REDACTED

THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

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



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| In the Matter of: | : | |
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| MATHEW B. TULLY, | : | Board Docket No. 22-BD-025 |
| | : | Disciplinary Docket No. 2017-D030 |
| Respondent. | : | |
| | : | |
| A Member of the Bar of the | : | |
| District of Columbia Court of Appeals | : | |
| (Bar Registration No. 491695) | : | |
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| GREGORY T. RINCKEY, | : | Board Docket No. 22-BD-025 |
| | : | Disciplinary Docket No. 2016-D371 |
| Respondent. | : | & 2018-D052 |
| | : | |
| A Member of the Bar of the | : | |
| District of Columbia Court of Appeals | : | |
| (Bar Registration No. 980732) | : | |

REPORT AND RECOMMENDATION OF
THE AD HOC HEARING COMMITTEE

Respondents are charged with violating Rules 5.6(a), 8.4(a), 8.4(d), 5.1(a), 5.1(b), 5.1(c)(1), 5.1(c)(2), 5.3(a), and 5.3(b) of the District of Columbia Rules of Professional Conduct (the "Rules"), arising principally from their conduct relating to lawyer and non-lawyer employees of their law firm's office in the District of Columbia. Disciplinary Counsel contends that the Respondents committed all the charged violations and should be suspended for at least six months each as a sanction

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

for their misconduct. The Respondents contend that Disciplinary Counsel failed to establish any of the charged Rule violations and that this matter should be dismissed.

As set forth below, the Hearing Committee finds that Disciplinary Counsel has proven multiple Rule violations against each Respondent by clear and convincing evidence and recommends that each Respondent should be suspended for ninety days.

## I. PROCEDURAL HISTORY

A seven-day hearing was held in this matter on March 20-23, 2023, March 27, 2023, April 4, 2023, and April 11, 2023. The following exhibits were received in evidence: DCX 6-18, 21-31, 35, 37-48, 50-68, 70-73, 76-81, 84-85, 87-98, 100-115, 118, 127, and 130; and RX 1-74, 80-91, 93-94, 98-101, 103-105, 132, 134, 136-138, 140-141, 146-154, 156, 158, 160, 162, 164-166, 168-178, 181-183, 185-193, 197-200, 203-206, 208-218, 220-223, 225, 229-234, 236-254, 258-259, 261, 263-264, and 268-271.[1] The following exhibits were excluded from evidence: RX 106 and RX 202.[2]

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[1] "DCX" refers to Disciplinary Counsel's exhibits. "RX" refers to Respondents' exhibits. "Tr." refers to the transcript of the hearing held on March 20-23, 2023, March 27, 2023, April 4, 2023, and April 11, 2023. "FF" refers to the Hearing Committee's Findings of Fact.

[2] Pursuant to the Board's February 22, 2023, protective order, the following admitted exhibits were placed under seal: DCX 6, 118, and 130; RX 3-26, 28, 30-70, 72-73, 82, 84, 134, 136, 165-166, 170, 178, 183, 205, 212, 222, 229-234, 236, 246-247, 249-251, 261, and 269-271. RX 202, which was excluded, was also offered under seal. Also pursuant to the Board's order, some portions of the hearing were conducted without contemporaneous public streaming. *See, e.g.*, FF 127; Tr. 449-

The Hearing Committee's April 19, 2023, order prescribing the format and timing for post-hearing briefs directed that Disciplinary Counsel's post-hearing brief—

> contain proposed findings of fact that consist of numbered paragraphs, including within each paragraph specific references to the parts of the record that support the facts set forth in that paragraph. Respondents' brief shall contain a response to each numbered paragraph in Disciplinary Counsel's proposed findings of fact including, in the case of disagreement, specific references to the parts of the record relied upon.

Emphasis in original.

The Respondents did not timely move for reconsideration of that order. Disciplinary Counsel's post-hearing brief complied with the order. More than seven weeks following the April 19 order's issuance, and after requesting and receiving several extensions of time without seeking reconsideration of the April 19 order, the Respondents filed a brief that objected to—and expressly did not conform to—the requirements of that order. *See* Respondents' Post-Hearing Brief at 8-10. Although that brief's nonconformity to the Hearing Committee's order complicated, delayed, and burdened the preparation of this Report and Recommendation, the Committee nevertheless considered it fully. We are satisfied that this has not prejudiced the Respondents. Due to the nonconformity of their brief, however, our Findings of Fact

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50, 452. These portions of the transcript are not under seal or otherwise redacted. *See* Order, *In re Tully*, 22-BD-025, at 2, (HC June 16, 2023).

adopt language proposed by Disciplinary Counsel more frequently than might otherwise have been the case.

## II. FINDINGS OF FACT

The following findings of fact are based on the testimony and documentary evidence admitted at the hearing. Unless otherwise noted, these findings of fact have been established by clear and convincing evidence. *See* Board Rule 11.6; *In re Cater*, 887 A.2d 1, 24 (D.C. 2005) (stating that "clear and convincing evidence," which is more than a preponderance of the evidence, 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").

### A. Background

1. Respondent Mathew B. Tully was admitted to the Bar of the District of Columbia Court of Appeals on March 7, 2005, and assigned Bar number 491695. Mr. Tully also is a member of the New York and Virginia bars. Specification of Charges at 2 ¶ 1; Answer at 3.

2. Respondent Gregory T. Rinckey was admitted to the Bar of the District of Columbia Court of Appeals on May 9, 2008, and assigned Bar number 980732. Mr. Rinckey also is a member of the New York and New Jersey bars. Specification of Charges at 2 ¶ 2; Answer at 4; Tr. 1037-38.

3. Mr. Tully opened a solo law practice in Albany, New York, in 2003. Tr. 1557-58. Messrs. Tully and Rinckey formed the firm of Tully Rinckey PLLC (the "Firm" or "Tully Rinckey") in Albany in 2004 or 2005. Tr. 28, 1037.

4. Messrs. Tully and Rinckey were the only equity partners of the Firm from 2004 until 2020. Tr. 28, 185. At all times relevant to this proceeding, one of the two served as the Firm's overall managing partner. Tr. 29, 185-86. For the most part, Mr. Tully held that position; Mr. Rinckey served when Mr. Tully was absent on military leave or otherwise. Tr. 29, 185-86.

5. Graig Cortelyou, a non-lawyer, was employed by the Firm beginning in or about 2008 and eventually became the Firm's chief operating officer. Mr. Cortelyou reported to whichever Respondent was serving as managing partner of the Firm. Tr. 186-88.

6. The Firm opened an office in the District of Columbia in 2008 (the "D.C. Office"). Tr. 28-29, 1040. The D.C. Office had a managing partner who reported to the Firm's overall managing partner. Tr. 32, 185-86, 1040-42. During the relevant time period, several different attorneys served sequentially as D.C. Office managing partner. Tr. 1072-74; Respondents' Post-Hearing Brief at 12.

7. The degree to which the D.C. Office managing partner was permitted to act independently of the Firm's overall managing partner was disputed. Mr. Tully confirmed that when he was the overall managing partner, he was "the person that really made the managerial decisions." Tr. 185-86. There was testimony from Disciplinary Counsel's witnesses that all managerial directives came from the Firm's overall managing partner, Tr. 458-59, and that office managing partners could make few decisions without clearance from the overall managing partner, Tr. 409, 649, 674-76, 883-84. Mr. Rinckey, on the other hand, asserted that office managing

partners had considerable authority. Tr. 1049-50. Be that as it may, aside from the delay in providing certain client files to Rachelle Young after she left the Firm,[3] the Respondents do not contend, and the record contains no evidence, that the actions of subordinates that are the basis for the violations found here were unknown to or unapproved by the Respondents.

8. The Firm later opened an office in Rosslyn, Virginia that eventually was merged into the D.C. Office. Tr. 33, 673.

9. Although the Firm began using confidentiality agreements for its employees early in its existence, it did not begin using employment and separation agreements until around 2010 or 2011. Answer at 7-8; Tr. 1138-39, 1141, 1176-78, 1350-51, 1600-01.

10. Each former Firm lawyer who testified worked in the D.C. Office for all or part of his or her period of employment by the Firm. Tr. 409 (Debra D'Agostino), 458 (Eric Montalvo), 508 (Yancey Ellis), 536 (Janice Gregerson), 643 (Christina Quashie), 672 (Corinna Weiss), 796 (Bensy Benjamin), 876 (Joanna Friedman). So did Victoria Harrison, Robert Watkins, and Chuck McCullough, who did not testify. Tr. 179, 391, 684; RX 84 at 10; DCX 70 (recital requiring McCullough to seek D.C. Bar admission).

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[3] The Hearing Committee has not found a violation based upon this incident. *Infra* p. 73.

11. At all relevant times, the Respondents principally practiced in the Firm's Albany, New York office. Tr. 491,1041, 1043, 1049.

B. Confidentiality Agreements

12. Prior to her employment at Tully Rinckey, Debra D'Agostino practiced federal employment law at Passman & Kaplan, a Washington law firm that was a competitor of Tully Rinckey. In June 2009, Tully Rinckey hired her as a senior associate in its federal employment law practice. Tr. 403-05.

13. Steven Herrick, then the D.C. Office managing partner, and Mr. Rinckey encouraged Ms. D'Agostino to bring clients from Passman & Kaplan and provided a form on which her clients could elect to continue being represented by her at Tully Rinckey. The majority of Ms. D'Agostino's clients followed her to Tully Rinckey. Tr. 405-09.

14. Eric Montalvo was a lawyer in the U.S. Marine Corps whom Tully Rinckey hired in August 2009 to start a military law practice in the D.C. Office. Tr. 456-58.

15. The Respondents had established video surveillance whereby they could observe the public areas of the D.C. Office from Albany. Tr. 459. In one instance Mr. Tully, who was not physically in the D.C. Office, phoned a lawyer in the D.C. Office to complain that the lawyer's shirt was not tucked in. Tr. 414-15.

16. In early 2010, about six months after joining the Firm, Mr. Montalvo decided to leave. Tr. 456. He announced his intention to join Puckett & Faraj and negotiated his departure with Mr. Tully. DCX 8; Tr. 464-65. The Firm proposed

sending a joint letter to clients stating that Mr. Montalvo "will be unable to continue to service your legal matter at his new firm" and that all Mr. Montalvo's cases were being transferred to Mr. Rinckey. DCX 77 at 2. Also, Mr. Tully wanted Mr. Montalvo to agree that for any clients who followed Mr. Montalvo to his new firm, the Firm would receive "referral" fees equaling twenty-five percent of future collections by Mr. Montalvo. Tr. 466; *see* DCX 77 at 1; DCX 9. During the negotiation, there was no discussion suggesting that the Firm would co-represent such clients. Tr. 466-67. Mr. Montalvo objected to the statement about his being unable to service clients at his new firm because he believed that it violated the D.C. Rules of Professional Conduct. DCX 78 at 1. Mr. Tully threatened legal action if Mr. Montalvo were to "poach our clients" and asserted that "client lists" were trade secrets. DCX 9 at 1.

17. No agreement was reached between the Firm and Mr. Montalvo about notifying clients. After Mr. Montalvo arrived at his new firm, he notified his Tully Rinckey clients of his move. Tr. 470-71.

18. Joanna Friedman practiced federal employment law at Passman & Kaplan. At the encouragement of Ms. D'Agostino, Ms. Friedman applied to and was hired by Tully Rinckey in May 2010 for the D.C. Office. Tr. 874-76. Messrs. Rinckey and Herrick encouraged her to bring clients with her and provided her with election-of-attorney forms. Five clients followed her from Passman & Kaplan. Tr. 876-78.

19. Ms. D'Agostino eventually found the Tully Rinckey work environment overwhelming and oppressive. Tr. 423-26. There was incessant pressure to bill forty hours a week, and hours were not counted as qualified billable hours if the client did not have sufficient funds on deposit to pay for them. Tr. 411-14, 45-46. The Albany office surveilled the D.C. Office via security cameras in common areas and monitored closely the attorneys' use of their office computers. Tr. 414-17. On one occasion, Ms. D'Agostino used her Firm computer to order an item from jcrew.com. Tr. 415-16. Later that day, she tried to return to the J.Crew website only to find that it had been blocked on her computer. Tr. 416. Another associate used his Firm computer to send or receive emails about a forthcoming personal trip to Europe. *Id.* Soon thereafter, Mr. Tully told the associate that he had heard the associate was traveling to Europe. *Id*. The Firm took aggressive positions about secrecy; "everything [was] somehow . . . confidential." Tr. 417-20. At Firm meetings, there were threats about suing departing lawyers, with Mr. Tully at one point laughing about ruining someone's life and bankrupting her. Tr. 422-23. Ms. D'Agostino testified credibly that she "was terrified that they were going to ruin me, ruin my career, ruin my reputation." Tr. 423. "That," she said, "was part of the calculus in staying [at the Firm], is if you leave, they are going to sue you, and they are going to ruin you. I'm not going to say it came up every single Monday meeting, but it certainly came up frequently." *Id.* Numerous Firm lawyers and non-lawyers who later considered coming to work at Ms. D'Agostino's new firm, the Federal Practice Group ("FPG"), expressed similar concerns to her. Tr. 434-36. Corinna

Weiss testified that there was frequent discussion of that topic while she was at the Firm, and that it affected her plans for leaving the Firm. Tr. 685-87.

20. In August 2010, Ms. D'Agostino gave notice of her departure even though she was walking away from a large bonus. Tr. 425-26, 432. Mr. Tully and Mr. Herrick dictated to her how clients were to be divided: she could keep the clients she had brought from Passman & Kaplan, but any clients acquired after she had moved to Tully Rinckey had to remain with the Firm. After Ms. D'Agostino had transferred all those clients to other Firm lawyers, Mr. Herrick told her that she was free to go. Tr. 427-29.

21. Ms. D'Agostino joined Puckett & Faraj in September 2010. Tr. 430. Tully Rinckey knew she was going to that firm. Tr. 430-31. After she arrived at Puckett & Faraj, however, a former client informed her that when he had called Tully Rinckey to speak with her, he was told that "they had no idea where I went, I just took off or something," and that he had to Google her to locate her. *Id.* Eventually she joined Mr. Montalvo in establishing FPG. Tr. 431-33.

C. Employment Agreements

22. After the departures of Mr. Montalvo and Ms. D'Agostino, and generally because of the high turnover of lawyers, Tully Rinckey began to require all but the most junior lawyers to sign employment agreements. DCX 6 at 1; Tr. 879-80, Tr. 1138-39, 1404-06. When Ms. Friedman had joined the D.C. Office in May 2010, she was required to execute only a confidentiality agreement. DCX 18; Tr. 878-79. In May 2011, though, Mr. Herrick, who was then the D.C. Office managing

partner, informed her that if she wanted to remain employed at the Firm, she would have to sign an employment agreement. She was uncomfortable with a proposed "no-interference" clause that prohibited her from working with former Tully Rinckey lawyers if she left the Firm. Mr. Herrick said that he had no authority to change the terms, but once he talked to "Albany," the Firm agreed to limit the prohibition to Firm employees who were practicing at Tully Rinckey during the term of Ms. Friedman's contract. Tr. 879-84; *see* DCX 17 at 14 ¶ 9.14.

23. In addition to the no-interference clause, Ms. Friedman's employment agreement (DCX 17), which Mr. Tully signed (Tr. 198-99), contained the following paragraphs:

a. ¶ 7.6: liquidated damages ranging from $20,000 to $50,000 for leaving the Firm without "Good Reason"—a term defined narrowly in ¶ 7.5—before December 31, 2013 (DCX 17 at 9-10; *see* DCX 104 at 6);

b. ¶ 8.2: liquidated damages of $2,000 for each material breach of the agreement other than early departure (DCX 17 at 11); and

c. ¶ 9.10: a prohibition on discussing the terms of the agreement with former employees and a prohibition on the "improper removal" of "each name and/or contact information of a firm client" (*id.* at 13).

24. Yancey Ellis left the U.S. Marine Corps and joined the D.C. Office in October 2010. Tr. 503-04. He was presented with a three-year employment agreement but had concerns about the liquidated damages provision for early departure. Although Mr. Ellis was able to negotiate a reduction in the dollar amount

of liquidated damages, the provision remained in the agreement. Tr. 504-08; DCX 14 at 8 ¶ 7.6. Mr. Tully signed the agreement. Tr. 507; DCX 14 at 12.

25. Mr. Ellis's employment agreement (DCX 14) included the following additional paragraphs:

a. ¶ 8.1: liability for Tully Rinckey's attorneys' fees and costs in any post-employment litigation arising out of his departure for other than "Good Reason" or his dismissal for cause, regardless of the result (DCX 14 at 9; *see* DCX 104 at 6);

b. ¶ 8.3: $10,000 liquidated damages for each material breach of the agreement other than early departure (DCX 14 at 9);

c. ¶ 9.10: obligation to keep the agreement confidential, "[i]n particular" from current and former Firm employees (*id.* at 11); and

d. ¶ 9.14: a post-employment prohibition upon hiring any attorney or other employee of the Firm within thirty-six months after Mr. Ellis's departure (*id.* at 12).

26. Corinna Weiss (née Ferrini) joined Tully Rinckey in July 2011. Although hired for the D.C. Office, she also worked in the Virginia office. She was presented with an employment agreement on a take-it-or-leave-it basis. Tr. 669-74.

