DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
OLEKANMA A. EKEKWE-KAUFFMAN, ESQUIRE,	:	Board Docket No. 15-BD-027
	:	Bar Docket No. 2008-D228
Respondent.	:	
	:	
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration Number 479967)	:	

REPORT AND RECOMMENDATION
OF THE BOARD ON PROFESSIONAL RESPONSIBILITY

The charges against Respondent, Olekanma A. Ekekwe-Kauffman, arise out of her representation of a client, Fremah Manago, from May 13, 2005 through December 2007, in a dispute with the University of the District of Columbia. An Ad Hoc Hearing Committee concluded that, *inter alia*, Respondent mishandled Ms. Manago's civil matter, engaged in negligent misappropriation, and engaged in dishonesty, fraud, and misrepresentation, in violation of District of Columbia Rules of Professional Conduct 1.1(a), 1.1(b), 1.3(a), 1.3(b)(1), 1.3(b)(2), 1.4(a), 1.4(b), 1.5(a), 1.15(a), 1.15(e), 1.16(d), and 8.4(c). The Hearing Committee concluded that Disciplinary Counsel did not prove by clear and convincing evidence that Respondent violated Rules 1.3(c), 3.1, and 8.4(d).[1]

[1] The Hearing Committee report was initially issued on December 8, 2016, and reissued on December 12, 2016 with certain typographical errors corrected.

The Hearing Committee recommended that Respondent be disbarred, relying primarily on its conclusions that Respondent's misconduct included negligent misappropriation, as well as dishonesty, fraud, and misrepresentation (when she fabricated an invoice that she used as evidence in proceedings before the Attorney-Client Arbitration Board, the Superior Court, and the Hearing Committee), and that she testified falsely before the Hearing Committee.

Both parties filed exceptions to the Hearing Committee report. Respondent argues that Disciplinary Counsel did not prove any Rule violations, that the Hearing Committee erred in not accepting Respondent's version of the underlying events, and that she should not be disbarred. Disciplinary Counsel argues that the Hearing Committee was correct in the Rule violations it found and its recommendation that Respondent be disbarred, but that it erred in not finding violations of Rules 3.1 and 8.4(d).

Before turning to the merits, we address Respondent's argument that this prosecution is barred by the doctrine of laches because the events at issue occurred between 2005 and 2007, and the secretaries and paralegals who assisted Respondent during the relevant time period have "moved on in their careers and are no longer available to Respondent to call as witnesses" in her defense. *See* Respondent's Brief to the Board at 3. Disciplinary Counsel contends that Respondent waived this argument because she did not raise it before the Hearing Committee,[2] and that in any

[2] As addressed in *In re Malyszek*, Bar Docket Nos. 2009-D334 *et al.*, at 5-6 (BPR June 16, 2017), *review pending*, D.C. App. No. 17-BG-0663, we agree with Disciplinary Counsel that there are

event, Respondent did not identify any witness who she could not call or any testimony or other evidence that was lost due to the passage of time. We agree with Disciplinary Counsel that Respondent has not shown that she was prejudiced by delay.

The Court of Appeals has held that "undue delay in prosecution is not in itself a proper ground for dismissal of charges of attorney misconduct." *In re Williams*, 513 A.2d 793, 796 (D.C. 1986) (per curiam). The Court explained that "[s]peedy trial principles, which in criminal cases are a constitutionally required curb on the abuse of government power, in the disciplinary system take second place to other societal interests." *Id.* The Court opined that it "might hold differently if respondent had shown that the undue delay impaired his defense." *Id.* at 797. Respondent has failed to make that showing. She did not identify the alleged missing witnesses, make a proffer of their anticipated testimony, or even explain her attempts to find her former employees. Thus, there is no evidence in the record that would support the conclusion that Respondent was prejudiced by the passage of time. Respondent's motion to dismiss is denied.

Turning to the merits of the case, having reviewed the record and the briefs of the parties, the Board concurs with the Hearing Committee's factual findings as supported by substantial evidence in the record, and with its conclusions of law that

compelling reasons why it would be appropriate to conclude that a respondent has waived arguments not made to the Hearing Committee. However, absent further guidance from the Court, and consistent with the Board's report in *Malyszek*, we decline to conclude that Respondent's argument to the Board is limited to the arguments made to the Hearing Committee.

Respondent violated Rules 1.1(a), 1.1(b), 1.3(a), 1.3(b)(1), 1.3(b)(2), 1.4(a), 1.4(b), 1.5(a), 1.15(a), 1.15(e), 1.16(d), and 8.4(c), as supported by clear and convincing evidence.[3] We agree with the Hearing Committee's finding of a misappropriation, but conclude that it was reckless, not negligent. We also agree with the recommended sanction of disbarment. Our disbarment recommendation is supported both by the Hearing Committee's analysis and by our conclusion that Respondent's misappropriation was at least reckless, for the reasons discussed below.

Ms. Manago and Respondent disagreed over the precise terms of the billing arrangement. Ms. Manago testified that it was a $5,000 flat fee agreement. Hearing Committee Finding of Fact ("FF") 5. Respondent testified that Ms. Manago agreed to pay her $250 per hour. FF 4. Respondent and Ms. Manago agreed that Ms. Manago made periodic payments to Respondent. FF 5. Ms. Manago understood that the periodic payments were made toward the $5,000 flat fee, while Respondent understood that the periodic payments would be used to compensate Respondent for work done at her $250 hourly fee. FF 4-5. The Hearing Committee could not determine whether Respondent and Ms. Manago agreed that Respondent would be paid on an hourly basis (as Respondent maintained), or on a flat fee basis (as Ms.

[3] We do not reach Disciplinary Counsel's argument that the Hearing Committee erred in finding that Disciplinary Counsel had not proven violations of Rules 3.1(a) and 8.4(d), because our resolution of those issues would not change the sanction recommendation, and would only serve to prolong the Board's consideration of this matter. *See In re Mardis*, Bar Docket Nos. 2009-D540 & 2009-D557 (BPR July 13, 2017), *review pending*, D.C. App. No. 17-BG-0768; *In re Bach*, Bar Docket No. 071-05, at 19 (BPR Dec. 20, 2007) ("[B]ecause the finding that Respondent engaged in intentional misappropriation without extraordinary circumstances carries with it the sanction of disbarment, it is unnecessary to decide whether his conduct also violated Rule 8.4(d)."), *recommendation adopted*, 966 A.2d 350, 353 & n.7 (D.C. 2009).

