DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
HARRY TUN,	:	
	:	Board Docket No. 14-BD-099
Respondent.	:	Bar Docket No. 2010-D463
	:	
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 416262)	:	

REPORT AND RECOMMENDATION
OF THE BOARD ON PROFFESSIONAL RESPONSIBILITY

Respondent, Harry Tun, is charged with violating District of Columbia Rules of Professional Conduct 3.3(a)(1), 8.4(c), and 8.4(d), for making alleged false statements in a motion to recuse the Honorable Russell F. Canan in a criminal trial where Respondent represented the defendant. The alleged false statements arise from a prior history between Judge Canan and Respondent. Judge Canan previously informed the Chief Judge of the Superior Court about Judge Canan's concerns with the accuracy of CJA vouchers that Respondent submitted in connection with his representation of indigent criminal defendants. Hearing Committee Finding of Fact ("FF") 3. Respondent allegedly double-billed CJA matters on 162 different occasions. FF 4. Respondent contends these billing errors occurred because of sloppy recordkeeping practices, which also included his failure to charge for time worked on CJA matters in excess of the erroneously double-bill charges.

The matter was referred to the United States Attorney's Office, which declined to prosecute if Respondent paid restitution and self-reported to the Office of Disciplinary Counsel.[1] FF 5. Respondent satisfied these conditions. FF 6. The Office of Disciplinary Counsel then investigated the matter and eventually entered into a negotiated discipline with Respondent ("Voucher Case"). FF 6-7. The Hearing Committee approved of the terms of the negotiated discipline and recommended it to the Court of Appeals, but the Court referred the matter to the Board for its opinion on the appropriateness of the sanction. FF 8, 10. While the Board and Court examined the suitability of the negotiated discipline in the Voucher Case, Respondent continued practicing, which included representing a criminal defendant beginning in July 2009 in a matter assigned to Judge Canan. FF 9.

Because of the prior history with Judge Canan underlying the Voucher Case, Respondent moved to recuse him in October 2009. FF 11. In the recusal motion, Respondent stated that Judge Canan had "reported [Respondent] for an alleged ethical violation," which had been investigated by Disciplinary Counsel and "dismissed without any disciplinary action being instituted against" Respondent. *Id.* There is no dispute that this statement is false in several material ways. FF 18. First, Judge Canan never reported Respondent for an ethical violation. Second, the disciplinary action in the Voucher Case was still pending at that time Respondent

[1] The District of Columbia Court of Appeals changed the title of Bar Counsel to Disciplinary Counsel, effective December 19, 2015. We use the current title herein.

stated it had been dismissed.[2] Finally, Respondent in fact received discipline for his action. Respondent was reported for making this false statement in the recusal motion.

Disciplinary Counsel charged Respondent after an investigation into the matter. The seminal question before the Hearing Committee was whether Respondent made a *knowing* misrepresentation in the recusal motion to bolster his argument that Judge Canan was biased against him. During the hearing, Respondent testified, providing a number of reasons for his inclusion of the erroneous statements in the recusal motion. *See* FF 19-28. A majority of the Ad Hoc Hearing Committee found that there was clear and convincing evidence that Respondent made the false statement knowingly, and thus violated Rules 3.3(a)(1) (knowingly making a false statement of fact to a tribunal) and 8.4(c) (engaging in conduct involving dishonesty and misrepresentation). This majority also found that Respondent testified falsely during the hearing when explaining the reasons he included the erroneous statements in the recusal motion.

The Hearing Committee concluded that Respondent did not violate Rule 8.4(d) (interfering with the administration of justice) because Judge Canan promptly

[2] Indeed, at the time Respondent made the false statement, his negotiated disposition in the Voucher Case was undecided by the Court of Appeals. In fact, on November 24, 2009, the Board recommended that the Court reject the negotiated discipline because the sanction was unduly lenient. Following the Board's recommendation, on January 21, 2010, the Court rejected the negotiated discipline in the Voucher Case, without prejudice to the parties resubmitting a revised petition. The parties did not submit an amended petition for negotiated discipline reflecting a sanction consistent with the Board's recommendation until November 16, 2010, which they then amended on March 10, 2011. The Court approved the amended petition on August 11, 2011, and Respondent was suspended for eighteen months, with six months stayed in favor of probation.

denied the motion for recusal on procedural grounds (the motion did not include a required affidavit), and thus, any interference with the administration of justice was *de minimis*. The Hearing Committee recommended that Respondent be suspended from the practice of law for one year for the Rule 3.3(a)(1) and 8.4(c) violations.

The Ad Hoc Hearing Committee Chair, Eric F. Fox, Esquire, dissented in part (the "Dissent"), finding that the false statement was made recklessly, not knowingly, and thus concluding that Respondent violated only Rule 8.4(c). The Chair also found that Respondent did not testify falsely to the Hearing Committee and that the proper sanction was a three-month suspension.

Both Disciplinary Counsel and Respondent took exception to the Hearing Committee report. Disciplinary Counsel excepted only to the sanction recommendation, and argued that a three-year suspension with fitness was appropriate because Respondent engaged in a pattern of dishonesty and has a prior disciplinary history. Respondent agreed with the Dissent in that he violated Rule 8.4(c) and that the sanction should be a three-month suspension. The Board heard oral argument on January 26, 2017.

The Board, having reviewed the record and the argument of the parties, concurs with the Hearing Committee's factual findings as supported by substantial evidence in the record, and with its conclusions of law as supported by clear and convincing evidence. Thus, for the reasons set forth in the Hearing Committee's Report and Recommendation, which is attached hereto and adopted and incorporated by reference, the Board finds that Respondent violated Rules 3.3(a)(1) and 8.4(c) by

making an intentional false statement in his recusal motion and that he testified falsely in front of the Hearing Committee. For the reasons set forth in the Hearing Committee's Report and Recommendation, we also recommend that Respondent be suspended for one year. Unlike the Hearing Committee, however, the Board recommends a requirement of fitness before reinstatement.

I. LENGTH OF SUSPENSION

In so doing, the Board recommends against Disciplinary Counsel's three-year suspension with fitness recommendation. The sanction of a three-year suspension with a fitness requirement in dishonesty cases generally applies where there is "a pattern of dishonesty and misrepresentation over a lengthy period." *In re Moore*, Bar Docket No. 94-93, at 9 (BPR June 19, 1996), *recommendation adopted*, 691 A.2d 1151, 1152 (D.C. 1997) (per curiam). For example, in *Moore* (a case upon which Disciplinary Counsel relies), the respondent was criminally convicted of a willful failure to file a federal tax return and sentenced to one year in prison, and therefore was guilty of a "serious crime" under the Rules of the D.C. Court of Appeals. *Id.* at 1, 3. The respondent lied to the IRS generally (*e.g.*, stating his tax liability was zero in 1986 and 1987 when he knew that was not true—he had actually earned over $1 million); lied to the IRS investigators and hid documents (claiming his returns were in possession of his accountants, which he knew to be untrue); and testified falsely to the Superior Court, Family Division in 1995 in his divorce case (regarding his income and ownership of certain property). *Id.* at 6-8. This pattern

of egregious dishonesty to the court and the IRS over a period of at least nine years is distinguishable from Respondent's conduct in its level of dishonesty.