27. Mr. Tully threatened not to pay a bonus to Ms. Weiss when she questioned whether her participation in a promotional video was ethically permitted. Mr. Herrick, who was then the D.C. Office managing partner, told Ms. Weiss that she had set off Mr. Tully because she had raised an ethical concern. Tr. 677-83. She

knew that the Firm had initiated proceedings against lawyers who departed, so she stayed until the end of her contract even though she wanted to leave sooner. Tr. 685-87.

28. In early 2015, shortly before Ms. Weiss's contract expired, Mr. Tully asked her about her plans. She pretended to be interested in a new employment agreement with the Firm because she feared that the Firm would otherwise find an excuse to fire her. Mr. Tully had Mr. Cortelyou send her a new agreement. Tr. 687-89.

29. The proposed five-year employment agreement for Ms. Weiss, dated March 2, 2015 (DCX 39), contained the following paragraphs:

a. ¶ 7.6: $50,000 liquidated damages for early departure without "Good Reason," as narrowly defined in ¶ 7.5 (DCX 39 at 13; *see* DCX 104 at 6);

b. ¶ 7.7: after departure, an obligation to pay a "Referral Fee" of one-third of fees "billed" to former Tully Rinckey clients or, if one-third was an unethical proportion, the maximum ethical proportion (DCX 39 at 13-14);

c. ¶ 8.1: liability for Tully Rinckey's attorneys' fees and costs related to Tully Rinckey's enforcement of the agreement, regardless of the outcome, if she left other than for "Good Reason" (*id.* at 14; *see* DCX 104 at 6);

d. ¶ 8.2: $10,000 liquidated damages for each material breach of the agreement other than early departure (DCX 39 at 14);

e. ¶ 9.3: mandatory arbitration in Albany (*id.* at 15);

f. ¶ 9.10: a requirement that she not disclose the agreement to former employees (*id.* at 16-17); and

g. ¶ 9.14: after termination of employment, a thirty-six month prohibition on working with current Tully Rinckey employees and a twenty-four month prohibition on working with former Tully Rinckey attorneys (*id.* at 17).

30. On March 10, 2015, Ms. Weiss sent Mr. Cortelyou a memorandum objecting to some of the terms of the agreement. DCX 40. Her memorandum expressly identified the prohibition on working with former Tully Rinckey lawyers as violative of Rules 5.6(a) and 5.5(a), respectively, of the D.C. and Massachusetts Rules of Professional Conduct. *Id.* at 7-8; Tr. 691-94.

31. The day Ms. Weiss sent her memorandum (DCX 40) to Mr. Cortelyou, Mr. Tully telephoned her and told her that her time at the Firm was ending. Tr. 696-97. Later that day, Mr. Cortelyou revoked the proposed new employment agreement and instructed Ms. Weiss to delete all correspondence about it. DCX 41. Because she knew the Firm monitored her office computer, she took a screen shot rather than copy the correspondence or send it to her personal email. *See* Tr. 697-98.

32. Janice Gregerson began working in the D.C. Office of Tully Rinckey as a law clerk in 2012. When she was admitted to the bar in October 2012, she

signed a four-year employment agreement that was signed by Mr. Rinckey for the Firm. DCX 50; Tr. 535-39.

33. Ms. Gregerson's employment agreement (DCX 50) contained the following paragraphs:

a. ¶ 7.6: liquidated damages of between $25,000 and $50,000 for early departure without "Good Reason," a term defined narrowly in ¶ 7.5 (DCX 50 at 8-9; *see* DCX 104 at 6);

b. ¶ 8.1: obligation to pay the Firm's attorneys' fees and costs in the event of post-employment litigation, regardless of outcome (DCX 50 at 9);

c. ¶ 8.2: $10,000 liquidated damages for each material breach of the agreement other than early departure (*id.*);

d. ¶ 9.3: mandatory arbitration of any disputes in Albany (*id.* at 10);

e. ¶ 9.10: prohibiting of disclosure of the terms of the agreement to former Tully Rinckey lawyers and providing that each "improper removal" of names or contact information of a Firm client would constitute a separate breach (*id.* at 11-12); and

f. ¶ 9.14: agreement not to employ current employees of the Firm for thirty-six months after her departure from the Firm and not to work with former Firm lawyers for eighteen months (*id.* at 12-13); she understood that the latter prohibition meant not to work with FPG. *See* Tr. 538-39.

34. Christina Quashie came to work for Tully Rinckey as a law clerk in May 2012. After being admitted to the bar, she began to work as an associate in the

D.C. and Virginia offices. Tr. 642-43. She signed a five-year employment agreement, also signed by Mr. Rinckey, in December 2013. DCX 59; *see* Tr. 643. She negotiated unsuccessfully with Mr. Herrick or Mr. Cortelyou to eliminate liquidated damages provisions from the agreement. Tr. 645-46.

35. Ms. Quashie's employment agreement (DCX 59) contained the following paragraphs:

a. ¶ 7.6: $35,000 liquidated damages for early departure from the Firm without "Good Reason," which is defined narrowly in ¶ 7.5 (DCX 59 at 12-13; *see* DCX 104 at 6);

b. ¶ 7.7: "Referral" fee of one-third of fees "billed" if she departed from the Firm and any clients represented by the Firm thereafter elected to be represented by her (DCX 59 at 13);

c. ¶ 8.1: liability for the Firm's attorneys' fees and costs in event of a post-employment dispute, regardless of outcome, if she was terminated for cause or departed without "Good Reason" (*id.* at 14; *see* DCX 104 at 6);

d. ¶ 8.2: $10,000 liquidated damages for each material breach of the agreement other than early departure (DCX 59 at 14);

e. ¶ 9.3: mandatory arbitration in Albany (*id.* at 14-15);

f. ¶ 9.10: prohibition on discussing the agreement with former Tully Rinckey lawyers and providing that each "improper removal" of the

name and/or contact information of a Firm client would constitute a separate breach (*id.* at 16-17); and

g. ¶ 9.14: a thirty-six month post-employment prohibition on hiring Firm employees and a twenty-four month post-employment prohibition on working with former Firm lawyers (*id.* at 17).

36. Bensy Benjamin began to work in the D.C. Office of Tully Rinckey in August 2015. She was presented an employment agreement but was unable to negotiate any terms other than salary and leave. Tr. 795-98; DCX 67. She entered into a three-year employment agreement, signed for the Firm by Mr. Rinckey. DCX 67.

37. Ms. Benjamin's employment agreement (DCX 67) included the following paragraphs:

a. ¶ 7.6: $25,000 liquidated damages for early departure from the Firm for other than "Good Reason," as defined narrowly in ¶ 7.5 (DCX 67 at 11-12; *see* DCX 104 at 6);

b. ¶ 8.1: obligation to pay the Firm's costs and attorneys' fees in any post-employment litigation, regardless of outcome, if her departure was other than for "Good Reason" (DCX 67 at 12);

c. ¶ 8.2: $10,000 liquidated damages for each material breach of the agreement (*id.* at 13);

d. ¶ 9.3: mandatory arbitration of disputes in Albany (*id.* at 13-14); and

e. ¶ 9.10: a prohibition on discussing the agreement with present or former Firm attorneys or other personnel, and a provision that each "improper removal" of a name and/or contact information of a Firm client or potential client would constitute a separate breach (*id.* at 15).

38. In August 2011, Rachelle Young entered into an employment agreement, signed by Mr. Rinckey, for a term of three-plus years. DCX 35. Ms. Young's agreement contained the following provisions:

a. ¶¶ 7.6 and 2.1: liquidated damages for early departure, the amount of which would be between $10,500 and $30,000 depending upon whether any Firm client thereafter became a client of Ms. Young (*id.* at 4, 11);

b. ¶ 8.2: $10,000 in liquidated damages for each material breach of the agreement other than a breach relating to Ms. Young's early departure, which would be subject to ¶ 7.6 (*id.* at 11);

c. ¶ 9.3: mandatory arbitration in Albany (*id.* at 12-13);

d. ¶ 9.10: a prohibition on discussing the agreement with present or former Firm attorneys and a provision that each "improper removal" of a Firm client name and/or contact information would constitute a separate breach (*id.* at 14); and

e. ¶ 9.14: prohibitions on soliciting Firm employees for thirty-six months after termination of her employment with the Firm and on working with former Firm lawyers for eighteen months after termination (*id.* at 15).

39. Victoria Harrison entered into a five-year employment agreement with Tully Rinckey, signed by Mr. Rinckey, in January 2014. DCX 61. Ms. Harrison worked in the D.C. and Virginia offices. Tr. 684. The agreement included the following provisions:

a. ¶ 7.6: $35,000 liquidated damages for early departure from the Firm, other than for "Good Reason," which was defined narrowly in ¶ 7.5 (DCX 61 at 12-13; *see* DCX 104 at 6);

b. ¶ 7.7: "Referral" fee of one-third of fees "billed" to Firm clients who elect to be represented by Ms. Harrison after her departure (DCX 61 at 13);

c. ¶ 8.1: responsibility to pay attorneys' fees and costs of any post-employment litigation with the Firm, regardless of outcome (*id.* at 14);

d. ¶ 8.2: $10,000 liquidated damages for each material breach of agreement (*id.*);

e. ¶ 9.3: mandatory arbitration in Albany (*id.* at 14-15);

f. ¶ 9.10: a prohibition on disclosing the agreement to present or former Firm lawyers and a provision that each "improper removal" of a client name and/or contact information would constitute a separate breach (*id.* at 16); and

g. ¶ 9.14: after departure, a thirty-six month prohibition on recruiting Firm employees and a twenty-four month prohibition on working with former Firm lawyers (*id.* at 17).

40. Robert Watkins entered into a five-year employment agreement with Tully Rinckey, signed by Mr. Rinckey, in March 2014. DCX 63. The agreement contained the following paragraphs:

a. ¶ 7.6: $30,000 liquidated damages for early departure from the Firm for other than "Good Reason" (*id.* at 11);

b. ¶ 7.7: a "Referral" fee of one-third of fees "billed" to Tully Rinckey clients who became Watkins's clients after his departure (*id.*);

c. ¶ 8.1: responsibility to pay the Firm's attorneys' fees and costs for any post-departure litigation, regardless of outcome (*id.* at 12);

d. ¶ 8.2: $10,000 liquidated damages for any material violation of agreement other than early departure (*id.*);

e. ¶ 9.3: mandatory arbitration in Albany (*id.* at 13);

f. ¶ 9.10: a prohibition on disclosing the agreement to present or former Firm lawyers and a provision that each "improper removal" of a client name and/or contact information would constitute a separate breach (*id.* at 14-15); and

g. ¶ 9.14: a prohibition on soliciting employment of any Firm employee for thirty-six months, and from working with former Firm lawyers for twenty-four months, following Mr. Watkins's departure from the Firm (*id.* at 15).

41. Irwin (Chuck) McCullough entered into a five-year employment agreement with Tully Rinckey, signed by Mr. Tully, in May 2017. DCX 70. The agreement contained the following paragraphs:

a. ¶ 7.6: $15,000 liquidated damages for early departure from the Firm for other than "Good Reason" (*id.* at 13);

b. ¶ 8.1: a requirement to pay the Firm's attorneys' fees and costs in the event of post-employment litigation, regardless of outcome (*id.*);

c. ¶ 8.2: $10,000 liquidated damages for any material breach of agreement (*id.* at 14);

d. ¶ 9.3: mandatory arbitration in Albany (*id.* at 14-15); and

e. ¶ 9.10: a prohibition on disclosing the agreement to present or former Firm lawyers and a provision that each "improper removal" of a Firm client name and/or contact information would constitute a separate breach (*id.* at 16-17).

42. Shaun May, a non-lawyer, entered into a three-year employment agreement with Tully Rinckey to work in media relations in the D.C. office in 2013. Mr. Cortelyou signed the agreement. DCX 57. Paragraph 6.6 provided for $30,000 in liquidated damages for early departure from the Firm. *Id.* at 9-10. Paragraph 7.1 provided for $10,000 in liquidated damages for any material breach other than early departure. *Id.* at 10. Paragraph 8.19 required that Mr. May not compete for twenty-four months after the termination of employment within fifty miles of the D.C.

Office, and paragraph 8.14 prohibited Mr. May from being employed for twenty-four months by former Tully Rinckey lawyers. *Id.* at 13-14.

43. Wendy Milone, a non-lawyer, entered into a three-year employment agreement with Tully Rinckey in March 2014. Mr. Rinckey signed the agreement. DCX 65; Tr. 370-71. The agreement included a $30,000 liquidated damages clause for early departure, a $10,000 liquidated damages clause for any material breach other than early departure, a twenty-four month non-compete within fifty miles of the office, and an agreement that Ms. Milone would not work with former Tully Rinckey lawyers for twenty-four months after the end of her employment with the Firm. DCX 65 at 10 ¶ 6.6, 11 ¶ 7.2, 15 ¶ 8.15, 16 ¶ 8.22; *see also* Tr. 371-72. It also provided that during her employment and for ten years afterward, she would not "assist or otherwise participate willingly or voluntarily" in any "investigation" of the Firm. DCX 65 at 13 ¶ 8.7. Ms. Milone was employed as "a head secretary in D.C." Tr. 368.

D. Separation Agreements and Departures

Joanna Friedman

44. As had Mr. Montalvo and Ms. D'Agostino, other lawyers employed in the D.C. Office found the work environment to be difficult. On one occasion, Mr. Tully cut Joanna Friedman's bonus in half for a reason she believed to be arbitrary. She decided to leave when her contract was complete. Tr. 886-89. She went through the motions of negotiating a new employment agreement to avoid the risk of being fired before she received her bonus for the final year. Tr. 888-93.

45. When those negotiations did not progress satisfactorily, the Firm began to reassign Ms. Friedman's clients to other lawyers. Tr. 897-98. She sought to speak with Mr. Rinckey, but he refused to engage with her and directed her to deal with Mr. Cortelyou. In September 2013, after Mr. Rinckey informed all the D.C. Office lawyers but Ms. Friedman that they would receive bonuses, she notified Mr. Rinckey that the Firm had breached her contract. Tr. 894-97; DCX 21.

46. Mr. Cortelyou responded by informing Ms. Friedman that the Firm was investigating her for violation of its trade secret policies. He proposed that she make a settlement offer and provide a list of client names and two letters, one to be sent to clients that the Firm and Ms. Friedman "mutually agree will depart with you and another letter to clients we mutually agree that you will not solicit." DCX 23 at 2. Mr. Cortelyou also claimed that Ms. Friedman had an ethical obligation not to discuss her departure with Firm clients. *Id.* at 3; Tr. 898-902.

47. Ms. Friedman addressed her response to Mr. Rinckey. DCX 24. She refused to provide a list of clients she would take with her and expressed her belief that Rule 1.4 of the D.C. Rules of Professional Conduct required her to inform her clients of her departure. *Id.* at 2. Mr. Rinckey emailed her that she was not to communicate with him but only with Mr. Cortelyou. DCX 25; Tr. 905-07. Mr. Rinckey supervised Mr. Cortelyou in these negotiations. Tr. 1385-86.

48. Ms. Friedman had refrained from informing her clients of her departure, but she concluded that Mr. Rinckey and the Firm were not negotiating in good faith and that she had an obligation to inform clients with whom she had been working.

Tr. 910-11. She emailed Mr. Cortelyou, informing him of her departure date and reminding him of the obligation to communicate her departure to her clients. DCX 27; Tr. 911.

49. Mr. Cortelyou responded by sending Ms. Friedman a draft separation agreement. DCX 28; Tr. 911-12. It included a list of clients whom the "firm and [Ms. Friedman] have mutually agreed . . . will depart with" Ms. Friedman. DCX 28 at 3 ¶ 13(a). It provided that Ms. Friedman was not to contact any clients not on the list, subject to liquidated damages of $50,000 for each contact. *Id.* at 3 ¶ 13(b). The draft agreement asserted the continuing application of paragraph 9.14 of Ms. Friedman's employment agreement (DCX 17), which prohibited her from working with former Tully Rinckey lawyers for eighteen months after her departure. DCX 28 at 3 ¶ 10(a); *see* DCX 17 at 14. Ms. Friedman refused to agree. DCX 29 at 2 ¶ 10(a), 3 ¶ 13; Tr. 912-15.

50. In response, on September 23, 2013, the Firm put Ms. Friedman on administrative leave, barred her from the Firm's offices, and cut off her computer access to the files of all but two clients for whom there were impending deadlines. Her access later was expanded to a few more clients. Tr. 915-19; DCX 30.

51. On the same day, Mr. Rinckey sent Ms. Friedman a notice of intent to arbitrate. DCX 31; Tr. 920-21.

52. After being placed on administrative leave, Ms. Friedman consulted the D.C. Bar's ethics hotline and decided to inform her clients that she was leaving Tully Rinckey and joining FPG. She did so on or about September 23, 2013. Tr. 921-23.

53. On October 4, 2013, the last day Ms. Friedman was with the Firm and the Friday before she started work at FPG, Mr. Rinckey sent her a memorandum informing her that she would have been fired had she not resigned and that she was ineligible to be rehired. RX 174; Tr. 922-23. Mr. Tully nevertheless offered her reemployment on two subsequent occasions. Tr. 931-32; DCX 111 at 2.

Yancey Ellis

54. Yancey Ellis, who came to the Firm from the Marine Corps with no clients, found that the Firm had insufficient military law business for him to meet his qualified billable hour requirement. When the Firm tried to assign him employment cases, he gave notice that he was leaving because of a material change in his duties, in violation of his employment agreement. Tr. 512-15; *see* DCX 14 at 7 ¶ 7.4(ii).

