falsity of this statement has been established because Respondent "admitted in this proceeding that she did not always record the time she spent performing services for hourly clients." DC PFFs & PCLs at 74. Disciplinary Counsel relies on its PFF 21, which asserts, "Respondent did not always keep time for legal work she performed for clients paying by the hour. Tr.

190:7-191:22; 236:4-239:10; 242:13-17." Respondent in fact testified that she did not always bill her hourly clients for work that she did on weekends but that she normally kept a record of such work with a "no charge" notation. Tr. 190. Respondent acknowledged that she did not always record such time on her time sheets and "didn't bill for a lot of the work that I did or that my staff did [because] these were not the kind of cases where we were interested in capturing every penny. . . ." Tr. 237; *see also* Tr. 236, 238. Respondent was also examined by the Hearing Committee as follows:

> Mr. Tigar: And is it your testimony, based on what Ms. Dunston was asking, that from time-to-time you would have performed the service and it would not be reflected on one of those sheets?
>
> The Witness: Yes.
>
> Mr. Tigar: And in addition to that at the time that this was transmuted into a bill, you might make a decision not to bill for the time even though it was on a sheet.
>
> The Witness: That is correct as well.

Tr. 242. In broadly relying on this testimony by Respondent, Disciplinary Counsel ignores the context of the statement in the Motion for Reconsideration – *viz*, that the work for which she actually sought compensation in this and other Fee Petitions and invoices was documented in a timely manner in her records. Respondent was plainly not including in the statement at issue work for which she had not charged – the only issue that she was asked about and which she addressed in the testimony that Disciplinary Counsel erroneously relies upon. (Disciplinary Counsel also relies on its PFF 122, but its PFF 122 is completely inapposite here.)

We have credited Respondent's testimony regarding her time-keeping procedures. FF 158-*52*. We recognize that that testimony did not specifically include this statement in her Motion for Reconsideration. We think that Respondent's sweeping, exculpatory statement is entirely understandable under the circumstances. More importantly, there is nothing in the record from which we could find that Respondent did not believe this statement when she made it or that she made it knowing that she did not record time contemporaneously with a goal of accuracy. Respondent and her staff in her small, busy law practice may or may not have been a bit slap-dash at times and probably did not have complete and full-time control of the paper flow in the office, but Disciplinary Counsel has adduced no evidence that Respondent did not believe that she "consistently record[ed] time contemporaneously" when she made her representation to Judge Christian. In addition to the lack of any such evidence from Disciplinary Counsel, the record contains undisputed evidence (1) that Respondent and her staff were concerned to improve their time-keeping software and took steps to do so, FF 123; (2) that with respect to Respondent's "has always" assertion the evidence established that Respondent maintained contemporaneous notes of her time and recorded her time contemporaneously on time sheets when at her desk and on other materials when away from the office, FFs 118, 120; and (3) that with respect to Respondent's "will always" assertion Respondent instituted additional safeguards after Judge Christian's Order, FF 128. We also note that Respondent claimed only that she monitored her time "consistently," not that that she contemporaneously entered time

invariably. Accordingly, we recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that this statement by Respondent violated Rules 3.3(a)(1) or 8.4(c).

53. Disciplinary Counsel's charge that Respondent's statement in the Motion for Reconsideration in *Williams* that the particularly long wait for the 8/28/13 hearing "allowed the parties to confer" when Respondent appeared by phone, wait was 15 minutes and hearing lasted 7 minutes violated Rule 3.3(a)(1) and/or Rule 8.4(c)

We have credited Respondent's testimony, FF 158-*53*, about the data entry error that underlies the subsequent statement in the Motion for Reconsideration. But that credibility finding goes only to the truthfulness and accuracy of her testimony regarding how she handled this entry while she and Ms. Wilson hurriedly prepared the Motion for Reconsideration, FFs 152 & 153. The issue with respect to the Rule 8.4(c) charge is whether Respondent's statement in the Motion for Reconsideration, arising from her and Ms. Wilson's failure to catch the error as they prepared the Motion for Reconsideration, resulted from mere negligence or, instead, as Disciplinary Counsel has argued, from reckless dishonesty because "[s]he made that statement without checking the record," "made this statement almost automatically in self-defense without checking the record in some discernible way about that particular entry" and thereby "[a]t a minimum . . . recklessly disregarded the truth." Tr. 4150; DC PFFs & PCLs at 72. In support of its argument, Disciplinary Counsel points out that the time sheet and calendar entries that show the limited amounts of time (.3 hours, .4 hours, .6 hours) spent on and in connection with the hearing – as Respondent explained and as we have found, FF 158-*35*, Charge No. 35 – "if

consulted, would have shown the time that could properly be charged was considerably less than three hours." DC PFFs & PCLs at 72. Respondent contends that the erroneous statements "could not have misled the judge who identified the error in the first place," Resp. PCLs at 21-22, but we think that that somewhat speculative contention, even if likely accurate, does not fully address the issue of whether Respondent's waiting time/conference explanation was made recklessly.

Disciplinary Counsel cites *In re Rosen*, 570 A.2d 728 (1989). Rosen, an experienced member of the District of Columbia Bar, filed a sworn statement in connection with his application to the Maryland Bar, stating that nothing had arisen since his initial bar application that "no changes ha[d] taken place with respect to [his] personal situation which would reflect unfavorably on [his] qualifications to be admitted as a member of the Maryland bar." *Id.* at 728. In fact, Rosen had been the subject of two bar complaints, as to which he was "actively defending himself." *Id.* at 729. Given that Rosen was actively litigating a matter of continual and central concern to a practicing lawyer, and in light of the centrality of "character and fitness" to bar admission and membership, the Court of Appeals found Rosen's misstatement to be reckless. *Id.*

As has been true throughout this Report up to this point, the three members of the Hearing Committee agree on the entirety of the foregoing precis of the evidence pertaining to the question whether Respondent's explanation in her Motion for Reconsideration was merely negligent or recklessly dishonest. Two of the members conclude that a Rule 8.4(c) violation has been established by clear and convincing

evidence. Their views, constituting the conclusion of the Hearing Committee on this issue, are set out here.[55]

In *In re Romansky*, 825 A.2d 311, 317 (D.C. 2002), the Court focused on whether Romansky had consciously disregarded the risk that the fee agreements at issue did not permit premium billing and emphasized that "the Board must determine whether Romansky's explanation for his conduct is true." After remand, the Court of Appeals found that Disciplinary Counsel had failed to prove that Romansky had not made a "good faith mistake" explainable by a recent change in his firm's billing policies and other circumstances. *In re Romansky*, 938 A.2d 733, 741 (D.C. 2007) ("*Romansky II*"). *Romansky II* provides a standard for determining whether conduct is or is not reckless. *See also* Black's Law Dictionary 1277 (7th ed.1999) (recklessness is a "state of mind in which a person does not care about the consequences of his or her action"); 57 AM. JUR. 2D Negligence § 302 (1989) ("Reckless misconduct requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts that would disclose this danger to any reasonable person."). The Court of Appeals concluded in *Romansky II* that certain circumstances (new firm policy, ambiguity of that policy, *et al*.) were "virtually in equipoise" and therefore that Bar Counsel had not met its burden of proving recklessness by clear and convincing evidence. *Id*. at 742.

[55] Mr. Bernstein dissents and finds that Disciplinary Counsel has not proven a violation of Rule 8.4(c). *See* Separate Statement at 1-5.

The line in this matter between negligence and recklessness is perhaps even thinner and vaguer than in *Romansky II*. The majority recognizes that the tone and content of Judge Christian's order provide context for the work that Respondent and her staff, principally Ms. Wilson, undertook. Of Judge Christian's Order, Ms. Wilson testified "I was honestly shocked. The -- the way that Judge Christian characterized Sylvia's behavior was completely opposite of what I had observed. The way that she criticized the billing practices seemed entirely nonsensical to me." Tr. 2673; *see also* Tr. 2673-76. The Order, DX 75, begins with the blanket statement "Though Ms. Rolinski undertook various roles throughout the pendency of this case, her performance fell far below even the most rudimentary expectation." DX 75 at 701. This observation was not based on a determination of the quality of care that Respondent provided, nor on a conclusion reached after notice and an opportunity to be heard with respect to assertions of professional incompetence, lack of integrity and lapses in professional discipline. In short, the hasty compilation of the Motion for Reconsideration can be seen as an understandable response to a disturbing judicial action that in the end was not sustained by the Court of Appeals. DX 82. Thus, the evidence clearly establishes that Respondent was frantically attempting to correct problems that Judge Christian had identified. The majority also recognizes that the error in reporting on the August 28 hearing was "hiding in plain sight," to invoke a commonplace expression based on well-nigh universal experience. One looks in vain for the car keys before "finding" them in a location that one has "looked at a dozen times." This sort of human experience antedates the automobile. The 13th

Century Persian poet Rumi wrote, "You wander from room to room, Hunting for the diamond necklace, That is already around your neck!" Both of these factors suggest a "good faith," merely negligent mistake by Respondent.

The majority further recognizes that there are three additional considerations arguably similar to those in *Romansky II*. First, Respondent demonstrated her continuing concern with the accuracy of her billing by retaining counsel and prosecuting her appeal. It was in the course of this continued concern and ongoing review that she and her counsel noted, and corrected, the error. Second, the set of tasks, and the time constraints for addressing them, imposed by Judge Christian's order, called forth "executive function" and detail orientation on Respondent's part, as to both of which capabilities Respondent suffered from a diagnosable condition, as we have found in FFs 172-174, 185, *infra.* Respondent suffered from a diagnosable condition. Third, because recklessness is a mental state, defined only in part by objective failure to take account of relevant information, Respondent's character evidence for honesty weighs in her favor on this issue.

However, we emphasize again that the initial oversight is not what is at issue in Charge No. 53. The issue with this charge is whether Respondent's explanation in her Motion for Reconsideration based solely on her experience in other such hearings without having any information in her records about or any recollection of this particular hearing – however limited and regardless of whether such information or recollection at the time might actually be accurate or inaccurate – is also merely negligent or is so extremely careless as to constitute reckless dishonesty.

Respondent's failure to step back and ask herself whether she had any actual basis for saying that she had attended the hearing in person and had spent three hours on it conflicts, in the majority's view, with any notion of responsible reconstruction of time spent on a task many days or weeks or, in this instance, 16 months earlier – especially when Judge Christian had noted in her Order that the Probate Division's *Williams* docket showed that Respondent had participated in the August 28, 2013 hearing by telephone. FF 114. Indeed, the Court of Appeals observed in *Romansky II* that Romansky's failure to check whether the bills at issue fell under the new firm policy allowing premium billing or whether the client had been notified of and had assented to the change in the terms of engagement "could be viewed as supporting a conclusion that the respondent's conduct was reckless and therefore dishonest" because of acting "in conscious disregard of a readily apparent risk . . . ." 938 A.2d at 741-42. Consequently, the majority has a firm conviction that Respondent's recourse to a hackneyed explanation devoid of any facts specific to the August 28, 2013 hearing is a step beyond Romansky's addition of a premium to his bill and thus is not excused by the circumstances that we have recognized but that are not fully equivalent to those that were determinative in *Romansky II.*

Consequently, the majority of the Hearing Committee recommends a Conclusion of Law that Respondent's explanation was recklessly dishonest in contravention of Rule 8.4(c). Because Rule 3.3(a)(1) is violated only by a knowing misstatement to the tribunal, these same members recommend a Conclusion of Law

that Disciplinary Counsel has not proved by clear and convincing evidence that this statement violated Rule 3.3(a)(1).

****

We have now completed our charge-by-charge analysis of each individual knowing false statement, dishonesty and excessive fee charge brought by Disciplinary Counsel against Respondent.

G. ADDITIONAL THEORIES THAT MIGHT ESTABLISH RULE 3.3(a)(1) & 8.4(c) VIOLATIONS

We turn, therefore, to consideration of whether there is an overall pattern in the evidence that constitutes proof by clear and convincing evidence of Respondent's violation of Rules 3.3(a)(1) or 8.4(c). In its brief, Disciplinary Counsel does not discuss *Ukwu*, *supra*, or *In re Bradley*, 70 A.3d 1189 (D.C. 2013) (per curiam), or *In re Kline*, 113 A.3d 202 (D.C. 2015), but, in light of those three cases we have identified and consider at this point three theories under which the "entire mosaic" of the statements and entries, together with other circumstantial evidence, might constitute clear and convincing evidence of Rule 3.3(a)(1) and 8.4(c) violations.

1. We consider first whether the time entries, as a whole, demonstrate *per se* an overall pattern of dishonesty. In *In re Ukwu*, *supra*, the Court of Appeals observed:

> A theme running through the five client matters has Respondent failing in every case to prepare the client for an Immigration Court hearing or an INS interview. . . .
>
> * * * * * *

> Under the "one client-at-a-time" approach apparently utilized in this case by the Hearing Committee and the Board, Respondent's repetition of similar violations in each of the five cases is treated as irrelevant in determining whether intent was proved in any of the other cases. Thus, although, in the Board's words, "[a]theme running through the five client matters has Respondent, [inter alia] failing in every case to prepare the client for an Immigration Court hearing or an INS interview" (emphasis added), this consistent theme is regarded by the Board as having no bearing on Respondent's intent. In our view, this mode of analysis cannot be reconciled with our decisions in *Shillaire* or *Godette*.
>
> If, as we have concluded, the Hearing Committee and the Board were required to consider the "entire mosaic" — all five representations — in determining whether Rule 1.3(b) was violated, then the finding by the Board regarding the consistent "theme" common to all five cases comes very close to a determination that the "neglect [was] so pervasive that [Respondent] must have been aware of it." Indeed, it would not be unreasonable to conclude based on the Board's own findings, that Bar Counsel proved the requisite intent as that term is used in our case law.

926 A.2d at 1115, 1117-18 (emphasis added) (quoting *In re Lewis*, 689 A.2d 561, 564 (D.C. 1997) (per curiam) (appended Board Report)).

Ukwu had committed the "act element" of a rule violation in that he had failed to provide competent assistance to the client. The Court of Appeals relied on the "theme" or "mosaic" of misconduct to infer the intent required by Rule 1.3(b) and to reject any claim that similarity among instances of violative conduct was happenstance. This analysis reflects a well-established rule that prior acts may be considered to prove "intent," "knowledge," absence of mistake" or "lack of accident." Fed. R. Evid. 404(b). In contrast, in this proceeding, as reflected in the immediately preceding analysis of Charges No. 1-53, there is no series of admitted

or established acts, omissions or misconduct. In this matter, we have examined each of the alleged violations to determine what evidence Disciplinary Counsel has produced in support of its allegations. Because Disciplinary Counsel chose to present the major portion of its case by only conducting an adverse and almost wholly unspecific and undetailed examination of Respondent, we have analyzed the indicia of her credibility at length. The predicate for an *Ukwu*-type evaluation is totally lacking because Disciplinary Counsel has not in the first instance proved the "act" elements of any particular violations, from which one might then be able to infer by clear and convincing evidence a "mosaic" of repetitive, even pervasive dishonesty.

The Court of Appeals made a similar point about circumstantial evidence in *Bradley*, 70 A.3d 1189, where the question arose whether Bradley, who was not originally charged with dishonesty, had testified falsely at her hearing about the extent of her contact with her ward:

> Respondent's testimony was contradicted, however, by the nursing home staff who testified that respondent did not participate in any of the meetings for nine years, beginning in 1995. Mr. Beard's social worker could not recall a single time when respondent called or visited Mr. Beard in the eight years the social worker worked with him. There was also no evidence presented supporting such contacts with Mr. Beard or his caregivers; respondent never submitted petitions for compensation for legal services or reimbursement costs associated with these purported visits or long-distance telephone calls. Moreover, to reach the nursing home, appellant would have had to drive 130 miles out of the way on her route to her parents' vacation home.

70 A.3d at 1192. (We note, as does Respondent, that Disciplinary Counsel called nursing home employees to testify about the absence of visits by the respondent in

Bradley, a determinative factor in *Bradley* that is glaringly absent in this proceeding. *See* Resp. PCLs at 11; *see also id.* at 13.) The Court then turned to the question of whether Bradley had falsely testified intentionally. Like the Board, the Court of Appeals found that she had intentionally testified falsely because there was

> no factual support in the record for the Committee's conclusion that she simply misremembered what had occurred. Although respondent testified that she visited him multiple times a year and that she was often in contact with the nursing home, she failed to produce any records, such as a compensation request or a nursing home visitor or telephone call log to support her representations. More importantly, her testimony was contradicted by social workers at the nursing home who testified that they could not recall a single instance when respondent called or visited Mr. Beard.

Id. at 1194.

Additionally, the nursing home staff testified that the respondent in *Bradley* did not participate in any of the quarterly care plan meetings over nine years, beginning in 1995. The ward's social worker could not recall a single time when respondent called or visited Mr. Beard in the eight years the social worker worked with him. There was also no evidence presented supporting such contacts with Mr. Beard or his caregivers; respondent never submitted petitions for compensation for legal services or reimbursement costs associated with these purported visits or long-distance telephone calls. Moreover, to reach the nursing home, the respondent would have had to drive 130 miles out of the way on her route to her parents' vacation home. *Id*. at 1192. The Court of Appeals also noted:

> What further confirms for us that this was a knowing misrepresentation as opposed to a mere failure to remember,

> however, is the level of detail about the visits respondent paid to Mr. Beard in this case. Respondent testified to events—for example, traveling great distances to visit Mr. Beard in the nursing home multiple times a year over ten years—that are not the kind of events one simply misremembers.

Id. at 1194.

In sharp contrast, at no time during Respondent's lengthy adverse examination in this proceeding was she confronted in Disciplinary Counsel's bare-bones case with any contradiction of her version of events; instead, there is documentation in the Reports of Guardian and other documents to support her testimony, FF 158-*1* through FF 158-*62*, and the testimony about travel times is not inherently unbelievable. FF 144. And, as we have noted, several witnesses corroborated her version and provided testimony as to her character for honesty and her financial stability, and Disciplinary Counsel called no witnesses, such as nursing home staff, to contradict her testimony about the occurrence of the visits, the purpose of the visits, her consultations and other work during the visits or her financial status. When looking for themes and context, one consistent aspect of Respondent's conduct, corroborated by many witnesses, *see, e.g.*, FFs 134, 143, shows that she gave careful attention to the concerns and needs of these two wards, reflecting her desire to "provid[e] a service to the Court in which I clerked." Tr. 249; *see also* Tr. 2900 (Respondent) ("[It] is a way for me to give back to the community. . . .").

The respondent in *Kline* was an Assistant United States Attorney. He failed to disclose exculpatory evidence to defense counsel. He argued that his failure did not constitute an intentional violation of Rule 3.8(e) because he never understood the

withheld item was truly material to the defense, nor that he had a duty to disclose. Yet, the evidence showed that he had repeatedly been reminded by his adversary and even by the trial court of his duty to make such disclosures. Indeed, Kline had represented to the trial judge that he was especially careful when it came to *Brady* evidence. The Court of Appeals held that these prior events supported the conclusion that the respondent withheld the statement because he did not think it was exculpatory. 113 A.3d at 214. Thus, Kline's claimed unawareness was convincingly contradicted by the "'entire mosaic'" of evidence that he "consciously decided" that the evidence did not have to be produced. *Id*. at 213-14.

In sum, while we have viewed the evidence as a whole, careful not to let an instance-by-instance analysis prevent us from seeing a pattern or matrix, we nonetheless hew to two important principles. First, Disciplinary Counsel has the burden to prove by clear and convincing evidence each alleged dishonesty violation and/or a discernible, documented pattern or matrix of dishonesty and cannot rely, as *Padharia* and *Reid* teach, on a suspicious overview or the views of others such as judges reviewing fee petitions or law firm investigators applying a different standard or on the sheer number of suspicious acts and omissions to avoid that burden. Second, the Hearing Committee must examine the evidence as to each charge to determine whether Disciplinary Counsel has met its burden with respect to individual charges or with respect to a clear and convincing mosaic of proven acts or omissions. Care must be taken by us and others not to let the sheer number of

allegations evolve into a "mosaic" where one does not in fact exist.[56] Here, Disciplinary Counsel has not established:

- the predicate of improper acts or omissions, as in *Ukwu*;
- the absence of credible testimony by Respondent regarding the entries or the existence of other evidence (such as the visitor logs from CBL or testimony from credible witnesses – unlike Ms. Mukami, whose testimony about Respondent's alleged lack of visits we did not credit, FFs 75; *cf.* 158-*13*) undermining Respondent's testimony, as in *Bradley*; or
- any other evidence of Respondent, unlike as in *Kline*, being repeatedly reminded – by Probation Division rules or by other standards or persons – of a duty to set forth her billing entries in a certain way, especially when indistinguishable entries had been approved by the Probate Division and not referred to Disciplinary Counsel in the past. *See, e.g.*, FFs 40-44, 53.