Other decisions imposing a sanction of a three-year suspension with a fitness requirement are also distinguishable because they concern a pattern of dishonesty and misrepresentation over a lengthy period coupled with a covert act to conceal or further the dishonesty. *See, e.g.*, *In re Vohra*, 68 A.3d 766, 769-771 (D.C. 2013) (three-year suspension with fitness where the respondent filled out his clients' visa applications incorrectly, corrected his mistakes by forging their signatures, and falsely told them the applications were still pending when they had already been rejected); *In re Silva*, 29 A.3d 924, 925 (D.C. 2011) (three-year suspension with fitness where the respondent neglected a real estate transaction, created a false document with forged signatures to cover up his neglect, and lied about the matter to his client); *In re Slaughter*, 929 A.2d 433, 447 (D.C. 2007) (three-year suspension with fitness where the respondent "engaged in repeated acts of dishonesty, deliberately preparing and forging documents to support his on-going misrepresentations to his law firm"); *In re Steele*, 868 A.2d 146, 153-155 (D.C. 2005) (three-year suspension with fitness and restitution for pervasive dishonesty, including false statements and document fabrication).

Even *In re Bradley*, where the Court suspended the respondent for two years with fitness, addresses much more egregious conduct than that of Respondent in the instant case. In *Bradley*, the respondent "knowingly and repeatedly caused serious damage to her probate clients through her neglect" in that (a) one client "remained

in a nursing home without any outside contact for years and missed an opportunity to be transferred to a nursing home located closer to his family"; and (b) the other client's estate "lost hundreds of thousands of dollars" because of the respondent's neglect. 70 A.3d 1189, 1195 (D.C. 2013) (per curiam). The duration of the respondent's neglect in *Bradley* is also much longer than any misconduct in the instant case—ten years of neglect of one client and five years of neglect of the other. *Id.* In addition, the respondent's history included two informal admonitions for neglect of probate clients, and the respondent lied about the neglect to the Hearing Committee. *Id.* at 1193-95.

Here, Respondent's conduct is simply less severe. Like those cases involving extended periods of suspension beyond a year, Respondent lied in his recusal motion to Judge Canan; lied to the Hearing Committee about the reason for including misrepresentations in the recusal motion; and was previously suspended in the Voucher case for making reckless misrepresentations on CJA vouchers, and received five informal admonitions arising out of other matters (none of which involve dishonesty). However, his conduct neither involved the protracted and repeated dishonesty nor any other overt act to conceal the dishonesty as found in the three-year suspension cases. In addition, Respondent's conduct did not involve the extensive neglect present in *Bradley*. Thus, while the misconduct here, a false statement to a court and false testimony to the Hearing Committee, is unquestionably serious, it is not as serious as the conduct in *Bradley* or the three-year suspension cases.

II. FITNESS

The Hearing Committee recommended that Respondent be reinstated to practice following his period of suspension. Disciplinary Counsel argues that Respondent should be required to prove fitness prior to reinstatement. Respondent argues that a fitness requirement should not be imposed. For the reasons set forth below, the Board agrees with Disciplinary Counsel, and recommends that Respondent be required to prove his fitness to practice prior to reinstatement.

The Court established the standard for the imposition of a fitness requirement in *In re Cater*, 887 A.2d 1 (D.C. 2005). "[T]o justify requiring a suspended attorney to prove fitness as a condition of reinstatement, the record in the disciplinary proceeding must contain clear and convincing evidence that casts a serious doubt upon the attorney's continuing fitness to practice law." *Id*. at 6. Proof of a "serious doubt" involves "more than 'no confidence that [a] Respondent will not engage in similar conduct in the future.'" *In re Guberman*, 978 A.2d 200, 213 (D.C. 2009) (alteration in original) (quoting Disciplinary Counsel's brief). It connotes "'real skepticism, not just a lack of certainty.'" *Id.* (quoting *Cater*, 887 A.2d at 24).

In articulating this standard, the Court observed that the reason for imposing a condition for reinstatement on proof of fitness was "conceptually different" from the basis for imposing a suspension. *Cater*, 887 A.2d at 22. As the Court explained:

> The fixed period of suspension is intended to serve as the commensurate response to the attorney's past ethical misconduct. In contrast, the open-ended fitness requirement is intended to be an appropriate response to serious concerns about whether the attorney will act ethically and competently in the future, after the period of suspension has run. . . . [P]roof of a violation of the Rules that merits

> even a substantial period of suspension is not necessarily sufficient to justify a fitness requirement . . . .

Id.

In addition, the Court found that the five factors for reinstatement set forth in *In re Roundtree*, 503 A.2d 1215, 1217 (D.C. 1985), should be used in applying the *Cater* fitness standard. These factors include:

> (a) the nature and circumstances of the misconduct for which the attorney was disciplined;
>
> (b) whether the attorney recognizes the seriousness of the misconduct;
>
> (c) the attorney's conduct since discipline was imposed, including the steps taken to remedy past wrongs and prevent future ones;
>
> (d) the attorney's present character; and
>
> (e) the attorney's present qualifications and competence to practice law.

Cater, 887 A.2d at 21, 25.

For the reasons discussed below, we find that Disciplinary Counsel has proven by clear and convincing evidence that there is a serious doubt as to Respondent's ability to practice law following his suspension.

Here, Respondent's misconduct was very serious, as it involved multiple instances of dishonesty—to the court (in the recusal motion) and the Hearing Committee (in his false testimony)—even if such dishonesty did not occur over a protracted period of time. The Court has consistently held that "'honesty is basic to the practice of law, and that lawyers have a greater duty than ordinary citizens to be scrupulously honest at all times.'" *In re Baber*, 106 A.3d 1072, 1077 (D.C. 2015)

(quoting *Guberman*, 978 A.2d at 209 n.10). Thus, when a lawyer's misconduct creates a serious doubt as to a lawyer's honesty, it creates a serious doubt as to his or her ability to practice law. *See, e.g.*, *In re Daniel*, 11 A.3d 291, 302 (D.C. 2011) (imposing a fitness requirement where misconduct showed the respondent to be "comfortable acting dishonestly, and the circumstances show[ed] dishonest behavior over a number of years"); *In re Slaughter*, 929 A.2d 433, 447 (D.C. 2007) (finding that "repeated dishonesty" raised serious doubts as to the respondent's fitness to practice overall); *In re Goffe*, 641 A.2d 458, 468 (D.C. 1994) (per curiam) (finding that a "'disturbing pattern of dishonesty . . . justifie[d] the imposition of a showing of fitness prior to [the r]espondent's reinstatement'" (quoting Board Report)).

Moreover, the *Roundtree* factors support fitness in this case. Respondent's false testimony to the Hearing Committee shows that he does not understand the seriousness of his false statements to Judge Canan, shows that he does not appreciate his obligation to be honest, and reflects negatively on his present character. There is no evidence that Respondent has taken any steps to remedy his misrepresentation to Judge Canan.[3]

Upon consideration of these factors, we find that Disciplinary Counsel has proven by clear and convincing evidence Respondent's "disturbing pattern of dishonesty," which gives us a serious doubt as to Respondent's ability to practice

[3] And finally, Disciplinary Counsel does not argue that Respondent lacks the present qualifications or competence to practice law.

ethically in the future. As such, we recommend that Respondent be required to prove his fitness to practice prior to reinstatement.

CONCLUSION

For the reasons stated in the Hearing Committee's Report and Recommendation, which is attached hereto and adopted and incorporated by reference (with the exception noted above), the Board recommends a sanction of a one-year suspension with the requirement that Respondent prove fitness prior to reinstatement.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: __/TRB/_____
Thomas R. Bundy, III

Dated: July 14, 2017

All members of the Board concur in this Report and Recommendation, except Mr. Bernius, Ms. Soller, and Mr. Carter, who are recused.