55. Mr. Herrick, who was the managing partner of the D.C. Office, accepted the notice in August 2011 but demanded $30,000 in liquidated damages. Tr. 515-16. After some negotiation, in which Mr. Herrick had to obtain authorization from Mr. Tully, the Firm agreed to accept as liquidated damages unused vacation time owed Mr. Ellis. Tr. 516-19. Even though he had no new employment lined up, Mr. Ellis was willing to pay these liquidated damages so that he could leave. *See* Tr. 520-23.

56. Mr. Ellis and Mr. Herrick executed a separation agreement dated September 2, 2011. DCX 15. It expressly provided for the reduced liquidated

damages that Mr. Ellis eventually paid. DCX 15 at 1-2 ¶ 8; Tr. 519-22; *see* DCX 15 at 1 ¶ 4.

57. The separation agreement also provided that for thirty-six months, Mr. Ellis could not practice with any other lawyer who had ever been employed by Tully Rinckey. DCX 15 at 4 ¶ 17. Mr. Ellis did not have any job offers and was "just quitting so [he] could . . . get out of the firm." Tr. 520.

Corinna Weiss

58. Corinna Weiss was concerned about leaving early because of the frequent threats to sue departing lawyers. Tr. 685-87. Like Ms. Friedman, she went through the motions of negotiating a contract renewal because she feared that she would be fired if she announced that she was leaving at the end of her contract. Tr. 687-89, 733-34; *see* Tr. 888-93.

59. When the Firm revoked the offer for continuing employment, it reassigned Ms. Weiss's clients to other lawyers. She was prohibited from speaking with the clients with whom she had worked. The Firm took the position that because her clients had been reassigned to other Firm lawyers, she had no obligation or right to communicate with them. DCX 42 at 1; Tr. 697-701.

60. Eventually, on April 30, 2015, Ms. Weiss signed a separation agreement, co-signed by Mr. Tully. DCX 42; Tr. 701-02. One recital in the agreement stated that Ms. Weiss did not have any clients directly assigned to her with whom she was ethically required to communicate about her departure. DCX 42 at 1. The agreement further provided that if she contacted any Firm clients after she

left, she would be subject to liquidated damages of $10,000 for each contact she initiated. *Id.* at 4 ¶ 11.

61. Paragraph 21 provided that the agreement could not be reviewed by any lawyer previously employed by the Firm. *Id.* at 7.

62. Paragraph 16 provided that Ms. Weiss was "not to assist or otherwise participate willingly or voluntarily in any . . . investigation" of the Firm or its owners. *Id.*

63. Because of the restriction on cooperating in any investigation, when Disciplinary Counsel first approached Ms. Weiss, she was concerned that participating in the investigation, particularly providing documents, would "run afoul" of this provision. Tr. 705-06. She asked that Disciplinary Counsel subpoena the documents, which "might help in the event that this was ever brought up of me being in violation of this provision." *Id*.

64. Although the separation agreement prohibited Ms. Weiss from contacting her clients, it did not prohibit her from representing those clients if they initiated the contact. DCX 42 at 4 ¶ 11. Five or six of her clients managed to find her using Google and followed her to a small employment firm. Tr. 704-05.

Janice Gregerson

65. Janice Gregerson found that there was always a looming threat of being fired if her billable hours were not "qualified" because the clients in question did not have sufficient funds on deposit. Tr. 544-46. If she was assigned cases from a departing lawyer, she was instructed not to tell the clients where the lawyer had gone.

Tr. 549-51. She found the constant surveillance oppressive, including one occasion in which Mr. Tully threatened to fire her immediately for forwarding an email about "firm vision" to her personal email account. DCX 52; Tr. 546-49.

66. Ms. Gregerson has an underlying health condition, which was exacerbated by stress and anxiety. She began to see a psychiatrist and take antidepressants. She experienced panic attacks while on the way to work and decided that for the sake of her health, she had to leave. Tr. 551-52.

67. In early 2015, Ms. Gregerson gave notice of her intent to leave and was presented with a separation agreement by Larry Youngner, who had become managing partner of the D.C. Office. Tr. 552-53; *see* Tr. 542-43; DCX 54.

68. Ms. Gregerson objected to several provisions and prepared a counterproposal by revising the draft agreement by hand. *See* DCX 54; Tr. 553. She struck the third "Whereas" clause that said she had informed the Firm that she no longer wished to work in private practice or practice in the area of federal employment law. DCX 54 at 1; Tr. 553. She did so because she had made no such communication to the Firm. Tr. 553. She also edited the seventh "Whereas" clause, which stated she had no clients assigned to her and thus had no ethical reason to communicate with them "about her departure or after her departure." *Compare* DCX 54 at 1, *with* DCX 42 at 1. In the clause that provided she would not contact Firm clients, she added the proviso "after March 20," which she had proposed as her last day. DCX 54 at 4 ¶ 11; *see id.* at 1 ¶ 1. She struck the $100,000 liquidated damages clause from that provision. *Id.* at 4 ¶ 11.

69. Ms. Gregerson also struck a provision that she would pay a thirty percent "referral" fee for all cases from Tully Rinckey that might be transferred to her future law firm. DCX 54 at 4 ¶ 12; Tr. 553-54.

70. Ms. Gregerson gave the marked-up draft to Mr. Youngner. On March 9, 2015, less than a day later, Mr. Tully emailed her, rejecting her changes, stating that she had given notice of anticipatory breach of her employment agreement, and attaching a notice of intent to arbitrate. Tr. 554-55; DCX 55.

71. Either Mr. Youngner or Cheri Cannon, who was about to succeed Mr. Youngner as D.C. Office managing partner, directed Ms. Gregerson to have no contact with her clients. No joint letter was proposed or sent to those clients. Tr. 556-57.

72. Ms. Gregerson was upset about Mr. Tully's notice of intent to arbitrate and asked Mr. Youngner why she was being treated this way. The next day she received a revised separation agreement, which she accepted as presented and did not attempt to negotiate. Tr. 557-58, 569-70; *see* DCX 56.

73. That separation agreement, which was dated March 10, 2015, was signed on behalf of the Firm by Mr. Tully. DCX 56 at 8-9. A "Whereas" clause recited that Ms. Gregerson had no clients directly assigned to her and hence none with whom she would need to communicate about her departure. *Id.* at 1. Another provision subjected her to liquidated damages of $100,000 for contacting clients of the Firm. *Id.* at 4 ¶ 11. There was no discussion about a joint letter to Ms.

Gregerson's clients about her departure, and she is unaware whether any notice was sent. Tr. 557.

74. The agreement provided that Ms. Gregerson could not have it reviewed by any former employee of the Firm. DCX 56 at 7 ¶ 21.

75. The agreement also provided that Ms. Gregerson would not voluntarily assist in any investigation of the Firm or its owners. *Id.* at 6 ¶ 16. She believed this arguably prohibited her from voluntarily participating in disciplinary proceedings, though she thought the Rules of Professional Conduct required her to do so despite what the agreement said. Tr. 571-72.

76. Ms. Gregerson eventually found employment at another firm, but she has not practiced federal employment law "knowing what I did know about how Tully Rinckey would try to enforce the noncompete against other attorneys." Tr. 558-59; *see* Tr. 534-35.

Christina Quashie

77. Christina Quashie decided to leave the Firm because of Mr. Tully's management style and constant pressure to increase her hourly billing. In one instance, Mr. Tully visited every lawyer in the D.C. Office individually, asking what value they brought to the Firm. Tr. 646-49.

78. Late in 2015, Ms. Quashie told Mr. Youngner that she was leaving. He said that he would have to inform management in New York. Tr. 650.

79. Ms. Quashie intended to go to another firm that practiced federal employment law, but she did not disclose that to Tully Rinckey because she

believed, based on experience, that if she did so, "they would initiate legal proceedings against me." Tr. 653-55. She considered joining FPG but withdrew that application because she believed Tully Rinckey would sue her if she went there. Tr. 655-56.

80. After Ms. Quashie gave notice of her departure, the Firm said that it would contact her clients and there were no discussions about sending a joint letter. She did not give personal notice to her clients. Tr. 651-52.

81. Ms. Quashie executed a separation agreement, effective November 9, 2015, which also was signed by Mr. Tully. DCX 60. It recited that she did not have clients directly assigned to her and thus had no ethical obligation to communicate with them about her departure. *Id.* at 1. She further agreed not to contact her clients after she left, and that if she was ethically required to contact them, she must do so jointly with the Firm. If she violated this provision, she would be liable to the Firm for liquidated damages of $100,000 for each violation. *Id.* at 4 ¶ 13. Mr. Rinckey admitted that the Firm's position was that lawyers whose cases had been reassigned were prohibited from contacting clients except by joint letter. Tr. 1360-62, 1455-56.

82. Ms. Quashie's separation agreement further provided that it could not be reviewed by any former Tully Rinckey lawyers. DCX 60 at 9 ¶ 24.

83. The separation agreement prohibited Ms. Quashie from voluntarily participating in any investigation of the Firm or its owners. *Id.* at 9 ¶ 19.

Bensy Benjamin

84. Ms. Benjamin received an email from Mr. Tully informing her that Tully Rinckey was suing Isabel Casteleiro, a former associate, for stealing clients. Ms. Benjamin found it shocking that the Firm would do that because her understanding was that clients had the right to choose which lawyer represented them. Tr. 799-801; *see* 1272-76.

85. In the Spring of 2017, Mr. Tully sent an email to all Firm lawyers that demanded their responses to a "hypothetical" scenario—obviously referring to the Firm—involving the firing of underperforming lawyers. Tr. 803-04. Ms. Benjamin found the email inappropriate and threatening. Tr. 804.[4] She sent a candid and lengthy response, to which Mr. Tully replied by accusing her of being a "nag" and "entitled." Tr. 804-05.

86. A week or so after this exchange, Mr. Tully accused Ms. Benjamin of stealing company property because she had emailed samples of her writing to her personal email account. She complained about his calling her a nag and asked if he would have done so if she were a man. Mr. Tully thereupon gave her the option of being fired immediately or given some time to wrap things up with her clients. Tr. 806-08.

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[4] Although not identified as such during Ms. Benjamin's testimony, the date (May 23, 2017) and content of RX 205 (a separately typed version of the email) and RX 233 suggest that they are the email to which she was referring.

87. Almost immediately following this exchange with Mr. Tully, Mr. Cortelyou emailed Ms. Benjamin a separation agreement. Cheri Cannon, who was then the managing partner of the D.C. Office, told her, "You need to sign this agreement. None of it is negotiable." Tr. 808-09.

88. Ms. Benjamin executed the separation agreement on June 9, 2017, with her last day being August 11, 2017. Mr. Tully signed it for the Firm. DCX 68. It stated that she did not have any clients directly assigned to her and thus there was no ethical requirement that she communicate with them about her departure. *Id.* at 1. It further provided that if she did communicate with her clients, she would be subject to liquidated damages of $100,000 for each violation. If communications were ethically required, they must be joint. *Id.* at 4 ¶ 11.

89. Ms. Benjamin was representing about fifty clients before she left the Firm. She believed that the separation agreement prohibited her from informing them of her departure and that the Firm was assuming that responsibility. She became frustrated when the Firm did not notify the clients, but she did not think she could inform them without violating the agreement. Tr. 810-12; DCX 84. On July 20, 2017, the Firm and Ms. Benjamin sent her clients a joint letter advising the clients that she was leaving on August 4. It gave them the option to continue to be represented by Ms. Benjamin but also told them that she was not affiliating with another law firm. DCX 85. Ms. Benjamin did not have a job lined up at the time of her departure, and she told the Firm that she was going to take a break and travel.

She thought about starting her own firm, but feared that if she did so, Tully Rinckey would sue her. Tr. 826-29, 836-38.

90. After Ms. Benjamin left the Firm, Ms. Cannon contacted her to inform her that a client was trying to reach her. Ms. Cannon had not provided Ms. Benjamin's contact information to the client but said that she would do so if Ms. Benjamin agreed. Ms. Benjamin did agree but the client never contacted her. Tr. 823-26; RX 245.

91. The separation agreement prohibited Ms. Benjamin from having it reviewed by any lawyer previously employed at Tully Rinckey. DCX 68 at 9 ¶ 22.

92. The agreement also prohibited Ms. Benjamin from voluntarily participating in any investigation of the Firm. *Id.* at 8 ¶ 17. When Disciplinary Counsel contacted her as a potential witness, she believed that in light of that clause, the Firm "would probably come after me" if she cooperated. She informed the Firm that Disciplinary Counsel had contacted her and that she intended to cooperate. Mr. Tully offered to have the Firm pay for her legal representation in connection with Disciplinary Counsel's investigation, but Ms. Benjamin declined. Mr. Tully did not tell her or others in the Firm that the prohibition against voluntarily cooperating with investigations did not apply to investigations conducted by Disciplinary Counsel. Tr. 812-13, 817-20; DCX 103.

Rachelle Young

93. Rachelle Young and Mr. Tully executed a separation agreement effective February 3, 2017. DCX 38. It recited that Ms. Young had no clients

assigned to her and hence had no ethical reason to contact them. *Id.* at 1. It provided for $100,000 in liquidated damages if she contacted any clients unless ethically required, in which case she had to do so jointly with the Firm. *Id.* at 4 ¶ 11. It prohibited her from voluntarily cooperating with any investigation. *Id.* at 8 ¶ 17. It provided that she could not disclose the agreement to any former Tully Rinckey lawyers. *Id.* at 9 ¶ 22.

94. Ms. Young left Tully Rinckey on June 30, 2017. RX 168; DCX 38 at 1 ¶ 1. On July 6, 2017, she provided the Firm's director of legal administration, Tr. 122, and Ms. Cannon with a list of clients who had elected to follow her to a competing firm, including WF and VG. DCX 97. Ms. Young asked for compact discs containing digital copies of all the files for such clients and asked that the Firm prioritize WF and VG because "this matter goes to hearing shortly." *Id.* at 2.

95. On July 11, 2017, Ms. Young again emailed Ms. Cannon and emphasized that she needed the VG/WF files no later than July 13 because there were important deadlines approaching. *See* DCX 100 at 1. Ms. Young reminded Ms. Cannon of the Firm's obligation under the Rules of Professional Conduct, including Rule 1.16, to take timely steps to protect the clients' interests, and she expressly asked for the entire files, including emails and electronic records. *Id.*

96. Ms. Young still did not receive all the WF/VG files, and so she emailed Ms. Cannon on Monday, July 17, informing Ms. Cannon that the case

was going to a hearing the next day and she still did not have the file: "Beyond dismayed that [the Firm] would put me and the clients in this situation, especially after my prior requests." DCX 101, at 2. Ms. Cannon responded that she had asked a paralegal to stay late on Friday to finish providing everything, but Ms. Young replied that it was too late because the hearing was tomorrow (Tuesday). DCX 101.

97. On August 16, 2017, Ms. Young emailed Mr. Tully and Mr. Rinckey, informing them that there had been "a lengthy delay in [the Firm's] return of client property, i.e., files and funds. To date the process is still incomplete." DCX 102, at 2. She said the failure to provide the WF/VG files in time for their hearing "despite my multiple requests—is inexcusable. It caused problems at the hearing." DCX 102.

98. Tully Rinckey has detailed Standard Operating Procedures ("SOPs"), which before 2020 would have been approved by whichever Respondent was serving as overall managing partner of the Firm. Answer at 4; Specification of Charges at 2 ¶ 4. The SOP relating to file transfers for departing counsel did not expressly direct the staff to transfer files and complete refunds in a timely fashion. Tr. 138-140, 143-48 (discussing, generally, RX 33 § 2.2.3; RX 36 § 3.1.10; RX 21 § 10.1.5; RX 60 §§ 9.1.5 & 9.1.6.). By contrast, the SOP on "Case Closing" said that when the Firm completed a case and there were client funds that needed to be refunded, special attention should be paid to ensure this was done quickly. Tr. 1247-49 (discussing RX 4 § 2.2).

99. Mr. Rinckey admitted that "[t]he system failed" and the staff had to be retrained after the failure to provide documents timely to Ms. Young and refunds to her clients. Tr. 1310-13.

Monica Molnar

100. In or around early 2014, Monica Molnar gave notice of her intention to leave the D.C. Office. *See* Tr. 154-55, 731; DCX 43. Mr. Rinckey negotiated the terms of her departure with her lawyer and initially sought liquidated damages of $35,000. DCX 43; Tr. 151-53.

101. The Firm put Ms. Molnar on administrative leave, and by letter dated January 30, 2014, Mr. Rinckey fired her. DCX 44; Tr. 154-55.

102. Ms. Molnar's employment agreement restricted her from practicing law with other lawyers who had worked at Tully Rinckey for eighteen months after she left the Firm. Tr. 161. When she left, she entered into a separation agreement providing that that clause of her employment agreement remained in effect and that it subjected her to liquidated damages of $50,000 if she breached the provision. DCX 45 at 1-2 ¶ 2(b), 3 ¶ 10. The separation agreement, which was signed by Mr. Rinckey, also provided for "referral" fees of fifty percent on all cases that transferred from Tully Rinckey to Ms. Molnar's new practice. DCX 45 at 4 ¶ 13.