Accordingly, we see no basis under the controlling jurisprudence from the Court of Appeals for finding a general or overall matrix of dishonesty by Respondent and therefore recommend a Conclusion of Law that Disciplinary Counsel has not proved by clear and convincing evidence that Respondent *in toto* violated Rules 3.3(a)(1) or 8.4(c).

2. We now turn to a second possible theory for finding an overarching pattern of dishonesty, one that Disciplinary Counsel has advanced – that Respondent engaged in a calculated stratagem of not disclosing that travel time was included in many of her time entries in the invoices attached to the various Fee Petitions.

[56] Indeed, in its ruling on Respondent's challenge to Judge Christian's order denying compensation, the Court of Appeals held that an "across-the-board" approach to evaluating Respondent's petition was not appropriate. *See* FF 116; DX 82 at 964-65.

Disciplinary Counsel asserts that this was "a deliberate attempt to deprive the judges of information they needed to exercise their discretion to approve charges" adopted because she knew that at least some judges would not approve claims for travel time and therefore needed to deceive such judges if one of them happened to be assigned to review one of her Fee Petitions. DC PFFs & PCLs at 68-69. Disciplinary Counsel bases this argument on its PFF 117. *See* DC PFFs & PCLs at 40-41. We have previously found that the evidence cited by Disciplinary Counsel in support of this PFF is not convincing. *See* Section III.F.

Disciplinary Counsel did not examine Respondent in its case-in-chief with respect to this contention. In her own case, Respondent testified that she believed that any judge reviewing a fee petition and attached invoice understood that travel time was included in time entries; she based this belief on the practice of other attorneys whom she observed – "I looked at what other people were doing. And nowhere did I see that people were breaking it out" – and on the fact that her other, non-probate clients understood that time was included in her time entries. Tr. 2954-55. On cross-examination, Respondent added that the Chief Judge of the Probate Division, Judge Lopez, had ordered in 2004 that travel time is compensable. Tr. 3609. She acknowledged – indeed, emphasized – that views on the compensability of travel and many other tasks and expenses "varied vastly from judge-to-judge and it varied over the years." Tr. 3609-10. Disciplinary Counsel did not further pursue this line of questioning and did not introduce any other evidence in its case-in-chief or in its rebuttal case – from Probate Division practitioners or Probate Division

officials, for example – pertaining to the practices of other guardians with respect to billing for travel time in the time period pertinent to this proceeding. Similarly, Disciplinary Counsel did not offer any other evidence – from Probate Division or other professional colleagues or from her employees, for example – pertaining to any statements made by Respondent that would arguably reveal her views and understandings and/or would be pertinent to whether she was trying to and thought that she could game the system.

Thus, this appears to be yet another instance in this proceeding where the huge amount of charges in bulk, to use the admonitory terminology of the Board in *Padharia*, n.47, *supra*, seems to have rendered Disciplinary Counsel unable to find and adduce actual evidence, as opposed to accusations and theories, on a few potentially critical, potentially determinative issues. In the absence of evidence contradicting, let alone disproving Respondent's testimony and of any evidence otherwise establishing her alleged stratagem, and in light of all the other indicia of her general truthfulness previously discussed in the introductory overview in FF 158, as well as our finding of her credibility in dozens of other instances, we cannot find by clear and convincing evidence from the thin gruel that Disciplinary Counsel has provided us to digest that Respondent purposely misled Probate Division judges by the form of her invoice entries.

3. We turn now to a third circumstance which we have first noted previously in the course of our analysis of Charges No. 7, 10 and 33 – the 5-hour claims in *RTW* underlying Charges No. 7-9 for visits on 12/18/2009, 11/6/2009 and

10/12/2009; the intertwined 3-hour claims in *RTW* underlying Charges No. 10-12 for visits on 12/17/2009, 12/8/2009 and 11/23/09; and the consecutive 3-hour claims underlying Charges No. 33-41 in *Williams*. Disciplinary Counsel identifies a different but similar situation – the same 3.0-hour time claim for the June 3, August 28 and October 11, 2013 court hearings in *Williams*, arguing that "[t]hese repeated charges are inconsistent with claims of random errors – 'typos' or 'data entry errors.' Instead, they are consistent with a deliberate pattern of intentionally submitting identical three-hour time charges for every probate hearing no matter how long the hearing lasted." DC PFFs & PCLs at 70-71.

It seems unlikely but possible that two visits to Ms. Toliver Woody in the fall of 2009 before the first surgery and one visit immediately after the second surgery each took exactly 5.0 hours or that another 2 visits before the second surgery and one visit on the day of the second surgery each took exactly 3.0 hours. It seems very unlikely that 3 hearings regarding Mr. Williams and 9 visits to Mr. Williams in roughly the second half of 2013 took exactly 3.0 hours.

However, these unlikelihoods seem indistinguishable from the "at least some of them were [false]" contention by Disciplinary Counsel that was rejected by the Board in *Padharia*. Like the Hearing Committee in *Padharia*, we are skeptical that all of these 3.0-hour claims and 5.0-hour claims are accurate, but we are bound by the Board's ruling in *Padharia* on such evidence. Correlatively, the Board's rejection in *Reid* of Disciplinary Counsel's contention that "the Board should infer the Respondent *must* have left the document review office unlocked" on the ground

that that contention was "not supported by any evidence in the record and is entirely speculative . . . [and was only a proposed] inference [that was] not logically drawn from the facts, but calls for pure speculation" is compelling and controlling. Order, *In re Reid*, Board Docket No. 17-BD-072, at 22 (BPR December 8, 2020) (dismissing charges). The discrepancies in *Reid* between the lawyer's account of his time and the building's entry key records, document review software activity logs and certain time sheets and bills certainly merited investigation but, as the Board pointed out, the evidence showed that they had potentially innocent explanations. *See id.* at 7, 10-11 (noting that key cards were not always necessary to access and enter floors of the building, and that the document review software was not always working properly). The point of *Reid*, as we understand it, is that, in a proceeding in which Disciplinary Counsel bears the burden of proving its charges by clear and convincing evidence, suspicion is an invitation to investigation and proof, not a springboard for jumping to conclusions.

There may be some degree of truly incredible "consistency" or coincidence or whatever in some case that would permit, unlike the statements in *Padharia* or the speculative inference sought by Disciplinary Counsel in *Reid*, a finding by clear and convincing evidence of a disciplinary violation, but we think that *Padharia* and *Reid* preclude this Hearing Committee from making any such finding on the basis of the identical 3.0-hour and 5.0-hour time entries in *RTW* and even the eleven 3.0-hour time entries in *Williams*, especially in light of the total absence with respect to these entries of any of the evidentiary predicates present in *Ukwu*, *Bradley* or *Kline* and

especially when Disciplinary Counsel has not pursued a theory based on these three anomalies and Respondent, therefore, has not had an opportunity to contest it.

With respect to 3.0-hour time claims for the three court hearings in *Williams* that Disciplinary Counsel identifies and makes conclusory assertions about without providing any supporting analysis, we have analyzed each of those individually, found the explanations of them by Respondent and other witnesses to be credible and concluded that Disciplinary Counsel has not proven the dishonesty charges associated with them by clear and convincing evidence. FF 158-*33*; FF 158-*35*; FF 158-*38*; Section IV.E.33, 35, 38, *supra*. Thus, here also, none of the evidentiary predicates in *Ukwu*, *Bradley* or *Kline* is present with respect to the time claims for the three hearings.

For all the reasons set forth above, we recommend a Conclusion of Law that none of the three possible matrix theories discussed above establishes proof by clear and convincing evidence that Respondent has violated Rules 3.3(a)(1) or 8.4(c).

H. ADDITIONAL RULE 1.5(a) CHARGES

The three charges at issue here – Nos. 54, 55 and 56 in the Notice of Violative Conduct – arise from entries in Respondent's Fee Petitions that do not involve services to the wards and do not include allegations that the underlying acts did not occur.

54. Disciplinary Counsel's charge that the entry in Respondent's December 23, 2014 Fee Petition (*see* FF 113) of 1.1 hours on 8/20/2014 to draft and file the Notice of Death in *Williams* constituted an excessive fee in violation of Rule 1.5(a)

In the absence of any other evidence from Disciplinary Counsel, this charge

turns entirely on Respondent's testimony. We have credited her testimony because of its specificity and because of the absence of any contradictory testimonial or documentary evidence. FF 158-*54*. And we remain mindful that a finding in a Fee Petition review of unreasonableness or policy inconsistency is not equivalent to a finding by clear and convincing evidence of excessiveness. Accordingly, we recommend a Conclusion of Law that that Disciplinary Counsel has not proved by clear and convincing evidence that this entry violated Rule 1.5(a).

55. Disciplinary Counsel's charge that the entry in Respondent's December 23, 2014 Fee Petition (*see* FF 113) of 2.2 hours on 10/11/2013 (*see* DX 70 at 687) for finding and rewriting the Acceptance in *Williams* constituted an excessive fee in violation of Rule 1.5(a)

We have credited Respondent's testimony about the steps she took to prepare and submit the Acceptance because of the specificity of that testimony and especially because of its confirmation by fellow Probate Division practitioner Vicky Wright-Smith. FF 158-*55*. No evidence calls Respondent's or Ms. Wright-Smith's testimony into question, and Disciplinary Counsel has adduced no evidence even beginning to suggest that Respondent did not spend 2.2 hours on this task. Disciplinary Counsel asserts that Respondent should not have spent 2.2 hours on finding the form on the Probate Division's web site, *see* PFF 125 of DC PFFs & PCLs, but we decline to adopt PFF 125 because it ignores (i) that Ms. Wright-Smith confirmed the telephone conversation with Respondent during which neither could find the form online and which "went on for a while," (ii) that Ms. Wright-Smith and documentary evidence confirmed that she eventually found a copy of the form in her files and sent it to Respondent and (iii) that Ms. Sloan could not say that 2.2 hours for filing an

Acceptance would be unusual. FF 102. Additionally, Disciplinary Counsel adduced no evidence in support of its all-too-common conclusory assertion that Respondent should not have spent 2.2 hours on this task. Accordingly, we recommend a Conclusion of Law that that Disciplinary Counsel has not proved by clear and convincing evidence that this entry violated Rules 3.3(a)(1) or 8.4(c).

56. Disciplinary Counsel's charge that the entries in Respondent's June 29, 2007 Fee Petition (*see* FF 51) in *RTW* for Technology/ASS fees constituted an excessive fee in violation of Rule 1.5(a)

Disciplinary Counsel argues that "[i]t is unreasonable for a lawyer to charge a client for costs that are attributable to general overhead" and that Judge Long disallowed this claim. DC PFFs & PCLs at 81. Both of Disciplinary Counsel's contentions miss the point. The first argument is unsubstantiated by any evidence or authority; Disciplinary Counsel adduced no evidence or legal authority indicating that these fees were unreasonably high, that openly claiming them is dishonest or that the fees were not apportioned among Respondent's various clients as she claimed. Second, and as we have pointed out before, Judge Long's disallowance on unreasonableness and/or policy grounds was not based on and does not constitute proof by clear and convincing evidence in a proceeding where the burden of proof lies on Disciplinary Counsel to prove dishonesty or unreasonableness and cannot be shifted to Respondent. Additionally, we have credited Respondent's testimony that the charges were added at the suggestion of her firm's computer consultant. FF 158-*56*. Accordingly, in the face of a complete absence of evidence or legal authority, we recommend a Conclusion of Law that Disciplinary Counsel has not proved by

clear and convincing evidence that these entries violated Rule 1.5(a).

I. THE RULE 8.4(d) CHARGES[57]

Disciplinary Counsel's December 2, 2020 Notice of Violative Conduct includes the following six charges that Respondent has violated Rule 8.4(d):

> **57. Filing Eight Guardian Reports late in *RTW*[58];**
>
> **58. Failing to file and then late-filing the Suggestion of Death in *RTW*;**
>
> **59. Late-filing her Acceptance of her appointment as Guardian in *Williams*;**
>
> **60. Late-filing her Guardian Plan in *Williams*;**
>
> **61. Late-filing her Guardian Report in *Williams*; and**
>
> **62. Late-filing the Suggestion/Notice of Death in *Williams*.**

Rule 8.4(d) provides, "It is professional misconduct for a lawyer to engage in conduct that seriously interferes with the administration of justice." To establish a violation of Rule 8.4(d), Disciplinary Counsel must establish by clear and convincing evidence that: (i) Respondent's conduct was improper, *i.e.*, that Respondent either acted or failed to act when he or she should have; (ii) Respondent's conduct bore directly upon the judicial process with respect to an identifiable case or tribunal; and (iii) Respondent's conduct tainted the judicial

[57] As we explained previously in FF 158-*57* and n.40, *supra*, our legal recommendation in this Section is to be distinguished from our credibility determinations of FFs 158-*57* through 158-*62*.

[58] Because the Thirteenth and Final Report are the same in *RTW*, we count only seven Guardian Reports in RTW identified by Disciplinary Counsel as being late in the Notice of Violative Conduct.

process in more than a *de minimis* way that had at least a potential impact upon the process to a serious and adverse degree. *In re Hopkins*, 677 A.2d 55, 60-61 (D.C. 1996); *In re Martin*, 67 A.3d 1032, 1052 (D.C. 2013). The Court of Appeals has acknowledged, with respect to the "more than a *de minimis* way" threshold, that "[t]his point is a matter of degree." *In re Yelverton*, 105 A.3d 413, 427 (D.C. 2014). The Comment to this Rule advises that the Rule "includes conduct proscribed by the previous Code of Professional Responsibility under DR 1-102(A)(5) as 'prejudicial to the administration of justice,'"[59] that Rule 8.4(d) is to be "interpreted flexibly," and that it "includes any improper behavior of an analogous nature to [eight preceding] examples" listed in the Comment. Rule 8.4, cmt. [2]. Both the Board and the Court of Appeals have posited that the Rule "is a general rule that is purposely broad to encompass derelictions of attorney conduct considered reprehensible to the practice of law." *In re Alexander*, 496 A.2d 244, 255 (D.C. 1985) (appended Board Report); *see also Hopkins*, *supra*, 677 A.2d at 59. Establishing an interference with the administration of justice does not require proof that the attorney's action or inaction "cause[d] the court to malfunction or make an incorrect decision." *Hopkins*, 677 A.2d at 60. "[A]n attorney's improper conduct can be prejudicial to the administration of justice not only by bearing directly on the judicial decision-making function, but also by bearing directly on the judicial process in general." *Id.*

[59] The Court of Appeals has confirmed that "[c]onduct prohibited by Rule 8.4(d) includes conduct prohibited under former DR 1-102(A)(5), and the case law interpreting DR 1-102(A)(5) has been incorporated into Rule 8.4(d)." *Hopkins*, 677 A.2d at 56, n.1.

Evidence that the attorney knowingly or willfully violated the Rule is not a required element. *Id.* at 59-60. "[T]he purpose of Rule 8.4 is not to safeguard against harm to the client from the attorney's incompetence or failure to advocate. Rather it is to address the harm that results to the 'administration of justice' more generally." *Yelverton*, 105 A.3d at 427. Rule 8.4(d) seeks to protect both litigants and the courts from unnecessary "legal entanglement." *Id*.

The majority concludes that there is no material dispute that Disciplinary Counsel has established the first two elements of Rule 8.4(d).[60] With respect to the first element – whether Respondent failed to act when she should have – Respondent insisted that her Guardianship Reports in *RTW* were due in August and February of each year, and not in July and January. Tr. 312-13, 3546-47. However, the majority is convinced by the testimony of Ms. Stevens and Ms. Sloan that the reports were due in July and January of each year. FF 49. Moreover, even if Respondent were correct and Ms. Stevens and Ms. Sloan were incorrect in this regard, Respondent had an easy remedy – applying to the Division for clarification of the Guardian Report due dates. *See* FF 35. Respondent has acknowledged that certain of her other filings at issue here were filed late. Tr. 712-13, 3551. With respect to the second element, Respondent's actions or inactions clearly bore upon the judicial process in two identifiable cases and in an identifiable tribunal.

[60] In his Separate Statement, Mr. Bernstein disagrees that the first element (that Respondent failed to act when she should have) has been established because he finds that the evidence is not clear and convincing that the RTW Guardian Reports were late. *See* Separate Statement at 9-11.

Thus we turn to consideration of the third element – whether Respondent's conduct tainted the judicial process in more than a *de minimis* way and to a serious and adverse degree actually or potentially. Here, we find the assessment of the facts in this proceeding and of the case law applicable to those facts much more difficult. The relevant evidence adduced by the parties and the applicable case law is murky at best,[61] as reflected in the following two-step analysis – first, reviewing in chronological order numerous Court of Appeals and Board decisions applying the foregoing general principles to specific instances of attorney conduct alleged to have violated Rule 8.4(d) and then, second, attempting to apply those holdings and the more general guidance to the facts in this record.

The respondent in *Alexander*, 496 A.2d at 244, was charged with a DR 1-102(A)(5) violation in five different representations. In the first (No. 82-80), the respondent missed a settlement conference that had been scheduled by the trial court and then filed a motion to vacate the trial court's ensuing dismissal of the case, which was granted. 496 A.2d at 249 (appended Board Report). In its Report, which was attached to the decision of the Court of Appeals, the Board "reluctantly" agreed with the Hearing Committee's conclusion that Bar Counsel had not proved that the respondent knew or should have known the actual date of the settlement conference and therefore had not proved a DR 1-102(A)(5) violation by clear and convincing evidence. *Id.* at 250. The Board observed in what appears to be *dictum* that if the

[61] Mr. Bernstein argues that the Court of Appeals' case law is adequately clear to support his finding that the third element was not established. *See* Separate Statement at 5-9, 15-20.

respondent's knowledge of the date had been proven, such proof "could have provided the basis for a different finding in this regard." *Id.*

In another matter at issue in *Alexander* (No. 428-80), the respondent was found to have violated DR 1-102(A)(5) because he had not taken adequate steps to ensure that an unopposed continuance motion which a staff person filed at his direction and which resulted in the re-scheduling of a trial was, in fact, unopposed and served on opposing counsel. *Id.* at 251-52. The motion was granted and consequently opposing counsel appeared for trial on the original date. *Id.* The Board concluded that "[t]his lack of service directly reflects conduct prejudicial to the administration of justice" notwithstanding "Respondent's arguments about an honest misunderstanding or improper [office] management." *Id.* at 252.

In a third matter at issue in *Alexander* (No. 49-81), the respondent was found to have violated DR 1-102(A)(5) when he opened and read the case file of an Assistant United States Attorney before a hearing during which the respondent represented the defendant. *Id.* at 255. The Board based this conclusion on its view that DR 1-102(A)(5) "is a general rule that is purposely broad to encompass derelictions of attorney conduct considered reprehensible to the practice of law." *Id.*

In a fourth matter at issue in *Alexander* (No. 55-81), the respondent failed to timely appear for a day of trial in a driving while intoxicated case. The Board concluded, "It is beyond question that Respondent's failure to appear at the trial in a timely fashion violates DR 1-102(A)(5)." 496 A.2d at 256.

In a fifth matter at issue in *Alexander* (No. 168-81), Respondent was found to

have violated DR 1-102(A)(5) for again filing a consent motion for a continuance without actually contacting opposing counsel. 496 A.2d at 258, 260.

In *In re Pierson*, Bar Docket No. 214-93 (BPR Aug. 3, 1995), the lawyer's misconduct with respect to distribution of settlement proceeds compelled the Superior Court to hold additional and otherwise unnecessary proceedings to keep the settlement in force. The Board declined to find a violation of Rule 8.4(d) in light of the following considerations:

> Bar Counsel also alleged that Respondent seriously interfered with the administration of justice, in violation of Rule 8.4(d), by failing to pay the settlement, which forced counsel for Elnar to have the ease reinstated. Bar Counsel relies on the fact that the Superior Court twice had to consider motions to reinstate the case as the burden on the system of justice caused by Respondent's misconduct.
>
> The case law that has developed under former DR 1-102(A)(5) guides us to the conclusion that Respondent's conduct in this regard did not interfere with the administration of justice. Comment 2 to Rule 8.4(d) states that "the extensive case law" on the DR 1-102(A)(5) standard is "incorporated into this Rule." **Those cases make clear that more is required to show a violation of the Rule than conduct by an attorney that caused a court to have to take action.** The crux of the violations found in cases under DR 1-102(A)(5) was that attorneys knew of court procedures and then failed to obey, with a resulting interference with the judicial decision-making process. Many of the cases deal with such misconduct as failure to appear for scheduled court proceedings, or refusal to provide information sought on behalf of a tribunal. *See In re Delate*, 579 A.2d 1177 (D.C. 1990) (failure by an attorney appointed as a conservator to appear at a hearing, file an accounting, or respond to requests from Bar Counsel); *In re Jones*, 521 A.2d 1119 (D.C. 1986) (failure to cooperate with auditor-master). Another line of cases deals with

> the refusal of lawyers accused of disciplinary violations to deal with Bar Counsel. *E.g.*, *In re Cone*, 455 A.2d 1357 (D.C. 1983).
>
> Just putting a court to the need to conduct proceedings that it otherwise would not have to conduct is not enough to establish a violation of Rule 8.4(d). *See In re Reynolds*, 649 A.2d 818 (D.C. 1995) (violation of the conditions of probation in a criminal case is not sufficient to show a violation of DR 1-102(A)(5) because it did not impact the decision-making process of the court, although it required hearings to be held). We cannot conclude that Respondent's conduct here, troublesome as it is, "taint[ed] or interfere[d] with the decision-making process of the tribunal." *In re Shorter*, 570 A.2d 760,768 (D.C. 1990).