Manago maintained). Hearing Committee Report ("HC Rpt.") at 28. The Hearing Committee determined that Respondent took more than she had earned, regardless of whether the fee was calculated as an hourly fee or a flat fee. *Id.*

The Hearing Committee found that Respondent never deposited any of Ms. Manago's funds into a trust account, and instead deposited them all in her operating account. FF 34-40. Disciplinary Counsel did not produce bank records sufficient to show that the balance in Respondent's operating account fell below the amount she was required to hold in trust for Ms. Manago. HC Rpt. at 33 n.12. However, Respondent testified that she was not required to hold any of Ms. Manago's funds in trust because Ms. Manago *always* paid in arrears. FF 37. Respondent testified that she treated all of Ms. Manago's payments as her own upon receipt and held nothing in trust. *Id.* Thus, the Hearing Committee examined the evidence to determine whether Disciplinary Counsel proved that Respondent had engaged in the unauthorized use of unearned fees.

The Hearing Committee determined that if Respondent was being paid on an hourly basis, as Respondent herself claims, her own time records prove that she received unearned fees during May and June 2005, which she treated as her own before they were earned, and therefore misappropriated. HC Rpt. at 31-33. The Hearing Committee also determined that, in the alternative, if Respondent and Ms. Manago had agreed to a flat fee of $5,000, Respondent engaged in misappropriation when she accepted $6,300 of payments from Ms. Manago, $1,300 more than the flat fee agreement, which she treated as her own before they were earned. *Id.* at 34-35.

We agree with the Hearing Committee that there is clear and convincing evidence that Respondent misappropriated unearned fees under either scenario, since Respondent admits that she always treated Ms. Manago's funds as her own upon receipt.

On the issue of Respondent's intent, the Hearing Committee found that it was a close question, but that Disciplinary Counsel had not proven anything more than negligent misappropriation because the evidence showed only that Respondent engaged in misappropriation and commingling, and kept poor records. HC Rpt. at 35-38. Relying on *In re Anderson*, 778 A.2d 330, 339-342 (D.C. 2001), the Hearing Committee concluded that misappropriation, commingling, and poor record keeping was not enough to establish recklessness. HC Rpt. at 37. We disagree, because the evidence in this case shows more misconduct than in *Anderson*. Respondent admits that she treated Ms. Manago's payment as her own property as soon as it was paid. FF 37. Significantly, the client paid at least $500 before Respondent did any substantial work on the case. FF 39. If, as Respondent contends, she was entitled to an hourly fee, she knew she had not earned the first $500 when it was received. Treating this unearned fee as Respondent's own property would constitute intentional misappropriation. *See Anderson*, 778 A.2d at 339 (citations omitted) (intentional misappropriation occurs where an attorney handles entrusted funds in a way "that reveals . . . an intent to treat the funds as the attorney's own"). At a minimum, Respondent's conduct reflects a conscious disregard for the safety of Ms. Manago's funds, as she made no efforts to determine if she was entitled to treat Ms.

Manago's money as her own. *See id.* ("[R]ecklessness is a state of mind in which a person does not care about the consequences of his or her action." (internal citations and quotation marks omitted)). This is more than sloppy record-keeping. Respondent used Ms. Manago's funds as her own even though Respondent's own records showed that she had not earned them. As we find that Respondent's handling of Ms. Manago's funds was, at a minimum, reckless, we recommend that she be disbarred because the record does not contain extraordinary circumstances that would permit departure from the presumptive sanction of disbarment pursuant to *In re Addams*, 579 A.2d 190, 191 (D.C. 1990).

Thus, and for the reasons set forth in the Report and Recommendation of the Ad Hoc Hearing Committee, which is attached hereto and adopted and incorporated by reference, we recommend that Respondent be disbarred. We further recommend that the period of disbarment run for purposes of reinstatement from the filing of the affidavit required by D.C. Bar R. XI, § 14(g). D.C. Bar R. XI, § 16(c); *see In re Slosberg*, 650 A.2d 1329, 1331-33 (D.C. 1994).

BOARD ON PROFESSIONAL RESPONSIBILITY

By: ___/JCP/_____
John C. Peirce

Dated: July 27, 2017

All members of the Board concur in this Report and Recommendation, except Mr. Kaiser, who did not participate.

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

In the Matter of	:	
OLEKANMA A. EKEKWE-KAUFFMAN,	:	**Board Docket No. 15-BD-027**
	:	**Bar Docket No. 2008-D228**
Respondent.	:	
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration Number 479967)	:	

REPORT AND RECOMMENDATION OF THE AD HOC HEARING COMMITTEE

I. INTRODUCTION, PROCEDURAL HISTORY AND SUMMARY

This disciplinary proceeding arises out of Respondent Olekanma A. Ekekwe-Kauffman's representation of a client, Fremah Manago. Disciplinary Counsel[1] has charged that, in the course that representation between May 2005 and December 2007, Respondent failed to represent Ms. Manago with the requisite competence, skill, care, zealousness, and diligence. Disciplinary Counsel also charges that Respondent failed to hold advanced fees paid by Ms. Manago in trust, and spent advanced fees before they were earned. Disciplinary Counsel further alleges that, after Ms. Manago filed complaints with Disciplinary Counsel and with the Attorney-Client Arbitration Board ("ACAB") in April and May 2008, Respondent submitted to both entities a "final invoice" that overstated time spent and fees owing in her client's matter and then, after the ACAB rejected Respondent's arguments and awarded Ms. Manago $9,000 as a refund of legal fees, filed an allegedly baseless lawsuit in November 2008 seeking to vacate the ACAB award *in toto*.

[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 in this Report and Recommendation.

Disciplinary Counsel charges that this alleged misconduct violated Rules 1.1(a), 1.1(b), 1.3(a), 1.3(b)(1), 1.3(b)(2), 1.3(c), 1.4(a), 1.4(b), 1.5(a), 1.15(a), 1.15(e), 1.16(d), 3.1, 8.4(c), and 8.4(d).

Disciplinary Counsel filed its Specification of Charges on March 4, 2015 and Respondent filed her Answer on March 23, 2015. Pre-Hearing Conferences were conducted on April 13, 2015 and again on June 12, 2015, after Respondent's counsel entered his appearance.

The Ad Hoc Hearing Committee, composed of Warren Anthony Fitch, Esquire, Chair; Ronald A. Goodbread, Esquire; and Sara K. Blumenthal, Public Member, heard evidence on September 15, 16, and 17, 2015 and on October 26, 27, and 28, 2015. Respondent was represented by Abraham C. Blitzer, Esquire. Disciplinary Counsel was represented by Assistant Disciplinary Counsel Catherine Kello, Esquire, Disciplinary Counsel presented the testimony of three fact witnesses: Respondent, Ms. Manago, and Kevin O'Connell, a Forensic Investigator for the Office of Disciplinary Counsel. Respondent testified in her own defense and presented the testimony of two witnesses.