103. After leaving Tully Rinckey, Ms. Molnar went to work for FPG. Tr. 161. Mr. Rinckey emailed her lawyer a notice of breach of the separation agreement. DCX 46; Tr. 161-64. He alleged that she had violated the "No

Interference" provision of her employment by working with alumni of the Firm within eighteen months after her departure. DCX 46 at 1-2.

104. Eric Montalvo represented Ms. Molnar in this dispute, and he wrote Mr. Rinckey pointing out various ethical problems with the employment and severance agreements, including that the restriction on her employment violated D.C. Rule 5.6. DCX 47; Tr. 164-66.

105. Mr. Tully thereafter took over the matter on behalf of the Firm. Tr. 166. Mr. Tully wrote Mr. Montalvo disputing that the D.C. Rules applied and claiming that the Firm's agreements had been found legal and ethical under New York law. Mr. Tully threatened to sue FPG and stated that he had a period of six years in which to do so. DCX 48; Tr. 166-70.

Isabel Casteleiro Cottrell

106. Isabel Casteleiro left the D.C. Office in August 2016. *See* DCX 107. D.C. Office managing partner Cheri Cannon, who was directly supervised by Mr. Tully, wrote to Ms. Casteleiro's clients. Tr. 253, 257. The letters informed the clients of Ms. Casteleiro's departure but did not provide them with contact information for her. Ms. Casteleiro did not sign the letters. DCX 107; Tr. 254-57. Mr. Tully testified that she had not told the Firm where she was going to work next. Tr. 255.

107. After Ms. Casteleiro joined FPG on August 15, 2016, she wrote to her former Tully Rinckey clients, providing her new contact information and explaining

that they had a choice whether Tully Rinckey or FPG would represent them. DCX 108.

108. Mr. Tully emailed Ms. Casteleiro on August 24, 2016, that it should be "undisputed" that she had breached her employment agreement because of the letter she had sent to her clients. DCX 109 at 1. Mr. Tully enclosed a notice of intent to arbitrate. *Id.* at 3. Although Mr. Tully conceded at the hearing that there was nothing objectionable about the content of Ms. Casteleiro's letter, Tr. 260; *cf.* Tr. 1369-70 (Rinckey), his August 24 email claimed that her letter violated her fiduciary obligations to Tully Rinckey. DCX 109. At the hearing, he claimed the problem was that she had sent her letter to clients via email and that client email addresses are trade secrets. Tr. 258-60. (Mr. Rinckey took the same position when testifying about Victoria Harrison's departure. Tr. 1368-69; *see* Tr. 1361.) Mr. Tully added that he thought Ms. Casteleiro had sent the clients other communications, which he regarded as badgering, although he did not mention these communications in his August 24, 2016, email and the Respondents did not offer any such communications into evidence. Tr. 262-64. Mr. Rinckey testified that another problem with Ms. Casteleiro's letter was that it was sent ten days after she left Tully Rinckey, which Mr. Rinckey viewed as unduly late. Tr. 1371-73, 1380.

Other Lawyers

109. Victoria Harrison executed a separation agreement on July 24, 2015, signed by Mr. Tully. DCX 62. It prohibited her from communicating with clients

(*id.* at 1, 3-4 ¶ 11), assisting voluntarily in investigations (*id.* at 8 ¶ 17), and disclosing its terms to former Tully Rinckey lawyers (*id.* at 9 ¶ 22).

110. Chuck McCullough executed a separation agreement effective June 29, 2018, signed by Mr. Rinckey (although prepared for Mr. Tully's signature). DCX 71. It prohibited Mr. McCullough from communicating with clients (*id.* at 1, 3 ¶ 11), assisting voluntarily in investigations (*id.* at 8 ¶ 17), and disclosing its terms to former Tully Rinckey lawyers (*id.* at 9 ¶ 22). Mr. McCullough agreed to pay—and did pay—liquidated damages of $5,000 for his early departure from the Firm. *Id.* at 1-2 ¶ 2; Tr. 180-82.

111. Robert Watkins executed a separation agreement effective May 2, 2016, signed by Mr. Tully. DCX 64. Mr. Watkins was represented in his departure negotiations by his father, a partner in a major D.C. law firm who was familiar with the D.C. Rules of Professional Conduct. Tr. 394-400. Unlike the other such agreements in evidence, Mr. Watkins's separation agreement expressly nullified the liquidated damages provision in his employment agreement. DCX 64 at 2 ¶ 2(b). Also, unlike the other agreements, it did not prohibit Mr. Watkins from voluntarily cooperating with an investigation. Tr. 395-96; *see* DCX 64.

112. Following Mr. Watkins' departure for military service (Tr. 1188), Tully Rinckey informed his client, Everett Chatman, that another lawyer would be taking over the case. DCX 92. The Firm did not inform Mr. Chatman where Mr. Watkins had gone. *See id.* Mr. Chatman became dissatisfied with the replacement lawyer and sought to contact Mr. Watkins. Mr. Chatman's email was intercepted by another

Firm lawyer who would not tell him where Watkins was. DCX 93; DCX 94; Tr. 759-63. Mr. Chatman telephoned Tully Rinckey in an effort to learn where Mr. Watkins could be reached. Except for one secretary who said she thought, but was not sure, that Mr. Watkins might be on military deployment, no one would provide any information to Mr. Chatman, saying it was against the Firm's policy. Tr. 763-65, 768-69. The Firm did not have an SOP instructing employees to inform clients where their former lawyers had gone, but Mr. Rinckey testified that the Firm's staff was instructed to provide that information. Tr. 1386-90.

Non-Lawyer Employees

113. Ms. Milone left Tully Rinckey in January 2015. DCX 66 at 1. Her separation agreement, signed by Mr. Tully (*id.* at 10), prohibited her from working for any competitor of Tully Rinckey within fifty miles of their offices for two years, subject to liquidated damages of $30,000. *Id.* at 1-2 ¶ 2, 3-4 ¶ 9 (incorporating DCX 65 at 16 ¶ 8.22). It also provided that she could not voluntarily cooperate with any investigation of the Firm or its owners. *Id.* at 8 ¶ 16.

114. Mr. May left the Firm in March 2015. DCX 58 at 1. His separation agreement, signed by Mr. Tully (*id.* at 10), provided that he could not work for any competitor of Tully Rinckey within fifty miles of their offices for two years, subject to liquidated damages of $30,000. *Id.* at 1-2 ¶ 2, 3 ¶ 9 (incorporating DCX 57 at 14-15 ¶ 8.19). It also provided that he would not voluntarily cooperate with any investigation of the Firm or its owners. DCX 58 at 8 ¶ 16.

E. Legal Ethics Opinion 368

115. Eric Montalvo represented several lawyers who had left Tully Rinckey, including Ms. Molnar. Mr. Montalvo communicated with the Respondents about whether the D.C. Rules of Professional Conduct applied to Ms. Molnar and whether certain contractual provisions were permitted by the D.C. Rules. DCX 47; DCX 48. Mr. Montalvo asked the D.C. Bar's Legal Ethics Committee for an opinion as to choice of law, the application of Rule 5.6(a) to liquidated damages clauses for lawyers who departed before the expiration of their contracts, and the provision in the employment agreements prohibiting departing lawyers from working with other former Tully Rinckey lawyers. Tr. 484-86; *see* DCX 76 (D.C. Bar Legal Ethics Opinion ("LEO") 368).

116. In February 2015, the Legal Ethics Committee issued LEO 368 (DCX 76), which opined that Rule 5.6(a) prohibits agreements imposing liquidated damages on lawyers who, after departure, compete with their former law firm. It further stated that a firm may not restrict lawyers' subsequent professional association with partners or employees of the firm. It also included advice on the choice of law issue, essentially holding that the rules to apply were those of the jurisdiction where the relevant lawyers were admitted to practice and where the predominant effect of the conduct occurred. The opinion relied extensively upon D.C. case law and ethics opinions stretching back decades, as well as authority from other U.S. jurisdictions and the American Bar Association.

117. After LEO 368 was issued, Respondents changed their employment agreement template and informed the current lawyers in their firm that they would no longer enforce the provisions of the employment agreements that forbade them from practicing with other lawyers who had also practiced at Tully Rinckey. Tr. 176-77. In March 2015, however, Mr. Cortelyou, on behalf of Mr. Tully, Tr. 354, proposed an employment agreement that restricted Ms. Weiss from practicing with former Firm lawyers for twenty-four months following her departure from the Firm. DCX 39 at 1, 17 ¶ 9.14; *cf.* DCX 40 at 7-8 (Ms. Weiss's objection to this provision).

118. Respondents did not, however, void the liquidated damages provisions for lawyers who left before the expiration of their employment agreements, and they continued to include such provisions in employment agreements negotiated after February 2015. Tr. 172-78. A 2018 template for employment agreements continued to provide for liquidated damages for early departure. DCX 72 at 13-14 ¶ 7.6; Tr. 278-80. Employment agreements negotiated after the issuance of LEO 368 included those for Ms. Weiss, FF 29, Ms. Benjamin, FF 36-37, and Mr. McCullough, FF 41. Respondents also attempted to enforce liquidated damages for early departure after LEO 368 was issued. Tr. 277.

F. Actions Brought by Respondents Against Departing Lawyers

119. Respondents sued or sought to arbitrate against lawyers who departed from Tully Rinckey. These efforts were unsuccessful. *See* Tr. 229-30. In 2009, Tully Rinckey sued departing Albany associate Donna Cole-Paul. *See* DCX 10;

Tr. 1121-23. Although the Firm initially obtained preliminary equitable relief because Ms. Cole-Paul had removed files before receiving authorization from clients (DCX 10), the case was settled for $500 in a settlement agreement signed by Mr. Tully. DCX 11.

120. The Firm sued another departing lawyer, Elizabeth Fletcher, and in 2010, in an agreement signed by Mr. Tully, settled that case for $1. DCX 12; *see* Tr. 1124.

121. The Firm sought to recover $40,000 in liquidated damages from departing D.C. Office lawyer Raven Hall. Tr. 731; DCX 106 at 1. An arbitrator denied the claim in a 2014 reasoned award, finding that the liquidated damages clause was an unenforceable penalty, not actual damages. DCX 106.

122. In 2014, based upon medical advice, Meghan Peters left the Albany office after she became pregnant. DCX 104 at 2-3. The Firm threatened to seek damages if she did not try a court martial that had been assigned to her. *Id.* at 4. After gaining an acquittal in that proceeding, Ms. Peters filed an arbitration claim seeking payment for her work. *See id.* at 5. Tully Rinckey counterclaimed for $30,000 in liquidated damages for early departure, $250,000 in liquidated damages for twenty-five alleged violations of the Firm's SOPs, and their attorneys' fees and costs. *Id.* at 13-15, 20. In a lengthy reasoned award, the arbitrator, characterizing the Firm's counterclaims as a "bombard[ment]," awarded the Firm nothing, finding that Rule 5.6 prohibited liquidated damages because they put undue pressure on a lawyer to remain in her employment. *Id.* at 18-22. Although the relevant Rules of

Professional Conduct in that case were those of New York, the arbitrator relied in part on LEO 368. *Id.* at 19-20. He found unenforceable the provision of Ms. Peters' employment agreement requiring her to pay the Firm's attorneys' fees and costs even if she prevailed. He awarded Ms. Peters $10,716.23 and Tully Rinckey nothing. *Id.* at 20-22.

123. In 2016, on behalf of the Firm, Tully sought to compel arbitration in Albany against Ms. Friedman, Ms. Casteleiro, a third lawyer, and Shaun May, a non-lawyer who had worked at the Firm in media relations. All had left Tully Rinckey and were working at FPG. DCX 113.

124. In late 2016, Mr. Tully filed a summons in Albany, thus commencing a civil action[5] in New York Supreme Court[6] against FPG, Mr. Montalvo, Ms. D'Agostino, Ms. Friedman, another lawyer, and various John Does. DCX 114. Mr. Tully filed a verified complaint in that action in January 2017. DCX 115.

125. Tully Rinckey never went to arbitration against Ms. Friedman, Mr. May, or the others. Tr. 340-41. The lawsuit was dismissed for lack of personal jurisdiction. Tr. 483, 1751. Although the Firm filed a notice of appeal, it thereafter entered into a mutual release, executed by the Respondents, dismissing both the

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[5] N.Y. C.P.L.R. § 304(a).

[6] In New York, the Supreme Court is the state trial court of general jurisdiction. N.Y. CONST., art. VI, § 7; N.Y. Jud. L. § 140-b.

arbitration and the lawsuit, with the defendants making no payment to the Firm. RX 197; Tr. 341-44, 484, 1751-52.

G. Trade Secret Claims

126. The Respondents expended considerable time and effort attempting to justify the liquidated damages clauses for misappropriating or misusing a broad range of information that the Firm claimed was confidential or constituted trade secrets. This included SOPs about, *inter alia*, client intake and managing partner responsibilities, personal use of office equipment, client complaints, hiring if new attorneys, and absence and tardiness, Tr. 1518-24 (discussing RX 18; RX 61; RX 62), a description of the Firm's organizational structure, Tr. 1519-20; RX 29, an internal reorganization plan, Tr. 1526, 1528-30, 1532 (discussing RX 231; RX 232), client email addresses, Tr. 1530-31 (discussing RX 212); *see* Tr. 258-60, 1368-69, and the compilation of information that is in the public domain, Tr. 1521-23.

127. Before the hearing, the Board issued an order on February 22, 2023, recognizing that the hearing might include references in exhibits and testimony to trade secrets. As required by that order, the Hearing Committee received some exhibits under seal and suspended the live stream of the hearing when discussion of claimed trade secrets was anticipated.

128. In their post-hearing brief, the Respondents claimed that the Board order "stands for the proposition that Respondents were not unreasonable in their belief that the Firm had the right to protect what Respondents perceived to be confidential or trade secret information by lawful means including confidentiality

contracts and related litigation, threats of litigation, or settlement of breaches of those contracts." Respondents' Post-Hearing Brief at 5.

129. The Respondents offered an expert witness, Benjamin Fink, on the propriety of the Firm's efforts to maintain the Firm's claimed trade secret and confidential information.

130. Mr. Fink had never testified as an expert in a lawyer discipline case. Tr. 1504. His familiarity with D.C. Rule 5.6 was apparently limited to having read "a couple" of D.C. Court of Appeals opinions. He identified those opinions as "Akman" and "Jacobson Holman." Tr. 1506-07.

131. *Jacobson Holman, PLLC v. Gentner*, 244 A.3d 690 (D.C. 2021), considered an equity partner's departure from a law firm. *Id.* at 692. The Court of Appeals held that Rule 5.6 forbids conditions and restrictions on such a departure that restrict a lawyer's "professional autonomy" and "freedom of clients to choose a lawyer" (quoting comment [1] to D.C. Rule 5.6(a)). *Id.* at 701-02. The *Jacobson Holman* opinion does not mention, much less discuss, "trade secrets."

132. In *Neuman v. Akman*, 715 A.2d 127 (D.C. 1998), a partner who withdrew from his law firm to engage in private practice challenged a limitation on a benefit he would receive on withdrawal. *Id.* at 128. The Court of Appeals held that because the partner would be paid his entire capital account, it was not a violation of Rule 5.6 to deny him an additional amount based on his pre-departure "productivity." *Id.* at 128-30, 136-37. As in *Jacobson Holman*, the *Neuman* opinion

did not mention or discuss trade secrets. It did reaffirm the breadth and purpose of Rule 5.6, however.

133. Following *voir dire* by counsel, the Hearing Committee accepted Mr. Fink as an expert witness regarding trade secret law but not regarding professional responsibility law in the District of Columbia. Tr. 1494-1514.

134. Mr. Fink testified that protecting claims of trade secrets or contractual confidentiality required the Firm to take actions such as filing suit or arbitration, or threats of same, when the Firm perceived that a current or former employee was misusing the Firm's confidential or trade secret information. Mr. Fink further testified that the Firm's use of confidentiality agreements, security cameras in the workplace, and systems to monitor unauthorized copying or exporting of computer files, were the kind of measures that courts expect will be taken to protect a claimant's trade secrets. Tr. 1516-17, 1524-25, 1536-37, 1552-53.

135. Much of Mr. Fink's testimony consisted of affirming that certain "types" of information possessed by a law firm "could" be considered trade secrets, and that certain law firm practices could or could well be relevant to such a determination. Here are some examples, each with emphasis added:

***Tr. 1518:***

> Q. Okay. Is this a type of reasonable measure to protect trade secrets and client confidentiality?
>
> A. Yes. This is certainly the *type* of information or evidence that a court *would consider* to determine whether an employer has used reasonable measures to protect its trade secret information.

***Tr. 1519:***

Q. Exhibit 18 is part of the SOP entitled "consult attorneys." Is this also a type of information that would constitute a trade secret?

A. Yeah. Very often standard operating procedures within companies are the *type* of information that courts will consider to constitute trade secrets, as long as it has met the other requirements we talked about earlier in terms of reasonable measures. . . . And so, yes. This is the *type* of information that very well *could* constitute a trade secret.

***Tr. 1520:***

Q. . . . Take a look at [RX 61 at §] 9.2, "Managing partner standard operating procedure."
Would that constitute a trade secret?

A. Yes, it certainly *can*.

***Tr. 1524:***

Q. And this [caseload management; encouraging employees to participate in marketing SOP] is part of the standard operating procedure; is that correct? Your understanding?

A. That is my understanding, yes.

Q. So would these be constituting a trade secret, in your opinion?

A. Yes. I certainly think, again, this is the *type* of information that a court *could find* constitutes a trade secret, given that it lays out various aspects of the operation of the business.