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

In the Matter of:	:	
	:	
HARRY TUN,	:	
	:	Board Docket No. 14-BD-099
Respondent.	:	Bar Docket No. 2010-D463
	:	
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration Number 416262)	:	

REPORT AND RECOMMENDATION
OF THE AD HOC HEARING COMMITTEE

I. INTRODUCTION

On November 13, 2014, Disciplinary Counsel[1] filed a Petition with the District of Columbia Court of Appeals Board on Professional Responsibility, instituting formal disciplinary proceedings against Harry Tun, Esquire, a member of the Bar of the District of Columbia, Bar Number 416262. The Petition was accompanied by a five-page document captioned "Specification of Charges."

At the direction of the Chairman of the Ad Hoc Committee at a pre-hearing conference held on January 21, 2015, Disciplinary Counsel filed an Amended Specification of Charges on April 29, 2015, to clarify that among the alleged violations, Respondent was being charged with "knowingly" making a false statement to a tribunal in violation of Rule 3.3(a)(1).[2]

[1] The Petition was filed by the Office of Bar Counsel. The District of Columbia Court of Appeals changed the title of Bar Counsel to Disciplinary Counsel, effective December 19, 2015. We use the current title herein.

[2] *See* Pre-hearing Transcript ("P. Tr.") 5-6 (Jan. 21, 2015).

AMENDED SPECIFICATION OF CHARGES

The significant facts alleged in the Amended Specification of Charges are as follows:

1. The District of Columbia Court of Appeals and the Board on Professional Responsibility have jurisdiction over this matter because Respondent is a member of the District of Columbia Bar, having been admitted on November 14, 1988, and subsequently assigned Bar Number 416262.

2. Respondent was a criminal defense attorney who accepted appointments from the Superior Court to represent indigent criminal defendants. Each time the Superior Court appointed Respondent to represent an indigent defendant, it provided him with a voucher form to use when he submitted his claim for payment to the court.

3. The Honorable Russell F. Canan, an Associate Judge of the Superior Court, became concerned about the accuracy of Respondent's vouchers and notified the Chief Judge, who then referred the matter to the United States Attorney's Office for the District of Columbia for investigation.

4. It was ultimately found that Respondent submitted vouchers for the same time period for two or more clients (a practice known as "double billing") on 162 occasions.

5. The U.S. Attorney's Office agreed not to criminally prosecute Respondent if he (i) repaid the $16,034 in overpayments he had received as a result of false reporting; and (ii) reported his conduct to the Office of Disciplinary Counsel.

6. Accordingly, on July 26, 2006, Respondent reported his conduct to Disciplinary Counsel. On February 20, 2009, Disciplinary Counsel served Respondent with a Specification of Charges alleging that Respondent violated Rules 1.5(a) and (f), in that he charged an unlawful and therefore unreasonable fee when he submitted the false vouchers to the Superior Court; Rule 3.3(a)(1), in that he made a [knowingly] false statement of material fact or law to a tribunal when he submitted the false vouchers; Rule 8.4(c), in that he engaged in conduct that involved dishonesty, fraud, deceit, or misrepresentation; and Rule 8.4(d), in that he engaged in conduct that seriously interfered with the administration of justice.

7. On March 27, 2009, Disciplinary Counsel and Respondent filed a Petition for Negotiated Discipline ("PND") with the Board on Professional Responsibility wherein Respondent (i) stipulated that his conduct violated all the Rules charged in the Specification of Charges; and (ii) agreed that the appropriate sanction would be a nine-month suspension coupled with a one-year period of probation (three months of the suspension would be stayed pending successful completion of the probation).

8. On July 14, 2009, an Ad Hoc Hearing Committee issued its Report and Recommendation, wherein it concluded that the negotiated discipline was appropriate and it recommended to the Court of Appeals that the PND be approved. *In re Tun*, BDN 273-06 (HC July 14, 2009).

9. On July 16, 2009, Respondent entered his appearance on behalf of the defendant in the criminal matter of *United States of America v. Ferose K. Khan*, Case No. 2009 CF2 14008, pending in the Superior Court of the District of Columbia.

10. On August 12, 2009, the Court referred the Hearing Committee's Report and Recommendation to the Board for its views concerning the appropriateness of the negotiated discipline. *In re Tun*, App. No. 09-BG-804, BDN 273-06 (D.C. Aug. 12, 2009).

11. On October 16, 2009, Respondent filed a motion to recuse Judge Canan from Mr. Khan's case. As grounds for his motion, Respondent falsely stated as follows:

> With regard to the present matter, several years ago, Judge Canan reported undersigned counsel for an alleged ethical violation, which was then investigated by D.C. [Disciplinary] Counsel. *The investigation was then dismissed without any disciplinary action being instituted against undersigned counsel.*

(emphasis added).

12. On October 29, 2009, Judge Canan denied Respondent's motion to have him recused from the matter.

13. On November 24, 2009, the Board recommended to the Court that it reject the PND on the grounds that the proposed sanction was unduly lenient. *In re Tun*, App. No. 09-BG-804, BDN 273-06 (BPR Nov. 24, 2009) at 14 ("We believe a more appropriate sanction would be an 18-month suspension, with six months stayed subject to the terms of the agreed-upon probation."). The Board recommended that the Court allow Disciplinary Counsel and Respondent "to submit a modified proposal more in line with our suggested sanction." *Id.* at 15.

14. On March 10, 2011, Disciplinary Counsel and Respondent submitted an Amended Petition for Negotiated Discipline and proposed a sanction consistent with that recommended by the Board.

15. On August 11, 2011, the Court approved the Amended Petition for Negotiated Discipline. *In re Tun*, 26 A.3d 313 (D.C. 2011) (per curiam).

Disciplinary Counsel charged that Respondent's conduct violated the following Rules of Professional Conduct:

a. Rule 3.3(a)(1), in that Respondent knowingly made a false statement of fact to a tribunal;

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

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

Amended Specification of Charges ¶¶ 1-15.

RESPONDENT'S ANSWER AND DEFENSE

Respondent filed an Answer to the Specification of Charges on December 23, 2014,[3] admitting all of Disciplinary Counsel's factual allegations with two exceptions: first, Respondent denied that his statement to Judge Canan was "done falsely or with the intent to be false of [sic] misleading," and second, Respondent denied that he violated any of the charged violations of the Rules of Professional Conduct. Answer at 1.[4] In his testimony and his post-hearing brief, Respondent modified his position, admitting that he violated Rule 3.3(a)(1) by making a knowing false statement of fact to a tribunal, but at the same time asserting that his conduct was merely negligent, and thus did not violate Rules 8.4(c) and 8.4(d). Respondent's Proposed Findings of Fact, Conclusions of Law and Recommendation as to Sanctions at 3-4; Tr. at 239, 263-64.

[3] At the pre-hearing conference on February 27, 2015, and later at the disciplinary hearing on May 5, 2015, Respondent designated his original answer filed on December 23, 2014, to serve as his answer to the Amended Specification of Charges. Pre-hearing Tr. 56; Hearing Transcript ("Tr.") 208-09.

[4] Respondent's Proposed Findings of Fact, Conclusions of Law and Recommendation as to Sanction ("Resp. Br.") at 3. It appears from the record, however, that Respondent simply meant that he knew such a statement was false. He does not appear to assert that he knowingly included a false statement in his Motion.

II. PROCEDURAL BACKGROUND

Pre-hearing conferences were held on January 21 and February 27, 2015. On May 5, 2015, the Ad Hoc Hearing Committee, composed of Chair Eric R. Fox, Esquire, Trevor Mitchell, Public Member, and F. Nicole Porter, Esquire, convened for the evidentiary hearing. Melvin G. Bergman, Esquire, appeared on behalf of Respondent, who was present. Joseph N. Bowman, Esquire, Assistant Disciplinary Counsel, appeared on behalf of the Office of Disciplinary Counsel. Disciplinary Counsel moved Disciplinary Counsel's Exhibits A through C, and 1 through 3, into evidence without objection from Respondent (Tr. 214), called Respondent as its only witness (Tr. 215-286), and rested its case. Tr. 277. Respondent did not call any witnesses or offer any exhibits into evidence. The parties made closing arguments. Tr. 290-305. After an Executive Session, the Hearing Committee made a non-binding, preliminary finding that Respondent had violated at least one Rule of Professional Conduct. Tr. 305; *see* Board Rule 11.11.