At the close of the violations phase of the hearing, the Hearing Committee admitted all of Respondent's and Disciplinary Counsel's exhibits. Tr. 1085, 1097, 1104. The Hearing Committee then made a preliminary, non-binding determination that Respondent violated at least one of the Rules as charged by Disciplinary Counsel. *See* Board Rule 11.11. Neither party offered additional evidence in aggravation or mitigation of sanction. The Hearing Committee ordered the parties to file proposed findings of fact, conclusions of law, and recommendations as to sanction.

Having considered those submissions, as well as reviewing the entire record in this matter and reaching the Findings of Fact set forth in Section III of this Report, the Hearing Committee respectfully recommends that the Board find that Disciplinary Counsel has proved by clear and convincing evidence that Respondent violated Rules 1.1(a), 1.1(b), 1.3(a), 1.3(b)(1), 1.3(b)(2), 1.4(a), 1.4(b), 1.5(a), 1.15(a), 1.15(e), 1.16(d), and 8.4(c) and that Disciplinary Counsel has not

proved by clear and convincing evidence that Respondent violated Rules 1.3(c), 3.1, or 8.4(d). The Hearing Committee further recommends that Respondent be disbarred.

II. FINDINGS OF FACT[2]

BACKGROUND

1. Respondent graduated from law school in 1998, and was admitted to the Bar of the District of Columbia Court of Appeals by examination on December 2, 2002. Tr. 1036; BX 1. Respondent was admitted to the Maryland Bar in 2010. Tr. 46; BX 5 at 1. After working with a firm for a while, Respondent established a solo practice in 2003 or 2004. Tr. 1037. Between 2002 and 2005, Respondent focused her practice on administrative hearings arising under the Americans with Disabilities Act and involving students at public and charter schools in the District of Columbia. Tr. 1032-33, 1036. In her solo practice, Respondent had filed one personal injury complaint and some divorce complaints, and had conducted one civil jury trial prior to her engagement by Ms. Manago; she had also handled some personal injury, family law, and guardianship cases. Tr. 1038-39. At all relevant times, Respondent maintained an office in Washington, D.C. BX 5 at 1; Tr. 44-45.

2. In the Spring of 2004, Ms. Manago was a student in the Respiratory Therapy program at the University of the District of Columbia (UDC), where she experienced problems with the instructors and administrative staff in charge of the program. Tr. 426, BX 17 at 9.

MS. MANAGO'S ENGAGEMENT OF RESPONDENT

3. Ms. Manago retained Respondent on May 13, 2005 to represent her in her dispute with UDC. BX 15; Tr. 46-47; Tr. 425, 428. Respondent thereupon provided to Ms. Manago a

[2] "BX" refers to Disciplinary Counsel's exhibits, and the page numbers refer to the Bates numbers included on the bottom center of the document; "RX" refers to Respondent's exhibits. "Tr." refers to the transcript of the hearing; "ODC Brief" refers to Disciplinary Counsel's Corrected Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction.

retainer agreement in the standard form that Respondent had developed. Tr. 47, 429. The form agreement included " _____ matters in the District of Columbia." Respondent told Ms. Managо to fill out the top part of the form and Ms. Managо wrote the word "Educational" above the blank line. BX 15; Tr. 429-30. The form agreement set forth five different fee arrangements and did not specify which one applied to Ms. Managо's case. BX 15; Tr. 431; Tr. 48-50.

4. Respondent testified that, under the agreement, she would charge Ms. Managо $250 per hour for legal services, with no cap on the amount of fees to be charged. Tr. 49-51, 75, 871-72, 1073; BX 15.

5. Ms. Managо understood that the agreement provided for a flat fee of $5,000 and that, as noted in handwriting on the margins of the agreement, she was to make periodic payments of $250 toward the $5,000 total. BX 5 at 1; BX 15; Tr. 430-35. Ms. Managо testified that Respondent told her the other options for fees did not apply to her case. Tr. 431, 435.

6. The agreement specified that in flat fee cases "any further action beyond the specified flat fee agreement will be billed at the hourly rate of $250 plus costs and expenses." BX 15 at 1.

7. Respondent and Ms. Managо each signed and dated the written agreement on May 13, 2005. BX 15; Tr. 425, 428-29; Tr. 48. As more fully discussed in Section III.E, we find that the evidence as to whether Respondent and Ms. Managо agreed upon an hourly fee or a flat fee is in equipoise.

RESPONDENT'S REPRESENTATION OF MS. MANAGO

8. In an effort to resolve Ms. Managо's issues with UDC, Respondent wrote letters to, met with, and conducted telephone conferences with UDC officials in the first five weeks of the representation. BX 57. UDC eventually made a settlement offer. Respondent communicated that

offer to Ms. Manago, along with a recommendation that it be accepted. Ms. Manago decided to reject the settlement offer and to proceed with litigation. Tr. 866-870; RX 3 at 1, 3-4, 8, 37-39.[3]

9. Respondent thereupon told Ms. Manago to write down everything that had happened and how she was treated by UDC. Tr. 554-55, 561. Respondent filed a civil action on behalf of Ms. Manago ("Complaint") in D.C. Superior Court (Case No. 2005 CA 008186 B) on October 12, 2005. BX 17. Respondent included in the Complaint much of what Ms. Manago had written, without editing to correct grammatical errors or to present her client's claims in an organized, comprehensible manner. Tr. 558-561; BX 17. Respondent's contemporaneous time records show no factual investigation, no legal research, and no consultation with Ms. Manago prior to the filing. BX 57 at 1.

10. Respondent did not show Ms. Manago the final version of the Complaint, earlier drafts, or the attachments before filing it, despite Ms. Manago's prior request that Respondent do so. Tr. 554, 556, 737-38; BX 17.

11. In the Complaint Respondent named as defendants the District of Columbia, UDC, and three UDC employees – Connie Webster, Janet Akintola, and Susan Lockwood. BX 17. Respondent served only three of the named defendants – the District of Columbia, Ms. Webster, and Ms. Lockwood. BX 5 at 2; BX 18 at 3. Respondent did not serve Ms. Akintola or UDC. *Id*.

12. In a motion filed on December 15, 2005, the District of Columbia moved to dismiss the Complaint for failure to state a claim upon which relief could be granted, asserting that it was not a proper defendant to the action, and Defendants Webster and Lockwood sought dismissal for failure to state a claim upon which relief could be granted and for failure to set forth a short and plain statement of the claim showing that the pleader was entitled to relief, as required by SCR-Civil

[3] Respondent's work during this initial phase of the representation is not at issue in this proceeding.