Bar Docket No. 214-93 at 13-14 (emphasis added). On appeal, the Court of Appeals noted:

> According to Bar Counsel, [Respondent's] actions forced counsel for Elenar [sic] to move twice in the Superior Court to have the case reinstated. The hearing committee and the Board both ruled in favor of Ms. Pierson on this charge because, in the Board's words, the case law makes clear "that more is required to show a violation of the Rule than conduct by an attorney that caused a court to have to take action." Bar Counsel does not challenge this ruling.

In re Pierson, 690 A.2d 941, 946 (D.C. 1997).

In re Hopkins, *supra*, arose out of a difficult set of circumstances that the respondent found herself in during her representation of the personal representative of an intestate estate. 677 A.2d at 57-58. Bar Counsel charged that Respondent's "failure to act while her client depleted the estate account violated," *inter alia*, DR 1-102(A)(5). *Id.* at 58. The hearing committee recommended that the Board find a violation of DR 1-102(A)(5), but the Board disagreed and dismissed the matter, reasoning that the respondent's inaction did not "cause the court to malfunction or

make an incorrect decision." *Id*. at 59. The Court of Appeals reversed, emphasizing that it had stated in *Alexander*, *supra*, that DR 1-102(A)(5) was "purposely broad . . ." and citing *In re L.R.*, 640 A.2d 697 (D.C. 1994) and a number of other decisions for the proposition that interference with judicial decision-making that leads to an incorrect decision is not an element of the Rule, so long as the action or inaction "bear[s] directly on the judicial process in general." *Id.* at 59-60. The Court of Appeals then concluded that Respondent's inaction after initially notifying the Register of Wills of her client's first series of withdrawals from the estate account "destroyed[] the Probate Division's ability to administer the estate assets" and thereby violated DR 1-102(A)(5). *Id*. at 62 (footnote omitted).

During the course of a number of complex financial transactions by his client, the respondent in *In re Mason*, 736 A.2d 1019 (D.C. 1999), made a false statement to the Federal Home Loan Bank Board. 736 A.2d at 1021, 1026-27 (appended Board Report). Observing that "[o]ur case law supports a somewhat expansive view of DR 1-102(A)(5)" and recounting the statement in *Alexander* that DR 1-102(A)(5) is "purposely broad," the court agreed with the hearing committee and the Board that under "this broad reading" each of the three elements identified in *Hopkins* had been satisfied. 736 A.2d at 1022-25.

The respondent in *In re Uchendu*, 812 A.2d 933 (D.C. 2002), who was also a Notary Public, had a substantial practice representing guardians and personal representatives in the Probate Division. Over the course of approximately two years, he signed clients' name on at least 16 documents requiring verification and filed 15

of those documents with the Division. 812 A.2d at 934. The respondent "claimed that the Probate Division regularly accepted documents with his initials on the signature line and that he had signed documents for clients 'right in front of' Probate Division employees," but the hearing committee discredited the respondent's testimony on the basis of testimony from Probate Division employees. *Id.* at 935. In the course of considering the question whether documents filed by personal representatives or guardians are legally required to be signed by the personal representative or guardian, the Court of Appeals observed,

> Guardians and personal representatives are key participants in the probate process who are required to apprise the court of their actions as they execute their fiduciary obligations. For the probate court to effectively supervise these fiduciaries, they must be personally accountable for their actions.

Id. at 938. Relying on *Alexander* and *Hopkins*, the Court of Appeals concluded that Uchendu had violated Rule 8.4(d) because his actions had tainted or potentially tainted the judicial process and thereby "impaired the court's ability to hold his clients responsible for any false or inaccurate statements in the documents," even if the documents had not actually affected the judicial decision-making process. 812 A.2d at 941.

In *In re Hallmark*, 831 A.2d 366 (D.C. 2003), the respondent submitted an untimely and otherwise deficient Criminal Justice Act voucher and then failed to respond to the inquiries of the presiding judge, who referred the matter to Bar Counsel because he "question[ed] the bona fides of Ms. Hallmark's affirmation of the 'truth and correctness' of her statements on her voucher." 831 A.2d at 369

(alteration in original). Bar Counsel charged that the respondent's "submission of an untimely and inaccurate voucher burdened the courts' administrative staff and the presiding judge" and thereby contravened Rule 8.4(d). *Id.* at 374. The Court of Appeals "agree[d] with the Board that respondent's conduct did not violate Rule 8.4(d)," reasoning:

> The Board found that although troubling and negligent, respondent's conduct was not so serious an interference with the justice system as to constitute a violation of Rule 8.4(d), and was attributable simply to her inexperience with the CJA system and reflected poor personal judgment. . .
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> The Board found that Bar Counsel failed to prove by clear and convincing evidence that respondent's conduct impacted the administration of justice in more than a *de minimis* way. Generally, we have found a Rule 8.4(d) violation upon a showing of more egregious conduct than the one at bar. . . . Contrasting this type of conduct [summarized in the preceding citations], where there is intentional disregard for the effect that an action may have on judicial proceedings or the client's cause, what we have here is a deficient request for compensation – which the Hearing Committee found to be the result of negligence, not fraud. **We do not doubt that respondent's conduct placed an unnecessary burden on the administrative processes of the Superior Court and on the presiding judge, but her untimely submission of an obviously deficient voucher did not seriously affect the administration of justice, or her client**.

Id. at 374-75 (citations omitted, emphasis added).

In *In re Powell*, Bar Docket No. 420-02 (BPR July 27, 2005), the respondent was charged with violating Rule 8.4(d) and other Rules by making false statements in his application for admission to the United States District Court for the District of

Colorado. Bar Docket No. 420-02 at 1, 8-10. The Board rejected the hearing committee's "narrow interpretation" of Rule 8.4(d) as requiring an impact upon an identifiable case, and, relying upon "the 'somewhat expansive view' authorized in *Mason*," agreed with Bar Counsel's position that the second *Hopkins* element includes interference with any judicial process "in general." *Id*. at 19-21, 24. However, the Board acknowledged that its reading of Rule 8.4(d) in *Powell* was "difficult to reconcile" with its decision in *In re Schoeneman*, Bar Docket No. 393-00 (BPR July 30, 2004) which, along with *In re Cleaver-Bascombe*, Bar Docket No. 183-02 (BPR Dec. 17, 2004), was then pending before the Court of Appeals:

> The reciprocal action now before the Court in *Schoeneman* addresses whether the attorney's failure to notify the federal court of his Virginia revocation – in violation of the court's rule – bore directly on the administration of justice in violation of Rule 8.4(d). The Board recommended finding that the simple failure to notify rule violation did not constitute a violation of Rule 8.4(d). In part, the Board was reluctant to expand the scope of violations under Rule 8.4(d) in the context of a reciprocal proceeding.
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> As the dissent in *Schoeneman* points out, the precise contours of interference with the administration of justice are not clear, but these three cases now before the Court – *Cleaver-Bascombe*, *Schoeneman* and now *Powell* – provide an opportunity for the Court to further clarify this Rule.

Bar Docket No. 420-02 at 23-24.

In *In re Cleaver-Bascombe*, 892 A.2d 396 (D.C. 2006), the Court of Appeals concluded that the submission of a voucher to the Superior Court seeking compensation under the Criminal Justice Act and containing false entries

contravened Rule 8.4(d) because "the consequences for the judicial process of the submission of a false voucher were more than minimal." 892 A.2d at 405.

In re Evans, 902 A.2d 56 (D.C. 2006), arose out of the attorney's conflict of interest in dual roles as the owner of a title company and the attorney for a client trying to close a loan being processed by his title company, a representation that included filing a Petition for Probate in the Probate Division in an effort to clear title on the property at issue. 902 A.2d at 59, 61-62 (appended Board Report). The Court of Appeals accepted the Board's findings and appended its report. *Id.* at 59. The Board, focusing on the first *Hopkins* prong, found a Rule 8.4(d) violation because (1) "[t]he record demonstrates that Respondent repeatedly took shortcuts in connection with the . . . probate proceeding and committed numerous other failures . . ."; (2) "[t]he totality of circumstances demonstrate that Respondent manipulated the probate proceeding to transfer real estate to his client under questionable circumstances"; (3) "Respondent's misconduct did not arise from a passing failure"; (4) "Respondent's multiple failings reflect an 'intentional disregard' for the effect his actions might have on the probate proceeding"; and (5) ". . . this misconduct had more than a *de minimis* effect on [the probate court] proceeding" in that "[t]he successor personal representative had to take corrective actions that would not otherwise have been necessary to recapture the value of the estate . . . ." *Id*. at 67-69.

In *In re Edwards*, Bar Docket No. 488-02 (BPR Dec. 18, 2006), the respondent, after a client's death in 1998, failed to locate over a period of

approximately four years a will that she had drafted in 1994. *Id*. at 3, 4, 7. The Board concluded that Respondent had violated Rule 8.4(d):

> By losing, or misplacing the Will, Respondent prevented the timely opening of the estate. Further, by failing to safe keep her client's Will and retrieve it in a timely manner, Respondent allegedly frustrated the probate process to the detriment of her client's heir. All of this taken together, constitutes a violation of Rule 8.4(d) . . . .
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> Respondent's conduct did not impact on an ongoing probate proceeding, but on the probate process. Her failure to locate the Will and initiate the probate process interfered with the "judicial process" with respect to an identifiable "tribunal" – the Superior Court's Probate Division. *Hopkins*, 677 A.2d at 61.
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> * * * * *
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> We distinguish the facts of this case and its more than *de minimis* impact on the judicial process from the facts in *In re Hallmark*, 831 A.2d 366 (D.C. 2003). . . . Respondent herein neglected her duty to her deceased client and his heir and, as a result, adversely impacted the probate process in the District of Columbia.

Id. at 15, 17, 19.

The respondent in *In re Cole*, Bar Docket No. 268-05 (BPR Dec. 20, 2007), was retained in an asylum proceeding before the U.S. Immigration and Naturalization Service. Bar Docket No. 268-05 at 3. He failed to file a revised application which the INS judge required after finding the initial application deficient. *Id.* at 3-4. He eventually falsely informed his client that the revised application had been filed and did not inform the client of the ensuing departure and removal orders. *Id.* at 4-6. The hearing committee concluded that this misconduct

did not violate Rule 8.4(d) but the Board disagreed on the ground that the misconduct "significant[ly] taint[ed] . . . the judicial process" because, as argued by Bar Counsel, the client "permanently lost an opportunity to obtain residence in the United States based on the facts alleged in his political asylum petition" and because "Respondent's decision not to inform his client of the Immigration Court's voluntary removal order, delayed and obstructed the judicial process." *Id.* at 13-14. The misconduct "led to an unnecessary expenditure of time and resources by the Immigration Court as . . . new counsel took belated steps to try to rectify the situation . . . ." *Id*. In its review of the case, the Court of Appeals did not address the Rule 8.4(d) issue. *In re Cole*, 967 A.2d 1264 (D.C. 2009).

In re White, 11 A.3d 1226 (D.C. 2011), involved two reports by the Board. The 2009 report addressed the respondent's representation of a client in an age discrimination action in the United States District Court of the District of Columbia, even though the respondent had been the head of the investigative unit of the District of Columbia Office of Human Rights when the client's complaint had been investigated. 11 A.3d at 1229. Both the hearing committee and the Board concluded that the respondent had not violated Rule 8.4(d) by her actions. *Id*. at 1229-1231. The Court of Appeals disagreed, finding that the judicial process was affected in more than a *de minimis* way because "[t]he entire litigation was disrupted and delayed while the District Court dealt with the motion to disqualify," because the District Judge found that even just some of respondent's actions had tainted the proceeding before him, and because the "actions that respondent took to share her

knowledge of the Proceeding before OHR, her former employer, with co-counsel and client . . . presented at least a potential impact upon [the District Court's] process to a serious and adverse degree." *Id*. at 10-11.

The respondent in *In re Yelverton*, 105 A.3d 413 (D.C. 2014), engaged in "a pattern of repetitive frivolous filings" in the course of his representation of a complaining witness in a criminal case. 105 A.3d at 416-18. Agreeing with the Board, the Court of Appeals found a Rule 8.4(d) violation because the filings ". . . required responsive action from both the Superior Court and this court . . . , adding to the work of already burdened courts." *Id*. at 427 (distinguishing *Hallmark* and citing *Hopkins*). The Court of Appeals added, "[o]n this record, we conclude that respondent's numerous meritless, repetitive, and at times vexatious motions and other filings, considered in their totality, caused more than *de minimis* harm to the judicial process and violated Rule 8.4(d)." *Id*. at 428.

In *In re Padharia*, Board Docket No. 12-BD-080 (BPR Apr. 7, 2017), the respondent had filed Petitions for Review in 30 different immigration proceedings; he then failed to file briefs in nearly all of those cases and ignored court deadlines. Board Docket No. 12-BD-098 at 5-6. The United States Court of Appeals for the Fourth Circuit dismissed the cases for failure to prosecute. *Id*. "The Hearing Committee concluded that [Padharia] did not violate Rule 8.4(d) because the Fourth Circuit's staff had an efficient system for administratively handling violations of its court orders of the kind Respondent routinely engaged in here." *Id.* at 8-9. The Board disagreed:

> . . . [T]he Hearing Committee's application of *Hopkins* and *Cole* produces a counterintuitive result: whether a lawyer violates Rule 8.4(d) would seem to depend not on the lawyer's conduct but, rather, on how efficiently the court before which the lawyer practices is managed. A lawyer who routinely disregards court orders—as Respondent did here—when practicing before a well-run court receives a disciplinary windfall under the Hearing Committee's reading of *Hopkins*, which asked only if there was an *actual* interference with the administration of justice. However, Rule 8.4(d) broadly encompasses conduct that at least *potentially* impacts the judicial process to a "serious and adverse degree." *Hopkins*, 677 A.2d at 61.
>
> In light of our recent decision in *In re Askew*, Board Docket No. 14-BD-084 (BPR Feb. 9, 2017) ("Askew II") (repeated motions for extension of time and failure to comply with filing deadlines violated Rule 8.4(d)), *review pending*, D.C. App. No. 17-BG-152—which was issued after the Hearing Committee report in this case—we have little trouble concluding that Respondent's practice of ignoring court orders (not just the filing of extensions) had at least the potential to taint the judicial process in more than a *de minimis* way, and thus that Respondent violated Rule 8.4(d). This is particularly so when one considers the quantity of conduct at issue here. The Fourth Circuit had to contact Respondent in all thirty cases, often multiple times per case. Respondent violated orders requiring the filing of initial docketing statements and orders that set a briefing schedule. His failure to follow these court orders required the Clerk of the Fourth Circuit to dismiss his clients' cases under Fourth Circuit Rule 45. **While perhaps one missed deadline is not a serious interference with the administration of justice, surely as the number of orders ignored rises, the potential for interference with the administration of justice does as well, making it more than *de minimis***. *See, e.g.*, *In re Murdter*, 131 A.3d 355, 357 (D.C. 2016) (failure to file brief despite numerous orders to do so was among conduct violating Rule 8.4(d)); *Askew I*, 96 A.3d at 57.

Id. at 9-10 (emphasis added); *see also Padharia*, 235 A.3d at 748-49 (adopting the

Board's findings and recommendations after neither party filed an exception thereto).

In *In re Klayman*, 228 A.3d 713 (D.C. 2020) (per curiam), the Court of Appeals affirmed the Board's conclusion (rejecting the Hearing Committee's view) that the respondent had not violated Rule 8.4(d), observing, "[t]he Board cited a number of reasons for rejecting the Hearing Committee's conclusion, including its longstanding 'concern[] about the scope of Rule 8.4(d) in litigation-related disciplinary matters' and its view that any Rule 8.4(d) violation would be 'derivative of the conflict-of-interest finding.'" *Id*. at 718 (alteration in original) (quoting Board Report). The Court of Appeals also emphasized that the trial judge, when he disqualified Respondent, had found that the respondent's opposition to disqualification rested on a "legitimate debate." *Id*. The Court of Appeals therefore agreed with the Board that the respondent's commencement of litigation when he had a conflict-of-interest did not constitute "'behavior [that] sufficiently tainted the judicial process to a degree adequate to sustain the Rule 8.4(d) charge.'" *Id.* (quoting Board Report). In a footnote to the late-quoted sentence, the Court of Appeals added, "[t]he Board noted that in *White*, by contrast, [the same judge] concluded that [the attorney's] conduct had tainted the proceedings; specifically, '[t]he entire litigation was disrupted and delayed while the [d]istrict [c]ourt dealt with the motion to disqualify[,]' and the court had to strike an entire deposition because of [the attorney's] presence." *Id*. at 718 (quoting *White*, 11 A.3d at 1232).

In re Smith, Board Docket No. 18-BD-012 (BPR Dec. 17, 2020), arose out of the respondent's co-trusteeship of a special needs trust in the Probate Division. Board Docket No. 18-BD-012 at 3. With respect to the Rule 8.4(d) charge, Disciplinary Counsel argued that the respondent violated Rule 8.4(d) because his "unauthorized disbursement of settlement funds and his failure to maintain adequate trust account records prompted the court to order an audit, and the Auditor-Master to expend significant time and effort to account for the entrusted funds that Respondent mishandled." *Id*. at 17. The Board found a Rule 8.4(d) violation but on different grounds:

> Regarding the third [*Hopkins*] prong, we disagree with the Hearing Committee and Disciplinary Counsel that there is clear and convincing evidence that Respondent's failure to obtain court approval before taking his fees, while improper, tainted the T.S. Trust probate proceedings in more than a *de minimis* way, or even had the potential to do so.
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> However, we agree with the Hearing Committee and Disciplinary Counsel that Respondent's failure to maintain adequate records seriously interfered with the administration of justice. The Hearing Committee accurately recounts the "laborious process" necessary for the Auditor-Master to verify Respondent's expenditures of T.S. Trust funds because Respondent kept incomplete records. . . . Thus, there is clear and convincing evidence that Respondent's failure to maintain records resulted in the otherwise unnecessary expenditure of time and resources in a judicial proceeding.

Id. at 18-20. In a footnote, the Board continued:

> To be clear, we do not conclude that Respondent violated Rule 8.4(d) simply because the Superior Court referred the case to the Auditor-Master. Rather, on the facts, the 8.4(d) violation arises

> from the substantial, otherwise unnecessary, effort required of the Auditor-Master because Respondent failed to maintain records as required by Rule 1.5(a).

Id. at 20 n.1.

In their post-hearing papers, the parties in this proceeding recite some general principles but provide no analysis of the foregoing case law. Disciplinary Counsel asserts generally that "[t]he Acceptance Form, the guardianship reports, the guardianship plan, and the notice of death are important elements of the system that keeps the program operating effectively." DC PFFs & PCLs at 83. Disciplinary Counsel adds at this late stage that failing to comply with court-imposed deadlines can constitute a separate Rule 1.3(c) violation, albeit one not charged in this proceeding. *Id*. Disciplinary Counsel also points to what it calls Respondent's "particular disdain for timely filing" and asserts that "Respondent's habitual and continued late filings frustrated the goals and processes of the guardianship program," but provides no factual or legal citations for these assertions. *Id*. at 83-84.

Respondent emphasizes:

> Despite ODC's best efforts its Probate witness could not and would not testify that a handful of ostensibly late filings over five (5) years in a system handling 7,000 late filings a year constituted a "burden." It is simply not possible to seriously contend that those few filings "tainted" the judicial process [to a] "serious and adverse degree."

Resp. PCLs at 27.

Disciplinary Counsel replies:

> Respondent also contends in her PCL at 27 that ODC has failed to prove any Rule 8.4(d) violations because Nicole Stevens, the

> Register of Wills, was reluctant to call guardian delinquencies and attendant litigation a "burden" on the Probate Division during her testimony. Yet, while it is true that Ms. Stevens did not want to use the term "burden," she testified without hesitation that guardian delinquencies and the attendant Division procedures including summary hearings, diverted Court resources and undermined the efficiency and efficacy of the guardianship program. ODC PFF ¶¶ 6-8, 11. Respondent's semantic defense is not tenable. Disciplinary Counsel's charge that Respondent violated Rule 8.4(d) is based on Respondent's course of conduct in two cases over a course of six to eight years. Her disdain and casual disregard for the processes of the Probate Court and her continued effort to minimize the import of her misconduct only underscore her violation of the Rule.