The Hearing Committee then re-convened for the sanctions phase of the hearing. Disciplinary Counsel moved Disciplinary Counsel's Exhibits 4 through 9 into evidence, without objection from Respondent. Tr. 315. Respondent introduced no evidence in mitigation. *See* Tr. 309, 314-15. The Hearing Committee set the post-hearing briefing schedule before adjourning, and the Chair issued an order memorializing the briefing schedule on May 7, 2015. Both parties filed post-hearing briefs, and Disciplinary Counsel filed a reply brief.

III. STANDARD OF REVIEW

Disciplinary Counsel bears the burden of establishing by clear and convincing evidence that Respondent violated the Rules of Professional Conduct. *See In re Anderson*, 778 A.2d 330, 335 (D.C. 2001) ("*Anderson I*"); *see also In re Anderson*, 979 A.2d 1206, 1213 (D.C. 2009) ("*Anderson II*") (applying clear and convincing evidence standard to charge of misappropriation

of funds); Board Rule 11.6. As the Court has explained, "[t]his more stringent standard expresses a preference for the attorney's interests by allocating more of the risk of error to [Disciplinary] Counsel, who bears the burden of proof." *In re Allen*, 27 A.3d 1178, 1184 (D.C. 2011) (citation and internal quotations omitted).

Clear and convincing evidence is more than a preponderance of the evidence, it is "evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *In re Cater*, 887 A.2d 1, 24 (D.C. 2005) (citation omitted). On the basis of the record as a whole, the Ad Hoc Hearing Committee makes the following findings of fact and conclusions of law set forth below, each of which is supported by clear and convincing evidence.

IV. FINDINGS OF FACT

1. The District of Columbia Court of Appeals and the Board on Professional Responsibility have jurisdiction over this matter because Respondent is a member of the District of Columbia Bar, having been admitted on November 14, 1988, and subsequently assigned Bar Number 416262. BX[5] A (Registration Statement).

2. Respondent was a criminal defense attorney who accepted appointments from the Superior Court to represent indigent criminal defendants. Each time the Superior Court appointed Respondent to represent an indigent defendant, it provided him with a voucher form to use when he submitted his claim for payment to the court. BX 3 at 370-71.

3. The Honorable Russell F. Canan, an Associate Judge of the Superior Court, became concerned about the accuracy of Respondent's vouchers and notified the Chief Judge, who then referred the matter to the U.S. Attorney's Office for the District of Columbia for investigation. BX

[5] References to Disciplinary Counsel's Exhibits will be marked as originally designated in the record: "BX __," identifying specific pages within the exhibits as "BX at __."

3 at 375-76; *see also* BX C (Respondent's Responses to the Specification of Charges, admitting allegations of ¶ 3 of Amended Specification of Charges).

4. A review of the vouchers revealed that Respondent sought payment for the same time period for two or more clients on 162 occasions. BX 3 at 14 (Petition for Negotiated Discipline).

5. The U.S. Attorney's Office agreed not to criminally prosecute Respondent if he (i) repaid the $16,034 in overpayments he had received as a result of false reporting; and (ii) reported his conduct to the Office of Disciplinary Counsel. BX 3 at 376; *see also* BX C (Respondent's Responses to the Specification of Charges, admitting allegations of ¶ 4 of Amended Specification of Charges); Tr. 275 (Chair) (finding that "the self-reporting was a condition of the U.S. Attorney dismissing the case").

6. Accordingly, on July 26, 2006, Respondent reported his conduct to Disciplinary Counsel. BX 2 at 1 (Chronology Report for Complaint Number 2006-D273). On February 20, 2009, Disciplinary Counsel served Respondent with a Specification of Charges alleging that Respondent violated Rules 1.5(a) and (f), in that he charged an unlawful and therefore unreasonable fee when he submitted the false vouchers to the Superior Court; Rule 3.3(a)(1), in that he made a [knowingly] false statement of material fact or law to a tribunal when he submitted the false vouchers; Rule 8.4(c), in that he engaged in conduct that involved dishonesty, fraud, deceit, or misrepresentation; and Rule 8.4(d), in that he engaged in conduct that seriously interfered with the administration of justice. BX 3 at 1-7 (Specification of Charges filed in *In re Tun*, Bar Docket No. 2006-D273, on February 17, 2009).

7. On March 27, 2009, Disciplinary Counsel and Respondent filed a PND with the Board on Professional Responsibility wherein Respondent (i) stipulated that his conduct violated

all the Rules charged in the Specification of Charges; and (ii) agreed that the appropriate sanction would be a nine-month suspension coupled with a one-year period of probation (three months of the suspension would be stayed pending successful completion of the probation). BX 3 at 19.

8. On July 14, 2009, an Ad Hoc Hearing Committee issued its Report and Recommendation, wherein it concluded that the negotiated discipline was appropriate, and it recommended to the Court of Appeals that the PND be approved. *In re Tun,* Bar Docket No. 273-06 (HC July 14, 2009).

9. Two days later, on July 16, 2009, Respondent entered his appearance on behalf of the defendant in the criminal matter of *United States v. Ferose K. Khan,* Case No. 2009 CF2 14008, pending in the Superior Court of the District of Columbia. BX 1 at 2 (Superior Court Docket Sheet); Tr. 215-16 (Tun).

10. On August 12, 2009, the Court referred the Hearing Committee's Report and Recommendation to the Board for its views concerning the appropriateness of the negotiated discipline. *In re Tun*, App. No. 09-BG-804 (D.C. Aug. 12, 2009).

11. On October 16, 2009, while the PND was pending before the Board, Respondent filed a motion to recuse Judge Canan from Mr. Khan's case. Among the grounds for recusal set forth in his motion, Respondent falsely stated as follows:

> With regard to the present matter, several years ago, Judge Canan reported undersigned counsel for an alleged ethical violation, which was then investigated by D.C. [Disciplinary] Counsel. *The investigation was then dismissed without any disciplinary action being instituted against undersigned counsel.*

BX 1 at 6-7 (Motion to Recuse Judge) (emphasis added).

12. On October 29, 2009, Judge Canan denied Respondent's recusal motion because it was not accompanied by the required affidavit of bias or prejudice or certificate of counsel stating

that the motion was made in good faith. Tr. 258-59; BX 1 at 10-12 (Order at 1-2); *see* D.C. Super. Ct. Civ. R. 63-I (applicable in a criminal case pursuant to D.C. Super. Ct. Crim. R. 57).

13. On November 24, 2009, the Board recommended to the Court that it reject the PND on the grounds that the proposed sanction was unduly lenient. *In re Tun*, Bar Docket No. 273-06 at 14 (BPR Nov. 24, 2009) ("We believe a more appropriate sanction would be an 18-month suspension, with six months stayed subject to the terms of the agreed-upon probation."). The Board recommended that the Court allow Disciplinary Counsel and Respondent "to submit a modified proposal more in line with our suggested sanction." *Id.* at 15. The Court rejected the PND, without prejudice to the parties submitting a revised petition. Order, *In re Tun*, App. No. 09-BG-804 (D.C. Jan. 21, 2010) (per curiam).

14. On March 10, 2011, Disciplinary Counsel and Respondent submitted an Amended Petition for Negotiated Discipline and proposed a sanction consistent with that recommended by the Board. BX 3 at 369.