8(a) and SCR-Civil 12(b)(6). Defendants Webster and Lockwood also moved, in the alternative, for a more definite statement pursuant to SCR-Civil 13(e). BX 18 at 1-2.

13. The motion to dismiss argued, *inter alia*, that the Complaint did not identify the contract – or its terms – that had allegedly been breached or allege "extreme and outrageous conduct" to support the Intentional Infliction of Emotional Distress claim. BX 18 at 4, 7. It also noted that as of December 15, 2005, Respondent had failed to serve properly the additional two defendants (UDC and Akintola), but that the arguments raised in the motion and supporting memorandum applied equally to those defendants. BX 5; BX 18 at 3 n.1.

14. The District of Columbia was not a proper party to the lawsuit because, under D.C. Code § 38-1202.01(a), it did not have control or authority over UDC or its employees.

15. On January 5, 2006, Respondent filed an opposition to the motion to dismiss that did not address the lack of service on defendants UDC and Akintola. BX 19, 20.

16. On January 25, 2006, the Court granted the defendants' motion and dismissed the Complaint with prejudice as to the District of Columbia, Lockwood and Webster. BX 21; Tr. 406-07, 882-83, 924. Two or three weeks elapsed before Respondent provided a copy of the court's order on the motion to dismiss to Ms. Manago, after several inquiries about the status of the case. Tr. 131, 565.

17. On February 6, 2006, Respondent filed a motion for reconsideration and sought, in the alternative, leave to amend the Complaint to cure the deficiencies identified in the defendants' motion. BX 22; Tr. 407-08. In their February 17, 2006 opposition, the defendants set forth why UDC could not be sued in its own name, as Respondent had done in the Complaint. BX 23 at 6-7. D.C. Code § 38-1202.01(a) requires any suit to be brought against the UDC Board of Trustees. BX 23 at 7-8.

18. On March 6, 2006, the Court granted leave for Respondent to amend her client's Complaint "[i]n light of this jurisdiction's strong preference that disputes be resolved on the merits." BX 24; Tr. 408; *see also* Tr. 562.

19. Respondent filed an Amended Complaint on March 17, 2006. BX 25; Tr. 408-09. In the Amended Complaint, Respondent named as defendants the "Board of Trustee [sic], University of the District of Columbia," Janet Akintola, Connie Webster, Susan Lockwood, the District of Columbia and then-Mayor Anthony Williams. BX 25 at 1. Respondent indicated on the Certificate of Service that she had served the Amended Complaint on Ellen Efros, D.C. Assistant Attorney General. BX 25 at 10. The Amended Complaint did not correct the substantive pleading deficiencies of the Complaint. BX 25.

20. On April 24, 2006, defendants District of Columbia, Webster, and Lockwood moved to dismiss the Amended Complaint, asserting again that the District of Columbia was not a proper defendant and that the Amended Complaint failed to state a claim upon which relief could be granted against any of the defendants. BX 28; Tr. 569, 573-74.

21. Respondent filed an opposition to the motion to dismiss on May 9, 2006. BX 29. The defendants replied to the opposition on May 15, 2006. BX 30. The Court granted the defendants' motion to dismiss with prejudice on May 25, 2006. BX 31.

22. On June 29, 2006, Respondent filed a Praecipe, and on July 14, 2006 filed a Motion for Hearing Date. BX 32. In these filings, Respondent requested a status hearing because the May 9, 2006 dismissal did not name the UDC Board of Trustees or Janet Akintola. *Id*. Defendants opposed Respondent's motion on the basis that those parties had never been served. BX 33-34. Respondent filed a response on August 4, 2006. BX 35.

23. On August 9, 2006, the court denied Respondent's request for a hearing date because Respondent had not properly served the UDC Board of Trustees or Janet Akintola. BX 36; Tr. 926.

The Court rejected the affidavit of proof of service of the Amended Complaint that Respondent filed as to the UDC Board of Trustees because it did not aver service of a copy of the Complaint, summons, and initial order, purported to serve a "so-called 'Statement of Claim,'" and failed to name the person served. BX 36 at 3. The Court ordered the case dismissed as to defendants UDC and Akintola. BX 36 at 4.

24. Respondent filed an appeal with the D.C. Court of Appeals on or about August 17, 2006, and thereafter briefed the matter. BX 16; Tr. 412-13, 573, 882. Respondent did not show Ms. Manago a copy of the brief before she filed it. Tr. 573. Respondent also failed to notify Ms. Manago when the oral argument was scheduled. Tr. 577-78.

25. The Court of Appeals affirmed the dismissal of the case with prejudice on November 1, 2007, concluding that each of the counts in the Amended Complaint failed to state a claim upon which relief could be granted and that Respondent had not served the only proper defendant, the UDC Board of Trustees. BX 16; Tr. 413-15, 926-27.

26. More than a month elapsed before Respondent forwarded a copy of the Court of Appeals' decision to Ms. Manago on December 6, 2007. BX 42 at 13. Respondent stated in her cover letter that she intended to file a new complaint against the UDC Board of Trustees if Ms. Manago so authorized. *Id.*; BX 45 at 17; BX 6 at 2; BX 41 at 12; Tr. 586 (Manago). Respondent told Ms. Manago to resume her payments and to continue making them while Respondent worked on filing a new complaint. Tr. 548, 586. Respondent did not file a new action against the UDC Board of Trustees. BX 58 at 30-31; Tr. 586; *see* FF 31.

27. Throughout the representation, Respondent failed to communicate with Ms. Manago regarding the substance of the case unless Ms. Manago initiated the inquiry. Tr. 452-53, 564-65, 587-88.

MS. MANAGO'S PAYMENTS AND RESPONDENT'S ACCOUNTING AND HANDLING OF THEM

28. Ms. Manago paid Respondent $250 on the day they signed the engagement letter. BX 15; BX 54 at 1; Tr. 433, 436 (Manago); Tr. 51 (Respondent). Ms. Manago made an additional $250 payment on May 23, 2005. Respondent did not begin working on the case until May 24, 2005, when she drafted a letter to UDC and billed one hour for that work. BX 55.[4]

29. Ms. Manago continued to make periodic payments to Respondent until February 2008. BX 5 at 1; BX 6 at 5; Tr. 539-540, 548 (Manago).