***Tr. 1526:***

Q. Okay. Would a reorganization plan like that constitute a trade secret?

A. It certainly *can*. It's the *type* of information that a court would consider to be a trade secret if the other requirements are met.

***Tr. 1529:***

> Q. Okay. And if someone was leaving the firm and they took a snapshot of that [reorganization of one of the Firm's practice areas] on their telephone and left with it, would that constitute misappropriation of a trade secret?
>
> A. Yes. It certainly *could* fit within the definition of the statute.

***Tr. 1530:***

> Q. . . . . Would that [same reorganization memo] again, if someone took that, constitute a misappropriation of a trade secret, sir?
>
> A. Yes, it *could*.

***Tr. 1531:***

> A. . . . And so, yeah. There's plenty of cases that have held that client lists, particularly client lists that contain information beyond just the client name *can constitute* a trade secret.
>
> Q. And so if someone took this information with them would it constitute misappropriation?
>
> A. Yes. It very well *could be found* to be by a court.

136. Mr. Fink did not testify that particular items alleged by the Respondents to constitute trade secrets were in fact trade secrets as a matter of law. Instead, he opined that at most, they were the *type* of information that *could* be found to be trade secrets.

137. The Respondents presented no evidence, and have made no claim, that District of Columbia law permits a lawyer to violate the Rules of Professional Conduct in order to protect trade secrets.

H. Credibility/False Testimony

138. Based on their demeanor, consistency of testimony, plausibility, and responsiveness, all Disciplinary Counsel's witnesses were credible with two exceptions. Neither exception affects our ultimate findings. Eric Montalvo's occasional evasiveness and argumentativeness on cross-examination is irrelevant because his testimony was cumulative with that of numerous other witnesses. Everett Chatman's confusion about what the Firm did to further his case was irrelevant to the only alleged violation as to which he testified, namely the Firm's refusal to provide him with information as to the whereabouts of his former lawyer, Robert Watkins.

139. The Respondents were largely but not always credible.

140. Both Respondents testified about modifying their practices relating to "referral fees" based on amendments to the D.C. Rules of Professional Conduct made in October 2015. Tr. 67, 1166-68, 1259-60, 1397-1404 (Rinckey); Tr. 356, 1756-57 (Tully). Mr. Rinckey testified that "[i]t was my understanding, up until October 2015, that [pure][7] referral fees were allowed in the District of Columbia, so

[7] The hearing transcript has this word as "fewer." Tr. 1166:18. It is the Committee's recollection, however, that Mr. Rinckey referred to "*pure*" referral fees. The Respondents and their counsel referred elsewhere to "pure" referral fees, *e.g.* Tr. 1400-01 (references by Mr. Rinckey to "pure" referral fees); Respondents' Post-Hearing Brief at 39 & n. 8 (references to "pure" referral fees); Answer at 8 (same), and a reference to "fewer" referral fees would be nonsensical. We note that the parties have not availed themselves of the opportunity to seek a correction to the transcript on this point. *See* Board Rule 11.9.

they were put into some of the contracts." Tr. 1166; *accord* Tr. 1259-60. As outlined in our Conclusions of Law, *infra* pp. 65-66, this supposed belief was inaccurate and we find appropriate violations of the Rules in respect of the referral fee provisions. Although we doubt that Respondents believed at the times in question that referral fees of the type long forbidden by Rule 1.5(e) were permissible, there apparently was some confusion about the issue within the Bar.[8] Accordingly, we do not find to a clear and convincing degree that the Respondents intentionally testified falsely on this point.

141. Respondents provided contradictory testimony as to why they did not believe LEO 368 prohibited them from continuing to include liquidated damages for early departure in their employment agreements. Mr. Rinckey testified that he believed liquidated damages were permitted because they were competition-neutral—that is, because they applied to all lawyers who left, even if they did not compete against the Firm. Tr. 170-76, 1141-42, 1173-75, 1427-35. Mr. Rinckey's explanation ignores the fact that LEO 368 addressed only a *subset* of the circumstances covered by Rule 5.6(a), whose terms are not limited to competition situations. Mr. Tully testified that under the Firm's agreements, liquidated damages were triggered *before* the lawyers left Tully Rinckey, by anticipatory breach, and that Rule 5.6(a) only applies to *post*-employment restrictions. Tr. 203. Both explanations were inaccurate. Here too, we question whether the Respondents'

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[8] *See infra* nn. 24-26 and accompanying text.

explanations were bona fide or simply post hoc rationalizations for continuing a practice that the LEO 368 had concluded is forbidden by Rule 5.6(a). Given how easily the inaccuracy of the Respondents' contentions can be demonstrated, though, we are unable to conclude that there is clear and convincing evidence that the Respondents deliberately sought to mislead the Committee.

142. Finally, Mr. Tully testified that neither Mr. Ellis nor Mr. McCullough paid liquidated damages as such. He claimed that Mr. Ellis reimbursed the Firm for improperly paid leave, Tr. 1630-32, and that Mr. McCullough voluntarily paid $5,000 because Mr. McCullough was remorseful about having attended an expensive charitable event at the Firm's expense just before he decided to leave, Tr. 1638-40. Both lawyers' separation agreements, however, labeled these payments as liquidated damages. DCX 15 at 1-2 ¶ 8; DCX 71 at 1-2 ¶ 2. Mr. Ellis sought to avoid paying any liquidated damages when negotiating his separation agreement, but ultimately agreed to pay a reduced amount. *See* FF 55-56. Mr. Rinckey conceded that Mr. McCullough had paid $5,000 as liquidated damages. Tr. 181-82. Mr. Tully's explanation for the payment by Mr. Ellis was plausible. Mr. Tully's explanation of the rationale for Mr. McCullough's payment also was plausible and was not inconsistent with the separation agreement's characterization of the $5,000 payment as liquidated damages. We do not find clear and convincing evidence that Mr. Tully's testimony was intended to mislead the Committee.

## III. CONCLUSIONS OF LAW

Disciplinary Counsel contends that each Respondent violated Rules 5.6(a), 8.4(a), 8.4(d), 5.1, and 5.3. Disciplinary Counsel's Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction at 75. Specifically, the Specification of Charges alleged that Respondents violated:

- Rules 8.4(a) and 5.6, in that they attempted to participate in, or did participate in, offering and making employment and similar type agreements that restricted the rights of lawyers to practice after termination of their relationship with the Firm;

- Rules 5.1(a) and 5.3(a), in that they failed to make reasonable efforts to ensure that their law firm had effective measures giving reasonable assurance that all lawyers and non-lawyer assistants conform to the Rules of Professional Conduct, specifically Rules 5.6, 1.4(b), and 1.16(d);

- Rule 5.1(b) and Rule 5.3(b), in that, having direct supervisory authority over other lawyers and non-lawyer assistants, they failed to make reasonable efforts to ensure that those persons conformed to the Rules of Professional Conduct, specifically Rules 5.6, 1.4(b), and 1.16(d);

- Rule 5.1(c)(1) and (2), in that they ordered or, with specific knowledge of the conduct, ratified conduct that violated the Rules of Professional Conduct; and they were partners who knew or reasonably should have known of conduct by subordinate lawyers at a time when its consequences could be avoided or mitigated but failed to take reasonable remedial action; and

- Rules 8.4(a) and 8.4(d), in that they attempted to engage in, or engaged in, conduct that seriously interfered with the administration of justice, by deterring witnesses from cooperating with Disciplinary Counsel.

Specification of Charges at 19-20.

Disciplinary Counsel recommends a six-month suspension for each Respondent but does not request that a fitness requirement be imposed as a condition of reinstatement. Disciplinary Counsel's Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction at 75. The Respondents contend that no violation has been proven by clear and convincing evidence, and ask that even if violations are proven, a sanction short of suspension should be imposed. Respondents' Post-Hearing Brief at 77-78. They argue that even if all the charged violations are proven (but without a finding that they testified falsely), that they should be publicly reprimanded. *Id.* at 78.

The Hearing Committee concludes that each Respondent has committed multiple violations of each Rule cited by Disciplinary Counsel other than Rules 5.1(a) and 5.3(a)—twenty-eight by Mr. Tully and thirty-four by Mr. Rinckey—and recommends a ninety-day suspension for each Respondent.

A. Motions to Dismiss

The Respondents seek dismissal of all or specified portions of this matter on a number of grounds. Respondents' Post-Hearing Brief at 48-60. The Hearing Committee does not rule on motions to dismiss but recommends a disposition in its Report to the Board after hearing all the evidence. Board Rule 7.16(a); *In re Ontell*, 593 A.2d 1038, 1040 (D.C. 1991). Once a Contact Member has approved a petition, "the underlying purposes of the Board require that we proceed to a hearing on the merits rather than being detoured into questions of pleading and form." *In re Stanton*, 470 A.2d 281, 285 (D.C. 1983) (per curiam) (appended Board Report).

Pursuant to Board Rule 7.16(a), we recommend that the Board deny each of Respondents' motions to dismiss for the reasons set out below.

B. Applicable Law

As a threshold matter, the Hearing Committee must determine which jurisdiction's rules apply to the Respondents' alleged misconduct. The Respondents are admitted to practice in the District of Columbia. FF 1-2. Each also is admitted in New York and one additional jurisdiction.[9] FF 1-2. As D.C. Bar members, they are subject to the disciplinary jurisdiction of the D.C. Court of Appeals regardless of where their conduct occurs and even if they also are subject to the jurisdiction of one or more other courts. D.C. Rule 8.5(a).

Disciplinary Counsel charged that the Respondents' conduct violated the D.C. Rules only. *See* Specification of Charges at 19-20. Disciplinary Counsel contends that the D.C. Rules apply because the Respondents are both licensed in D.C. and D.C.'s Rules are substantially the same as any other potentially applicable disciplinary rules (*e.g.*, the Model Rules, or the New York or Virginia rules). Disciplinary Counsel's Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction at 45.

The Respondents argue that Disciplinary Counsel bears the burden of proving that the D.C. Rules apply to the specific alleged misconduct and that the similarity of the disciplinary rules between jurisdictions is not relevant. They contend that in

[9] Mr. Tully is admitted in Virginia and Mr. Rinckey in New Jersey. FF 1-2.

each instance where Disciplinary Counsel failed to establish that the D.C. Rules apply to this matter, such charges should be dismissed. Respondents' Post-Hearing Brief at 48-54.

D.C. Rule 8.5(b) states that:

> In any exercise of the disciplinary authority of this jurisdiction, the Rules of Professional Conduct to be applied shall be as follows:
>
> (1) For conduct in connection with a matter pending before a tribunal, the rules to be applied shall be the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise, and
>
> (2) For any other conduct,
>
> (i) If the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and
>
> (ii) If the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

With two arguable exceptions, none of the conduct of Respondents that is in issue in this matter was in connection with a matter pending before a tribunal. *See, e.g.*, Respondents' Post-Hearing Brief at 2 (noting that no charges are based upon Respondents' civil litigation against certain of the Firm's former employees). Neither arguable exception—Everett Chatman's case before the U.S. Department of Veterans Affairs, *see* DCX 91; Tr. 755-76; Tr. 775-77 (discussing RX 84), and the cases of Rachelle Young's clients before the U.S. Merit Systems Protection Board,

*see* RX 213—is a basis for any of the Hearing Committee's findings of violations. *See* D.C. Rule 8.5(b)(1); *see also* Respondents' Post-Hearing Brief at 2 (noting absence of charges based upon Respondents' civil litigation in New York against former Firm employees).

LEO 368 notes that—

> Rule 5.6(a) seeks to protect lawyers' autonomy and clients' right to choose a lawyer. D.C. Rule 5.6 cmt. [1]. The predominant effect of a provision penalizing such a lawyer for post-departure competition falls upon a lawyer who is located in D.C. For that reason, the predominant effect prong [of Rule 8.5] renders members of the D.C. Bar in the firm subject to the D.C. version of Rule 5.6(a) regardless of where they principally practice.

D.C. Bar Ethics Op. 368 (Feb. 2015).[10] Indeed, the Respondents note accurately that this matter "concern[s] the Firm's treatment of personnel in the [D.C. Office] and treatment of clients who were being serviced by lawyers working in the [D.C. Office]." Respondents' Post-Hearing Brief at 2. Given the facts here, the Respondents' conduct had its predominant effect in the District of Columbia. *See* D.C. Rule 8.5(b)(2)(ii). Thus, the D.C. Rules of Professional Conduct apply to this case. *Id.*[11]

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[10] A footnote to LEO 368 observes that although the "predominant effect" test "is to be applied narrowly, . . . we conclude that this fact pattern triggers it." LEO 368 n.20 (2015) (citations omitted).

[11] That some agreements with lawyers employed by the Firm provided that they would be governed by New York law does not affect this conclusion. LEO 368 (Feb. 2015) (concluding that contractual choice of law provision cannot override choice of law dictated by Rule 8.5).

C. Trade Secret Claims

Respondents' claims of trade secret protection for a broad range of the Firm's records and data were unpersuasive. More importantly, even if some of the information did constitute trade secrets, such a status would not obviate the Respondents' obligations under Rule 5.6 or justify violations of that or any other Rule of Professional Conduct.

The Respondents have overstated the extent and meaning of the Board's February 22, 2023, order. As a matter of evidence and procedure, the Board order set out a means to protect information that might constitute trade secrets from public disclosure in the context of these proceedings. The Board's order did not address the validity of the Respondents' trade secret claims or the tactics the Respondents used to preserve what they regarded as trade secrets.

The Board's order did not suggest that the Respondents are insulated from professional discipline if those tactics violated Rule 5.6 or other Rules of Professional Conduct. The only two District of Columbia court decisions with which Respondents' expert, Mr. Fink, expressed familiarity do not support a contrary view. Indeed, those opinions lay great stress on the importance of the lawyer and client interests that Rule 5.6 protects. *See Jacobson Holman*, 244 A.3d 690; *Neuman*, 715 A.2d 127.

D. The Respondents Violated Rules 8.4(a) and 5.6(a).

The legal profession exists to serve clients, and lawyers must perform such service with skill,[12] zeal,[13] and diligence.[14] The same Rules of Professional Conduct that create this commitment, however, also limit it in a variety of ways. Insofar as relevant here, D.C. Rule 5.6[15] prohibits conditions whose effect is to limit the access of *future* clients to lawyers of their choosing—particularly "'to lawyers, who by virtue of their background and experience, might be the very best available talent to represent [such] individuals.'"[16]

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[12] D.C. Rule 1.1(b).

[13] D.C. Rule 1.3(a).

[14] *Id.*

[15] Similar provisions appear in the ABA Model Rules of Professional Conduct and the rules of all fifty-one U.S. jurisdictions, including New York. ABA CPR Policy Implementation Committee, "Variations of the ABA Model Rules of Professional Conduct: Rule 5.6: Restrictions on Right to Practice" (Sept. 29, 2017), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_6.pdf (last visited Nov. 8, 2023).

[16] *In re Hager*, 812 A.2d 904, 918 (D.C. 2002) (quoting ABA Formal Opinion 93-371 (1993)); *accord Jacobson Holman*, 244 A.3d at 700-03; *Neuman*, 715 A.2d at 130 (stressing need to "protect[] future clients against having only a restricted pool of attorneys from which to choose" (quoting 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 5.6:201, at 824 (2d ed. Supp. 1997))); *see* N.Y. State Bar Ass'n Comm. on Pro. Ethics, Formal Op. 730 (July 2000). In *Jacobson Holman*, the Court of Appeals went so far as to hold that contractual provisions violating Rule 5.6(a) are "unenforceable as against public policy." 244 A.3d at 702.

D.C. Rule 8.4(a) provides that "[i]t is professional misconduct for a lawyer to . . . [v]iolate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." D.C. Rule 5.6(a) provides that "[a] lawyer shall not participate in offering or making . . . a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement."[17] Rule 5.6 has been read broadly in this and other jurisdictions.[18]

D.C. Rule 5.6(a) reflects the tension between two values—protecting client (and potential client) choice of counsel by ensuring lawyer mobility, on the one hand, and allowing law firms to protect their investments in their lawyers, on the other. The ABA Model Rules of Professional Conduct and the rules of most American jurisdictions favor the former value.[19] The District of Columbia long—and

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[17] The retirement exception is not at issue in this case.

[18] *See, e.g.*, *Jacobson Holman*, 244 A.3d at 700-03; D.C. Bar Ethics Op. 335 (July 2006) (finding unethical a settlement agreement provision restricting plaintiff's lawyer from disclosing public information). Legal Ethics Opinion 335 also discusses opinions from D.C. and other jurisdictions—including New York—as well as from the ABA Standing Committee on Ethics and Professional Responsibility, that find a broad range of restrictions on attorneys' practices violative of Rule 5.6.

[19] A handful of jurisdictions other than D.C. permit "reasonable" financial assessments against former lawyers who compete with a firm if such assessments accurately reflect the reduction in that firm's value due to the departure. *E.g.*, *Howard v. Babcock*, 863 P.2d 150 (Cal. 1993); *Jacob v. Norris, McLaughlin & Marcus*, 607 A.2d 142, 150-52 (N.J. 1992). This is distinctly the minority rule,

emphatically—has taken that position.[20] So has New York, where Respondents' principal office is located and where they principally practice.[21]

LEO 368 may have been more specific on this issue than some previous expressions of D.C. law but it did not mark a change of direction. For example, comment [2] to Rule 5.6, which took effect in February 2007—before Tully Rinckey opened the D.C. Office—states that "[r]estrictions, other than those concerning retirement benefits, that impose a substantial financial penalty on a lawyer who competes after leaving the firm may violate paragraph (a)." LEO 325, issued in 2004, said that "[i]t has long been clear that Rule 5.6(a) bars not only agreements that would explicitly restrict lawyers' practices but also reaches agreements that may not explicitly bar such actions but create financial disincentives to taking these actions."