DC Reply at 21.[62]

The interpretation of applicable Rule 8.4(d) case law and its application to the facts in this and other cases have been difficult for the Hearing Committee and have raised concerns on the part of all three members. It is indeed difficult to reconcile a "purposely broad" and "somewhat expansive" standard with one that has been said, in the same sentence containing the "purposely broad" delineation, to be intended to address "reprehensible conduct." It is equally difficult to identify what the tipping "point of degree" would be on a set of facts falling somewhere between the CJA vouchers at issue in *Hallmark* and *Cleaver-Bascombe* or similar filings. The distinction for Rule 8.4(d) purposes between the Bar applications at issue in *Powell* and in *Schoeneman* is not easy to identify, and the same is true of the different Rule 8.4(d) results in the conflict of interest situations giving rise to *White* and *Klayman*.

[62] That Judge Christian had to take the time to review recordings of the hearings in *Williams*, *see* DX 75 at 701, 722, and review the record in *Toliver-Woody* contributes to the diversion of judicial resources.

The Board's expressed hope in *Powell* 16 years ago that the Court of Appeals might "further clarify the rule" is understandable but, as far as we can tell, has gone unfulfilled. We also share the Board's concern expressed in *Klayman* that Rule 8.4(d) charges may be tacked on to ("derivative of") other charges in order to obtain a sanction if other charges are not proven. *In re Klayman*, Board Docket No. 13-BD-084 at 14 (BPR Feb. 6, 2018), *recommendation adopted*, 228 A.3d at 713.

Notwithstanding these concerns and misgivings, two members, a majority of the Hearing Committee, conclude that this Hearing Committee is required under a certain group of Board and Court of Appeals decisions to find, in light of and on the basis of FFs 31-35, that Respondent violated Rule 8.4(d) by her continual late filings from near the beginning of the *RTW* guardianship through the end of the *Williams* guardianship.

First the majority of the Hearing Committee finds that the following eleven filings were late: the 2nd, 5th, 6th, 7th, 10th, 12th and Final Reports of Guardian and the Suggestion of Death in *RTW* and the Suggestion of Death, Guardianship Plan, and the 2nd Report of Guardian in *Williams*.

Second the majority concludes that this string of late filings seriously interfered with the administration of justice. The majority reaches this conclusion despite our belief from the entire record in this matter that Respondent provided her two wards exemplary attention, support, and service and did not prejudice them in any way – legally or personally – by her acts and omissions that collectively constitute, in our view, her violation of Rule 8.4(d). Nevertheless, in the view of the

majority, the recent cases of *Evans*, *Edwards*, *Cole*, and *Smith* appear to establish perhaps a very low bar for a "more than *de minimis*" showing – namely, that the totality of a respondent's acts and omissions caused some person or component in the judicial process to take material corrective or other measures that would not otherwise have been necessary. This standard from disciplinary cases over the past 15 years strikes us as a departure from the Board's view in 1995 that "more is required to show a violation of the Rule than conduct by an attorney that caused a court to have to take action" and that "[j]ust putting a court to the need to conduct proceedings that it otherwise would not have to conduct is not enough to establish a violation of Rule 8.4(d)." *See Pierson*, *supra*, Bar Docket No. 214-93, at 13-14. Be that as it may, in the opinion of the majority, Probate Division Director Stevens' testimony about the importance of the Guardianship Plan, Guardianship Reports, and Notice of Death[63] in guardianship cases and about the effect of their not being filed in a timely manner, *see, e.g.*, FFs 31-35, establishes by clear and convincing evidence an actual impact on the Probate Division, including its administrative staff – comparable to the need for several measures by the successor Personal Representative in *Evans*, the frustration of the probate process in *Edwards*, the expenditure of time and resources by the Fourth Circuit's efficient Clerk's Office in handling the respondent's missed deadlines and court order violations in *Padharia*,

[63] Mr. Bernstein disagrees with the majority in its assessment of how the Notice of Death impacted the judicial process. *See* Separate Statement at 15 (arguing that Disciplinary Counsel failed to prove how any of the possible negative effects from a late death notice, as described by Ms. Stevens, applied in this particular case).

and the financial analysis that the Auditor-Master had to undertake in *Smith*. The majority concludes also that Disciplinary Counsel more accurately summarizes the content and significance of Ms. Stevens' testimony than Respondent. *Cf*. Resp. PCLs at 27 and DC Reply at 21; *see* FFs 32, 34, 35 (quoting Ms. Stevens' testimony). Consequently, the majority has no choice but to conclude, under the current Rule 8.4(d) jurisprudence as we understand it, that Disciplinary Counsel has proved by clear and convincing evidence – as reflected in FFs 49-50, 53-54, 56-59, 69-70, 81, 85, 89-91, 104-106, 109-111 – that, as in *Padharia*[64], the totality of Respondent's 11 delinquent filings in the course of her *RTW* and *Williams* guardianships that are charged as items 57, 58, 60, 61, and 62 in the Notice of Violative Conduct, constitute a violation of Rule 8.4(d).[65]

V. RECOMMENDATION AS TO SANCTION

A. THE FACTORS TO BE CONSIDERED

The Court of Appeals has instructed that, in determining the appropriate sanction for a disciplinary infraction, the factors to be considered include (1) the seriousness of the misconduct, (2) the presence of misrepresentation or dishonesty, (3) Respondent's attitude toward the underlying conduct, (4) prior disciplinary violations, (5) mitigating circumstances, (6) whether counterpart provisions of the

[64] Mr. Bernstein disagrees with the majority's interpretation of *Padharia* as it relates to the facts of this case. *See* Separate Statement at 19.

[65] We do not conclude that Disciplinary Counsel has proved that Respondent was at fault with respect to the circumstances underlying Charge No. 59 in the Notice of Violative Conduct – the late filing of the Acceptance in *Williams* – because the three members of the Hearing Committee have all credited Respondent's testimony that she telephoned Mr. Baloga from New York City and guided him through the drafting and mailing of the Acceptance before it was due. FF 100.

Rules of Professional Conduct were violated (*i.e.* the total number of Rule violations), and (7) prejudice to the client. *See, e.g.*, *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc); *In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013).

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

B. ANALYSIS

1. Seriousness of the Misconduct

We see nothing in the record indicating that Respondent's dilatory filings constituted a serious ethical violation.

2. Misrepresentation or Dishonesty

We have found that Respondent was not dishonest in the course of the guardianships giving rise to this disciplinary proceeding – except for one reckless misstatement in her Motion for Reconsideration in *Williams* – and that she did not testify falsely during the hearing.

3. Respondent's Attitude Toward the Underlying Misconduct

Within two weeks of Judge Christian's July 28, 2015 Order in *Williams*,

Respondent publicly apologized for and acknowledged and was remorseful for her errors and took immediate steps to avoid their reoccurrence and to rectify the consequences of them. FF 153; DX 76 at 734-35; Tr. 417-18. Respondent has acknowledged those errors in this proceeding. Tr. 2590-91. On the other hand, Respondent was a bit dismissive of the importance of the Reports of Guardian, Tr. 271-72, 3460, 3551 (perhaps because her careful attention to her wards did not necessitate any action by the Division) and a bit bullheaded about the interpretation of Judge Lopez's January 12, 2005 Order (FFs 49 & 50). Tr. 311-14, 346-47, 431, 560-61.

4. Prior Discipline

Respondent has no prior disciplinary history in the District of Columbia or elsewhere, as confirmed by Disciplinary Counsel. Tr. 4284.

5. Mitigating and Aggravating Circumstances

Disciplinary Counsel argues that there is "significant aggravation in this case." DC PFFs & PCLs at 85.

First, Disciplinary Counsel alleges that Respondent "was uncooperative during the investigation and pendency of this case, failing to provide requested information." *Id.*; *see* PFFs 142-147 in DC PFFs & PCLs at 50-51. We think that Disciplinary Counsel's statement reflects a short-sighted view of the nearly decade-long history of this matter. The case has involved serious (and sometimes tendentiously expressed) allegations of serious misconduct and equally strong (and sometimes tendentiously expressed) denials and defenses. In litigation of this nature,

it is not unusual for the parties to be more than usually disputatious. The disciplinary process gives the lawyer being investigated and perhaps charged an array of procedural rights, including the right to resist compliance with motions to quash and other procedural devices. It would be inconsistent — and perhaps unconstitutional — to find that a lawyer who invokes her procedural rights should incur discipline for doing so. *Cf. Lefkowitz v Cunningham*, 431 U.S. 801, 807-08 (1977) (stripping lawyer of his political party position because he refused to waive his Fifth Amendment rights violates the constitution); *In re Kennedy*, 542 A.2d 1225, 1231 (D.C. 1988) (recognizing that, although the respondent had not expressed remorse, he was "entitled to protest a recommended sanction"). In sum, we do not find an adequate basis in this record for increasing whatever sanction we may recommend because of Respondent and her lawyer's forceful defense. Proper professional aggressiveness (even if aggravating at times) does not constitute uncooperativeness.

Disciplinary Counsel also argues:

> . . . Respondent operated under an Order on Conditions of Practice while this matter was pending. The Order required Respondent to be monitored by her expert forensic psychiatrist who was to certify monthly to the Board that Respondent was continuing her treatment, taking her medications, and able to practice law. Respondent did not inform Dr. Tellefsen that she had cancelled, missed, or failed to make 22 appointments with her mental health providers. Instead, she implied that she was continuing her treatment and consistently asked Dr. Tellefsen to so certify, demonstrating no concern that the certification sometimes was false.

DC PFFs & PCLs at 85-86. Disciplinary Counsel examined Dr. Tellefsen about missed appointments. Tr. 4809-12. Dr. Tellefsen testified on redirect examination

that is "not unusual" for someone in Ms. Rolinski's position to cancel and reschedule appointments. Tr. 4823. Ms. Rolinski's counsel then asked:

> Q. So does it -- did knowing that an appointment was canceled on June 4, I believe, and rescheduled for June 20, does that change at all retroactively the certifications you provided to the Board?
>
> A. Not at all.

Id.

Respondent presented a substantial amount of evidence regarding her admirable personal and family circumstances from her childhood through her undergraduate and graduate education. *See, e.g.*, Tr. 2592-98. We focus here, however, on Respondent's professional career and find an exemplary record of public service. Respondent served as a Clerk for a Judge of the Superior Court of the District of Columbia. Tr. 2600, 2603. She has served as a moot court judge at the Georgetown University and American University law schools and has served as a mentor for new admittees to the Maryland Court of Appeals and also for students at the American University School of International Service. Tr. 2729-31. Respondent is a certified mediator in the Circuit Court for Montgomery County, Maryland. Tr. 2599. Respondent was fluent in four languages in the early 1990s – English, French, Bulgarian and Macedonian – and has devoted time to democratization work in Bulgaria. Tr. 2608-09; RX 105 at 1681-82. She served as Chief of Staff to the President of the General Assembly of the United Nations in 1992 and 1993. Tr. 2610-13. In connection with her work on the crisis in Czechoslovakia, Yugoslavia and Bosnia, Respondent helped to raise relief funds for Bosnian mothers and

children. Tr. 2613-14. She also handled 22 adoptions of Bulgarian children and participated in the founding of Humanity, Inc., an orphanage support group, and a similar organization providing support for blind and deaf citizens of Bulgaria. Tr. 2614-15. Respondent has done non-partisan volunteer work on voting issues in Bulgaria and in the United States. Tr. 2637-38. Respondent listed still more public service activities in her brief to the Court of Appeals in the *Williams* matter. DX 79 at 830. In addition to the character and reputation evidence that we received and credited during the merits phase of the hearing, Respondent called six additional witnesses and submitted declarations from seven other individuals describing, in their view, her honesty, generosity, and extensive volunteer work domestically and internationally and expressing their appreciation for the high quality and results of her professional services and other assistance. Tr. 4330-4433; RX 105, RX 106. We have found this evidence to be convincing.

6. Number of Violations

The majority has concluded in Section IV.F of this Report that Respondent made one recklessly false statement her Motion for Reconsideration in *Williams*. We unanimously concluded in Section IV.E.35 that Respondent charged an unreasonable fee in one instance. Finally, the majority has concluded in Section IV.I of this Report that the pattern or totality of Respondent's 11 dilatory filings in the course of the ten-year span of the *RTW* and *Williams* guardianships seriously interfered with the administration of justice as we understand the controlling Board and Court of Appeals jurisprudence; since we conclude that no single one of those

dilatory filings had any material impact on the Probate Division, and guided by the Board's approach in *Padharia*, Board Docket No. 12-BD-080 at 10, we treat Respondent's dilatory filings as a single violation of Rule 8.4(d). In any event, the majority's recommended sanction, *infra*, does not turn on whether there is one Rule 8.4(d) violation or 11.

7. Prejudice to the Wards

The record is devoid of any evidence of any prejudice to Ms. Toliver-Woody or Mr. Williams arising from Respondent's misstatement in her Motion for Reconsideration or her dilatory filings in the course of serving as their Guardian.

C. RECOMMENDED SANCTION

Respondent's Rule 8.4(d) violation, by itself, would seem plainly to require nothing more than an informal admonition. This sanction would be consistent with the informal admonitions in *In re Scott*, Disciplinary Docket No. 2016-D257 (ODC, Letter of Informal Admonition July 20, 2017) for four delinquent filings in the Probate Division over a ten-month period; *In re Anderson*, Bar Docket No. D334-99 (ODC, Letter of Informal Admonition Feb. 27, 2004) for "repeated delays and failures to follow court orders" during a trial, misconduct that also violated Rules 1.1(a) & (b); *In re Fenty*, Bar Docket No. 368-02 (ODC, Letter of Informal Admonition Aug. 31, 2005) for several delinquent filings in the Probate Division, misconduct that also violated Rules 1.1(a) & (b), 1.3(a), and 1.16(d); and *In re Brown*, Bar Docket Nos. 2006-D046 *et al.* (ODC, Letter of Informal Admonition Mar. 19, 2007) for failing to file certain reports in three matters in the Probate

Division, failing to attend court hearings on those failures to file and failing to return telephone calls from the court, misconduct that also violated Rules 1.1(a) & (b) and 1.3(a). To recommend an informal admonition would also be consistent with informal admonitions in proceedings involving more serious misconduct than Respondent's, such as *In re L.R.*, 640 A.2d 697 (D.C. 1994) (Court of Appeals' order of informal admonition), where criminal defense counsel, who was appointed and receiving compensation under the Criminal Justice Act but not experienced with its provisions, accepted additional payment from the defendant; *In re Newland*, Disciplinary Docket No. 2017-D144 (ODC, Letter of Informal Admonition Aug. 28, 2017), where the respondent had removed documents from opposing counsel's table during a hearing before the United States Civilian Board of Contract Appeals; *In re Baker*, Bar Docket No. 2013-D435 (ODC, Letter of Informal Admonition Mar. 26, 2015), where the respondent recklessly filed a declaration which had not been reviewed or signed by the declarant; *In re Goldschmidt*, Bar Docket No. 2007-D426 (ODC, Letter of Informal Admonition July 22, 2008), where the trial court found that Respondent's filings had violated Fed. R. Civ. P. 11 and had "infected the entire litigation" and "badly hurt" opposing counsel, misconduct that also violated Rule 3.1; *In re Agee*, Bar Docket No. 243-01 (BPR May 14, 2004) (Board directing Disciplinary Counsel to issue an informal admonition), where the respondent failed to file a written response to the disciplinary complaint or notify Disciplinary Counsel of his new mailing address, misconduct that also violated Rule 8.1(b); and *In re Hamilton*, Bar Docket No. 271-96 (ODC, Letter of Informal Admonition Sept. 15,

2003), where the respondent accepted legal fees from an estate without prior Probate Division approval, misconduct that also violated Rules 1.5(a) & (f).

We turn now to the question whether Respondent's Rule 8.4(c) violation and her Rule 8.4(d) violation together call for a more substantial sanction. *In re Margulies*, No. 88-1032, Mem. Op. & J. (D.C. Jan. 26, 1989), involved "blatant" instances of dishonest statements to the Court and resulted in a public censure. *See In re Margulies*, Bar Docket No. 475-86 at 3 (BPR July 21, 1988); *see also In re Molovinsky*, No. M-31-79 (D.C. Aug. 27, 1979) (per curiam) (respondent was publicly censured for "lying" to Superior Court judge about reason for being late to court). A public censure was also imposed in *In re Austern*, 524 A.2d 680 (D.C. 1987), where the respondent had dishonestly assisted a fraudulent real estate transaction but had no prior disciplinary record and notable contributions in the field of legal ethics; in *In re Hadzi-Antich*, 497 A.2d 1062 (D.C. 1985), where the respondent had made false statements on a resume in an attempt to gain employment; and in *In re Mitchell*, 727 A.2d 308 (D.C. 1999), where the respondent's dishonest misleading of a client for over 14 months regarding his firm's bankruptcy resulted in the client's funds being frozen and where the attorney, like Respondent here, had a significant public service history and no prior disciplinary history.

Cases involving slightly more serious sanctions and significantly more egregious dishonesty than in the present proceeding are also informative, such as *In re Hawn*, 917 A.2d 693, 693-94 (D.C. 2007) (per curiam), where the respondent was suspended for 30 days for falsifying a resume and altering law school transcripts in

an attempt to obtain legal employment; *In re Owens*, 806 A.2d 1230, 1231 (D.C. 2002) (per curiam), where the respondent was suspended for 30 days for false statements that included one made under oath to an Administrative Law Judge to cover up eavesdropping in violation of the judge's sequestration order; *Cole*, 967 A.2d at 1264 , where the respondent was suspended for 30 days for intentionally misleading his client to cover up the fact that he had not filed a proper asylum application; *In re Spaulding*, 635 A.2d 343 (D.C. 1993), where the respondent was suspended for 30 days after he dishonestly told his client that a dismissed case was still active; *In re Ontell*, 593 A.2d 1038 (D.C. 1991), where the respondent was suspended for 30 days for misrepresentations to two separate clients about the status of their cases; *In re Schneider*, 553 A.2d 206 (D.C. 1989), where the respondent was suspended for 30 days for fabricating receipts for travel expenses, but did not act for personal gain; and *In re Rosen*, 481 A.2d 451 (D.C. 1984), where the attorney was suspended for 30 days for dishonest statements in three separate court filings.

We think that the informal admonitions in *Marguiles*, *Austern*, *Hadzi-Antich*, and *Mitchell* for more serious misconduct than that at issue here and the 30-day suspensions in *Cole*, *Spaulding*, *Ontell*, *Schneider* and *Rosen* for the significantly more serious misconduct than that at issue here all counsel against any sanction greater than an informal admonition for Respondent's one instance of a reckless misstatement, charging an unreasonable fee, and her late filings. The majority further concludes that Respondent's Rule 1.5(a), Rule 8.4(c), and Rule 8.4(d) violations together – when considered in light of Respondent's extraordinary record of public

service, her medical problems throughout the period relevant to this proceeding, the absence of any prior disciplinary record, and her continuing practice of law during the long pendency of this proceeding – merit only an informal admonition. It seems clear to us that any other sanction would "foster a tendency toward inconsistent dispositions for comparable conduct. . . ." D.C. Bar Rule XI, § 9(h)(1). Mr. Bernstein, who writes separately, also concludes that an informal admonition is an appropriate sanction for the violation of Rule 1.5(a) that he finds. *See* Separate Statement at 20-21 (emphasizing mitigating factors).

VI. RESPONDENT'S DISABILITY ASSERTION

A. FINDINGS OF FACTS PERTINENT TO RESPONDENT'S DISABILITY ASSERTION

159. Dr. Christine Tellefsen was called as an expert witness by Respondent. Tr. 4468. Dr. Tellefsen is a forensic and general psychiatrist. Tr. 4469. She was recognized by the Hearing Committee as an expert in psychiatry and forensic psychiatry. Tr. 4470-71, 4789-80. Pursuant to an Order of the Board, Dr. Tellefsen has filed monthly certifications that Respondent remains competent to practice law. DX 304; RXK 222, 224; Tr. 4598-60.

160. Dr. Tellefsen was retained by Respondent's counsel "to evaluate . . . does she have any sort of mental disorder, and if she did, would it have had anything to do with the misconduct that she was being charged with." Tr. 4479. She interviewed Respondent in person on July 20, 2018, August 30, 2018, and May 2, 2019, as well as by telephone on September 18, 2018. Tr. 4477-78; RXK 200 at 1; RXK 212 at 1. She submitted her report on September 20, 2018 and submitted

supplemental reports on July 19, 2019, and March 17, 2020. Tr. 4482; RXK 200; RXK 212 at 1-2.[66] (Dr. Tellefsen's supplemental reports address reports by Dr. Blumberg and Dr. Garmoe. The July 19, 2019 Addendum Report concerning Dr. Blumberg's opinion is considered in FF 180, *infra*.)

161. As part of her examination of Respondent, Dr. Tellefsen utilized the services of a neuropsychologist, as she typically does in such cases. Tr. 4475-76; *see* FF 169, *infra*.