30. In approximately August 2006, after the case was dismissed with prejudice by the trial court, Ms. Manago realized that she had paid Respondent about $8,000 (approximately $3,000 more than the agreed upon $5,000 flat fee). Tr. 538. After a discussion about the fees, Ms. Manago understood from Respondent that the money she had paid in excess of $5,000 would be placed in a trust account to be used towards her appeal. Tr. 539, 543-44 (Manago). Ms. Manago and Respondent agreed that Ms. Manago would not make any payments from September 2006 through December 2006 and she would resume payments in January 2007 at the rate of $200 each month. Tr. 539-40, 548 (Manago).

31. Ms. Manago resumed and continued making payments after Respondent told her that she would file a new action and Respondent continued to accept those payments. Tr. 540, 585-86, 778-782, 786-796, 804-09; BX 58 at 30, 31.

32. Ms. Manago ultimately paid Respondent a total of $10,800. BX 6 at 5; BX 40 at 5; BX 54; Tr. 704-05 (Manago); *see also* FF 23.

[4] The record is unclear as to whether Respondent wrote a second letter to UDC on June 9, 2005, since that entry is reflected on some invoices, but not others. *Compare* BX 57 at 1 (invoice dated June 15, 2005), *and* BX 57 at 8-9 (invoice dated Dec. 13, 2005), *with* BX 57 at 10-11 (invoice dated March 28, 2006), *and* BX 57 at 12-13 (invoice dated June 27, 2006).

33. Respondent's invoices contained no entries related to any legal work done on re-filing the case after dismissal by the Court of Appeals in November 2007. BX 55, 57.

34. In approximately March 2008, Ms. Manago asked Respondent to refund at least a portion of her legal fees. BX 6 at 41; Tr. 549-550. Respondent did not do so at that time. Tr. 550.

35. Throughout the representation, Respondent collected costs and expenses from Ms. Manago around the time they needed to be paid. BX 56 at 1; BX 58 at 4; Tr. 546.

36. Respondent provided periodic and contemporaneous invoices to Ms. Manago, in which Respondent recorded and billed her time at $250 per hour. Tr. 325-333, 877; BX 55 at 1-13. Respondent personally prepared the invoices based on data she inputted into one or more computer programs she used. Tr. 98-104. Ms. Manago never contemporaneously questioned or protested any of these invoices. Tr. 877-78. Respondent never advised Ms. Manago that the invoices she provided during the representation contained any errors, were incomplete or showed less time on various tasks than Respondent had actually spent on them. Tr. 121-22, 128-29, 533-34.

37. Respondent spent all of Ms. Manago's funds as they came in. Tr. 361. Respondent testified that she had earned all of Ms. Manago's payments before she received them. *See* Tr. 76 ("She was never ahead . . . . I did more work for her before she paid. So she was never ahead."), 77 ("I've already earned all the money that I put in my operating account"), 361 ("Why would I [hold any of her money in a trust account]? I was working on her case, and she was behind."). However, the invoices Respondent prepared show that there were times when Ms. Manago had paid more than Respondent had earned, and thus we reject Respondent's contrary testimony. *See, e.g.*, BX 57 at 16-19; Part III.F, *infra*.

38. Respondent did not deposit any of the funds Ms. Manago paid into a trust account. Tr. 361, 773-74, 813-14; BX 37; RX 3 at 4. We note that Respondent testified that she "probably" put Ms. Manago's first $250 payment in a trust account. Tr. 77. We do not credit that testimony, as

it contradicts her later testimony that "there was no money held on behalf of Ms. Manago." Tr. 361. However, we do not find that Respondent purposely testified falsely, since her early testimony appears to be speculation.

39. The funds Ms. Manago paid Respondent exceeded the amounts charged in contemporaneous invoices on several occasions. Thus, on May 23, 2005, after Ms. Manago had made two $250 payments, Respondent should have held the $500 in trust because she had not yet begun to work on the case. BX 57 at 2. On May 24, 2005, after Respondent did her first work on the matter, she still had not earned $250 of Ms. Manago's funds which, therefore, should have remained in a trust account. BX 57 at 2, 16. Even based the June 2, 2008 invoice, which she created retroactively, Respondent did not earn the first $500 until June 15, 2005. BX 57 at 16-19. Ms. Manago never authorized Respondent to use the fees she advanced for any purpose other than compensation for legal services actually provided and costs actually incurred. Tr. 535.

40. Forensic investigator Kevin O'Connell reviewed the operating account documents that Respondent submitted to Disciplinary Counsel, as well as those that Bank of America produced. Tr. 768-770, 773-781. Respondent did not produce any trust account records. Tr. 772; *see also* Tr. 62, 67-70; BX 37; RX 3 at 4.

41. Respondent deposited at least some of Ms. Manago's fee payments into a business operating account at Bank of America with an account number ending in 2886. BX 49; BX 50; Tr. 775-76. On March 9, 2007, Respondent deposited in her operating account $200 received from Ms. Manago. BX 49 at 12; BX 50 at 1-1A; Tr. 777-78. On September 12, 2007, Respondent deposited in her operating account $200 received from Ms. Manago in August 2007. BX 49 at 24; BX 50 at 2-2A; Tr. 778-79. On October 2, 2007, Respondent deposited in her operating account $200 received from Ms. Manago in September 2007. BX 49 at 26; BX 50 at 4-4A. On December 4, 2007, Respondent deposited in her operating account $200 received from Ms. Manago in November 2007.

BX 49 at 31; BX 7-7A; Tr. 780-81.

42. Respondent testified that entries in parentheses on the invoices sent to Ms. Manago were for payments credited to Ms. Manago. Tr. 99-101. Respondent also testified that invoice entries not in parentheses were for charges to Ms. Manago, at $250.00 an hour. *Id*. Mr. O'Connell determined that this methodology was consistent in the invoices he reviewed in Respondent's file. Tr. 781-82.

43. Mr. O'Connell compiled a chart (BX 62) based on data derived from Bank of America's records contained in BX 49 and BX 50, showing the contemporaneous invoices Respondent prepared and provided to Ms. Manago reflected in BX 57 and in a receipt prepared by Respondent contained in BX 54 at 15; Tr. 765, 791-92, 824; BX 62. Mr. O'Connell did not base his chart on the June 2, 2008 invoice, which Respondent created retroactively and we generally find not to be credible, *see* FF 46-48, *infra*; however, that invoice seems to contain more of a complete record of the kinds of activity that took place such as filing the Complaint. *See* BX 57 at 16-19. Thus, we are unable to rely on the contemporaneous invoices alone to paint a complete picture of how much of her fee Respondent had earned at any given time.

THE DISCIPLINARY PROCESS

44. On April 24, 2008, Ms. Manago filed a disciplinary complaint with respect to Respondent's inadequate legal services and her failure to return legal fees as requested. BX 6; Tr. 530.