LEO 181 was issued in 1987, more than twenty years before the Respondents opened the D.C. Office. It addressed several provisions that closely parallel those at issue in this case. Among the provisions that the opinion found improper were (1) a

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however. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 13 rptr. n. cmt. b. (Am. Law Inst. 2000); ELLEN J. BENNETT, ET AL., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 612 (10th ed. 2023).

[20] *E.g.*, *Jacobson Holman*, 244 A.3d 690; *Neuman*, 715 A.2d 127; D.C. Bar Ethics Op. 325 (Dec. 2004); D.C. Bar Ethics Op. 241 (Sept. 1993); D.C. Bar Ethics Op. 181 (Apr. 1987) (interpreting prior version of Rule 5.6(a)).

[21] *See, e.g.*, *Cohen v. Lord, Day & Lord*, 550 N.E.2d 410, 411 (N.Y. 1989); N.Y. State Bar Ass'n Comm. on Pro. Ethics, Formal Op. 730 (July 2000). As noted above, New York law does not apply in this case.

prohibition on departing lawyers sending out new practice announcements, (2) a prohibition on departing lawyers hiring or working with individuals who were employed by the law firm at the time of the lawyer's departure, and (3) "provisions . . . making a vast amount of materials perpetually confidential." Moreover, there was a—

> truly oppressive liquidated damage clause found in the Agreement * * * The *in terrorem* effect of this sword of Damocles hanging over the head of a departing lawyer is not to be underestimated. This provision—as apparently was intended—would inhibit a lawyer from pursuing his or her profession in wholly legitimate ways.

The Ethics Committee concluded that the agreement was "grossly overreaching and improperly restrictive in violation of DR 2-108(A)."[22] D.C. Bar Ethics Op. 181 (Apr. 1987).

The Respondents contend that *Ashcraft & Gerel v. Coady*, 244 F.3d 948 (D.C. Cir. 2001), justified their imposing liquidated damages on their lawyer employees. Tr. 173. *Ashcraft* had said that liquidated damages for violations of a lawyer's contract with his firm did not violate D.C. Rule 5.6 because the damages there were not linked to the lawyer's competition with the firm. For one thing, it is not at all clear that *Ashcraft* would have justified the numerous types of liquidated damages clauses at issue in this case. More importantly, the adoption of comment [2] to Rule 5.6 by the D.C. Court of Appeals in 2007—a year *before* the Respondents opened

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[22] D.C. Disciplinary Rule 2-108(A) was replaced by the substantively identical D.C. Rule of Professional Conduct 5.6(a) in 1991.

the D.C. Office—effectively overruled any justification that *Ashcraft* might have provided.

The liquidated damages provisions in this case regarding early departure, contacting clients, hiring Firm employees, and working with Firm alumni, violate D.C. Rule 5.6(a) insofar as they were imposed upon lawyers who practiced in the D.C. Office. They also violate Rule 8.4(a) insofar as they constituted violations or attempts to violate the Rules of Professional Conduct. Whether those lawyer employees were members of the D.C. Bar is irrelevant. For purposes of this matter, it is the *Respondents'* offering or making the agreements in question that violated the rule.[23] The Respondents enforced such clauses in at least two instances—those of Mr. Ellis, DCX 15 at 1-2 ¶ 8, and Mr. McCullough, DCX 71 at 2 ¶ 2(c). *See* FF 55-56, 110. In Mr. McCullough's case the separation agreement was executed in June 2018, more than three years *after* the issuance of LEO 368. *See* FF 110. That the Respondents did not always enforce such clauses when lawyers left the Firm does not ameliorate the *in terrorem* effect of such provisions. *See* D.C. Bar Ethics Op. 181 (Apr. 1987) (noting "sword of Damocles" effect of liquidated damages clause via-à-vis lawyer considering departure).

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[23] We agree with the Respondents that D.C. Rule 5.6(a) is inapplicable to agreements with non-lawyers, as it extends by its terms only to agreements that restrict the rights of *lawyers* to practice after termination of the relationship. Disciplinary Counsel does not contend that the non-lawyers who were subject to the questioned contract requirements were essential to the practice of any of the lawyers who left the Firm. Accordingly, we have not taken those agreements into account in reaching our sanctions recommendations.

Referral fees—that is, a division of fees earned from a client between lawyers who are in different firms—long have been forbidden in the District of Columbia unless they are proportional to the services provided or responsibility assumed by the firm to whom the fees are paid, are advised to the clients in writing, have the clients' informed consent, and are not unreasonable. D.C. Rule 1.5(e) (eff. Jan. 1, 1991); D.C. Disciplinary Rule 2-107(A) (prior version of Rule 1.5(e); superseded Jan. 1, 1991). The Respondents, citing Rule 7.1, expressed the belief that referral fees were permitted under the D.C. Rules prior to 2015. Answer at 8-9; Respondents' Post-Hearing Brief at 39-40 & n.8; *see* FF 140. This assertion is incorrect.

D.C. Rule 7.1 was amended in 2007 to bar payments to so-called runners and others who were paid for referring potential clients to lawyers "through in-person contact." Thereafter there reportedly was some uncertainty about whether the new version prohibited payments from one lawyer to another for referring a matter where there was *no* "in-person contact"—for example, where a lawyer responds to an email from a potential client by referring that individual to another lawyer.[24]

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[24] D.C. BAR RULES OF PROFESSIONAL CONDUCT REVIEW COMMITTEE, PROPOSED AMENDMENTS TO SELECTED RULES OF THE D.C. RULES OF PROFESSIONAL CONDUCT 24-25 (March 2012), https://www.dcbar.org/getmedia/9a45a141-7771-4485-9679-2c70533aa9e0/inside_the_bar-structure-reports-rules_of_professional_conduct_review_committee-proposed_amendments2012.

That uncertainty, however, related to payments from the lawyer's *own* funds, not from the fees paid by the referred client.[25] As the D.C. Bar Legal Ethics Committee chair stated in referring the issue to the Bar's Rules of Professional Conduct Review Committee in 2008—

> *[w]e are not concerned here with fee splitting*, by which I mean the referring and referred lawyers agree to divide the fee paid by the client. *We believe Rule 1.5(e) adequately addresses that question.* Rather our focus is on a payment by the referred lawyer from her (*not the client's*) funds to the referring lawyer as compensation or a reward for the referral.[26]

Given that the referral fee provisions under consideration in this case were couched in terms of percentages of amounts billed to or collected *from clients* who followed departing lawyers to their new professional locations, FF 29.b., 35.b., 39.b., 40.b., 102, there is no merit to the Respondents' claim that they believed the provisions were of the type permitted under Rule 7.1 rather than forbidden by Rule 1.5(e). Moreover, even had the proposed payments been of the type envisaged by Rule 7.1 rather than Rule 1.5(e), any "referral" of an existing Tully Rinckey client to a departing lawyer necessarily would have been based upon in-person contact between the client and Firm lawyers and hence would have violated Rule 7.1 before and after 2015.

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[25] *Id.*

[26] *Id.* at 24 (emphasis added).

Mr. Rinckey claimed that the Firm intended any referral fees to be limited to those for which the requisites of Rule 1.5(e)[27] had been met. Tr. 1392-97. The record contains no other evidence supporting that contention and the Committee does not credit Mr. Rinckey's claim. Because the Specification of Charges does not charge either Respondent with violating Rule 1.5, and with an eye toward due process of law, we do not find a violation of that Rule. *See In re Robinson*, 225 A.3d 402, 406 (D.C. 2020); *In re Ruffalo*, 390 U.S. 544 (1968). We do find, however, that the referral fee clauses acted as a significant disincentive for lawyers who might be considering leaving the Firm, *see* D.C. Bar Ethics Op. 181 (Apr. 1987) (noting *in terrorem* effect of liquidated damages clauses),[28] and hence violated Rules 5.6(a) and 8.4(a).

We do not think that the savings clauses in some of these referral fee provisions, *e.g.*, DCX 59 at 13 ¶ 7.7, ameliorated the improper character of the referral fee clauses. It is true, as the Respondents claim, Respondents' Post-Hearing

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[27] D.C. Rule 1.5(e) permits division of fees between lawyers who are not part of the same firm only if they will be in proportion to the services provided or responsibility assumed by the Firm, be advised to the clients in writing, have the clients' informed consent, and not be unreasonable.

[28] New York law, which the Respondents contend—incorrectly—applies to these agreements, Respondents' Post-Hearing Brief at 3, 13, 21, 48-54, is to the same effect. *See, e.g.*, *In re Thelen LLP*, 20 N.E.3d 264, 273 (N.Y. 2014) (noting that such payments are "a major inconvenience for the clients and a practical restriction on a client's right to choose counsel" and that in all likelihood, departing attorneys "would simply find it difficult to secure a position in a new law firm because any profits from their work for existing clients would be due their old law firms, not their new employers").

Brief at 57, that our Court of Appeals has adopted the equitable reformation doctrine as a matter of D.C. contract law. *Steiner v. Am. Friends of Lubavitch*, 177 A.3d 1246, 1257 (D.C. 2018). In doing so, however, the Court of Appeals indicated several reservations about when the doctrine should be applied. The *in terrorem* effect of noncompete clauses might militate against reformation, for example. *Id.* at 1257 n.10. Also, the doctrine is to be applied only "[w]here less than all of a covenant is unenforceable on public policy grounds" and "the party seeking equitable reformation made the agreement 'in good faith and in accordance with reasonable standards of fair dealing.'" *Id.* at 1258 (quoting Restatement (Second) of Contracts § 184 & cmt. b. (Am. L. Inst. 1981)). Further, a decision whether to modify an improper noncompete clause should consider whether such a modification will injure the public. *Id.* Finally, "in certain professions based on personal relationships, the customers' interest weighs more heavily against equitable enforcement of noncompete agreements." *Id.* at 1261.

The *Steiner* decision's reservations about the equitable reformation doctrine weigh heavily against its applicability here. The *in terrorem* effects of the clauses in question are amply demonstrated by the record, no portions of the challenged provisions are enforceable, the personal nature of the lawyer-client relationship is

beyond dispute, and by definition—namely the provisions of Rule 5.6(a)[29]—the provisions are injurious to the public.

Similarly, the *in terrorem* effect of the clauses requiring former Firm lawyers whom the Firm sued to pay Tully Rinckey's legal fees in the event of post-departure litigation, regardless of whether they won or lost the lawsuits, contributed to the Respondents' violations of Rules 5.6(a) and 8.4(a). *See* D.C. Legal Ethics Op. 181 (Apr. 1987). That no such fee collections ultimately occurred does not detract from their significant adverse effect on lawyers' willingness to leave the Firm.

E. The Respondents Violated Rules 5.1(b), 5.3(b), 5.1(c)(1), and 5.1(c)(2).

Rule 5.1(a) requires that—

> [a] partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm or government agency, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm or agency conform to the Rules of Professional Conduct.

Rule 5.1(b) requires that a lawyer, "having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct."

Rule 5.3(a) requires that—

> [w]ith respect to a nonlawyer employed or retained by or associated with a lawyer[, a] partner or a lawyer who individually or together with

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[29] "Our conclusion that [the provision in question] violates Rule 5.6(a) necessarily compels a conclusion that this provision is unenforceable as against public policy." *Jacobson Holman*, 244 A.3d at 702.

> other lawyers possesses comparable managerial authority in a law firm or government agency shall make reasonable efforts to ensure that the firm or agency has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer.

Rule 5.3(b) provides that "[a] lawyer having direct supervisory authority over [a] nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer[.]"

Rule 5.1(c) provides that—

> [a] lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
>
> > (1) [t]he lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
> > (2) [t]he lawyer has direct supervisory authority over the other lawyer or is a partner or has comparable managerial authority in the law firm or government agency in which the other lawyer practices, and knows or reasonably should know of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Disciplinary Counsel contends that Respondents violated Rules 5.1(a) and 5.3(a) by failing to make reasonable efforts to ensure that their subordinates explained to clients information about their departing lawyers as required by Rule 1.4(b)[30] or to ensure that client files were returned and refunds made in a timely

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[30] Rule 1.4(b) requires that an attorney "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

manner following termination as required by Rule 1.16(d).[31] Disciplinary Counsel contends that, by violating Rules 5.1(a) and 5.3(a) on the facts presented here, Respondents necessarily also violated Rules 5.1(b), 5.1(c), and 5.3(b).

Rules 5.1 and 5.3 are directed at two types of conduct. One is where a supervising lawyer fails to take reasonable steps, such as prescribing adequate SOPs and otherwise adequately supervising subordinates, to ensure that his or her subordinates do not violate the Rules of Professional Conduct. The other is where the supervising lawyer procures or ratifies conduct by subordinates that would be a violation of the Rules of Professional Conduct if engaged in by the supervising lawyer.

The Respondents were well aware of—and indeed, directed and ratified—repeated conduct of their lawyer and non-lawyer subordinates that violated the D.C. Rules of Professional Conduct. This conduct included the provisions in employment agreements and separation agreements that levied liquidated damages, mandated referral fees, prohibited client contact, and prohibited post-employment association

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[31] Rule 1.16(d) provides that—

> [i]n connection with any termination of representation, a lawyer shall take timely steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred."

"'[A] client should not have to ask twice' for [her] file." *In re Thai*, 987 A.2d 428, 430 (D.C. 2009).

with other Firm alumni. Indeed, the Respondents have not claimed that their subordinates acted without their knowledge, and the record amply demonstrates that during the period in question, micromanagement by whichever Respondent was serving as the Firm's overall managing partner was the order of the day at Tully Rinckey. This course of conduct by the Respondents violated Rules 5.1(b), 5.1(c)(1), 5.1(c)(2), and 5.3(b).

The Firm had a practice of transferring the clients of departing lawyers to other Firm lawyers, barring the departing lawyers from contacting those clients in connection with their departures, and advising those clients—sometimes unilaterally and sometimes by a joint letter—that their matters had been transferred to other lawyers in the Firm. *E.g.*, FF 58-60, 68, 71, 73, 80-81, 88. Numerous separation agreements implementing this policy were signed for the Firm by each Respondent. FF 60, 73, 81, 88; *see* FF 101; DCX 45 at 1. When it excluded the departing lawyer from any role in formulating or sending a communication to the clients about their right to choose who would represent them going forward, the latter aspect of this practice arguably violated Rules 1.4 and 5.6(a) because it removed the departing lawyer from the notification process. D.C. Bar Ethics Op. 221 (Oct. 1991). Because the exclusion of departing lawyers was episodic and the Firm's SOPs contemplated the sending of a joint letter (Tr. 148-49 (discussing RX 21)), however, we do not find a violation of Rule 5.1(a) or Rule 5.3(a).

Similarly, although the Firm's SOPs did not expressly direct that clients be told where their departing lawyers were going, Mr. Rinckey testified credibly that

the Firm's staff members were instructed to provide that information. FF 112. There was testimony about failures to advise clients of Mr. Watkins and Ms. D'Agostino where their lawyers had gone, FF 21, 112, as well as Ms. Gregerson's testimony that someone who was not identified told her not to disclose such information even if asked by a client, FF 65, but not clear and convincing evidence that these were systemic. Accordingly, we do not find a violation of Rule 5.1(a) or 5.3(a) in these three failures to advise clients where their lawyers were bound.

We do not find a violation of Rule 5.3 arising from the late provision of files to Rachelle Young. *See* FF 94-99. Although the relevant SOPs could have been more explicit about the urgency of such operations, there is no evidence in the record suggesting that this was other than an isolated event. Furthermore, Mr. Rinckey acted promptly to rectify the error once he became aware of it. Rule 5.3(c) requires either a failure to make reasonable efforts to ensure subordinates' compliance with the Rules or a respondent's ratification of a subordinate's violation. Here the record reflects at most a single violation of Rule 1.16(d)—by non-lawyer subordinates and promptly reversed by the lawyer-supervisor, Mr. Rinckey. That does not justify a finding of a Rule 5.3 violation. *Cf. In re Dickens*, 174 A.3d 283 (D.C. 2017) (Rule 5.1(a) case; numerous red flags over a multiyear period); *In re Gregory*, 790 A.2d 573 (D.C. 2002) (per curiam) (appended Board Report) (Rule 5.3(b) case; multiple instances of embezzlement by employee over ten-month period; respondent ignored knowledge of employee's unauthorized check writing for two years).

F. The Respondents Violated Rules 8.4(a) and 8.4(d).

The Respondents also are charged with deterring witnesses from cooperating with the Office of Disciplinary Counsel, in violation of Rules 8.4(a) and 8.4(d). As discussed above, Rule 8.4(a) provides that "[i]t is professional misconduct for a lawyer to . . . [v]iolate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." Rule 8.4(d) provides that it is professional misconduct for a lawyer to "[e]ngage in conduct that seriously interferes with the administration of justice." Comment [2] to Rule 8.4(d) provides that "[t]he cases under paragraph (d) include acts by a lawyer such as: failure to cooperate with Disciplinary Counsel; failure to respond to Disciplinary Counsel's inquiries or subpoenas" and that "[p]aragraph (d) is to be interpreted flexibly and includes any improper behavior of an analogous nature to these examples."