15. On August 11, 2011, the Court approved the Amended Petition for Negotiated Discipline. *In re Tun*, 26 A.3d 313 (D.C. 2011). In its opinion, the Court distinguished Respondent's reckless record-keeping practices from the misconduct of attorneys who intended to defraud clients or subsequently perjured themselves. *See id*. at 314 (citing *In re Cleaver-Bascombe*, 892 A.2d 396, 411-12 (D.C. 2006)).

16. Respondent was the only witness who testified at the May 5, 2015 hearing before this Ad Hoc Hearing Committee. Tr. 215-244.

17. At the hearing, Respondent was called to testify by Disciplinary Counsel. Tr. 215.

18. Upon questioning by Disciplinary Counsel, Respondent admitted that the second statement quoted in Finding of Fact ¶ 11 above, from his motion to recuse Judge Canan (that the

investigation was dismissed without disciplinary action against undersigned Respondent), was false. Tr. 239.

19. Respondent testified, however, that he did not intentionally make the false statement. Tr. 239 (the recusal motion "was a rushed job," "I didn't – never intentionally said this."), 264 ("It was a typographical error, I didn't mean to say that.").

20. On the day Respondent filed the motion, he had had a "very heated exchange" in trial with Judge Canan on a different matter. Tr. 219. As a result of this exchange, Respondent was "really, really upset." Tr. 240. Respondent filed a motion to recuse Judge Canan in that matter and in Mr. Khan's case. Tr. 218-19. Respondent filed the motion in Mr. Khan's case because the "bias against [Respondent]" would spill over to Mr. Khan and he "tried to protect his client." Tr. 219.

21. Respondent testified that he prepared the motion containing the false statement in a rush (Tr. 242-43), that he filed the motion "at 8:30 or 9 at night" (Tr. 233), and that he failed to proofread the motion before filing it. Tr. 239-240.

22. Respondent's motion did not comply with Super. Ct. Civ. R. 63-I because it did not include either (i) an affidavit of bias or prejudice, or (ii) a statement that the motion was made in good faith. Respondent testified that he did not know that he had to file an affidavit of bias or prejudice with the motion. Tr. 285.

23. Respondent testified that he did not know that he had to file the affidavit until Judge Canan mentioned it from the bench. Tr. 285. Respondent also stated that he never would have filed the false statement intentionally because he was not that "stupid." Tr. 240-41.

24. Upon cross-examination by his own counsel, Respondent testified that he did not intentionally make the false statement, that "I would never state what I said in here because it will be career suicide to lie to the court knowing that that's easily verifiable." Tr. 263-64.

25. Committee Member Porter pointed out to Respondent that the requirement to file the affidavit of bias or prejudice and the certificate that the motion was made in good faith was set forth on the second page of his motion. *See* BX 1 at 5 (the motion quotes Super. Ct. Civ. R. 63-I). Respondent replied that the inclusion of the affidavit filing requirement and the certificate of counsel in his motion was a "cut and paste" job. Tr. 286.

26. Respondent testified that the assertion in the recusal motion that Disciplinary Counsel's investigation had been dismissed without disciplinary charges, was intended to refer to the investigation by the U.S. Attorney's Office, which had been concluded without criminal charges. Tr. 279-280.

27. However, Respondent had made precisely this assertion on page one of the recusal motion: "an investigation by the United States Attorney's Office for criminal conduct by [Respondent] was ultimately was [sic] dismissed without any criminal charges being lodged against [Respondent]." Committee Member Porter asked Respondent why he would have referred again to the U.S. Attorney's Office investigation on the fourth page of his recusal motion when he had previously addressed it on page one. Tr. 281.

28. Respondent replied that he was trying to "recap" the earlier statement made about the U.S. Attorney's Office but did so "inartfully." Tr. 279-281.

29. The Hearing Committee does not find credible Respondent's testimony that his statement that the disciplinary investigation had been dismissed was inadvertent. We find instead that Respondent's testimony was intentionally false.

V. CONCLUSIONS OF LAW

Disciplinary Counsel has alleged that Respondent's conduct violated the following District of Columbia Rules of Professional Conduct:

a. Rule 3.3(a)(1), in that Respondent knowingly made a false statement of fact to a tribunal;

b. Rule 8.4(c), in that he engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation; and

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

Each of these allegations will be addressed seriatim.

A. Rule 3.3(a)(1)

Disciplinary Counsel charges that Respondent violated Rule 3.3(a)(1), which provides that:

> (a) A lawyer shall not knowingly:
>
> (1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer, unless correction would require disclosure of information that is prohibited by Rule 1.6. . . .

Disciplinary Counsel alleges that in his motion to recuse Judge Canan in the *Khan* matter, Respondent falsely stated that:

> With regard to the present matter, several years ago, Judge Canan reported undersigned counsel for an alleged ethical violation, which was then investigated by D.C. [Disciplinary] Counsel. The investigation was then dismissed without any disciplinary action being instituted against undersigned counsel. Since this time, Judge Canan has fostered a hostile relationship with undersigned counsel.

Findings of Fact ("FF") ¶ 11.

Respondent conceded in his post-hearing brief that the statement was knowingly false and violated Rule 3.3(a)(1), but testified at the hearing and argued in his post-hearing brief that the statement was the result of his "failure to proofread the Motion [sic] before filing with the Court"

and the result of "poorly thought out drafting," and thus negligent. Resp. Br. at 3-4, 6; Tr. at 263-64. We reject Respondent's explanation as not credible and contrary to the weight of the evidence, from which we conclude that Respondent knowingly and intentionally made the false statement in the motion to recuse Judge Canan, who had previously questioned the veracity of his CJA vouchers and reported him to the Chief Judge, who referred the matter to the U.S. Attorney's Office for investigation.

First, Respondent's testimony that he did not intend to misrepresent that the disciplinary investigation against him had been dismissed, and he intended only to refer to the U.S. Attorney's criminal prosecution, is inconsistent with the motion to recuse itself, in which Respondent had already referred to the criminal prosecution on the first page. When asked about this by Committee Member Porter, Respondent testified that he was trying to "recap" his earlier statement but did so "inartfully." Tr. 279-281. Respondent's explanation is nonsensical and casts doubt on the veracity of his claim.

Second, Respondent failed to file the required affidavit of bias or prejudice in support of the motion to recuse, as well as the certificate of counsel attesting that the motion was filed in good faith. Although Respondent testified that he did not know that he had to file the bias affidavit or certificate of counsel, Respondent explicitly referred to both filing requirements in the motion itself. Respondent explained the reference to those requirements in the motion as a part of a "cut and paste" job (Tr. 286), and further testified that he prepared the motion in a rush. Tr. 242-43. However, Disciplinary Counsel's words during his closing argument at the hearing are worth repeating here:

> You would think that after making [prior admissions of Rule 3.3(a)(1), 1.5(a), and 8.4(d) violations] the normal lawyer—if this had happened to you, if you were going through this process, you would have been so shocked at yourself for having to make those admissions, you would never make a careless mistake like this. It's

> just completely implausible to believe that this was just a negligent thing, just a mistake.

Respondent not only wants the Committee to believe that he "inartfully" worded the sentence at issue in the motion, but that he inadvertently failed to file two crucial documents—an affidavit in which Respondent was required to swear to the allegations of bias or prejudice and a statement that the motion was filed in good faith—that would have supported the assertions made in his motion and would be particularly damning to him if found to be false. In light of these facts, we find that Respondent's explanation of "mistake" is self-serving and not credible, and that the evidence clearly and convincingly supports a finding that Respondent violated Rule 3.3(a)(1).