45. Disciplinary Counsel wrote to Respondent, on May 21, 2008, requesting a written response to Ms. Manago's complaint by June 2, 2008. BX 7; Tr. 142.

46. Respondent filed a written response with Disciplinary Counsel on June 2, 2008, asserting, *inter alia*, that Ms. Manago failed to meet her financial obligations under the retainer agreement. BX 8. Respondent attached an invoice addressed to Ms. Manago, dated June 2, 2008, in

which Respondent represented that she had expended 102.83 hours of time for fees of $25,924.99, including expenses. BX 8 at 8-11; Tr. 150-52. Respondent's invoice reflected payments by Ms. Managо of only $7,870. BX 8 at 11; Tr. 145, 156-57.

47. The June 2, 2008 invoice differed from previous invoices Respondent provided to Ms. Managо. Tr. 108, 150, 152, 160, 616-17. The June 2, 2008 invoice included additional time that Respondent purportedly expended on Ms. Managо's matter, and did not reflect all of the payments that Ms. Managо made for legal fees. Tr. 270-72, 301-08. The following chart summarizes the discrepancies proved by Disciplinary Counsel:

Date	Exhibit/Page	Actual payment by Ms. Managо	Respondent's June 2, 2008 invoice entry
9/6/2005	BX 57 at 6 (invoice dated 9/23/2005)	$250.00	$200.00
9/23/2005	BX 57 at 6 (same)	$500.00	$200.00
12/13/2005	BX 58 at 9 (receipt)	$250.00	No entry
2/28/2006	BX 58 at 13 (receipt)	$500.00	No entry
1/19/2007	BX 58 at 20 (receipt)	$200.00	No entry
3/28/2007	BX 58 at 22 (receipt)	$200.00	No entry

48. Respondent created the June 2, 2008 invoice solely because Ms. Managо filed a disciplinary complaint against her. Tr. 195.

49. Respondent's intent in creating the June 2, 2008 invoice was to obtain payment from Ms. Managо for some or all of the time that she had not previously billed. Tr. 254. Respondent had not provided Ms. Managо a copy of the June 2, 2008 invoice prior to the filing of the complaint with Disciplinary Counsel. Tr. 152.

50. Respondent also submitted two letters she claimed were sent to Ms. Managо requesting that Ms. Managо make payments on an overdue account. BX 59 at 4-5; Tr. 333-36; *see*

also BX 8 at 6-7. A letter dated July 11, 2007 asserted that ". . . your account is overdue." BX 8 at 6; BX 59 at 5. Ms. Manago, who had moved, did not receive this letter. Tr. 605-610.

51. On December 9, 2008, Disciplinary Counsel issued a subpoena to Respondent seeking a complete copy of Ms. Manago's original client file "including but not limited to . . . bills, invoices, accountings, financial records. . . ." BX 12 at 1-3; Tr. 56-57, 61. In response to Disciplinary Counsel's subpoena, Respondent produced only two handwritten documents reflecting time she expended on Ms. Manago's case. Tr. 770-72. Other than the bills, Respondent kept minimal or no written time records for the work she performed on Ms. Manago's behalf. *Id*. During the disciplinary hearing, Respondent testified that Disciplinary Counsel received all the notes she had in the file: "You have everything I had on the case. I gave them to you." Tr. 119.

52. On October 31, 2013, Respondent wrote to Disciplinary Counsel offering to pay Ms. Manago $5,000 in three installments in an "effort to resolve the fee dispute issue without the need for bar charges." BX 14 at 6; Tr. 391-92, 940-41.

THE ACAB PROCEEDING

53. On May 21, 2008, about a month after filing her disciplinary complaint, Ms. Manago filed a claim with the ACAB requesting arbitration and a refund of the fees and expenses she had paid to Respondent. BX 39; BX 42 at 6; Tr. 668-70, 338.

54. Both Ms. Manago and Respondent participated in the ACAB proceedings and submitted evidence to support of their positions. BX 38-42; Tr. 346-48, 669-673.

55. Respondent asserted that Ms. Manago was not entitled to a refund of legal fees because she still owed Respondent $20,000. BX 42; Tr. 192, 344-45. Respondent submitted the June 2, 2008 invoice to ACAB in support of her claim. Tr. 314-16.

56. On October 21, 2008, ACAB rejected Respondent's arguments and awarded Ms. Manago $9,000 as a refund of legal fees. BX 40 at 11.

57. The award required Respondent to refund the fees by November 25, 2008. BX 40 at 10-11, Tr. 353 (Respondent). Respondent did not pay Ms. Manago by that date. Tr. 357, 676-77.

58. On October 24, 2008, the ACAB denied Respondent's request for reconsideration and advised Respondent of the limited statutory bases upon which a party can appeal an arbitration award in the District of Columbia. BX 40 at 5; BX 40 at 6-9; BX 43; Tr. 353-55.

59. On November 24, 2008, Respondent filed an action in the Superior Court of the District of Columbia, seeking to vacate the ACAB award. BX 44; BX 45; Tr. 363-65, 677. Respondent submitted the June 2, 2008 invoice to the court in support of her claim. BX 45 at 67-70; Tr. 313-14. On January 5, 2009, the court rejected Respondent's challenges to the arbitration award, finding that she "fail[ed] to offer any argument as to why [her] case meets the legal requirements to vacate or modify ACAB's decision in this case. . . . Indeed, [Respondent] presents no substantive reason why ACAB's decision should be disturbed in any way." BX 47; BX 48; Tr. 381-84.

60. By separate order dated January 5, 2009, the court affirmed the ACAB award that ordered Respondent to pay Ms. Manago $9,000. BX 47. Respondent remitted little or none of the $9,000 award over the course of approximately the five years. Tr. 685-87; *see also* Tr. 384-85. Respondent began making the ordered payments in November 2013 and completed the payments in full in April 2014. BX 14 at 12-17, 21-22; Tr. 688, 691-94.

61. Respondent made five payments to Ms. Manago on the following dates: a first payment of $4,000 on November 27, 2013 (BX 14 at 12-13; Tr. 688); a second payment of $200.00 on December 30, 2013 (BX 14 at 14; Tr. 688); a third payment of $2,000 on January 21, 2014 (BX 14 at 15; Tr. 688); a fourth payment of $500.00 on May 15, 2014 (BX 14 at 16-17; Tr. 691); and a fifth payment of $2,500 on April 13, 2014 (BX 14 at 21-22; Tr. 692-94).