To establish a violation of Rule 8.4(d), Disciplinary Counsel must demonstrate by clear and convincing evidence that: (1) the respondent's conduct was improper, i.e., that Respondents either acted or failed to act when they should have; (2) the respondent's conduct bore directly upon the judicial process with respect to an identifiable case or tribunal; and (3) the respondent's conduct tainted the judicial process in more than a *de minimis* way, i.e., it must have at least potentially had an impact upon the process to a serious and adverse degree. *In re Hopkins*, 677 A.2d 55, 60-61 (D.C. 1996).

There was no proof that either Respondent told anyone to refrain from cooperating with inquiries from the Office of Disciplinary Counsel, but provisions in several employment and separation agreements allowed cooperation *only* when *required*, thus impliedly prohibiting *voluntary* reporting of lawyer misconduct to Disciplinary Counsel. FF 62-63, 75, 83, 92-93, 109-110.

The Respondents correctly state that D.C. Rule 8.3 requires reporting of lawyer misconduct to Disciplinary Counsel. Answer at 15; Respondents' Post-Hearing Brief at 20. That is so, however, only where the conduct "raises a *substantial question* as to [the] lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects," D.C. Rule 8.3(a) (emphasis added). Thus, there can be violations of the Rules of Professional Conduct that do not meet this mandatory reporting standard.

Rule 8.3 does not require the reporting of every violation of the Rules. D.C. Rule 8.3 cmt. [3]. Instead, it "limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of [the] rule." *Id.* As then-Bar Counsel[32] Leonard Becker put it, Rule 8.3(a) "ultimately accords a wide degree of judgment to a reporting lawyer. Except in *truly egregious cases*, Bar Counsel would be hard-pressed to second-guess . . . judgments [not to report] or to

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[32] The Office of Bar Counsel was renamed the Office of Disciplinary Counsel by the D.C. Court of Appeals in December 2015.

seek discipline by asserting the requisite 'clear and convincing' evidence of misconduct in failing to report." Leonard Becker, "Early Experience Under the 'Snitch' Rule," Wash. Lawyer, Nov.-Dec. 1992, at 8 (emphasis added). Thus, there are violations of the Rules of Professional Conduct whose reporting is *not* mandatory. The non-cooperation provisions of the various agreements under consideration here prohibited lawyers in the Firm from reporting such violations and this charge accordingly is sustained.[33]

G. Appropriateness of Sanction

This appears to be the first time that Rule 5.6(a) has been enforced within the D.C. lawyer disciplinary process, but the Rules, case law, and LEOs long have made clear that the types of restrictions that are the subject of this case are not permitted in this jurisdiction.[34] The Respondents contend that because this is the first D.C. disciplinary prosecution for a violation of Rule 5.6(a), "there is no reason to impose a sanction beyond a reprimand." Respondents' Post-Hearing Brief at 74. We disagree. Unlike the cases of first impression cited by the Respondents in support

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[33] Like Rule 5.6(a), Rules 8.1 and 8.3 do not apply to non-lawyers. Accordingly, we find no violations of those rules in the non-cooperation provisions agreed to between the Firm and Ms. Milone or between the Firm and Mr. May. *See* FF 113-14.

[34] *Hager*, 812 A.2d at 918 (quoting ABA Formal Opinion 93-371 (1993)); *accord Jacobson Holman*, 244 A.3d at 700-03; *Neuman*, 715 A.2d at 130 (stressing need to "protect[] future clients against having only a restricted pool of attorneys from which to choose" (quoting 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 5.6:201, at 824 (2d ed. Supp. 1997))); N.Y. State Bar Ass'n Comm. on Pro. Ethics, Formal Op. 730 (July 2000).

of this contention, *In re Kline*, 113 A.3d 202 (D.C. 2015); *In re Mance*, 980 A.2d 1196 (D.C. 2009), LEO 368 did not change the law in the District of Columbia. The best possible argument for the proposition that the liquidated damages clauses imposed by the Respondents were permissible would be for the period before the Court of Appeals added comment [2] to Rule 5.6. That addition, however, took effect February 1, 2007, which was *before* the Firm's D.C. Office was opened in 2008.

Moreover, the absence of previously imposed sanctions in this jurisdiction for these particular types of violations, as well as any lack of comparable cases, is no bar to the imposition of sanctions here. *See, e.g.*, *In re Blackwell*, 299 A.3d 561 (D.C. 2023) (imposing suspension in first-impression attorney discipline case).

In sum, we recommend a ninety-day suspension for each Respondent. A specific enumeration of the violations committed by each Respondent—twenty-eight by Mr. Tully and thirty-four by Mr. Rinckey—appears as an Appendix, which hereby is made a part of this Report.

## IV. RECOMMENDED SANCTION

In this case, Disciplinary Counsel has asked the Hearing Committee to recommend at least a six-month suspension for each Respondent. Respondent has requested that the Hearing Committee recommend a public admonition or a reprimand. For the reasons described below, we recommend a ninety-day suspension for each Respondent, with no fitness requirement for reinstatement.

A. Standard of Review

The sanction imposed in an attorney disciplinary matter is one that is necessary to protect the public and the courts, maintain the integrity of the legal profession, and deter the respondent and other attorneys from engaging in similar misconduct. *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); *Cater*, 887 A.2d at 17. "In all cases, [the] purpose in imposing discipline is to serve the public and professional interests . . . rather than to visit punishment upon an attorney." *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (en banc) (citations omitted); *see also In re Goffe*, 641 A.2d 458, 464 (D.C. 1994) (per curiam).

The sanction also must not "foster a tendency toward inconsistent dispositions for comparable conduct or . . . otherwise be unwarranted." D.C. Bar R. XI, § 9(h)(1); *see, e.g.*, *Hutchinson*, 534 A.2d at 923-24; *In re Berryman*, 764 A.2d 760, 766 (D.C. 2000). In determining the appropriate sanction, the Court of Appeals considers a number of factors, including: (1) the seriousness of the conduct at issue; (2) the prejudice, if any, to the client which resulted from the conduct; (3) whether the conduct involved dishonesty; (4) the presence or absence of violations of other provisions of the disciplinary rules; (5) whether the attorney has a previous disciplinary history; (6) whether the attorney has acknowledged his wrongful conduct; and (7) circumstances in mitigation or aggravation. *See, e.g.*, *Martin*, 67 A.3d at 1053 (citing *In re Elgin*, 918 A.2d 362, 376 (D.C. 2007)). The Court also considers "'the moral fitness of the attorney' and 'the need to protect the public, the

courts, and the legal profession.'" *In re Rodriguez-Quesada*, 122 A.3d 913, 921 (D.C. 2015) (per curiam) (quoting *In re Howes*, 52 A.3d 1, 15 (D.C. 2012)).

B. Application of the Sanction Factors

1. The Seriousness of the Misconduct

Respondents' misconduct was serious. It continued over many years, even after the issuance of the 2015 LEO that they claim was their first inkling they might be violating the D.C. Rules of Professional Conduct. Their behavior was oppressive to their employees and struck at the interests of clients and potential clients of lawyer-employees who wished to depart from the Firm. In addition to their own direct violations of the Rules, they not only countenanced but directed violations by their lawyer and non-lawyer subordinates.

2. Prejudice to Clients

With the possible exception of the delayed transfer of client files to Ms. Young, the Respondents' conduct did not prejudice any identified client. Even there, it is not clear that Ms. Young's clients were prejudiced by the delay and Mr. Rinckey promptly had the files transferred once he learned of the problem. Beyond that, however, Rule 5.6(a)'s prohibition on post-employment restrictions on a lawyer's practice is designed to provide clients and potential clients with the broadest possible choice of counsel, particularly counsel in specialized fields such as those in which the D.C. Office practices. Perforce, the numerous violations of Rule 5.6(a) can be considered to have injured clients and potential clients of lawyers who left or desired to leave the Firm.

3. Dishonesty

The conduct of the Respondents at issue in this proceeding did not involve dishonesty or misrepresentation. Disciplinary Counsel's Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction at 71. There were instances where the Respondents' testimony was inaccurate, inconsistent, or not credible. FF 139-142. Not every instance of inaccurate, inconsistent, or non-credible testimony meets the standard for enhancement of the sanction, though, and we do not find proof by clear and convincing evidence that these were instances deliberately intended to mislead the Committee. *Id.*; *see, e.g.*, *In re Bradley*, 70 A.3d 1189 (D.C. 2013); *In re Chapman*, 962 A.2d 922 (D.C. 2009).

4. Violations of Other Disciplinary Rules

Although no violations or attempted violations of Rule 1.5(e) were charged, the record shows that the Respondents at least attempted to violate it by contracting for or seeking "referral" fees on at least seven occasions. FF 16 (Tully); FF 28-29 (Tully); FF 34-35 (Rinckey); FF 39 (Rinckey); FF 40 (Rinckey); FF 69-70 (Tully); FF 102 (Rinckey). Division of fees between lawyers in different firms has long been forbidden in the District of Columbia. D.C. Rule 1.5(e) (eff. Jan. 1, 1991); D.C. Disciplinary R. 2-107(A) (prior version of Rule 1.5(e); superseded Jan. 1, 1991). No violation of Rule 1.5(e) was charged, however. Instead, the Respondents' actions relating to "referral" fees were charged as violations of Rules 5.6(a) and 8.4(a). Specification of Charges at 6 ¶ 11, 19 ¶ 37(a). These actions were noted in the Specification of Charges (¶ 11), and explored during the hearing, *e.g.*, FF 5, 29.b.,

35.b., 39.b., 40.b., 69, 102. For that reason, we could have considered them as violations of Rule 1.5(e) for sanctions purposes. *In re Kanu*, 5 A.3d 1, 7-9 (D.C. 2010); *In re Austin*, 858 A.2d 969, 975-76 (D.C. 2004). Mindful of due process considerations, however, *see Ruffalo*, 390 U.S. 544; *Robinson*, 225 A.3d at 406, we have not done so.

No violations or attempted violations of Rule 1.4 were charged. The record does not reflect who at the Firm inaccurately told Debra D'Agostino's client that the Firm did not know where Ms. D'Agostino had gone, whether that individual was acting upon the Respondents' authority, or whether the Respondents were aware of the exchange. *See* Tr. 430-31. Moreover, the Firm's refusal to tell client Everett Chatman where Robert Watkins had gone, DCX 93; DCX 94; Tr. 759-769, had little or no practical effect because Mr. Watkins had entered military service and couldn't have represented Mr. Chatman in any event. Accordingly, there is insufficient evidence to find that either Respondent violated Rule 1.4.

Finally, the Respondents committed multiple violations of each Rule cited in the Specification of Charges, other than Rules 5.1(a) and 5.3(a). See Appendix to this Report and Recommendation, *infra* pp. 88-96.

5. Previous Disciplinary History

Neither Respondent has any prior disciplinary history. Tr. 1933-34; Disciplinary Counsel's Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction at 71.

6. Acknowledgement of Wrongful Conduct

The Respondents have not acknowledged that their conduct was wrongful. Far from it. They claim that the host of restrictions and penalties they imposed or sought to impose on departing lawyers did not violate Rules 5.6(a) and 8.4(a), either because their restrictions applied regardless of whether such individuals competed with the Firm after departure (i.e., not solely to lawyers who competed with the Firm), Tr. 170-76, 1141-42, 1173-75, 1427-35, or because they had no reason to believe that the restrictions were impermissible until the issuance of LEO 368 in early 2015, Respondents' Post-Hearing Brief at 45, though violations continued to occur even after that date. *E.g.*, FF 118. They insist, with no supporting evidence, that their references to referral fees carried the unspoken assumption that they would comply with Rule 1.5(e), while simultaneously contending—inaccurately—that referral fees among lawyers were permissible in the District of Columbia until a 2015 change in a different rule (Rule 7.1) that does not address fee splitting. Tr. 1392-97.[35] Finally, they argue that their conduct should be judged under New York law even though its predominant effect was in the District of Columbia.

[35] Because no violations of Rule 1.5(e) were included in the Specification of Charges, the Hearing Committee has taken evidence of such violations into account in arriving at its sanction recommendation only insofar as they constituted violations of Rule 5.6(a) or 8.4(a).

7. Other Circumstances in Aggravation and Mitigation

There are several mitigating circumstances in this case. Both Respondents have performed honorable military service and pro bono service. Both have served on bar association committees. The Firm has contributed to a veterans' charity. Tr. 1044-45, 1568-70; *see* Respondents' Post-Hearing Brief at 43-44. Also, in most instances, the Respondents ultimately did not enforce the liquidated damages clauses and other provisions that violated the D.C. Rules when their lawyer employees departed from the Firm.

B. Sanctions Imposed for Comparable Misconduct

The parties concede that there are no cases involving comparable misconduct in the District of Columbia. Disciplinary Counsel's Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction at 70, 74; Respondents' Post-Hearing Brief at 73. The Hearing Committee has been advised that this is the first instance in which alleged violations of Rule 5.6(a) have been the subject of a D.C. disciplinary action. Tr. 1929.[36] We note that, in *Hager*, 812 A.2d 904, the

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[36] Violations of Rules 8.4(a) and 8.4(d) have resulted in a wide range of sanctions, from informal admonition to lengthy periods of suspension, depending on the underlying misconduct and accompanying Rule violations. *See, e.g.*, *In re Bernabei*, Board Docket No. 14-BD-061 (BPR Aug. 30, 2017) (directing Disciplinary Counsel to issue an informal admonition for violation of Rule 8.4(a) where the respondent knowingly assisted co-respondent in revealing client confidences and secrets); *In re Nwaneri*, Disc. Docket No. 2017-D059 (Letter of Informal Admonition Sept. 12, 2018) (informal admonition for violation of Rule 8.4(d) where the respondent attempted to obstruct Disciplinary Counsel's investigation); *In re Crawford*, 290 A.3d 934, 935 (D.C. 2023) (per curiam) (six month suspension with reinstatement conditioned upon proof of fitness for violations of Rules 8.4(a) and 8.4(d), along

Court suspended an attorney for one year for violating Rule 5.6(b) where the attorney entered into a secret settlement agreement that imposed a restriction on their ability to represent current or future clients in any related claims.[37] As the parties recognize, *Hager* is dissimilar to the instant matter, not only because it does not

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with Rules 3.1 (defending a proceeding, and asserting or controverting an issue therein, although there was no basis in law for doing so that was not frivolous); 3.3(a) (knowingly making false statements of fact to a tribunal or failing to correct false statements of material fact previously made to the tribunal); 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists); and 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation)).

Violations of Rules 5.1(b) and (c), and 5.3(b) have also resulted in sanctions ranging from informal admonitions to lengthy periods of suspension. *See In re Draper*, Bar Docket No. 2005-D299 (Letter of Informal Admonition Aug. 3, 2007) (informal admonition for violations of Rules 5.1, 5.3, and 8.4(d)); *In re Kirk*, Bar Docket No. 108-00 (Letter of Informal Admonition May 5, 2006) (informal admonition for violations of Rules 5.3(a), 5.3(b), and 1.15(b)); *Cater*, 887 A.2d 1 (180-day suspension with conditions where respondent violated Rule 5.3(b), along with Rules 1.1(a) (competent representation); 8.1(b) (failure to cooperate); 8.4(d) (serious interference with administration of justice); and D.C. Bar R. XI, § 2(b)(3) (failure to comply with Board order)); *In re Cohen*, 847 A.2d 1162 (D.C. 2004) (thirty day suspension where the respondent violated both Rules 5.1(a) and 5.1(c)(2)); *In re Roxborough*, 675 A.2d 950, 952 (D.C. 1996) (per curiam) (thirty day suspension with reinstatement conditioned upon proof of fitness where the respondent violated Rule 5.1(b), along with 1.3(c) (failure to act with reasonable promptness), 1.4(a) (failure to keep client reasonably informed), and 1.1(a) (failure to provide competent representation)).

[37] Rule 5.6(b) prohibits attorneys from "offering or making . . . agreement[s] in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between parties."

involve Rule 5.6(a), but also because *Hager* principally involved serious violations of Rules 1.7(b)(4) (conflict of interest) and 8.4(c) (dishonesty).

The sole case that either party has cited as being somewhat comparable is *In re Phillips*, 244 P.3d 549 (Ariz. 2010) (en banc). There the owner of a firm violated Rules 5.1 and 5.3 because the firm had policies that led to rule violations by subordinates. The Arizona Supreme Court imposed a six-month suspension with two years' probation; the dissenter would have added a fitness requirement as a prerequisite for reinstatement. That case differs from the instant one in three important respects that cut in different directions in terms of comparability. First, in *Phillips*, there was damage to specific clients who were unsophisticated individuals. Here, Disciplinary Counsel has not proven harm to identifiable clients or potential clients. Second, the violations of Rules 5.1 and 5.3 in *Phillips* seem to have reflected a failure of supervision rather than actual knowledge on the part of the respondent. Here, the Respondents not only knew of, but directed and ratified, their subordinates' actions in violation of the Rules. Third, the sanction in *Phillips* was aggravated by the respondent's prior discipline. Here, the Respondents have no record of prior discipline.

C. Fitness

Disciplinary Counsel has not requested that a fitness requirement be imposed, Disciplinary Counsel's Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction at 75, and "the imposition of a sanction harsher than that proposed by [Disciplinary] Counsel should be the exception rather than the

norm," *In re Ukwu*, 926 A.2d 1106, 1119 (D.C. 2007). We do not recommend imposition of a fitness requirement.