B. Rule 8.4(c)

Disciplinary Counsel charges that Respondent violated Rule 8.4(c), which provides that "[i]t is professional misconduct for a lawyer to: . . . [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation." The Court has held that "Rule 8.4(c) is not to be accorded a hyper-technical or unduly restrictive construction." *In re Ukwu*, 926 A.2d 1106, 1113 (D.C. 2007); *see also In re Hager*, 812 A.2d 904, 916 (D.C. 2002) (noting that the Court has "given a broad interpretation to Rule 8.4(c) . . . ."") (citing *In re Arneja*, 790 A.2d 552, 557 (D.C. 2002)). Nonetheless, each of the four terms encompassed within Rule 8.4(c) "should be understood as separate categories, denoting differences in meaning or degree." *In re Shorter*, 570 A.2d 760, 767 (D.C. 1990) (per curiam). Each category of Rule 8.4(c) requires proof of different elements. *See In re Romansky*, 825 A.2d 311, 315 (D.C. 2003).

Dishonesty is the most general category in Rule 8.4(c), and is defined as:

> fraudulent, deceitful or misrepresentative behavior [and] conduct evincing a lack of honesty, probity or integrity in principle; [a] lack of fairness and straightforwardness . . . . Thus, what may not legally be characterized as an act of fraud, deceit or misrepresentation may still evince dishonesty.

Shorter, 570 A.2d at 767-68 (internal quotation marks and citation omitted).

Misrepresentation is a "statement . . . that a thing is in fact a particular way, when it is not so." *Shorter*, 570 A.2d at 767 n.12 (citation omitted); *see also Schneider*, 553 A.2d at 209 n.8 (misrepresentation is element of deceit). Misrepresentation requires active deception or a positive falsehood. *See id*. at 767. The failure to disclose a material fact also constitutes a misrepresentation. *See In re Reback*, 513 A.2d 226, 228-29 (D.C. 1986) (en banc) (Court found deceit and misrepresentation where respondents neglected claim, failed to inform client of dismissal of case, forged client's signature onto second complaint, and had complaint falsely notarized); *In re Scanio*, 919 A.2d 1137, 1139-41, 1142-44 (D.C. 2007) (respondent failed to disclose that he was salaried employee when he made a claim for lost income to insurance company measured by lost hours multiplied by billing rate); *In re Outlaw*, 917 A.2d 684, 688 (D.C. 2007) (per curiam) ("Concealment or suppression of a material fact is as fraudulent as a positive direct misrepresentation.") (citations omitted).

We find, for the same reasons that Respondent violated Rule 3.3(a)(1), that Respondent engaged in dishonesty and misrepresentation in violation of Rule 8.4(c). The Court has held that Disciplinary Counsel does not need to establish that a respondent acted with "deliberateness" in making a misrepresentation in order to prove a violation of Rule 8.4(c). *See In re Rosen*, 570 A.2d 728, 728-30 (D.C. 1989) (per curiam). Rather, establishing a violation of Rule 8.4(c) based on a misrepresentation only requires proof that the respondent "acted in reckless disregard of the truth." *Id.* (finding material misrepresentation in Bar application where the respondent acted in reckless disregard of the truth).

For the reasons stated earlier, the Committee finds that Respondent intentionally misrepresented the facts. At a minimum, however, Respondent's actions amounted to a reckless

disregard of the truth. Respondent knew that the disciplinary proceeding resulting from Judge Canan's complaint to the Chief Judge remained pending, yet he failed to sufficiently review the motion before filing to make certain that it was accurate. This is akin to the conduct found to be reckless in *Rosen*. There, the respondent correctly represented on his Maryland Bar application that no disciplinary complaints had been filed against him. Later, after learning that complaints had been filed against him, he nonetheless affirmed that the facts set forth on his application were "still true and correct," without first reviewing the application. *Id.* at 728. Respondent's failure to review the motion (including the representation regarding the status of Disciplinary Counsel's investigation) before filing, constitutes at a minimum reckless conduct, and thus, the false statement is a misrepresentation under Rule 8.4(c).

Finally, the Court of Appeals has defined dishonesty as a general catchall word that still may be present in a case where there is no fraud, or deceit. *See Shorter*, 570 A.2d at 767-68. Given that the Committee has found that Respondent's false statement was a misrepresentation, it also concludes that Respondent behaved dishonestly.

C. Rule 8.4(d)

Rule 8.4(d) provides that "[i]t is professional misconduct for a lawyer to: . . . engage in conduct that seriously interferes with the administration of justice." To establish a violation of Rule 8.4(d), Disciplinary Counsel must demonstrate by clear and convincing evidence that: (i) Respondent's conduct was improper, *i.e.*, that Respondent either acted or failed to act when he should have; (ii) Respondent's conduct bore directly upon the judicial process with respect to an identifiable case or tribunal; and (iii) Respondent's conduct tainted the judicial process in more than a *de minimis* way, *i.e.*, it must have 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). Rule 8.4(d) is violated if the

attorney's conduct causes the unnecessary expenditure of time and resources in a judicial proceeding, where the impact is more than *de minimis*. *See In re Cole*, 967 A.2d 1264, 1266 (D.C. 2009). Conduct can bear directly upon the judicial process and taint the judicial process in more than a *de minimis* way when it delays a court's consideration of identifiable cases. *See In re Toppelberg*, Bar Docket No. 191-02 at 53 (BPR July 21, 2006), *recommendation adopted*, 906 A.2d 881, 881 (D.C. 2006) (per curiam).

Disciplinary Counsel's argument that Respondent violated Rule 8.4(d) is based on the facts that Respondent's recusal motion contained a false statement, did not comply with the Superior Court's rules for filing such motions and wasted Judge Canan's time. We agree with Discplinary Counsel that Respondent's conduct was improper (it contained a knowing false statement) and bore directly on the judicial process with respect to an identifiable case or tribunal (the underlying criminal case). However, we conclude that the improper conduct did not taint the judicial process in more than a *de minimis* way. It appears that Judge Canan dismissed Respondent's motion on procedural grounds because the motion was filed without the required affidavit (FF ¶ 12). Accordingly, the Committee finds that Disciplinary Counsel failed to establish a violation of Rule 8.4(d).

VI. RECOMMENDED SANCTION

The Hearing Committee has found that Respondent violated Rules 3.3(a)(1) and 8.4(c) of the D.C. Rules of Professional Conduct. Disciplinary Counsel asks that the Hearing Committee recommend the sanction of a three-year suspension with reinstatement conditioned on a showing of fitness to practice law, based on Respondent's dishonesty to the Superior Court while disciplinary proceedings were pending against him, and his intentional false statements to a tribunal (in violation of Rules 3.3(a)(1) and 8.4(c)), aggravated by his attempts to mislead the Hearing Committee by claiming that the false statement in his motion was inadvertent and falsely

testifying that he had voluntarily self-reported his misconduct to Disciplinary Counsel (when he was required to do so as a part of his agreement with the U.S. Attorney). FF ¶¶ 35, 36; *see* ODC Br. at 20-21.[6] Respondent asserts that an informal admonition is the appropriate sanction. Resp. Br. at 5.

A. Standard for Determining Sanction

The appropriate sanction is what is necessary to protect the public and the courts, maintain the integrity of the profession, and "deter other attorneys from engaging in similar misconduct." *In re Kline*, 113 A.3d 202, 215 n.9 (D.C. 2015). Under D.C. Bar R. XI, § 9(h), the sanction imposed must be consistent with cases involving comparable misconduct. The determination of an appropriate disciplinary sanction is based on consideration of various 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 and/or misrepresentation; (4) the presence or absence of violations of other provisions of the disciplinary rules; (5) whether the attorney had a previous disciplinary history; (6) whether or not the attorney acknowledged his or her wrongful conduct; and (7) circumstances in mitigation of the misconduct.