RESPONDENT'S TESTIMONY AT THE DISCIPLINARY HEARING AND RELATED EVIDENCE[5]

62. Respondent testified that she did four or five drafts of the Complaint and that Ms. Manago had the opportunity to review the drafts, including the final draft, and to make changes. Respondent testified that Ms. Manago never objected to anything in the final version of the Complaint. Respondent testified that RX 14 is the fourth or fifth draft of the Complaint and that it contains interlineations done by Ms. Manago. Tr. 879-880; BX 17; *see also* FF 8-10. Ms. Manago testified that she drafted a summary of relevant events at Respondent's request and gave it to Respondent even though it had grammatical errors, and that Respondent filed it without making changes or conferring with Ms. Manago. Tr. 561. Ms. Manago acknowledged that the handwritten edits on RX 14 are hers but testified that she received the draft and made the edits after the Complaint had been filed. Tr. 737-39. Respondent testified that the final Complaint that was filed set forth the alleged facts as Ms. Manago wanted and that Respondent wanted to make some changes but decided not to make any changes on the basis of advice from the D.C. Bar ethics hotline. Tr. 1042-1051. Ms. Manago testified that she did not see the filed Complaint until after it was filed, even though she had requested to see it before it was filed. Tr. 554, 55-57. The Hearing Committee credits Ms. Manago's testimony on this issue and has concluded that Respondent knowingly testified falsely about this issue.

63. Respondent testified that there was no point at which Ms. Manago had paid more than the value of work Respondent had already performed: "She was never ahead. She paid an

[5] During the hearing the Hearing Committee paid careful attention to Respondent's demeanor while testifying, the various explanations that she provided for her purported recollection of various matters, and other testimony and documentary evidence pertinent to the testimony reported in FF 62-73. In its deliberations, the Hearing Committee re-assessed these observations and also reviewed at greater length documentary evidence pertaining to a number of instances in her testimony. The Hearing Committee has reluctantly concluded that there is clear and convincing evidence that Respondent knowingly testified falsely on a number of occasions, as set forth in the ensuing text.

installment. I did more work for her before she paid. So she was never ahead." Tr. at 76. The Hearing Committee does not credit Respondent's testimony on this issue, but does not find that she knowingly testified falsely.

64. Respondent testified that she had a trust account and that she deposited payments from Ms. Manago into that account. Tr. 55. Respondent did not produce any records of a trust account in response to Disciplinary Counsel's subpoenas for financial records pertaining to Ms. Manago. Tr. 55, 62, 67- 73, 772; BX 11; BX 12; BX 14; BX 49 at 3-6. The Hearing Committee has concluded that Respondent knowingly testified falsely about this issue.

65. Respondent testified that on September 6, 2005, she met with Ms. Manago for thirty minutes. BX 8 at 8; Tr. 274-75, 320-21. Ms. Manago testified that she did not meet with Respondent that day, but brought a payment to the office and received a receipt from Respondent's receptionist, Keon Young. Tr. 449-450; BX 58 at 5. Respondent provided Disciplinary Counsel with a letter she sent to Ms. Manago on September 12, 2005, six days after the purported conference on September 6, 2005, in which she noted that they had not met: "I understood that you came to the office on Tuesday, September 6, 2005, at around 11:00 a.m. Sorry I missed you. I was expecting you in the afternoon around 3:00 p.m. Thank you for making the installment payment." BX 59 at 1; Tr. 322. The Hearing Committee credits Ms. Manago's testimony on this issue and has concluded that Respondent knowingly testified falsely about this issue.

66. Respondent acknowledged that the June 2, 2008 invoice contains a number of entries for conferences lasting .5 hours to 1.75 hours in August, September, and October of 2005 that had not appeared on previous invoices. Respondent provided various explanations for her ability to remember the precise dates and length of those alleged conferences. Tr. 160-66, 182, 1064-1071; BX 8 at 8. Ms. Manago testified that Respondent did not take any notes during their brief encounters when she would go by the office to make a payment and that she never met with Respondent for

more than 15 minutes. Tr. 683-85 (Managо). The Hearing Committee credits Ms. Managо's testimony on this issue and has concluded that Respondent knowingly testified falsely about this issue.

67. With respect to one of the entries on the June 2, 2008 invoice, Respondent testified that she conferred with Ms. Managо for about forty-five minutes on September 23, 2005 as reflected on the invoice. BX 8 at 8; Tr. 163 ("September 23, 2005, we were discussing the case, and I have a very good recollection of that day, a very good recollection of that day."); Tr. 185-86 ("On the 23rd, Ms. Managо—September 23rd, if I recall that day as I remember it now, Ms. Managо came in at 11:00 o'clock to my office and did not leave until 4:00 o'clock! And I have very good memory of the days I wrote down as conference days, and there are lots of conference days that I did not write down, lots of them."); *see also* Tr. 234-35. Ms. Managо testified that on September 23, 2005, she again made a payment but stayed only five minutes because she had appointments for two medical procedures, which she corroborated with her medical report of that date. Tr. 626-29; BX 61. The Hearing Committee credits Ms. Managо's testimony on this issue and has concluded that Respondent knowingly testified falsely about this issue.

68. Respondent testified that she telephoned Ms. Managо on the first day after she had received the Court of Appeals' decision on the previous evening and that Ms. Managо thereupon came by the office and picked up a copy of the decision. Tr. 1052-54. Respondent mailed Ms. Managо a copy of the decision about a month later under cover of a letter that said "Here is a copy of the order from the *Court of Appeal*. [sic]" BX 41 at 12. The Hearing Committee does not credit Respondent's testimony on this issue, but does not find that she knowingly testified falsely.

69. Respondent testified that she reviewed notes in her file and also docket entries in order to reconstruct her activities to create the June 2, 2008 invoice. Tr. 106, 108-09, 237, 238, 242, 295. Respondent, however, had virtually no notes, and the file she submitted to Disciplinary

Counsel included very few time records showing specific times devoted to Ms. Manago's case. Tr. 770-72; BX 37; BX 54-57; RX 3 at 4. The Hearing Committee has concluded that Respondent knowingly testified falsely on this issue.

70. Respondent acknowledged that her December 13, 2005 invoice contains an entry for October 18, 2005 reporting that Respondent copied the D.C. government's motion for Ms. Manago. Tr. 130-33; BX 55 at 6-7. The Superior Court's docket sheet in Ms. Manago's case shows that the government had not filed its motion as of October 18, 2005. RX 2 at 4; Tr. 148-49; BX 21-23. Respondent also billed time for copying the motion on November 17, 2005. Tr. 133-34; BX 55 at 6-7. Respondent insisted that she had provided her client with a copy of the government's pleading on October 18, 2005, before it was filed. Tr. 132. The Hearing Committee has concluded that Respondent knowingly testified falsely on this issue.