162. Dr. Tellefsen concluded that Respondent "suffers from several chronic physical and mental health disorders, including Attention Deficit Disorder and Depression," and is "mildly impaired" by a number of ". . . general, chronic physical and mental health disorders" – hypothyroidism secondary to radioablation of thyroid post-Graves' disease; visual impairment; borderline diabetes; and hypertension, as well as depression secondary to thyroid condition and attention deficit disorder (ADD), all of which are recognized in the Diagnostic and Statistical Manual of the American Psychiatry Association. RXK 200 at 10-11; Tr. 4484-87, 4489.[67] Dr. Tellefsen's summary is consistent with the uncontested information provided by Respondent, including eight eye surgeries between 2002 and 2006. RXK 209 at 2-3 (Progress Note of Dr. Sharon Solomon, Johns Hopkins Wilmer Eye Institute, 12/18/06); RXK 209 at 4-5 (Progress note of Dr. Walter Stark, Johns Hopkins

[66] The March 17, 2020 report was not included in Respondent's exhibits or otherwise moved into evidence. *See* Tr. 4608-10.

[67] Attention Deficit Disorder (ADD) and Attention Deficit and Hyperactivity Disorder (ADHD) are interchangeable terms for the same condition. Tr. 4496, 4705-06, 4933.

Wilmer Eye Institute, 12/18/06 reporting YAG laser capsulotomy for reduced vision caused by posterior capsular opacification); RXK 209 at 6-22 (additional John Hopkins Wilmer Eye Institute Progress Notes between 6/19/03 and 2/16/04 reporting "double and triple vision out of the left eye and reduced vision that interferes with her activities"); RXK 210 at 3-31 (office visit notes from Johns Hopkins Glaucoma Center between 6/3/15 and 9/7/18); Tr. 4851-78 (expert witness Dr. Sharon Solomon testifying that the surgical procedures incurred by Respondent commonly suffer from tear film deficiency which "can cause patients to have decreased vision with reading, computer work . . . ."). Dr. Tellefsen concluded that Respondent's depression and attention deficit disorder have been present since at least 1999, when most of Respondent's other health problems started, beginning with Graves' disease, which typically, as with Respondent, leads to visual problems and affects one's thyroid, necessitating treatment that causes hypothyroidism with its common complication of mood disorder, especially depression. Tr. 4487, 4506, 4522-27, 4586-87; RXK 200 at 9.

163. Dr. Tellefsen reported that ADD had not been formally identified 50 years ago and thus it has been common in her practice to have middle-aged patients with ADD that were not diagnosed in childhood. Tr. 4495. She further reported that it is common for ADD to run in a family. Tr. 4496. Dr. Tellefsen has concluded that Respondent has had ADD since childhood. Tr. 4513-14.

164. Dr. Tellefsen described ADD as consisting of "a condition where a person has difficulty sustaining attention to tasks [and] trouble sticking to one thing

until it's done . . . ." Tr. 4492. These are people who "get disorganized." Tr. 4493. She also reported that tasks that involve numbers, calculations, detailed work or mundane tasks such as filing Guardian Reports and other forms are more likely to create difficulties for patients with ADD and depression than other types of tasks, "particularly when you also have a visual problem." Tr. 4564, 4582-83. Similarly, in her view, "missing dates, being delinquent in dates is fully consistent with those two disorders [ADD and depression], either separately or together, and even more so together" and that "lateness is the hallmark of ADD." Tr. 4549, 4557.

165. Dr. Tellefsen reported that depression is frequently related to various types of medical conditions, that "[p]sychiatric complications, particularly depression, are common with any kind of thyroid disease," and that such a situation is recognized in the Diagnostic and Statistical Manual. Tr. 4504, 4506; RXK 200 at 9. Dr. Tellefsen noted that depression is a "continuum of symptoms in severity and impairment" and believes that Respondent's depression "wax[ed] and wane[d] over the years." Tr. 4603-04. She is not able to specify any particular times during the period of 2005 to 2015 when Respondent's depression was waxing. Tr. 4794.

166. Dr. Tellefsen concluded that Respondent's ADD and depression caused some of the misconduct alleged in the Notice of Violative Conduct and that some of the misconduct would not have occurred but for Respondent's various disorders. Tr. 4489-91, 4549-50; RX 200 at 11. Specifically, she concluded that the late filings in the Probate Division as set forth in the Notice of Violative Conduct were caused by the observed conditions and would not have occurred but for Respondent's ADD

and depression. Tr. 4490-91, 4549-50, 4560. She further stated that failing to catch data entry errors by others is "the kind of thing where I think I would expect to see mistakes" by persons with ADD and chronic depression and, in Respondent's case, were caused by Respondent's ADD and depression. Tr. 4591, 4594-96. Dr. Tellefsen was not asked to opine on and her opinion does not address the allegations involving intentions to deceive. Tr. 4518-19.

167. Dr. Tellefsen has many patients with depression who are actively practicing law, believes that lawyers with chronic depression can effectively practice law, and has concluded that, "on the basis of psychiatric condition," Respondent is "absolutely" competent to practice law. Tr. 4508-09, 4600. With respect to Respondent's office procedures, Dr. Tellefsen believes that changes in Respondent's bookkeeping and case monitoring and establishment of a system of working with another person on accounting matters, FF 128, reflect a recognition of problems leading to this proceeding that needed to be addressed. Tr. 4572-73.

168. Dr. Tellefsen reported that Respondent's current medications consist of a stimulating antidepressant, another stimulant, and a medication for anxiety. Tr. 4500; RXK 200 at 10. She believes that Respondent is doing well in her current treatment regimen and is competent to practice law. RXK 200 at 10, 11. Pursuant to the Board's Orders dated September 25, 2018 and January 14, 2020, Dr. Tellefsen has filed monthly certifications that Respondent has continued her treatment regimen, has stayed on her medications with good results, has not had an unusual number of cancellations and re-schedulings with her psychiatrist and therapist, and

is able to practice law. Tr. 4598-4600, 4823; RXK 222 at 1-85; RXK 224 at 1-20. These are confirmed by medical records of Respondent's treatment by her psychiatrist and therapist at MedPsych Health Services. DXK 312B at 3775-93; DXK 312C at 3795-3808; DXK 314 at 3832-3906. Dr. Tellefsen believes that, "on the basis of her psychiatric condition," Respondent remains competent to practice law, "absolutely." Tr. 4600.

169. Dr. Sidney Binks, the neuropsychologist consulted by Dr. Tellefsen (FF 161) is "a clinical psychologist with board specialty in clinical neuropsychology." Tr. 4651. Neuropsychology is a subspecialty of psychology that focuses on brain/behavior relationships. Tr. 4653. Dr. Binks was recognized by the Hearing Committee as an expert in forensic psychology and neuropsychology. Tr. 4654-55, 4789-90.

170. Dr. Binks interviewed Respondent on May 17, 2019, a step that he considers "a very important part of the evaluation" because it affords an opportunity for behavioral observations that are "critical to a diagnosis" and therefore is "generally a part of every psychological evaluation by a psychologist." RXK 223 at 1; Tr. 4660-62. His psychometrician administered a battery of 12 tests selected by Dr. Binks over a full day of testing on June 7, 2019, including tests for malingering, previous brain trauma, and ADD. Tr. 4656, 4664-65, 4679, 4695-96; RXK 223 at 1 (listing each specific test, including Performance Validity Tests, the Wechsler Adult Intelligence Scale: Fourth Edition (WAIS-IV), and the Minnesota Multiphasic Inventory – II: Restructured Form (MMPI-2: RF)). He submitted his Neurological

Evaluation on July 6, 2019. RXK 223 at 1-8. He also submitted a supplemental report dated March 19, 2020. RXK 223 at 9.

171. During the interview, Respondent was "easily distracted [and] preoccupied by small tasks and had the tendency to touch items on the testing table (e.g. fidgeting . . .) [and] had to be redirected several times . . . [and] seemed restless at times moving in her seat . . . [and] had to be reminded of directions several times." RXK 223 at 4; *see* Tr. 4693-94. During the testing, Respondent "tended to lose focus and needed redirection . . ." and had a "very elevated number of omission errors" that "show a strong indication for inattentiveness and . . . some indication of issues with sustained attention and vigilance"; she also had a high variance in reaction time. RXK 223 at 5-6. Both conditions are "common in people that have attention – ADD-type problems." Tr. 4695.

172. In the section of his report titled "Neuropsychological Formulation/Diagnosis," Dr. Binks identified "potential factors in Ms. Rolinski's history that may cause or indicate neurocognitive compromise," including "history of attentional difficulties since childhood; low grades in school despite above average intelligence; history of depression; family history of ADHD; and hyperactive, impulsive behaviors during testing." RXK 223 at 7; *see* Tr. 4704-07. He also reported that Respondent "demonstrated impairments in attention on observation as well as on both objective measures and subjective questionnaires. Results of the CPT-3 revealed problems with attention, sustained attention and vigilance." RXK 223 at 8. These and other findings "suggest substantial disruption

to her attentional system." *Id.*; *see* Tr. 4708-09, 4712-13. On the basis of the foregoing, Dr. Binks concluded: "*DSM-5* Diagnosis Supported by Testing – 314.01 (F90.2) Attention Deficit/Hyperactivity Disorder Combined Presentation." RXK 223 at 8; *see* Tr. 4713-14, 4717. Dr. Binks considers the severity of Respondent's ADHD to be "moderate on testing, pretty moderate on observation." Tr. 4730. Dr. Binks also concluded that Respondent has had ADHD since early childhood. Tr. 4717. He found, finally, that Respondent's "reported history suggests chronic ongoing struggles with depression and anxiety." RXK 223 at 8.

173. Dr. Binks believes that Respondent's ADHD waxed and waned between 2005 and 2015, which is "not at all uncommon," but cannot say when "at any specific moment without [having] be[en] present." RXK 223 at 9; Tr. 4745. Thus he cannot point to any evidence of ADHD being active at the time of any of the alleged misconduct. Tr. 4745-46. He would expect it to be affecting Respondent in times of stress or multitasking. Tr. 4747. He would also expect that "looking at months of billing records" would likely be interfered with by "her tendency toward distraction and her impulsivity." Tr. 4750.

174. In his March 19, 2020 Addendum, Dr. Binks opined that Respondent's medications and treatment appear to enable her to "successfully accommodate her underlying executive functioning deficits" and that "[b]ehaviorally, Ms. Rolinski appeared exceptionally consistent with a diagnosis of ADHD (over two days and many hours of 1:1 interview/testing) . . . ." RXK 223 at 9.

175. Dr. Neil Blumberg is a forensic psychiatrist. Forensic psychiatry is a

subspecialty of psychiatry "that deals with the overlap between psychiatry and law." Tr. 4904. Dr. Blumberg was recognized by the Hearing Committee as an expert in forensic psychiatry. Tr. 5097.

176. Dr. Blumberg was retained by Disciplinary Counsel "to evaluate the psychological circumstances Ms. Rolinski has advanced in mitigation of her ethical misconduct." DXK 308-B at 3189. He interviewed Respondent and administered two tests – the Structured Inventory of Malingered Symptomatology (SIMS) and the Personality Assessment Inventory (PAI) over 3¼ hours on December 5, 2018. *Id.*; Tr. 4912-13. Dr. Blumberg completed his report on January 7, 2019. DXK 308-B at 3189. He submitted a supplemental report dated July 2, 2019 that listed additional records that he had reviewed and indicated that his opinion had not changed. DXK 308-C at 3203.

177. Dr. Blumberg reported that forensic examinations include a "history taking," "a mental status examination, which is [his] direct observations of the individual" and "an evaluation about the individual's cognitive abilities." Tr. 4908-10. Respondent's elevated score on the SIMS, DX 308-B at 3199, "raised the specter of whether she was . . . feigning or exaggerating her complaints. . . ." but Dr. Blumberg "didn't conclude that she was exaggerating or feigning a mental disorder." Tr. 4915, 4941; *see also* Tr. 4969, 4982-83. Dr. Blumberg acknowledged that the SIMS is only a screening device and would not be surprised to learn that it could have a false positive rate of 60 percent. Tr. 4979. The PAI returned an invalid profile due probably, in Dr. Blumberg's view, to carelessness on Respondent's part. DXK

308-B at 3199. Dr. Blumberg did not administer any tests that assess or diagnose ADD. Tr. 5005.

178. Dr. Blumberg agreed with Dr. Tellefsen "in terms of Mr. Rolinski having had issues related to depression, fluctuating levels of depression over the years that apparently began when she developed hypothyroidism from treatment of hyperthyroidism . . . ." Tr. 4932; *see also* DXK 308-B at 3191. Respondent reported to Dr. Blumberg the same medical history as she provided to Dr. Tellefsen, as confirmed by medical records from Respondent's providers. *Compare* DXK 308-B at 3191, *with* RXK 200 at 10-11. *See also* DXK 308-B at 3200.

179. Dr. Blumberg concluded that "at the present time and at the times of her alleged misconduct, Sylvia Rolinski was not suffering from a diagnosable mental disorder," DXK 308-B at 3201, and that "at the times of Ms. Rolinski's alleged misconduct, she was not suffering from a clinically significant psychiatric or medical condition that substantially impaired her ability to appreciate and perform her duties and responsibilities as an attorney or her ability to conform her conduct to the ethical practice of the law." DXK 308-B at 3202; *see also* Tr. 4948-49, 4961-62, 5026. He based this conclusion on Respondent "being actively involved in a variety of complex international cases that she reports handling well," because "depression, if present, would impact an attorney's performance in almost all of their legal matters, even more so in highly complex cases, as opposed to being isolated to only lower fee probate matters," and on Respondent's academic record and achievements. DXK 308-B at 3201; Tr. 4933-37; *see also* 4947, 4960-61, 5008, 5043, 5070, 5082-83,

5086. Dr. Blumberg acknowledged that, in addition to Dr. Tellefsen and Dr. Binks, Respondent's current psychiatrist has diagnosed Respondent as having ADHD. Tr. 5018-19. Dr. Blumberg testified that he believes that Respondent has never suffered from ADHD, although he did not explicitly state this in either of his reports or otherwise communicate this opinion to Disciplinary Counsel. Tr. 5030-33. He also acknowledged that chronic depression can make attorneys less attentive to deadlines, that depression is more likely to lead to errors of omission than commission, and that Respondent usually worked with co-counsel in her international cases. Tr. 5060-61, 5072-73.

180. In her July 19, 2019 Addendum Report, Dr. Tellefsen stated her opinion that Dr. Blumberg did not adequately take into consideration Respondent's continuing vision problems. RXK 212 at 1. She also noted that the results of his testing are consistent with an ADD diagnosis and that he did not adequately explore the role of her depression. *Id.*; Tr. 4602-05.

181. Dr. William Garmoe is a clinical and forensic neuropsychologist. Tr. 5141-43; DXK 313-B at 3815, 3823. Dr. Garmoe defined neuropsychology and forensic psychology in the same manner as the other expert witnesses. Tr. 5144-45; *see* FFs 169, 175. Dr. Garmoe was recognized by the Hearing Committee as an expert in forensic neuropsychology. Tr. 5476. Dr. Garmoe acknowledged that "ADHD is not [his] primary area of focus" and that he does not treat patients specifically for ADHD. Tr. 5218.

182. Dr. Garmoe was retained by Disciplinary Counsel and noted at the

hearing, "I'm prepared to offer an opinion as to whether [in] my opinion ADHD was sufficient to explain the conduct. I'm not going to opine on what actually did cause the conduct." Tr. 5147. Dr. Garmoe reviewed Dr. Binks' report and the raw data from Dr. Binks' testing of Respondent. Tr. 5147-48; DXK 313-A at 3812. Dr. Garmoe did not interview Respondent and did not conduct separate tests. Tr. 5149-51, 5216. Dr. Garmoe stated, "It should be noted that this review did not include an in-person evaluation of Ms. Rolinski . . ." and "the opinions offered here are based entirely on records reviewed. Should additional information be obtained (such as review of other records or an in-person evaluation of Ms. Rolinski), it is possible some of my opinions would change." DXK 313-A at 3809, 3814.[68] Dr. Garmoe submitted his Forensic Neuropsychological Records Review on October 15, 2019. DXK 313-A at 3809. He submitted an Addendum on March 25, 2021, listing additional records and an excerpt of Respondent's testimony regarding her background that he had reviewed and indicating that none of his opinions expressed in his report had substantively changed. DXK 322 at 4020; Tr. 5151. He submitted another Addendum on April 17, 2021 listing testimony in this proceeding that he had reviewed, again indicating that none of his opinions expressed in his report had substantively changed. DXK 328 at 4042; Tr. 5152.

183. Dr. Garmoe concluded that "ADHD was not a disabling condition to

[68] In concluding that "[b]ehaviorally, Ms. Rolinski appeared exceptionally consistent with a diagnosis of ADHD (over two days and many hours of 1:1 interview/testing)," FF 174, *supra*, Dr. Binks emphasized that his extensive interview was "something that Dr. Garmoe did not have the opportunity to personally observe and then incorporate into his understanding of my testing data and the full extent of her executive functioning." RXK 223 at 9; *see* FF **Error! Reference source not found.**.

her during [2005-2019]." Tr. 5153-54; DXK 313-A at 3813 ("[I]t is my professional opinion that ADHD cannot selectively account for the alleged misconduct . . . ."); Tr. 5188 ("It would be my opinion that . . . ADHD would not be sufficient to cause the alleged conduct in the case."). Dr. Garmoe explained the basis of his opinion as follows:

> [T]he basis of that [opinion] is that whether or not Miss Rolinski suffered from ADHD, and of course there is significant debate about that, that during that time – during the period of time she was functioning well as an attorney . . . that she handled high-level, high-complex cases well, that she [was] accurate in her billing, and people were satisfied with the product that she was producing. . . . [S]he actually performed well as an attorney in complex cases that required detail focus, that required attention to ongoing issues, it required preparation, it required complex thinking.

Tr. 5154-55; *see also* Tr. 5180 ("[S]he's a very accomplished attorney."), 5197 ("[S]he engaged throughout her career in highly complex activities . . . ."), 5206-07 ("I would expect to see errors, lapses, omissions throughout much of her professional practice, and not just restricted to the tasks that have been described as mundane or simpler tasks."), 5256 ("[I]f those errors related to ADHD you would see a much broader pattern of errors throughout all elements of professional practice, and not just in these restrictive cases."), 5259 ("It would show up in other parts of life . . ."), 5401 ("I disagree with the . . . assertion that this would have affected one area of practice . . . ."), 5404 ("If her ADD was so severe as Dr. Binks is opining in his report and that she had a lifetime of not compensating for it, then we would see that

effect in much broader areas of her practice than just in certain types of situations when under stress."), 5418 ("In general, I would expect to see errors scattered throughout practice and not just on simple cases."), 5421 ("[Y]ou would see error-prone behavior throughout her practice. You'd see it in simple and complex cases."); DXK 313-A at 3813 ("ADHD cannot selectively account for the alleged misconduct, while leaving intact other aspects of her performance on complex legal cases."). In sum, his opinion was that "the evidence is not iron clad that ADHD was a factor." Tr. 5263. Dr. Garmoe acknowledged that he is not aware of any peer-reviewed literature supporting the theory that the absence of errors in other areas of Respondent's practice is evidence that ADD did not cause the alleged misconduct at issue in this proceeding. Tr. 5428, 5431, 5440. In his March 19, 2020 Addendum, Dr. Binks points out that "inconsistent executive weaknesses . . . [are] often the case in patients with Attention Deficit Hyperactivity Disorder (ADHD)," especially when the ADHD is untreated. RXK 223 at 9.

184. Disciplinary Counsel asked Dr. Garmoe to render an opinion on whether Respondent has ADHD but he did not do so; he has never rendered a diagnosis of ADHD without interviewing the patient. Tr. 5265, 5396. Dr. Garmoe also did not render an opinion on whether Respondent suffers from depression. Tr. 5215-16, 5265, 5448.

185. With respect to Dr. Binks' testing, Dr. Garmoe observed, "his testing

was done in 2019, and so it can't automatically be seen as a measure of where she was in 2005 and 2006." Tr. 5155. Dr. Garmoe acknowledged that Dr. Binks, whom he considers "a very experienced, respected examiner," "makes a good point that executive functioning is very complex" and that ADHD could impact certain areas such as detail work. Tr. 5157-58. He also confirmed that the tests administered by Dr. Binks to assess the question of ADD are "commonly-used ones." Tr. 5393. With respect to Dr. Binks' ADHD diagnosis, Dr. Garmoe considered that diagnosis to be consistent with the test results and "in general, [he thought] his diagnosis of ADHD is reasonable." Tr. 5398-99.

186. However, Dr. Garmoe questioned "the presumption that complex [tasks] are what are always going to demand your attention and not the detail," Tr. 5158, and considered it speculative. Tr. 5400-01. Dr. Garmoe also questioned whether the invalidity of the PAI and MMPI-2: RF testing was due to Respondent's inattentiveness, as Dr. Binks and Dr. Tellefsen believe, or to an uncooperative response style on respondent's part. Tr. 5170-72. He also considers Dr. Binks' interpretation of the WAIS-IV testing as showing that Respondent's vision and visual discrimination skills were lower than her verbal skills, *i.e.* that she "did consistently well in some tasks, and consistently poorly in others," to be erroneous. Tr. 5184-87.