See In re Martin, 67 A.3d 1032, 1053 (D.C. 2013) (citing *In re Elgin*, 918 A.2d 362, 376 (D.C. 2007)); *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987). The Committee will address each of these considerations in turn:

(1) Nature and seriousness of the misconduct.

Respondent made a false statement in a motion asking that a judge be recused for bias. By falsely stating in his motion that the investigation by Disciplinary Counsel, which grew out of the Chief Judge's referral to the U.S. Attorney's Office, had been dismissed, he attempted to falsely bolster the legitimacy of his recusal argument. Respondent was dishonest on a material fact that

[6] Disciplinary Counsel's Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction ("ODC Br.").

went to the heart of the basis for recusal. Moreover, the conduct occurred at a time when Disciplinary Counsel had already instituted an investigation into serious allegations that he had submitted fraudulent CJA vouchers to the court. In the Committee's view, Respondent's misconduct was serious.

(2) Prejudice to the client. Respondent's actions did not prejudice any clients.

(3) Whether the conduct involved dishonesty and/or misrepresentation. The Hearing Committee has concluded that Respondents' conduct involved dishonesty and misrepresentation. We also have found that Respondent testified falsely to the Committee by claiming that that the statement in his motion that disciplinary charges had been dismissed was inadvertent. Disciplinary Counsel argues that Respondent testified falsely when he testified that he voluntarily reported his voucher misconduct to Disciplinary Counsel, when, in fact, he was required to self-report as part of his agreement with the U.S. Attorney's Office. While this testimony was inaccurate, Respondent admitted in his Answer that he was required to report his misconduct to Disciplinary Counsel (*see* FF 5), and never argued otherwise to the Hearing Committee. Thus, we consider this erroneous testimony to simply be a mistake, and not an attempt to testify falsely before the Hearing Committee.

(4) The presence or absence of violations of other provisions of the disciplinary rules. The Committee has determined that more than one disciplinary rule was violated.

(5) Whether the attorney had a previous disciplinary history. Respondent has a previous disciplinary history. Respondent was suspended from the practice of law for 18 months (with six months stayed and one year of probation) for the submission of 162 CJA vouchers that double-billed for his services, the result of recklessly sloppy timekeeping practices. *Tun*, 26 A.3d at 314. (BX 3 at 528).

Respondent has also received the following informal admonitions:

Docket No. 308-93 – 1993, violations of Rule 1.4(a) (failure to keep his client informed about the status of a matter) and Rule 1.5(b) (failure to provide his client with a writing setting forth the basis or rate of his fee) (BX 4);

Docket No. 330-94 – 1995, violation of Rule 1.15(b) (failure to notify and deliver promptly to a third person any funds to which that person was entitled) (BX 5);

Docket No. 2003-D385 – 2004, violations of Rules 1.15(a) and 1.16(d) (failure to retain a client's file and records reflecting how he handled settlement funds) (BX 6);

Docket No. 2010-D040 – 2011, violation of Rule 1.6 (revealing a client's confidences and secrets) (BX 8); and

Docket No. 2009-D381 – 2013, violation of Rule 4.3(a)(1) (giving legal advice to an unrepresented person other than advice to secure counsel, when the interests of that person were in conflict with the interests of his client) (BX 9).

(6) Whether or not the attorney acknowledged his or her wrongful conduct. Respondent has acknowledged that the statement at issue in this matter was false.

(7) Circumstances in mitigation of the misconduct. Respondent also cooperated with Disciplinary Counsel's investigation.

B. Sanction Recommendation

Based on the foregoing, the Hearing Committee recommends that Respondent be suspended for one year.

As Disciplinary Counsel has noted, sanctions for dishonesty range from public censure to disbarment, with each case resting on its peculiar facts. ODC Br. at 19. In cases involving single instances of misrepresentation, including misrepresentations to courts or other tribunals, the Court

of Appeals has imposed sanctions ranging from public censure to a 60-day suspension. *See In re Hawn*, 917 A.2d 693, 693-94 (D.C. 2007) (per curiam) (30-day suspension for falsifying resume and altering law school transcripts in an attempt to obtain legal employment); *In re Uchendu*, 812 A.2d 933 (D.C. 2002) (30-day suspension with six-hour CLE course for submitting to Probate Division purportedly verified documents that respondent had signed with clients' names and had improperly notarized); *In re Owens*, 806 A.2d 1230, 1231 (D.C. 2002) (per curiam) (30-day suspension for false statements, including one made under oath, to Administrative Law Judge to cover up eavesdropping in violation of judges' sequestration order); *In re Phillips*, 705 A.2d 690, 691 (D.C. 1998) (per curiam) (60-day suspension for filing a false and misleading petition in federal court in Virginia); *In re Rosen*, 481 A.2d 451 (D.C. 1984) (30-day suspension for misrepresentations in papers filed with the Court on three separate occasions); Order, *In re Molovinsky*, No. M-31-79 (D.C. Aug. 27, 1979) (per curiam) (public censure for "lying" to Superior Court judge about reason for being late to court). Respondent's prior discipline is an aggravating factor that supports a longer suspension. *See, e.g.*, *In re Soininen*, 853 A.2d 712 (D.C. 2004) (six-month suspension for violations of 3.3(a)(1), 8.4(c), and 8.4(d), where the respondent submitted false statements to immigration courts that she was a member of the Bar, when she was in fact suspended). His false testimony to the Hearing Committee is also a significant aggravating factor. *See In re Cleaver-Bascombe*, 892 A.2d 396, 412-13 (D.C. 2006).

Due to Respondent's acts of dishonesty and misrepresentation in submitting his recusal motion with a false statement in it, his false testimony to the Hearing Committee, and his previous suspension for double billing and the spate of informal admonitions he has received, the Hearing Committee has concluded that a one-year suspension is appropriate in this case. In short, Disciplinary Counsel has asked for too harsh a sanction and Respondent's counsel has requested

one that does not take into consideration Respondent's prior disciplinary problems. Although some may feel that a one-year suspension is too severe, given the circumstances of this case, the Hearing Committee believes that such a suspension is within the acceptable range of sanctions for Respondent's behavior.

Respondent's counsel has presented the Hearing Committee with a copy of an informal admonition issued by Disciplinary Counsel in 2013 to an Assistant U.S. Attorney who violated Rule 3.3(a)(1) by filing false statements with the Superior Court. *In re Snyder*, Bar Docket No. 2010-D238 (B.C. June 24, 2013). *See generally In re Schlemmer*, 840 A.2d 657, 664 (D.C. 2004) (providing that the Board should consider informal admonition letters arising from similar factual circumstances, in addition to orders of final discipline, "in order to avoid inconsistent dispositions for similar misconduct"). Recognizing that the facts of each case are unique, the Committee notes that the respondent in *Snyder* had no prior discipline. Accordingly, Respondent's conduct warrants a harsher sanction than an informal admonition. In addition, in the *Snyder* informal admonition, Disciplinary Counsel believed it relevant that "neither the court nor counsel were ultimately misled by [respondent's false] statements." *Id.* at 2. In the present case, the court was not misled by Respondent's false statement, because that statement had no bearing on Judge Canan's decision to deny Respondent's motion.