## V. CONCLUSION

The record in this matter reflects dozens of violations—by each of the Respondents and, at their direction, by lawyer and non-lawyer subordinates whom they closely supervised. That their actions were violations of the D.C. Rules of Professional Conduct was—or should have been—apparent well before the issuance of LEO 368. Moreover, some violations occurred even after the issuance of that opinion.

We have carefully considered the Respondents' Rule violations in light of the sanction factors enumerated above. As the Court recently reiterated, the appropriate sanction must aim "not only to maintain the integrity of the profession and to protect the public and the courts, but also to deter other attorneys from engaging in similar misconduct." *In re Blackwell*, 299 A.3d 561, 572 (D.C. 2023) (quoting *Martin*, 67 A.3d at 1053). On the facts of this case, we cannot conclude that a Board reprimand is a sanction sufficient to meet that standard. On the other hand, we are not persuaded that the Respondents' misconduct merits a six-month suspension, particularly in light of the factors in mitigation.

For the foregoing reasons, the Committee finds that each Respondent violated the Rules specified in the Appendix and recommends that each should receive the

sanction of a ninety-day suspension.[38] We further recommend that the Respondents' attention be directed to the requirements of D.C. Bar R. XI, § 14, and their effect on eligibility for reinstatement. *See* D.C. Bar R. XI, § 16(c).

AD HOC HEARING COMMITTEE

Eric L. Hirschhorn, Chair

Thomas Alderson, Public Member

Michael E. Tigar, Attorney Member

[38] All the parties' pending objections and motions, other than those to be considered by the Board on Professional Responsibility, *see supra* at 55, or addressed in this Report, have been considered by the Hearing Committee and are overruled or denied, as the case may be.

## APPENDIX
## Individual Violations by Respondents

| Mathew B. Tully (28 violations) | | |
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| **Finding of Fact** | **Rule(s)** | **Conduct** |
| 16 | 5.6(a), 8.4(a) | Respondent violated 5.6(a) and 8.4(a) because he requested Mr. Montalvo pay a "referral fee" of twenty-five percent of Mr. Montalvo's future collections for any clients that followed Mr. Montalvo to his new firm after departure. |
| 20 | 5.6(a) | Respondent violated 5.6(a) by dictating to Ms. D'Agostino how clients would be divided after she left the Firm, thus limiting the access of future clients to the lawyers of their choosing. |
| 22-23 | 5.6(a), 8.4(a) | Respondent violated 5.6(a) and 8.4(a) because Ms. Friedman's employment agreement included a "no-interference" liquidated damages clause that prohibited her from working with Firm employees after she left the Firm. |
| 22-23 | 5.6(a), 8.4(a) | Respondent violated 5.6(a) and 8.4(a) because Ms. Friedman's employment agreement included a liquidated damages clause for early departure without "Good Reason." |
| 22-23 | 5.6(a), 8.4(a) | Respondent violated 5.6(a) and 8.4(a) because Ms. Friedman's employment agreement included a prohibition on the "improper removal" of Firm client names, thus limiting the access of future clients to the lawyer of their choosing. |
| 24-25 | 5.6(a), 8.4(a) | Respondent violated 5.6(a) and 8.4(a) because Mr. Ellis's employment agreement included a clause that made Mr. Ellis liable for the Firm's attorneys' fees and costs in the event of post-employment litigation, regardless of the outcome. |

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| 24-25 | 5.6(a), 8.4(a) | Respondent violated 5.6(a) and 8.4(a) because Mr. Ellis's employment agreement included a prohibition on working with Firm employees after leaving the Firm. |
| 28-29 | 5.3(b), 5.6(a), 8.4(a) | Respondent violated 5.3(b), 5.6(a), and 8.4(a) because Ms. Weiss's employment agreement included a liquidated damages clause for early departure without "Good Reason." |
| 28-29 | 5.3(b), 5.6(a), 8.4(a) | Respondent violated 5.3(b), 5.6(a), and 8.4(a) because Ms. Weiss's employment agreement included a clause that obligated her to pay an after departure "Referral Fee" of one third or the maximum ethical proportion of fees "billed" to former Firm clients, which acted as a significant disincentive for lawyers who might be considering leaving the Firm. |
| 28-29 | 5.3(b), 5.6(a), 8.4(a) | Respondent violated 5.3(b), 5.6(a), and 8.4(a) because Ms. Weiss's employment agreement included a clause that made her liable for the Firm's attorneys' fees and costs related to the enforcement of the employment agreement if she left other than for "Good Reason." |
| 28-29 | 5.3(b), 5.6(a), 8.4(a) | Respondent violated 5.3(b), 5.6(a), and 8.4(a) because Ms. Weiss's employment agreement included a prohibition on working with Firm employees and alumni after leaving the Firm. |
| 55-56 | 5.1(c), 5.6(a), 8.4(a) | Respondent violated 5.1(c), 5.6(a), and 8.4(a) by demanding and collecting liquidated damages for Mr. Ellis's early departure. |
| 55-57 | 5.1(c), 5.6(a), 8.4(a) | Respondent violated 5.1(c), 5.6(a), and 8.4(a) because Mr. Ellis's separation agreement included a clause that prohibited working with Firm alumni after he left. |
| 58-60 | 5.3(b), 5.6(a), 8.4(a) | Respondent violated 5.3(b), 5.6(a), and 8.4(a) by prohibiting Ms. Weiss from speaking with clients she had worked with upon her departure from the Firm and because her separation agreement included a liquidated damages clause if she contacted any Firm clients after she left. |

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| 62 | 8.4(a), 8.4(d) | Respondent violated 8.4(a) and (d) because Ms. Weiss's separation agreement included a clause that she would not voluntarily assist in an investigation of the Firm or its owners, thus prohibiting her from reporting non-mandatory Rule violations. |
| 68-73 | 5.1(c), 5.6(a), 8.4(a) | Respondent violated 5.1(c), 5.6(a), and 8.4(a) because Ms. Gregerson's separation agreement included a liquidated damages clause prohibiting her from contacting clients of the Firm. |
| 69-70 | 5.6(a), 8.4(a) | Respondent violated 5.6(a) and 8.4(a) because Ms. Gregerson's proposed separation agreement included a provision for her to pay a thirty percent "referral fee" for all cases from the Firm that might be transferred to her future law firm. |
| 71 | 5.1(b), 5.1(c)(1), 5.1(c)(2) | Respondent violated 5.1(b), 5.1(c)(1), and 5.1(c)(2) when Ms. Gregerson was directed to have no contact with her clients, thus limiting the access of clients to the lawyer of their choosing. |
| 75 | 8.4(a), 8.4(d) | Respondent violated 8.4(a) and (d) because Ms. Gregerson's separation agreement included a clause that she would not voluntarily assist in an investigation of the Firm or its owners, thus prohibiting her from reporting non-mandatory Rule violations. |
| 81 | 5.6(a), 8.4(a) | Respondent violated 5.6(a) and 8.4(a) because Ms. Quashie's separation agreement included a provision directing her not to contact her clients after she left and a liquidated damages clause if she violated that provision. |
| 83 | 8.4(a), 8.4(d) | Respondent violated 8.4(a) and (d) because Ms. Quashie's separation agreement included a clause that she would not voluntarily assist in an investigation of the Firm or its owners, thus prohibiting her from reporting non-mandatory Rule violations. |

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| 88 | 5.6(a). 8.4(a) | Respondent violated 5.6(a) and 8.4(a) because Ms. Benjamin's separation agreement included a clause that would subject her to liquidated damages if she communicated with her clients. |
| 92 | 8.4(a), 8.4(d) | Respondent violated 8.4(a) and (d) because Ms. Benjamin's separation agreement included a clause that she would not voluntarily assist in an investigation of the Firm or its owners, thus prohibiting her from reporting non-mandatory Rule violations. |
| 93 | 5.6(a), 8.4(a) | Respondent violated 5.6(a) and 8.4(a) because Ms. Young's separation agreement included a clause that provided for liquidated damages if she contacted any clients. |
| 93 | 8.4(a), 8.4(d) | Respondent violated 8.4(a) and (d) because Ms. Young's separation agreement included a clause that she would not voluntarily assist in an investigation of the Firm or its owners, thus prohibiting her from reporting non-mandatory Rule violations. |
| 109 | 5.6(a), 8.4(a) | Respondent violated 5.6(a) and 8.4(a) because a clause in Ms. Harrison's separation agreement prohibited her from communicating with clients, thus limiting the access of clients to the lawyer of their choosing. |
| 109 | 8.4(a), 8.4(d) | Respondent violated 8.4(a) and (d) because Ms. Harrison's separation agreement included a clause that she would not voluntarily assist in an investigation of the Firm or its owners, thus prohibiting her from reporting non-mandatory Rule violations. |
| 118 | 5.6(a), 8.4(a) | Respondent violated 5.6(a) and 8.4(a) when the Firm did not void the liquidated damages provisions for early departure in previously signed employment agreements and continued to include such provisions in their new employment agreements and in their employment agreement template for almost three years after LEO 368 was issued. |

| Gregory T. Rinckey (34 violations) | | |
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| **Finding of Fact** | **Rule(s)** | **Conduct** |
| 32-33 | 5.6(a), 8.4(a) | Respondent violated 5.6(a) and 8.4(a) because Ms. Gregersons's employment agreement included a liquidated damages clause for early departure from the Firm without "Good Reason." |
| 32-33 | 5.6(a), 8.4(a) | Respondent violated 5.6(a) and 8.4(a) because Ms. Gregerson's employment agreement included a clause that obligated her to pay for the Firm's attorneys' fees and costs in the event of post-employment litigation, regardless of outcome. |
| 32-33 | 5.6(a), 8.4(a) | Respondent violated 5.6(a) and 8.4(a) because Ms. Gregerson's employment agreement included a provision that each "improper removal" of client names would be a breach of the agreement, thus limiting the access of clients to the lawyer of their choosing. |
| 32-33 | 5.6(a), 8.4(a) | Respondent violated 5.6(a) and 8.4(a) because Ms. Gregerson's employment agreement included a prohibition on working with Firm employees and alumni after she left the Firm. |
| 34-35 | 5.6(a), 8.4(a) | Respondent violated 5.6(a) and 8.4(a) because Ms. Quashie's employment agreement included a liquidated damages clause for early departure from the Firm without "Good Reason." |
| 34-35 | 5.6(a), 8.4(a) | Respondent violated 5.6(a) and 8.4(a) because Ms. Quashie's employment agreement included a clause for "Referral" fees after her departure of one-third of fees "billed" to any former Firm clients, which acted as a significant disincentive for lawyers who might be considering leaving the Firm. |

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| 34-35 | 5.6(a), 8.4(a) | Respondent violated 5.6(a) and 8.4(a) because Ms. Quashie's employment agreement included a clause that made her liable for the Firm's attorneys' fees and costs in the event of a post-employment dispute, regardless of outcome, if her departure was not for cause or "Good Reason." |
| 34-35 | 5.6(a), 8.4(a) | Respondent violated 5.6(a) and 8.4(a) because Ms. Quashie's employment agreement included a prohibition on working with Firm employees and alumni after she left the Firm. |
| 36-37 | 5.6(a), 8.4(a) | Respondent violated 5.6(a) and 8.4(a) because Ms. Benjamin's employment agreement included a liquidated damages clause for early departure from the Firm without "Good Reason." |
| 36-37 | 5.6(a), 8.4(a) | Respondent violated 5.6(a) and 8.4(a) because Ms. Benjamin's employment agreement included a clause that obligated her to pay the Firm's attorneys' fees and costs in any post-employment litigation, regardless of outcome, if her departure was for other than "Good Reason." |
| 36-37 | 5.6(a), 8.4(a) | Respondent violated 5.6(a) and 8.4(a) because Ms. Benjamin's employment agreement included a prohibition on the "improper removal" of client names, thus limiting the access of clients to the lawyer of their choosing. |
| 38 | 5.6(a), 8.4(a) | Respondent violated 5.6(a) and 8.4(a) because Ms. Young's employment agreement included a liquidated damages clause for early departure from the Firm, which increased if any client thereafter became a client of Ms. Young. |
| 38 | 5.6(a), 8.4(a) | Respondent violated 5.6(a) and 8.4(a) because Ms. Young's employment agreement included a prohibition on the "improper removal" of client names, thus limiting the access of clients to the lawyer of their choosing. |

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| 38 | 5.6(a), 8.4(a) | Respondent violated 5.6(a) and 8.4(a) because Ms. Young's employment agreement included a prohibition on working with Firm employees and alumni after she left the Firm. |
| 39 | 5.6(a), 8.4(a) | Respondent violated 5.6(a) and 8.4(a) because Ms. Harrison's employment agreement included a liquidated damages clause for early departure from the Firm without "Good Reason." |
| 39 | 5.6(a), 8.4(a) | Respondent violated 5.6(a) and 8.4(a) because Ms. Harrison's employment agreement included a clause for "Referral" fees of one-third of fees "billed" to Firm clients who elect to be represented by Ms. Harrison after her departure, which acted as a significant disincentive for lawyers who might be considering leaving the Firm. |
| 39 | 5.6(a), 8.4(a) | Respondent violated 5.6(a) and 8.4(a) because Ms. Harrison's employment agreement included a clause that made her responsible to pay the Firm for attorneys' fees and costs of any post-employment litigation, regardless of outcome. |
| 39 | 5.6(a), 8.4(a) | Respondent violated 5.6(a) and 8.4(a) because Ms. Harrison's employment agreement included a prohibition on working with Firm employees and alumni after she left the Firm. |
| 40 | 5.6(a), 8.4(a) | Respondent violated 5.6(a) and 8.4(a) because Mr. Watkins's employment agreement included a liquidated damages clause for early departure from the Firm. |
| 40 | 5.6(a), 8.4(a) | Respondent violated 5.6(a) and 8.4(a) because Mr. Watkins's employment agreement included a "Referral Fee" of one-third of fees "billed" to Firm clients who became Mr. Watkins's clients after his departure, which acted as a significant disincentive for lawyers who might be considering leaving the Firm. |

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| 40 | 5.6(a), 8.4(a) | Respondent violated 5.6(a) and 8.4(a) because Mr. Watkins's employment agreement included a clause that made Mr. Watkins responsible to pay for the Firm's attorneys' fees and costs for any post-departure litigation, regardless of outcome. |
| 40 | 5.6(a), 8.4(a) | Respondent violated 5.6(a) and 8.4(a) because Mr. Watkins's employment agreement included a prohibition on the "improper removal" of client names, thus limiting the access of clients to the lawyer of their choosing. |
| 40 | 5.6(a), 8.4(a) | Respondent violated 5.6(a) and 8.4(a) because Mr. Watkins's employment agreement included a prohibition on working with Firm employees and alumni after he left the Firm. |
| 41 | 5.6(a), 8.4(a) | Respondent violated 5.6(a) and 8.4(a) because Mr. McCullough's employment agreement included a liquidated damages clause for early departure from the Firm. |
| 41 | 5.6(a), 8.4(a) | Respondent violated 5.6(a) and 8.4(a) because Mr. McCullough's employment agreement included a clause that required Mr. McCullough to pay the Firm's attorneys' fees and costs in the event of post-employment litigation, regardless of outcome. |
| 41 | 5.6(a), 8.4(a) | Respondent violated 5.6(a) and 8.4(a) because Mr. McCullough's employment agreement included a prohibition on "improper removal" of client names, thus limiting the access of clients to the lawyer of their choosing. |
| 46-49 | 5.6(a), 8.4(a), 5.3(b) | Respondent violated 5.6(a), 8.4(a) and 5.3(b) by negotiating with Ms. Friedman about which clients she would take with her upon departure, thus limiting the access of clients to the lawyer of their choosing. |
| 100, 102 | 8.4(a) | Respondent violated 8.4(a) by negotiating with Ms. Molnar for liquidated damages due to her early departure from the Firm. |

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| 100, 102 | 5.6(a), 8.4(a) | Respondent violated 5.6(a) and 8.4(a) because Ms. Molnar's employment agreement included a restriction from practicing from Firm alumni after she left the Firm, and her separation agreement included a provision that the restriction on work with Firm alumni remained in effect and that if she violated that provision, she was subject to pay liquidated damages. |
| 100, 102 | 5.6(a), 8.4(a) | Respondent violated 5.6(a) and 8.4(a) because Ms. Molnar's separation agreement provided for "referral fees" of fifty percent on all cases transferred from the Firm to Ms. Molnar's new practice. |
| 110 | 5.6(a), 8.4(a) | Respondent violated 5.6(a) and 8.4(a) because Mr. McCullough's separation agreement included a prohibition on communicating with clients, thus limiting the access of clients to the lawyers of their choosing. |
| 110 | 8.4(a), 8.4(d) | Respondent violated 8.4(a) and (d) because Mr. McCullough's separation agreement provided that he would not voluntarily assist in investigations, thus prohibiting him from reporting non-mandatory Rule violations. |
| 110 | 5.6(a) | Respondent violated 5.6(a) because Mr. McCullough's separation agreement included a liquidated damages provision and liquidated damages were collected from him for his early departure from the Firm. |
| 117 | 5.6(a), 8.4(a) | Respondent violated 5.6(a) and 8.4(a) because a proposed employment agreement to Ms. Weiss restricted her from working with Firm alumni post-departure, after LEO 368 was issued. |