187. Dr. Garmoe agreed that the SIMS test administered by Dr. Blumberg is

"designed as a screening tool" and "can have high rates of false positives." Tr. 5162, 5165. *See generally* Tr. 5160-66, 5276-78. Dr. Garmoe also agrees with Dr. Blumberg that Respondent was not feigning or malingering. Tr. 5281, 5306, 5379, 5384-85. Dr. Garmoe also acknowledged in his April 17, 2021 Addendum, without changing his ultimate conclusion, that "[b]ased on [his] review of these additional records, some of the testimony suggests historical evidence that may be seen in support of a diagnosis of ADD/ADHD." DXK 328 at 4042.

188. Dr. Garmoe does not take issue with Respondent's current medication or treatment protocols and does not disagree with Dr. Tellefsen's opinion that Respondent is capable of continuing to practice law. Tr. 5406-07.

B. THE CONTROLLING JURISPRUDENCE

In 1987, the D.C. Court of Appeals held that in a disciplinary case "[t]o fail to consider [a disability or addiction] as a mitigating factor would be to defy scientific information and common sense." *In re Kersey*, 520 A.2d 321, 326 (D.C. 1987). As a result, the Court held that where a respondent's ethical misconduct would not have occurred but for a qualifying disability or addiction, a hearing committee may recommend a mitigated sanction, which may result in a stay of disbarment or suspension in favor of probation. *See id.* at 327-28. The *Kersey* doctrine does not excuse misconduct, but rather "may provide for mitigation of the sanction in certain cases where, at a minimum, 'the attorney no longer poses a threat to the public

welfare, or if that threat is manageable and may be controlled by a period of probation . . . .'" *In re Robinson*, 736 A.2d 983, 989 (D.C. 1999) (quoting *In re Appler*, 669 A.2d 731, 740 (D.C. 1995)).

The respondent carries the burden of proof on all three *Kersey* elements. To prevail, the respondent must prove:

> (1) by clear and convincing evidence that she suffered from a disability or addiction at the time of the misconduct;
>
> (2) by a preponderance of the evidence that the disability or addiction substantially caused her to engage in that misconduct; and
>
> (3) by clear and convincing evidence that she is substantially rehabilitated.

In re Stanback, 681 A.2d 1109, 1114-15 (D.C. 1996); *see also In re Rohde*, 191 A.3d 1124, 1136-37 (D.C. 2018).

1. Qualifying Disability or Addiction

To satisfy the first *Kersey* factor, the respondent must prove that he or she was suffering from a disability or addiction "that has been held to warrant *Kersey* mitigation." *In re Lopes*, 770 A.2d 561, 568 (D.C. 2001). To date, the Court of Appeals has upheld *Kersey* mitigation for respondents suffering from alcoholism,[69] depression,[70] bipolar or manic depressive disorder,[71] and addiction to prescription

[69] *E.g.*, *Rohde*, 191 A.3d at 1136-38; *Kersey*, 520 A.2d at 328.

[70] *E.g.*, *In re Verra*, 932 A.2d 503, 505 (D.C. 2007) (per curiam).

[71] *E.g.*, *In re Larsen*, 589 A.2d 400, 400-01 (D.C. 1991) (per curiam).

drugs.[72] *Kersey* mitigation is unwarranted for respondents suffering from addiction to illegal drugs,[73] compulsive gambling,[74] and illegal sexual behavior.[75] New categories of disability or addiction offered under *Kersey* must be evaluated on an individual basis. *Kersey*, 520 A.2d at 327.

The fact that a respondent has been diagnosed with a disability is not sufficient to meet the respondent's burden under this prong by itself. "Respondent must have been suffering the ill-effects of the disability at the time of the misconduct. *See Lopes*, 770 A.2d at 568 (the respondent "was suffering from depression" at the time of the misconduct); *Robinson*, 736 A.2d at 985 (the respondent "suffered from dysthymia" at the time of the misconduct); *Stanback*, 681 A.2d at 1114-15 (respondent must show that "he suffered from an alcoholism-induced impairment" at the time of the misconduct); *In re Schuman*, Board Docket No. 18-BD-020, at 24-25 (BPR July 19, 2019) (respondent failed to prove that he was suffering from depression because notes from his doctor suggested his mental health had improved at the time of the misconduct), *recommendation approved*, 251 A.3d 1044 (D.C. 2021).[76]

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[72] *E.g.*, *In re Soininen*, 889 A.2d 294, 295-96 (D.C. 2005) (per curiam).

[73] *E.g.*, *In re Marshall*, 762 A.2d 530, 539 (D.C. 2000).

[74] *E.g.*, *In re Lobbe*, 660 A.2d 410, 411 (D.C. 1995) (per curiam).

[75] *E.g.*, *In re Bewig*, 791 A.2d 908, 909 (D.C. 2002) (per curiam).

[76] The *Schuman* Court recognized that the Hearing Committee had understood that whether the respondent was suffering the ill-effects of the disability was part of the second *Kersey* prong, which

2. Substantial Cause

To satisfy the second *Kersey* factor, the respondent must prove that his or her misconduct was "substantially caused" by the qualifying disability or addiction. *In re Zakroff*, 934 A.2d 409, 418 (D.C. 2007) (citations omitted). "Substantial cause" requires the respondent to show that "but for [the disabling condition], his misconduct would not have occurred." *Kersey*, 520 A.2d at 327. "[T]he 'but for' test does not require proof that the attorney's disability was the 'sole cause' of the attorney's misconduct"; instead it requires that the respondent establish a "sufficient nexus" between her misconduct and her disability or addiction. *See Zakroff*, 934 A.2d at 423 (citations omitted). As a result, a respondent does not need to prove that her disabling condition caused each and every disciplinary violation to satisfy the "but for" test. *Id.*

However, in cases where a respondent has committed temporally distinct violations, the respondent must prove that each instance of misconduct was substantially caused by the disabling condition. *See, e.g.*, *In re Johnson*, 158 A.3d 913, 916 n.2 (D.C. 2017) (no *Kersey* mitigation where the hearing committee found that a skin condition that caused lack of concentration, fatigue, and depression

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has a lower burden of proof. The Court of Appeals acknowledged but did not resolve the disagreement between the Board and the Hearing Committee, because under either analysis, the respondent "was not entitled to mitigation because he did not carry his burden of demonstrating causation." 251 A.3d at 1057 n.9. Because the Court of Appeals did not resolve the disagreement between the Board and the Hearing Committee, the Board's analysis controls.

substantially caused the misconduct in one client matter, but with respect to the other matter at issue, the depression did not impair him "to the point that [he] was unable to comply with the ethical requirements of practicing law"); *In re Verra*, 932 A.2d 503, 505 (D.C. 2007) (per curiam) ("[W]hile [respondent] demonstrated a causal relationship between her disorders and her misconduct arising from her representation of [her client], she had not shown it to affect her misconduct in cooperating with [Disciplinary] Counsel's investigation . . . .").

3. Substantial Rehabilitation

To satisfy the final *Kersey* factor, the respondent must show that he or she is "substantially rehabilitated." *Stanback*, 681 A.2d at 1115. A respondent is substantially rehabilitated when he or she "no longer poses a threat to the public welfare" or where "that threat is manageable and may be controlled by a period of probation . . . ." *Appler*, 669 A.2d at 740; *see also, e.g.*, *Rohde*, 191 A.3d at 1137 (finding substantial rehabilitation where the respondent "'ha[s] continued his law practice without incident' related to alcohol" for an extended period of time following the misconduct (quoting Board Report)); *Robinson*, 736 A.2d at 989-90 (respondent failed to show substantial rehabilitation based in part on her "failure . . . to bring her conduct in line with the requirements of this court, the Board, and the practice monitor" during the disciplinary proceedings, "a time when she well knew her practice would be carefully scrutinized"). Thus, the substantial rehabilitation

prong of *Kersey* "imposes a sort of fitness requirement on an attorney who seeks mitigation of sanctions under this doctrine." *Robinson*, 736 A.2d at 989.

C. ANALYSIS AND RECOMMENDATION

1. Qualifying Disability or Addiction. Respondent's 11 delinquent filings occurred between July 2005 and August 2014. FFs 48-49, 109. Her erroneous compensation request for 3 hours for the 8/28/13 telephonic hearing was filed in a December 23, 2014 Fee Petition, and her Motion for Reconsideration of Judge Christian's order was filed on August 7, 2015. FFs 113, 115. We conclude that Respondent has established by clear and convincing evidence that she suffered from depression and ADHD throughout this period.

Drs. Tellefsen and Binks conducted significantly more comprehensive examinations of Respondent than Drs. Blumberg and Garmoe. FFs 160-161, 170, 176, 182. Dr. Blumberg agreed with Dr. Tellefsen that Respondent suffered from depression "over the years" beginning at the time of her Graves' Disease in 1999 that, as is typical, led to her hyperthyroidism/hypothyroidism and continued with her visual impairments and other medical issues. FF 178 (Blumberg); FFs 162, 165 (Tellefsen). Drs. Tellefsen and Binks both acknowledged that Respondent's depression waxed and waned during the relevant period, FFs 165, 173, but there is no indication that the conditions did not persist at some level throughout 1999-2015.

Dr. Blumberg's limited testing of Respondent and Dr. Garmoe's failure to

interview Respondent further weaken their conclusions. FFs 176, 182. Indeed, Dr. Garmoe opined only that ADHD was not "disabling" and was not "sufficient to cause" the alleged misconduct. FFs 183, 184. He did not opine on whether Respondent has ADHD because he never renders a diagnosis without interviewing the patient and also did not render an opinion on whether Respondent suffered from depression. FF 184.

We also find convincing Dr. Tellefsen's critique of Dr. Blumberg's approach and Dr. Binks' critique of Dr. Garmoe's approach. FFs 180, 182 n.68. Dr. Garmoe acknowledged that Dr. Binks' ADHD diagnosis is consistent with the results of his extensive testing and that "his diagnosis of ADHD is reasonable." FF 185. Neither Dr. Blumberg nor Dr. Garmoe identified any weaknesses in Dr. Tellefsen's or Dr. Binks' evaluations.

2. Substantial Cause. Respondent has failed to meet her burden of establishing by a preponderance of the evidence that her delinquent filings or the single mistake in her Fee Petition and the Motion for Reconsideration were "substantially caused" by her depression and/or ADHD and would not have occurred "but for" her depression and/or ADHD. We do not base this conclusion on Dr. Blumberg's and Dr. Garmoe's sole rationalization that Respondent's depression and ADHD could not have caused her delinquent filings (or her invoice errors) because she functioned well in other aspects of her practice and personal life. *See* FFs 179,

183. Neither of them pointed to any support in peer-reviewed research for such a sweeping proposition. FF 183; *see also* FF 179. Indeed, we respectfully find such a sweeping generalization, no matter how many times repeated, facile and totally unconvincing and think that it is completely at odds with *Kersey*'s purposes and the associated jurisprudence; it also ignores Dr. Tellefsen's unanswered points that ADHD affects different types of tasks in different ways and to differing degrees, and that "lateness is the hallmark of ADD," as well as Dr. Binks' unanswered point that "inconsistent executive weaknesses . . . [are] often the case in patients with Attention Deficit Hyperactivity Disorder." FFs 164, 183.

Regardless of whether we view Respondent's delinquent filings as one pattern of delinquent filings constituting one Rule 8.4(d) violation or as 11 individual violations of Rule 8.4(d), Drs. Tellefsen and Binks did not link the delinquent filings or pattern of filings to a disabling level of depression and/or ADHD on the due dates of the various requisite Reports of Guardian or other requisite filings. Similarly, Drs. Tellefsen and Binks did not link the Fee Petition or Motion for Reconsideration error to depression and/or ADHD on the relevant dates. This lacuna is perhaps understandable in light of the passage of 15+ years between the July 2005 due date of the first delinquent Report of Guardian in *RTW* and the November 2020 commencement of the hearing in this proceeding and even the 6+ years between the August 2014 due date of the Notice of Death in *Williams* and the November 2020

commencement of the hearing in this proceeding and even the 5+ years between the filing of the Motion for Reconsideration and the November 2020 commencement of the hearing in this proceeding. Whatever the reason, Respondent adduced no evidence – through her experts, her own testimony, the testimony of others or other forms of evidence – of her mental condition on the day on which each delinquent filing was due, during the period before each missed deadline or during the period between each missed deadline and the eventual filing or when she filed the December 23, 2014 Fee Petition or the August 7, 2015 Motion for Reconsideration. Consequently, the record in this matter lacks even a preponderance of evidence that Respondent's Rule 8.4(d) violation or Rule 1.5(a) and related 8.4(c) violations was or were substantially caused by her ADHD and/or depression and would not have occurred but for her ADHD and/or depression.

3. Substantial Rehabilitation. We think that Respondent has established by clear and convincing evidence that she is competent and qualified to continue in the practice of law. Indeed, on this record it is not even a close question and we would reach the conclusion that she is unquestionably competent and qualified to practice law even if the standard of proof were proof beyond a reasonable doubt. Dr Tellefsen has communicated with Respondent on a monthly basis and has filed monthly certifications of Respondent's adherence to her treatment and medication regimens, which is fully supported by the MedPsych records, and is "absolutely"

confident of her conclusion that Respondent is competent to practice law. Tr. 4598-4600; FFs 167, 168. Dr. Binks agrees that Respondent's medications and treatments are successfully addressing her "underlying executive functioning deficits." FF 174. Dr. Blumberg does not believe that Respondent ever had "a clinically significant psychiatric or medical condition that substantially impaired her ability to appreciate and perform her duties and responsibilities as an attorney or her ability to conform her conduct to the ethical practice of the law." FF 179. Dr. Garmoe does not disagree with Respondent's current medication and treatment protocols or with Dr. Tellefsen's finding that Respondent is capable of continuing to practice law. FF 188. We consider Disciplinary Counsel's allegation that "during the pendency of this action, [Respondent] has induced her expert to unknowingly file false certifications with the Board," DC PFFs & PCLs at 93, to be totally unsubstantiated and to border on the outrageous.

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In sum, for the reasons stated above, we recommend conclusions (i) that Respondent has proved by clear and convincing evidence that she suffered from depression and ADHD at the time of the 11 missed deadlines and subsequent delinquent filings and at the time of filing the relevant Fee Petition and Motion for Reconsideration, (ii) that Respondent has not proved by a preponderance of the evidence that that Respondent's Rule 8.4(d) violation or Rule 1.5(a) and 8.4(c)

violations was or were substantially caused by her ADHD and/or depression and would not have occurred but for her ADHD and/or depression, and (iii) has proved by clear and convincing evidence that she is competent to practice law henceforth.

VII. CONCLUSION

As we conclude our work in this matter, and before summarizing our recommendations, we close, regretfully, with some observations.

First, we have already noted our and the Board's concern about "prosecuting in bulk" and the "unique challenges" that the tactic presents for the disciplinary system. Such challenges were certainly present in this case, beginning with the initial failure in the Hearing Committee's view to provide adequate notice to Respondent of the charges against her and continuing with the December 2, 2020 Notice of Violative Conduct that consisted of little more than an apparent grab-bag of incidents that Disciplinary Counsel apparently found suspicious primarily because of Judge Long's and Judge Christian's views and conclusions. Such suspicions and skepticism are certainly a reasonable starting point for further investigation, but they need to be substantiated by evidence, and Disciplinary Counsel needs to exercise its independent judgment carefully and responsibly as to which suspicions can actually be proved. In this regard, we note that, with one exception, Disciplinary Counsel did not present a single witness with direct personal knowledge of an alleged non-visit or exaggerated court appearance nor any physical evidence such as visitor logs

indicating, at the least, that visits were in fact logged and that Respondent's name is absent from the log-on dates pertinent to Disciplinary Counsel's charges. (The single exception is DX 56, the transcript of August 28, 2013, hearing in Williams, pertaining to the Rule 1.5(d) Charge No. 53, the 3-hour entry for a .3-hour hearing.) Similarly, as we have frequently noted previously, the repeated lack of any substantive examination of Respondent by Disciplinary Counsel was both vexing and telling. The passage of time may account for this total evidentiary failure but the answer to such a problem is not to press ahead and leave the appearance of hoping that the Hearing Committee will be overwhelmed by the number of charges or will stumble on something incriminating. The apparent "throw it against the wall and see what sticks" approach in this case, combined with Disciplinary Counsel's admission that it "cannot say with specificity what she did or didn't do," Tr. 1075, is, in our view, irresponsible and abusive. This approach undoubtedly imposed a financial, physical, and emotional burden on Respondent of an entirely different magnitude than what is normally present in these disciplinary proceedings, not to mention the corresponding burden on the Hearing Committee members. We are reminded of the remark by Judges Posner, Esterbrook and Dumbauld that "Judges are not like pigs, hunting for truffles buried in briefs." *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (per curiam). Nevertheless, we did in fact undertake such a forage – over the course of more than a year and hundreds and hundreds of hours of time on the

part of the Hearing Committee members and the Board's staff members supporting this Hearing Committee – with the result that where there was sufficient documentary evidence of one Rule 8.4(c) charge, one 1.5(a) charge and the group of Rule 8.4(d) charges, a majority of the Hearing Committee has recommended a conclusion of law that a violation occurred; however, in the scores of other situations where there was no first-hand evidence and extremely little or no other evidence, the entirely foreseeable conclusion of a failure of proof by clear and convincing evidence was reached.

Second, we find it troubling that an attorney would attempt to mislead a witness and the Hearing Committee by attempting to have the witness read into the record one part of one Probate Division Judge's ruling distributed as an exhibit only late in the preceding afternoon regarding the compensability *vel non* of travel time without disclosing other clarifying and contradictory observations in the remainder of the exhibit, a task that fell to the Hearing Committee. Tr. 1124-1131.

Third, and similarly, we find it troubling that an attorney would introduce into evidence a confessed judgment in a real estate dispute without also disclosing that the confessed judgment was vacated and the underlying action dismissed. Tr. 3703-04, 3709-12, 3719-32; DX 225; RX 102, 103 at 1668.

Fourth, we find it troubling that an attorney would advance a motive of financial problems when not only had the confessed judgment theory been

thoroughly debunked but any other evidence of finance pressure was absent and the record in this proceeding contains abundant and uncontested evidence of Respondent's financial success and stability. FFs 154-157.

Fifth, we find it troubling, as we have previously noted, that an attorney would assert that Respondent "induced her expert to unknowingly file false certifications with the Board"

- without providing a single citation to a single piece of evidence in support of that accusation, DC PFFs & PCLs at 93;

- when the expert in question testified without contradiction that cancelled and rescheduled appointments are not unusual and not significant, Tr. 4823; and

- when the record contains abundant proof – specifically, almost 100 pages – of Respondent's sessions with her treatment professionals throughout 2019 and 2020. DXK 312B at 3775-3793; DXK 312C at 3795-3808; DXK 314 at 3832-3906.

Aggressive advocacy can be both effective and admirable; aggressive advocacy and serious accusations without a basis are something else entirely.

Finally, we respectfully observe that much of the controversies in this and apparently many other disciplinary proceedings could probably have been avoided or at least significantly narrowed if the Probate Division had ever adopted uniform rules for what is compensable, what is not compensable, and what information must be provided in fee petitions and attached invoices. *See* FFs 41-44. Based on our

appraisal of the entire record in this proceeding, we think that Respondent – obviously exasperated but reflecting the testimony of other witnesses in this proceeding including, especially, Ms. Sloan, FF 40, and Ms. Patel, FF 44 – has probably described the pervasive underlying problem accurately:

> . . . [T]here is no harmony among the judges as to what is compensable and what is not compensable.
>
> *****
>
> . . . I don't know why the Probate Division runs it this way, but this is the life of practitioners, and it's a precarious life . . . and in my humble opinion an arbitrary and capricious administration of justice when a member of this Bar submits to the same court, and different members of the Bar submit the same thing to the court . . . that one judge says yes and another judge sends you to Bar Counsel. But that's the Probate Division.

Tr. 1127-28.

Our and Respondent's and Ms. Sloan's and Ms. Patel's observations and concerns appear to be shared by the Court of Appeals. *In re Wilson, Bruce E. Gardner, Appellant*, 277 A.3d 940 (D.C. 2022), involved an appeal by a guardian in an intervention proceeding – much like Respondent's appeal in *Williams*, FFs 114 & 115 – from a Probate Division judge's reduction of the guardian's fee request on the ground that "some of Mr. Gardner's requests were excessive and that others stemmed from noncompensable tasks." *Id*. at 942. In a detailed opinion finding fault with nearly every aspect of the Probate Division judge's understanding of applicable Court of Appeals decisions, the Court of Appeals commenced its analysis of various

aspects of the fee request and ensuing Probate Division rulings with the following observation:

> Ideally, people appointed to be guardians would be able to consult uniform rules and policies in preparing their petitions for fees. . . . They would know what categories of costs and fees the court will and will not compensate. **The Superior Court as yet has no rules of this sort. . . .**

Id. at 944 (footnote omitted) (emphasis added).