C. Fitness Requirement

The Court established the standard for the imposition of a fitness requirement in *In re Cater*, 887 A.2d 1 (D.C. 2005). The Court held that "to justify requiring a suspended attorney to prove fitness as a condition of reinstatement, the record in the disciplinary proceeding must contain clear and convincing evidence that casts a serious doubt upon the attorney's continuing fitness to practice law." *Id.* at 6. Proof of a "serious doubt" under *Cater* involves "more than 'no confidence

that a Respondent will not engage in similar conduct in the future.'" *In re Guberman*, 978 A.2d 200, 213 (D.C. 2009). It connotes instead "real skepticism, not just a lack of certainty." *Id.* (quoting *Cater*, 887 A.2d at 24).

In articulating this standard, the Court observed that the reason for conditioning reinstatement on proof of fitness was "conceptually different" from the basis for imposing a suspension. As the Court explained:

> The fixed period of suspension is intended to serve as the commensurate response to the attorney's past ethical misconduct. In contrast, the open ended fitness requirement is intended to be an appropriate response to serious concerns about whether the attorney will act ethically and competently in the future, after the period of suspension has run. . . . [P]roof of a violation of the Rules that merits even a substantial period of suspension is not necessarily sufficient to justify a fitness requirement . . . .

Cater, 887 A.2d at 22.

In addition, the Court found that the five factors for reinstatement set forth in *In re Roundtree*, 503 A.2d 1215, 1217 (D.C. 1985), should be used in applying the *Cater* fitness standard. They include:

> (a) the nature and circumstances of the misconduct for which the attorney was disciplined;
>
> (b) whether the attorney recognizes the seriousness of the misconduct;
>
> (c) the attorney's conduct since discipline was imposed, including the steps taken to remedy past wrongs and prevent future ones;
>
> (d) the attorney's present character; and
>
> (e) the attorney's present qualifications and competence to practice law.

Cater, 887 A.2d at 21, 25.

Disciplinary Counsel has proved by clear and convincing evidence that Respondent has engaged in misconduct. Respondent recognizes the seriousness of his misconduct, however, and

is remorseful. FF ¶ 26. There is no evidence that supports a finding that there is clear and convincing evidence of a serious doubt as to Respondent's ability to practice ethically. He engaged in serious misconduct when he made an intentional misrepresentation to Judge Canan. However, there is not clear and convincing evidence that this was anything other than a single, isolated incident.

VII. CONCLUSION

For the foregoing reasons, the Hearing Committee finds that Respondent violated Rules 3.3(a)(1) and 8.4(c), and recommends that he be suspended for one year. We further recommend that the Board and Court direct Respondent's attention 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

__/NP/_____
Nicole Porter
Attorney Member

___/TM/_____
Trevor Mitchell
Public Member

Dated: August 30, 2016

Mr. Fox has filed a separate statement concurring in part and dissenting in part.

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

In the Matter of:	:	
	:	
HARRY TUN,	:	
	:	Board Docket No. 14-BD-099
Respondent.	:	Bar Docket No. 2010-D463
	:	
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration Number 416262)	:	

SEPARATE STATEMENT OF ERIC R. FOX CONCURRING AND DISSENTING IN PART

I respectfully concur and dissent from the majority opinion in part. I agree with the majority that Respondent violated Rule 8.4(c), because he filed a motion that contained a misrepresentation (although I find that Respondent acted recklessly, not intentionally). I agree with the majority that Disciplinary Counsel did not prove a violation of Rule 8.4(d). I disagree with the majority's conclusion that Respondent violated Rule 3.3(a)(1) by making a knowing false statement of fact. Finally, I would recommend a sanction of a 90-day suspension, without a fitness requirement.

The primary basis for my disagreement with the majority relates to the assessment of Respondent's credibility. Contrary to the majority, I find that Respondent did not intend to mislead or deceive Judge Canan when he filed the recusal motion that contained a false statement. I credit Respondent's testimony that he prepared the motion after a very difficult day, and that he was upset because he thought that Judge Canan's bias against him would harm his clients. Tr. 239-240, 242-43. I further credit Respondent's testimony that the motion was a "cut and paste job" that was prepared in a rush, that he did not proofread it, and that he did not intend to mislead Judge Canan as to the status of the disciplinary investigation. It appears from the record that Respondent

was not presenting his excuses for the first time at the hearing, as he testified that upon discussing the matter with Disciplinary Counsel during the course of its investigation, he had claimed that he did not know why he said what he did in the motion, and that the false statement was a typographical error. Tr. 264, 281. Respondent acknowledged that if he had proofread the motion, he would have known that it contained an erroneous statement because he meant to refer to the fact that U.S. Attorney's office had concluded its criminal investigation of Respondent's actions, without bringing charges. Tr. 239-240.

I disagree with the majority that Respondent's failure to include the required affidavit of bias or prejudice and the statement of counsel shows that he acted with the intent to mislead Judge Canan. I find that failure to include these documents, after referring to them in the body of the motion itself, is consistent with Respondent's position that he did not pay attention to the content of the motion, that it was a "cut and paste job," prepared in haste, without care. This reckless conduct is not to be condoned, but it does not amount to an effort to mislead Judge Canan.

Because I conclude that Respondent did not intend to mislead Judge Canan, I find that he testified honestly before the Hearing Committee.

I. CONCLUSIONS OF LAW

A. Rule 3.3(a)(1)

I disagree with the majority that Respondent *knowingly* made a false statement of material fact in violation of Rule 3.3(a)(1). There is no question that Respondent drafted and filed a motion that contained a false statement. However, as discussed above, I credit Respondent's testimony that the motion contained a false statement because it was a "rush job," done in haste, without proofreading. Rule 1.0(f) provides that the term "knowingly" "denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." Here, I credit

Respondent's testimony that the motion was prepared in haste, and that he failed to proofread the motion before filing, and thus, I find that Disciplinary Counsel failed to prove by clear and convincing evidence that Respondent *knowingly* filed a motion containing a false statement. As such, I find that Disciplinary Counsel failed to prove a violation of Rule 3.3(a)(1).

B. Rule 8.4(c)

I agree with the majority that Disciplinary Counsel has established a violation of Rule 8.4(c) because Respondent's motion contained a misrepresentation that was made recklessly. *In re Rosen*, 570 A.2d 728, 728-30 (D.C. 1989) (per curiam). Because I credit Respondent's testimony that he did not intend to mislead Judge Canan, I disagree with the majority that Respondent made an *intentional* misrepresentation.

C. Rule 8.4(d)

I agree with the majority that Respondent did not violate Rule 8.4(d).

II. RECOMMENDED SANCTION

Considering the range of sanctions in analogous cases discussed above in the majority opinion, I recommend that Respondent be suspended for 90 days.

Clearly, the proper place to commence the analysis of sanctions is to determine what the appropriate sanction would be in this case if only Respondent's actions under consideration in the matter before the Committee were in issue. Only after making that determination can the Committee proceed to consider what adjustments should be made to reflect the fact that Respondent has been previously sanctioned for unacceptable behavior without sanctioning Respondent a second time for past infractions. After considering the sanctions imposed in the cases discussed in the majority opinion, I would recommend a suspension for 30 days for the Rule 8.4(c) violation in the present case without regard to prior discipline. *In re Rosen*, 481 A.2d 451 (D.C. 1984) (30-day suspension for misrepresentations in papers filed with the Court on three

separate occasions). However, due to Respondent's previous discipline, I recommend that the length of the suspension be tripled to three months.

As discussed above, I do not believe that Respondent acted with an intent to defraud or to deceive Judge Canan, and I have also found that Respondent did not testify falsely to the Hearing Committee.

I agree with the majority that Respondent should not be required to prove his fitness to practice as a condition of reinstatement.

III. CONCLUSION

For the foregoing reasons, I recommend that the Board find that Respondent violated Rule 8.4(c), and that he be suspended for three months.

/ERF/
Eric R. Fox
Chair

Dated: August 30, 2016