The Court of Appeals then:

- rejected the Probate judge's arbitrary 50% reduction of Gardner's travel expense claims, *id.* at 943-44;

- directed the Probate Division judge to explain why he had disapproved expenses in the present fee petition that he had previously approved in a previous petition from the same guardian, *id*. at 945;

- rejected a universal no-compensation-for-administrative-tasks rule, observing that "[t]he Guardianship Act authorizes a guardian to be paid from the Guardianship Fund for services he rendered 'in connection with a guardianship,' D.C. Code §21-2060(a) – language we have deemed to 'have a very broad meaning'" and further observing that "[a]s to administrative tasks in particular, our cases have grappled with – or mentioned but declined to grapple with – what rates a guardian might reasonably charge for tasks that are largely administrative," *id*. at 945-47 (footnotes and citations omitted);

- observed that "[t]he notion of a blanket rule precluding a guardian from seeking compensation for tasks that might be called administrative or clerical is at odds with our 'expansive view of the kinds of duties that are compensable under the Act'" and thereupon rejected a "flat rule prohibiting compensation for 'clerical' tasks such as electronic filing . . .

because the Guardianship Act authorizes payment for such services. . . .", *id*. at 946-47 (citation omitted);

- admonished the Probate Division judge that "[c]ontrary to the court's characterization of 'such personal services' as noncompensable, this court has made clear that 'core aspects of a guardian's services' are indeed 'interpersonal in nature,'" *id*. at 947;

- ruled that becoming better acquainted with the ward over breakfast while waiting for a lessor to arrive to show the ward an apartment – a task indistinguishable from many that Respondent Rolinski was criticized for in both *RTW* and *Williams* – "fit squarely within a guardian's statutory duty to remain acquainted with his ward," *id*.; and,

- ruled that helping a ward find housing – as Respondent did in both *RTW* and *Williams* – is an "indisputably legitimate objective" under "D.C. Code § 21-2047(b)(2) (describing one of a guardian's duties as 'establishing the ward's place of abode')," *id*.

Respondent's Fee Petitions in *RTW* that are at issue in this proceeding were filed between 2007 and 2012, and Respondent's single Fee Petition in *Williams* was filed in 2014. The guardian's third Fee Petition in *Wilson* covered the time period of July 2018 through July 2019. *Wilson*, 277 A.3d at 942. The Court of Appeals' decision in *Wilson* was issued on July 7, 2022, approximately three months before the submission of this Report. The persistence of the problems caused by the absence of uniform compensation standards in the Probate Division are especially troublesome, we respectfully observe, in a system whose overriding purpose and responsibility is to protect the most vulnerable members of the community. The system depends on guardians to obtain and monitor the necessary services for their

wards, without being dis-incentivized by inconsistent and sometimes inexplicable compensation uncertainties and judicial interpretations thereof and without being dis-incentivized by ensuing disciplinary proceedings that emanate from those uncertainties and that appear, at least in this instance, not to have been responsibly thought out, investigated, analyzed, or vetted.

****

We unanimously recommend that the Board conclude that Respondent violated Rule 1.5(a) by billing for 3 hours instead of .3 hours for attending a hearing, and two members recommend that the Board conclude that Respondent also violated Rule 8.4(c) by her reckless misstatement about the August 28, 2013 hearing in her Motion for Reconsideration and Rule 8.4(d) by missing 11 filing deadlines between 2005 and 2015 in the two guardianships. We further recommend, unanimously, that the Board conclude that Disciplinary Counsel has not proven any of its approximately 160 other charges against Respondent by clear and convincing evidence. Two members further recommend that Respondent be informally admonished for the three rule violations found by the majority, and one member recommends that Respondent be informally admonished for the single rule violation found by that member. Finally, we unanimously recommend that this sanction not be mitigated on the basis of *In re Kersey*.

Respectfully submitted,

Warren Anthony Fitch

Warren Anthony Fitch, Chair

David Bernstein

David Bernstein

Michael E. Tigar

Michael E. Tigar

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

In the Matter of:	:	
	:	
SYLVIA J. ROLINSKI,	:	
	:	
	:	Board Docket No. 19-BD-067
Respondent.	:	Disciplinary Docket No. 2015-D231
	:	
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 430573)	:	

SEPARATE STATEMENT OF MR. BERNSTEIN
IN PARTIAL DISSENT

I agree with the Findings of Fact set forth in the Report and Recommendation of the Ad Hoc Hearing Committee ("the Report"); however, I disagree with the majority's conclusions that Respondent's conduct violated D.C. Rules of Professional Conduct 8.4(c) (conduct involving dishonesty), and 8.4(d) (serious interference with the administration of justice). I explain the elements of my dissent herein. I then offer additional considerations in mitigation of sanction, though I agree with the majority's recommendation of an informal admonition. My concern is not the sanction itself but rather the factual basis for the sanction.

I. Disciplinary Counsel did not prove by clear and convincing evidence that Respondent was recklessly dishonest in violation of Rule 8.4(c), pertaining to her Motion for Reconsideration ("Motion").

Rule 8.4(c) provides that "[i]t is professional misconduct for a lawyer to" "[e]ngage in conduct involving dishonesty."

In assessing whether Disciplinary Counsel has proven reckless dishonesty under Rule 8.4(c) (Respondent consciously disregarded the risk that her statement in her Motion was incorrect), we look to the particular circumstances of the case. *See, e.g.*, *In re Romansky*, 938 A.2d 733, 735 (D.C. 2007) (anticipating that the Board, on remand, would make findings on the respondent's state of mind "'in the existing circumstances'" to specify whether the respondent acted knowingly or recklessly dishonest (citation omitted)); *see also In re Brown*, 851 A.2d 1278, 1279 (D.C. 2004) (per curiam) (no exceptions filed) (agreeing with the Board in finding an 8.4(c) violation "supported by the findings of the [SEC] related to the circumstances of [the respondent's] conviction"). These two examples illustrate that Disciplinary Counsel has not met its burden.

At issue is Respondent's false statement relevant to her incorrect time entry (and label) for the August 28, 2013 hearing in her Petition for Compensation ("Petition") and her extensive efforts to provide an accurate statement. Specifically, Respondent's Motion stated that the "[p]arties had a particularly long wait in the Probate Division hearing room prior to the hearing. This allowed the parties to confer." FF 115.

As the Committee has unanimously found, Respondent's colleague Ms. Wilson "was shocked by Judge Christian's Order," and Respondent "was shaken to the core." FF 153 (internal quotations omitted). And as the Committee again has unanimously found, Respondent and Ms. Wilson made every effort to submit accurate responses in Respondent's Motion:

- They undertook an "all-hands-on-deck" "around the clock" effort over the next ten days permitted for the filing of Respondent's Motion because they "had so little time and so much data to go through."
- This included time sheets, Respondent's calendar, the Guardianship Reports, court records, and notes.
- They cut the amount of the invoice by "thousands of dollars . . . as a courtesy . . . to try to comply with Judge Christian's specific requirements," even though they believed all of the entries reflected work that had been done.
- Throughout this process, Respondent repeatedly renewed her emphasis on accuracy.

See FF 153. In sum, the record shows that Respondent's review was assiduous, and painfully thorough exerting every effort to get the Motion *right*. *See also* FF 158-*53* (Committee unanimously crediting Respondent's good-faith attempts to provide accurate data). Considering the need to review a huge volume of data within a constrained time period, and also attempting to reconstruct data where there were gaps, Respondent and Ms. Wilson achieved an extremely high level of accuracy. Considering the level of effort, an occasional error and inability to recall is to be expected.

The majority faults Respondent for failing "to step back and ask herself whether she had any actual basis for saying that she had attended the hearing in person and had spent three hours" there (Report Section IV.F.53). The majority also emphasizes that Respondent made her statement "based solely on her experience in other such hearings without having any information in her records or any recollection of this particular hearing." *Id.* But these statements are inconsistent with what we have unanimously found. It is true that Respondent charged an

unreasonable 3.0 hours in her Petition (with a label of "attend court hearing" – (DX 73 at 686)), and that Judge Christian's order put Respondent on notice of the error, along with many potential others she identified. But thereafter, as we have unanimously found, Respondent diligently tried to get it right, but regrettably did not when describing her incorrect "3.0 hours" entry in her Motion. This is inconsistent with the majority's conclusion that Respondent made her statement "based solely on her experience in other such hearings."

We can only speculate as to why Respondent's answer was incorrect a second time. Speculation *could* conclude that she failed to take a step back.[1] But importantly, the evidence shows only that Respondent made an error,[2] not that she consciously disregarded a risk that she was providing false information to Judge Christian. There is no evidence that Respondent understood that a risk existed. She believed she was being truthful. There is every indication, beyond speculation, that Respondent made every effort to provide correct information.

In re Anderson and *In re Dailey* provide additional support. These are largely misappropriation cases, yet the same principles apply: Analyzing whether

[1] Disciplinary Counsel argues (DC PFFs & PCLs at 72) that Respondent was at least reckless in not looking at her time sheet and calendar, and in only looking for the number of hearings on the invoice, rather than the original documentation. But it cites its own PFFs 25, 134, and 138 for support, which do not discuss the statement in her Motion. Rather, these refer to Respondent's original Petition (or her Petitions generally), and the October 11 telephonic hearing. What is more, we have unanimously found that Respondent and Ms. Wilson reviewed all appropriate documents before filing the Motion.

[2] Notably, Disciplinary Counsel charged Respondent with only two violations based on her Motion – the one at issue here, and one we have previously, and unanimously, found wholly unpersuasive. *See* Report Section IV.F.52.

Disciplinary Counsel proved that a respondent's misappropriation was negligent or reckless turns on *how* the attorney handled the funds. *In re Anderson*, 778 A.2d 330, 339 (D.C. 2001). Similar to the current matter, in both cases the respondents developed a system to comply with the Rule, and did comply, except in one instance. The Court found only negligent, not reckless misappropriation in both. *In re Dailey*, 230 A.3d 902, 912 (D.C. 2020) (per curiam) (the respondent had "a system to track client funds" and only misappropriated funds in one instance); *Anderson*, 778 A.2d at 339-40 (same). Based on the foregoing factors, Disciplinary Counsel has not established recklessness under Rule 8.4(c), and I thus respectfully dissent from the majority on this charge.

II. Disciplinary Counsel did not prove by clear and convincing evidence that Respondent's conduct seriously interfered with the administration of justice in violation of Rule 8.4(d).

Rule 8.4(d) provides that "[i]t is professional misconduct for a lawyer to" "[e]ngage in conduct that seriously interferes with the administration of justice."

The Court of Appeals has construed Rule 8.4(d) in *In re Pearson* as follows:

> Rule 8.4(d) states that "[i]t is professional misconduct for a lawyer to . . . [e]ngage in conduct that seriously interferes with the administration of justice." A violation requires improper conduct that "bear[s] directly upon the judicial process . . . with respect to an identifiable case or tribunal" and "taint[s] the judicial process in more than a *de minimis* way." *See In re Hopkins*, 677 A.2d 55, 59-61 (D.C. 1996). "[T]he purpose of Rule 8.4 is not to safeguard against harm to the client from the attorney's incompetence or failure to advocate. Rather it is to address the harm that results to the 'administration of justice' more generally." *Yelverton*, 105 A.3d at 427. Rule 8.4(d) seeks to protect both litigants and the courts from unnecessary "legal entanglement." *Id*.

228 A.3d 417, 427 (D.C. 2020) (per curiam) (alterations in original). To establish a violation of Rule 8.4(d), Disciplinary Counsel must prove by clear and convincing evidence that (1) the respondent either took an improper action or failed to take action when he or she should have acted, (2) the improper action bears directly on an identifiable case, and (3) that the improper action taints the judicial process in more than a *de minimis* way, "meaning that it must 'at least potentially impact upon the process to a serious and adverse degree.'" *In re Hallmark*, 831 A.2d 366, 374 (D.C. 2003) (quoting *Hopkins*, 677 A.2d at 60-61).

In its relevant decisions, the Board and the Court of Appeals have emphasized that the misconduct must "seriously interfere" with the administration of justice. In *In re Edwards*, Bar Docket No. 488-02, at 14-20 (BPR Dec. 18, 2006), *recommendation adopted*, 990 A.2d 501, 506 (D.C. 2010), the Board noted that the failure to locate and file a will caused financial harm to the potential legatees, and violated specific probate rules. In addition, no steps could be taken to fulfill the decedent's wishes until the will was filed, and thus the misconduct seriously interfered with the administration of justice. In *In re Uchendu*, 812 A.2d 933, 934 (D.C. 2002), the respondent signed others' names to documents, including false notarizations, and entered other false signatures resulting in serious interference with the administration of justice. In *Hopkins*, the respondent violated Rule 8.4(d) by depleting the estate account, despite not having any negative intent when doing so, because the misconduct had more than a *de minimis* effect, in that it at least

potentially impacted upon the probate process to a serious and adverse degree. 677 A.2d at 59-63.

In each of these cases, the lawyer's misconduct had a measurable and significant adverse effect on the judicial process. This matter however involves only four summary hearings, over several years in two separate matters, in a system that sweeps the hundreds of late filings during a typical year into a series of summary calendar proceedings that are a normal part of the guardianship administrative system. In fact, these summary hearings are a normal function of the probate process, not a causative factor in overburdening the Court.

Of course, lawyers should make timely filings, but the automatic generation of delinquency notices does not impose a burden on the probate administrative process. It is the numerous summary hearings which require a probate judge's attention and the probate division staff's preparation that has an effect on the probate system. Indeed, in describing the time and Court resources used, Ms. Stevens focused on the summary hearings and preparations thereof, not the delinquency notices themselves. Tr. 3816-17.

As to these preparations, Ms. Stevens helpfully and effectively testified to the challenges she and her colleagues faced. Specifically, preparations would begin at least two to three weeks ahead of the hearing, which included "call[ing] people to remind them." Then a week before the hearing, another courtesy call was made. Docket management was employed to determine prior delinquencies or summary hearings, looking for "pattern[s] and practice[s]" to accurately represent the status

of the Fiduciary/Guardian to the Judge. With the time and effort these functions required, Ms. Stevens and her colleagues were unable to focus on other matters. Tr. 3816, 3818.

However, the challenges Ms. Stevens and her colleagues faced is not clear and convincing evidence of a more than *de minimis* interference under prong three of *Hopkins*. In her testimony, Ms. Stevens was careful not to use the term "burden" (or "burdensome") in describing the effects of preparing for and having summary hearings. Tr. 3816 ("I don't really want to use the word burdensome, it can . . . take up a lot of time" and resources "if we have a lot of summary hearings"); *see also* Tr. 3914 ("Again, I wouldn't use [burden]").

But undue "burden" is part of the *Hopkins* test. *See In re Johnson*, 275 A.3d 268, 279-80 (D.C. 2022) (per curiam) (agreeing with the Board that "wasted time and added expense for the former client, as well as added administrative burden on the ALJ" violated Rule 8.4(d)); *see also In re Thyden*, 877 A.2d 129, 142-43 (D.C. 2005) (explaining that the respondent's "actions crossed the line between zealous advocacy and those that are impermissible because they unduly burden the courts"); *In re Hallmark*, 831 A.2d 366, 375 (D.C. 2003) (explaining that though a deficient voucher undoubtedly "placed an unnecessary burden on the administrative processes of the Superior Court and on the presiding judge," an 8.4(d) violation generally requires "more egregious conduct" or "intentional disregard for the effect that an action may have on judicial proceedings"); *In re White*, 11 A.3d 1226, 1230 n.2, 1247 (D.C. 2011) (per curiam) (disagreeing with the Board's conclusion that the

respondent violated Rule 8.4(d), but nonetheless agreeing with the Board's analysis of Rule 8.4(d), which included that "[n]ot every action that requires a court to decide a motion interferes with the administration of justice, even though the court expends resources in deciding the matter" (appended and incorporated at 11 A.3d at 1247)). Disciplinary Counsel has not proven an undue burden on the judicial process.

Ms. Stevens' testimony also provides additional support: "it can take up a lot of time and really [use our scarce Court resources] if we have *a lot* of summary hearings." Tr. 3816 (emphasis added). To reiterate, from Respondent's First Guardian Report in *RTW* filed in January 2005 (FF 48), to Respondent's Final Guardian Report in *Williams* in November 2014 (FF 111), Respondent was involved in four summary hearings. Notably, we have unanimously found that Respondent did not cause the hearing related to the Acceptance in *Williams*. *See infra*. And these hearings were far from consecutive: there was one in 2008 (FF 56); one in 2011 (FF 91); one in 2013 (FF 103); and one in 2014 (FF 106). And notably, the two hearings for the late Guardian Reports in *RTW* occurred *after* Respondent had filed her Guardian Reports. Put simply, we have four summary hearings in almost ten years, which cannot be described as "a lot of summary hearings," that would take up the Court's time. We thus do not have clear and convincing evidence of more than a *de minimis* effect on the judicial process. *Cf.* Tr. 3816 (Stevens).

ODC has not offered evidence that Respondent's conduct was (1) wrongful in the filing of the guardianship reports in *RTW*, none of which were late, and (2) even

if they are found to be late, she was only involved in four summary hearings, total.[3] Though Ms. Stevens, her colleagues, and the Probate Court expended time and energy in preparing for and having these hearings, as with any and all summary hearings, the effects did not burden the judicial process in more than a *de minimis* way.

A. <u>Ruth Toliver-Woody – Guardianship Reports</u>

Insufficient evidence exists to show that the Guardianship Reports at issue were, in fact, late and, as a result, I dissent from the majority that the first prong of "improper" conduct is established. The record is clear that Judge Lopez ordered Respondent to file her first Guardianship Report on February 15, 2005, and she subsequently filed the reports at six-month intervals thereafter. That court order, understandably, would have been interpreted as setting the subsequent schedule, and this case was not a situation where an eight-month or ten-month period lapsed with no report being filed. Respondent credibly testified that Judge Lopez' order set the six-month intervals for the filing of Guardianship Reports for February and August of each year – and not January and July of each year. *See* FF 158-*57* (crediting

[3] To reiterate, I recognize that lawyers should make timely filings; however, procedural rules recognize that they often do not. For example, Fed. R. App. P. 4(a)(1) prescribes the time within which a notice of appeal must be filed in a civil case. Fed. R. App. P. 4(a)(5) provides an orderly procedure for extending the time for filing, even if the time has expired.

Respondent's testimony regarding her belief of the filing deadlines for the 2nd, 5th, 6th, 7th, 10th, 12th, 13th and final Guardianship Reports in *RTW*).[4]

Second, even if the first element of an improper action had been proven by clear and convincing evidence in *RTW*, the evidence is not clear and convincing that Respondent's conduct "seriously interfered" with the administration of the Probate Courts. Neither filing her Report before a notice of summary hearing was issued, nor after one was issued constitutes an impact upon the process to a serious and adverse degree. Incorporating my previous findings, I address each group immediately below.

1) Guardian Reports filed before a notice of summary hearing was issued – The Fifth, Seventh, Tenth, and Twelfth Reports.

There was no "serious interference" when Respondent filed her Reports after delinquency notices had been issued but before a notice of summary hearing had been sent. An automatic process for the issuance of delinquency notices exists within the Probate Division to deal with these filing infractions, and Respondent properly responded by taking corrective action. As described by ODC witness Nicole Stevens, delinquency notices issue automatically through a tickler

[4] I disagree with the majority on whether Judge Lopez' Order shifted each subsequent Guardian Report deadline by a month – from January/July to February/August.

I note that the Fifth Guardian Report was filed in August, rather than February when it would have been expected to be filed. But Disciplinary Counsel did not argue, and the majority did not find that this report was months overdue. I will not speculate on this undeveloped record.

calendaring system, and if that delinquency is not cured within 14 days, a summary hearing is scheduled.[5]

In these instances, no summary hearings took place – indeed, no notices of summary hearings were issued. This does not contradict Ms. Stevens' testimony described earlier; the focus instead is on the automatic process. And the probate process is unaffected by automatic generation of notices, like the ones found in this group. *See* FFs 53-54 (July 2007 delinquency notice, Fifth Report filed August 8, 2007), 58-59 (July 2008 delinquency notice, Seventh Report filed July 25, 2008), 69-70 (January 2010 delinquency notice, Tenth Report filed on January 27, 2010), 81-82 (January 2011 delinquency notice, Twelfth Report filed on January 25, 2011).

2) Guardian Reports filed after a notice of summary hearing was issued – The Second, Sixth, and Thirteenth and Final.

There is no serious interference with the administration of justice for Respondent's delinquent Guardian Reports filed after the notices of summary hearings were issued. The Second Guardianship Report, filed on August 11, 2005, was filed after the Court issued its delinquency notice on July 15, 2005, and after the Court issued a Notice of Summary Hearing on August 1. FFs 49-50. The Hearing

[5] A delinquency notice is generated when the filing is late, and the guardian is given 14 days from the date of the notice to come into compliance before the order to appear at a summary hearing is issued. Tr. 3805 (Stevens). During the period of 2005-2015, approximately 50-75 summary hearings were held per week among the two or three summary hearing calendars. Tr. 3860 (Stevens). The majority of those hearings involved late guardianship reports. Tr. 3860 (Stevens). However, Respondent's conduct had a minuscule effect on those calendars.

was set for September 1, but it was "[v]acated." DX 5 at 68-69 (entries 193 and 203). So no summary hearing took place.

The delinquent Sixth and Final Reports, however, each generated a summary hearing. Specifically, Respondent filed her Sixth Report on February 12, 2008, which was after the Court issued its delinquency notice on January 16, and after the Court issued a Notice of Summary Hearing on February 1. FFs 56-57; DX 5 at 61 (entry 120). A summary hearing was held on March 4, 2008, and was then continued to and held on March 18. FF 56. For the Final Guardianship Report, Respondent filed it on August 10, 2011, which was also after the delinquency notice was issued on July 18, and after the Court issued a Notice of Summary Hearing on August 3. FFs 89-90; DX 5 at 50 (entry 14). A summary hearing was held on August 26, 2011; an Order followed noting that the summary hearing was "[h]eld and disposed. The Court finds that the delinquent item has been filed." FF 91; *see also* DX 5 at 49 (entries 11-12).

In sum, the *four-total* summary hearings over an extended period did not rise above *de minimis*. So the *two* summary hearings in the *RTW* matter did not do so either. To again illustrate, the delinquent reports (the Sixth and Final respectively) had been filed by the time of each hearing. Of course, the hearings themselves contributed to "tainting the judicial process." But because Respondent had cured the deficiencies in filing her Reports before the hearings, we do not have clear and convincing evidence that the hearings generated a more than *de minimis* effect on the judicial process.

B. James H. Williams – Two Summary Hearings

In *Williams*, once again insufficient evidence exists to show a more than *de minimis* effect for a single late Guardian Report[6] and the two[7] summary hearings (with one being continued).[8] While Ms. Stevens did describe the administrative time required to prepare for summary hearings, FF 34, the two summary hearings in *Williams* were very brief as, in one instance, Respondent filed the delinquent item (Guardianship Plan) on the same day that the notice of summary hearing issued, *see* FFs 104-105, and in the other, the Acceptance and Consent Form was filed immediately after the summary hearing. FF 103. In regard to that late Acceptance and Consent Form, Ms. Stevens testified that given the short turn-around required: "we don't usually have a lot of hearings for Acceptance and Consent. I mean [a late filing of the Acceptance and Consent] is a deal, but would I characterize it as a big deal? Not in the scheme of things." Tr. 3801 (Stevens). Further, we have credited

[6] For the final Guardianship Report filed in *Williams*, a delinquency notice was generated but, again, no notice of summary hearing was generated as Respondent soon thereafter filed the report (titled 2nd and Final Report of Guardian). *See* FFs 110-111. In addition, because the Notice of Death was filed before the 2nd Guardianship Report's due date of August 28, 2014, Respondent's report constituted the "final report" which was timely filed, well before its due date. *See* FFs 37 & 158-*61*.

[7] Because we unanimously conclude that Disciplinary Counsel failed to prove that Respondent was at fault with respect to the circumstances regarding the filing of the Acceptance, it failed to satisfy the first prong of the *Hopkins* test. *See* Report Section IV.I n.65. But should the Board disagree on this point, and consider the third prong, I analyze the impact of the resultant summary hearing on the administration of justice in this section.

[8] The summary hearing for the Acceptance and Consent was continued, with Respondent's appearance waived upon a filing of the form, and she complied within the time required. *See* DX 59; DX 62.

Respondent's testimony that she believed her staff member (Mr. Baloga) had filed the Acceptance and Consent Form on her verbal instruction. *See* FFs 100 & 158-*59* (telephone conversation with Mr. Baloga regarding his completion of the Acceptance and Consent Form in *Williams*). Again, ODC identified such a limited number of summary hearings in *Williams*, and the circumstances of each suggest that they did not involve a more than *de minimis* delay.

C. Notices of Death

Insufficient evidence exists to suggest that the probate system was burdened or that its administration was "seriously interfered" with by Respondent's notifying the Probate Court of Ms. Toliver-Woody's death less than two months after it occurred and Mr. Williams' death approximately three weeks after it occurred. *See* n.9. I disagree with the majority that the timing of the filings constituted misconduct. I further disagree that, even if "misconduct" occurred, the filings seriously interfered with the administration of justice. ODC did not produce any evidence that *any one* of the potential negative effects of a late notice described by Ms. Stevens occurred, *see* FF 37, and several of those possible effects described by Ms. Stevens do not specifically affect the administration of justice, or the tribunal at issue, the Probate Court. ODC did not brief the issue of the timing of the filings but, instead, inaccurately stated that no notice of death was ever provided in *RTW* when ODC's own experts and the docket sheet suggested otherwise.[9] In contrast to the several

[9] Ms. Toliver-Woody passed away on June 20, 2011. FF 88. Respondent's final Guardianship Report (filed on August 10, 2011) gave notice that the "Ward passed away at St. Thomas More

cases cited by the majority in its analysis of Rule 8.4(d), *see* Report at 243-262, here, Disciplinary Counsel did not introduce any evidence demonstrating actual or potential adverse consequences for the notification of death occurring a few weeks or fewer than eight weeks after a ward's passing. FF 37.[10] In the cases relied on by the majority in its Rule 8.4(d) analysis, the respondents' misconduct had an identifiable measurable adverse effect. Essentially, significant, measurable damage was done. *See, e.g.*, *In re Alexander*, 496 A.2d 244, 251-52 (D.C. 1985) (per curiam) (appended Board Report) (conduct caused opposing counsel to prepare and appear for trial on wrong day); *Hopkins*, 677 A.2d at 62 (conduct resulted in the Probate Division being unable to administer the estate); *Uchendu*, 812 A.2d at 941 (conduct impaired the court's ability to hold respondent's clients responsible for false statements in the documents); *In re Cleaver-Bascombe*, 892 A.2d 396, 404-05 (D.C. 2006) (conduct caused the submission of a false voucher for CJA funds); *In re Evans*,

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Facility, MD" and that information gave the Probate Court notice that Ms. Toliver-Woody had passed away such that "the court could proceed to termination." FF 90 (ODC expert witness Andrea Sloan verifying that the report was an adequate substitute for a Suggestion of Death form); *see also* DX 5 at 49 (docket sheet reflecting that "suggestion of death" was included with the Final Guardianship Report). The Probate Court did not order the guardianship terminated until January 23, 2012. FF 93.

Mr. Williams passed away on July 23, 2014, and the Notice of Death was filed by Respondent on August 20, 2014. FFs 108-109. The Probate Court did not issue the order terminating the guardianship until November 26, 2014. FF 112.

[10] While the Notices or Suggestions of Death are to be filed "forthwith," the Probate Court orders terminating the guardianships in *RTW* and *Williams* were not docketed until five and three months, respectively, after the notices were filed. *See, e.g.*, FFs 93, 112. The filing of the *RTW* notice, less than two months after her passing, and the *Williams* notice, less than one month after his passing, do not appear so untimely by comparison.

902 A.2d 56, 69 (D.C. 2006) (per curiam) (appended Board Report) (conduct resulted in successor personal representative having to take corrective actions to recapture value of the estate); *In re Edwards*, Bar Docket No. 488-02, at 16-19 (BPR Dec. 18, 2006) (conduct caused financial harm to the potential legatees), *recommendation adopted*, 990 A.2d 501, 508 n.2 (D.C. 2010); *In re White*, 11 A.3d 1226, 1231-32 (D.C. 2011) (per curiam) (conduct disrupted and delayed the entire litigation in federal district court). Even if the Notices of Death are to be considered late as the majority suggests, ODC has not presented clear and convincing evidence showing an adverse effect on the ward or a potentially serious adverse effect on the Probate Court's administration of justice.

D. Clear and Convincing Evidence

Even when considering together the delinquency notices, the notices of summary hearings, the four summary hearings, and the Notices of Death, Respondent's conduct in its totality did not seriously interfere with the administration of justice. I have expressed my reasoning previously, but I also find that the effect was minimal, especially in comparison with the late filings and accountings described by the Hearing Committee and Board in *In re Harris-Lindsey*, Board Docket No. 15-BD-042 (BPR July 28, 2017).[11] In that matter, the respondent "repeatedly filed untimely or incomplete accountings, which forced the Probate Court and staff to send repeated delinquency notices and schedule multiple hearings

[11] Appropriately, I believe, ODC did not argue it had proven a violation of Rule 8.4(d) in *Harris-Lindsey* in its briefing to the Hearing Committee and did not take exception to the Board's non-finding of the Rule 8.4(d) violation. *See* Board Docket No. 15-BD-042, at 1.

in connection with missed deadlines." *See* Separate Statement of Mr. Peirce at 4, *Harris-Lindsey*, Board Docket No. 15-BD-042 (citing FF 49 of the Hearing Committee Report). Yet the Board found no violation of Rule 8.4(d), because clear and convincing evidence requires "a degree of persuasion higher than mere preponderance." *Harris-Lindsey*, Board Docket No. 15-BD-042, at 37 (citation omitted), *recommendation adopted in relevant part*, 242 A.3d 613, 617 n.2 (D.C. 2020). In distinguishing *In re Cole*, 967 A.2d 1264 (D.C. 2009), the Board found that the multiple delinquency notices and even a show cause hearing did not constitute a serious interference with the administration of justice within the probate system. The Board noted that in *Cole*, "the additional expenditure and time on the judicial process involved a fully contested political asylum hearing" and then briefing and argument before the Board of Immigration Appeals – causing a burden on two judicial bodies. *Harris-Lindsey*, Board Docket No. 15-BD-042, at 39 n.37 (cautioning against the broadening of the scope of "more than a *de minimis* effect"); *see also In re Harris-Lindsey*, 242 A.3d 613, 617 n.2 (D.C. 2020) (adopting the Board's position that the conduct did not "taint the judicial process in more than a *de minimis* way" (internal quotations omitted)); *In re Pierson*, Bar Docket No. 214-93, at 14 (BPR Aug. 3, 1995) ("Just putting a court to the need to conduct proceedings that it otherwise would not have to conduct is not enough to establish a violation of Rule 8.4(d)."), *adopting without further discussion where no exception noted*, 690 A.2d 941, 946 (D.C. 1997).

While the majority cites to *Padharia*, Board Docket No. 12-BD-080 (BPR Apr. 7, 2017), as weighing in favor of a Rule 8.4(d) violation in this case, it is not a comparable case. In *Padharia*, the respondent's complete *failure to file* briefs in nearly *30 different immigration matters*, resulted in his clients' cases being dismissed; that set of facts constitutes clear and convincing evidence that the misconduct had more than a *de minimis* effect and seriously interfered with the administration of justice. *See id.* at 5-6. *Padharia* makes it evident that a single ministerial dismissal is not a big deal, but a volume of more than 30 dismissals can have a more than *de minimis* effect. *See id.* at 10. Here, by contrast, the cumulative effect of four summary hearings may have interfered with the administration of justice to a limited extent, but they did not "seriously" interfere with the administration of justice.

As the Court of Appeals commented in *Hallmark*: "We do not doubt that respondent's conduct placed an unnecessary burden on the administrative processes of the Superior Court and on the presiding judge, but her untimely submission of an obviously deficient voucher did not seriously and adversely affect the administration of justice, or her client." 831 A.2d at 375. Here, Respondent caused the issuance of automatic delinquency notices, which were intended to facilitate compliance without necessitating a summary hearing, and she consistently complied in all but a few instances.

In a system that sweeps the hundreds of late filings during a typical year into a series of summary hearings, ODC only offered evidence of Respondent being

called to four such summary hearings – despite her acting as a guardian in matters that spanned several years. ODC has provided no evidence of any adverse effect resulting from Respondent's actions. This is not clear and convincing evidence of an 8.4(d) violation. *See Harris-Lindsey*, Board Docket No. 15-BD-042, at 37.

III. Thoughts in Mitigation

A final thought, from a "Public Member's" perspective. My dissent from two of the Committee majority's recommendations speaks for itself. Respondent had had a successful and apparently lucrative law practice for many years. As a result of her life's experience she dedicated herself to providing support to those requiring the intervention of the Probate Court. Her record over the years demonstrates her capability and success as a Guardian. The purpose of the attorney-discipline system is to deter misconduct, not to punish the attorney. The time and effort for Respondent and the disciplinary process to take this matter through the disciplinary system over years to the result recommended by this Committee seems to no useful purpose. It may only dissuade those successful attorneys who desire to support the probate process, to the detriment of the process and those who enter the probate process of necessity.

It is also useful to consider the end-result of this matter. After over 30 hearing days, over 5,400 transcript pages, and over 60 charges in Disciplinary Counsel's Notice of Violative Conduct, merely one violation is proven – an error constituting an unreasonable fee. The toll is heavy and personal for Respondent and not necessarily the best use of funds for the Disciplinary process.

By: David Bernstein
David Bernstein

APPENDIX

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

In the Matter of	
SYLVIA ROLINSKI, ESQUIRE,	**Board Docket No. 19-BD-067**
	Bar Docket No. 2015-D231
Respondent	
Member of the Bar of the District of Columbia Court of Appeals	
Bar Number: 430573	
Date of Admission: November 5, 1991	

DISCIPLINARY COUNSEL'S NOTICE OF VIOLATIVE CONDUCT

Pursuant to the Hearing Committee Chair's order, Disciplinary Counsel hereby further identifies the misconduct of Respondent as follows:

A. Dishonesty and/or Knowing False Statement and/or Excessive Fee

1. Toliver-Woody

1 Either 6th Guardian Report dated 2/12/08 stating 1 visit by phone during 6-month reporting period or 6/25/09 Petition for Compensation stating a 4-hour client meeting on 1/24/08

2 4-hour client meeting 1/24/08 claimed in 6/25/09 Petition for Compensation

3 8th Guardian Report dated 1/7/09 stating 3 visits during 6-month reporting period

4 9th Guardian Report dated 7/10/09 stating 3 visits during 6-month reporting period

4.5-hour visit on 8/14/09 claimed in 4/19/10 Petition for compensation

10th Guardian Report dated 1/27/10 stating 3 visits during 6-month reporting period

5-hour client meeting on 12/18/09 claimed in 4/19/10 Petition for Compensation

5-hour client meeting on 11/6/09 claimed in 4/19/10 Petition for Compensation

5-hour client meeting on 10/12/09 claimed in 4/19/10 Petition for Compensation

3-hour client meeting on 12/17/09 claimed in 4/19/10 Petition for Compensation

3-hour client meeting on 12/8/09 claimed in 4/19/10 Petition for Compensation

3-hour client meeting on 11/23/09 claimed in 4/19/10 Petition for Compensation

5-hour visit on 7/12/10 claimed in 5/6/11 Petition for Compensation

4.1-hour court appearance for 8/20/10 court hearing claimed on 5/6/11 Petition for Compensation

3.5-hour client meeting on 9/30/10 claimed in 5/6/11 Petition for Compensation

5-hour hearing on 10/22/10 claimed in 5/6/11 Petition for Compensation

4.8-hour client meeting on 11/22/10 claimed in 5/6/11 Petition for Compensation

4.8-hour client meeting on 1/7/11 claimed in 5/6/11 Petition for Compensation and duplicate 4.8-hour client meeting on 1/8/11 claimed in 1/11/12 Petition for Compensation

5-hour client meeting on 4/5/11 claimed in 1/11/12 Petition for Compensation

5-hour client meeting on 4/13/11 claimed in 1/11/12 Petition for Compensation

4-hour client meeting on 5/10/11 claimed in 1/11/12 Petition for Compensation

5-hour client meeting on 5/27/11 claimed in 1/11/12 Petition for Compensation

4.8-hour client meeting on 6/1/11 claimed in 1/11/12 Petition for Compensation

5-hour client meeting on 6/2/11 claimed in 1/11/12 Petition for Compensation

5.9-hour client meeting on 6/3/11 claimed in 1/11/12 Petition for Compensation

5.8-hour client visit on 6/9/11 claimed in 1/11/12 Petition for Compensation

4.8-hour client visit on 6/10/11 claimed in 1/11/12 Petition for Compensation

5.5-hour client meeting on 6/13/11 claimed in 1/11/12 Petition for Compensation

5.3-hour client meeting on 6/15/11 claimed in 1/11/12 Petition for Compensation

Various 0.3-hour and 0.4-hour charges for calls from St. Thomas More

2. J. Williams

3.8-hour client meeting on 6/1/13 claimed in 12/23/14 Petition for Compensation

2.8-hour client meeting on 6/2/13 claimed in 12/23/14 Petition for Compensation

3-hour hearing on 6/3/13 claimed in 12/23/14 Petition for Compensation

3-hour meeting with client on 6/19/13 claimed in 12/23/14 Petition for Compensation

35 3-hour hearing on 8/28/13 claimed in 12/23/14 Petition for Compensation when Respondent appeared by phone and hearing lasted 7 minutes

36 3-hour client meeting on 8/30/13 claimed in 12/23/14 Petition for Compensation

37 3-hour client meeting on 9/10/13 claimed in 12/23/14 Petition for Compensation

38 3-hour hearing on 10/11/13 claimed in 12/23/14 Petition for Compensation

39 3-hour meeting with client on 10/17/13 claimed in 12/23/14 Petition for Compensation

40 3-hour meeting with client on 11/12/13 claimed in 12/23/14 Petition for Compensation

41 3-hour meeting with client on 12/5/13 claimed in 12/23/14 Petition for Compensation

42 1.5-hour meeting with client on 1/18/14 claimed in 12/23/14 Petition for Compensation

43 3-hour meeting with client on 1/28/14 claimed in 12/23/14 Petition for Compensation

44 3-hour meeting with client on 2/18/14 claimed in 12/23/14 Petition for Compensation

45 2.5-hour meeting with client on 4/7/14 claimed in 12/23/14 Petition for Compensation

46 3-hour meeting with client on 5/15/14 claimed in 12/23/14 Petition for Compensation

47 3-hour meeting with client on 5/16/14 claimed in 12/23/14 Petition for Compensation

48 2.5-hour meeting with client on 6/25/14 claimed in 12/23/14 Petition for Compensation

49 0.8-hour care conference on 8/18/14 claimed in 12/23/14 Petition for Compensation even though J. Williams died on 7/23/14

B. Dishonesty and/or Knowing False Statement to Court

50 Statement in August 20, 2010 Hearing before Judge Campbell that visits to Toliver-Woody were reflected in guardian reports, then statement that visits were reflected in petitions for compensation

51 Failure to correct statement made during 10/11/13 hearing that she had already filed Acceptance in *In re Williams*

52 Statement in August 7, 2015 Motion for Reconsideration in *In re J. Williams* that Respondent "always has and always will consistently record time contemporaneously with her actions in order to ensure that an accurate record of [her] work is recorded."

53 Statement in August 7, 2015 Motion for Reconsideration in *In re Williams* that the particularly long wait for the 8/28/13 hearing "allowed the parties to confer" when Respondent appeared by phone, wait was 15 minutes and hearing lasted 7 minutes.

C. Excessive Fee

54 Charge on 8/20/14 of over 1.1 hours to draft and file Notice of Death in *In re J. Williams*

55 Charge on 10/11/13 of 2.2 hours to try to find then rewrite Acceptance in In re J. Williams

56 Technology/ASS fees in *In re Toliver-Woody*

D. Conduct that Seriously Interfered with the Administration of Justice

57 Delinquent Guardian Reports in *In re Toliver-Woody* (2d, 5th, 6th, 7th, 10th, 12th, 13th[1] and final)

58 Failure to file and/or delinquent filing of Suggestion of Death in *In re Toliver-Woody*

59 Delinquent Acceptance in *In re J. Williams*

[1] Respondent mistakenly called the Guardian Report she filed on 8/10/11 after the 6/20/11death of Ms. Toliver-Woody the 12th Guardian Report. It actually was the thirteenth and final report.

60 Delinquent Guardian Plan in *In re J. Williams*

61 Delinquent Guardian Report in *In re J. Williams* (2d and final)

62 Delinquent Suggestion/Notice of Death in *In re J. Williams*

Respectfully submitted,

/S/
Jerri Dunston
Assistant Disciplinary Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on this 2d of December 2020, I caused a copy of *Disciplinary Counsel's Notice of Violative Conduct* to be sent only by electronic mail[2] to Sylvia J. Rolinski, Esquire c/o Philip M. Musolino, Esquire at PMusolino@musolinoanddessel.com.

/S/
Jerri Dunston

[2] At this time, due to the Coronavirus, the Office of Disciplinary Counsel is physically closed and employees are working remotely making service by regular mail difficult to undertake.