71. Respondent testified that she sent payments to Ms. Manago in 2009 and 2010 but that some of her checks were returned uncashed. Tr. 384-85. Respondent did not produce copies of any uncashed checks. Tr. 943-44. Respondent produced a copy of an envelope addressed to Ms. Manago with a check dated November 16, 2013, but the envelope was addressed to Ms. Manago at XXXX Jxxxx Lxxx, Wheaton, Maryland 20902; Ms. Manago did not reside at that address after 2007. Tr. 457. Respondent testified that was the last address she had for Ms. Manago. Tr. 398. Respondent's June 2, 2008 invoice contains Ms. Manago's then-current address in the District of Columbia. BX 8 at 8. Ms. Manago testified that she first received a payment from Respondent in 2013. Tr. 687; *see* FF 62. Respondent's letter to Disciplinary Counsel dated October 31, 2013, in which she offered $5,000 to settle the matter, did not mention any previous attempts to pay Ms. Manago. BX 14 at 6; Tr. at 391-92; FF 54. On November 4, 2013, Disciplinary Counsel wrote Respondent in response to her $5,000 offer and informed her that "Ms. Manago reports that to date you have failed to pay any of the $9,000 award." BX 14 at 8; Tr. 395-96. The Hearing Committee

has not resolved the veracity of Respondent's testimony in this respect.

72. During the disciplinary hearing Respondent portrayed Ms. Managо as a difficult client whom she needed to refer to a psychologist. Tr. 161-62 ("That was the day that I met with her and she cried for about an hour, and that was the day that I decided to refer her to a psychologist.").

73. On September 16, 2015, the second day of the disciplinary hearing, Respondent testified that she terminated the attorney-client relationship with Ms. Managо because of a purported threat by Ms. Managо that "'I'm going to file a Bar complaint against you,'" and that Respondent answered, "'I'm not going to be threatened to keep doing your case. So stop threatening me.'" Tr. 373-74. Respondent further testified that Ms. Managо left her a note saying, "'I'm going to call [Disciplinary] Counsel on you.' That's what she said." Tr. 375. On October 28, 2015, the last day of the hearing, Respondent testified that Ms. Managо threatened her on more than one occasion. Tr. 1023-24. Respondent further testified that Ms. Managо said, "I will hurt you." Tr. 1026-27. Asked whether she made any notes in the file about the threats, she testified, "No, but I know when I'm threatened, when my safety is at risk." Respondent produced no documentation to corroborate her testimony. The Hearing Committee has concluded that Respondent knowingly testified falsely on this issue.

III. RECOMMENDED CONCLUSIONS OF LAW

A. RESPONDENT VIOLATED RULES 1.1(a) AND (b) BY FAILING TO PROVIDE COMPETENT REPRESENTATION TO HER CLIENT

Rule 1.1(a) requires a lawyer to provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. Rule 1.1(b) mandates that a lawyer shall serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters. Comment [5] to Rule 1.1 elaborates:

> Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation, and continuing attention to the needs of the representation to assure that there is no neglect of such needs.

See In re Drew, 693 A.2d 1127, 1132 (D.C. 1997) (failure to apply requisite knowledge and skill violated the rule). Where the evidence shows that an attorney's conduct was "obviously lacking," Disciplinary Counsel need not present expert testimony about skill and care afforded to clients by other lawyers in similar matters, in order to prove a violation of Rule 1.1(b). *In re Nwadike*, Bar Docket No. 371-00 at 28 (BPR July 30, 2004), *aff'd*, 905 A.2d 221 (D.C. 2006); *see Drew*, 693 at 1127.

Respondent mishandled Ms. Manago's civil matter in at least three respects. First, she named the District of Columbia as a defendant, even though the District was plainly not a proper party under D.C. Code § 38-1202.01(a). FF 11-16. Second, she failed to have two of the named defendants served or served properly. FF 11, 15, 23. Third, she filed a Complaint that was grossly deficient, including but not limited to a failure to set out the factual basis for the elements of her contractual and other claims. FF 9, 13, 20; BX 17. Respondent's failures caused the case to be dismissed with prejudice for failure to state a claim upon which relief could be granted. FF 13, 16. Even after the court granted Respondent leave to amend the Complaint and cure the deficiencies identified in the defendants' motion, Respondent repeated the same mistakes, leading once again to dismissal with prejudice. FF 19-21; *cf*. BX 17 at 15-18; BX 25 at 4-5.

Respondent's three failures to fulfill the basic requirements of filing suit establish, individually and collectively, that she did not apply the requisite legal knowledge, skill, thoroughness, and preparation and therefore her work was "obviously lacking." These missteps are exacerbated by Respondent's failure, when given the opportunity to file an amended complaint, to use the information she should have learned from the initial dismissal and underlying pleadings. She

again, for example, did not identify the terms of the contract she claimed had been breached or allege "extreme and outrageous" conduct to support the intentional infliction of emotional distress claim. BX 25 at 5-6, 8-9. Respondent's repeated errors demonstrated a lack of competence that caused a serious deficiency in the representation and, in addition, ultimately prejudiced Ms. Manago by causing the case to be dismissed. *See In re Evans*, 902 A.2d 56, 69-70 (D.C. 2006) (per curiam) ("The determination of what constitutes a 'serious deficiency' . . . [is] where the attorney makes an error that prejudices or could have prejudiced a client and the error was caused by a lack of competence.").

Accordingly, the Hearing Committee recommends that the Board find that Disciplinary Counsel has proved by clear and convincing evidence that Respondent violated Rules 1.1(a) and 1.1(b).

B. RESPONDENT VIOLATED RULE 1.3(a), BUT NOT RULE 1.3(c), BY FAILING TO REPRESENT HER CLIENT WITH DILIGENCE AND ZEAL

Rule 1.3(a) provides that "[a] lawyer shall represent a client zealously and diligently within the bounds of the law." Neglect within the meaning of Rule 1.3(a) is defined as "indifference and a consistent failure to carry out the obligations that the lawyer has assumed to the client or a conscious disregard of the responsibilities owed to the client." *In re Wright*, 702 A.2d 1251, 1255 (D.C. 1997) (per curiam) (appended Board Report) (citing *In re Reback*, 487 A.2d 235, 238 (D.C. 1985), *adopted in relevant part*, 513 A.2d 226 (D.C. 1986) (en banc)); *see also In re Lewis*, 689 A.2d 561, 564 (D.C. 1997). Neglect requires proof of a pattern of lack of diligence and zeal in pursuing the client's case. *See id*. Rule 1.3(c) provides that "[a] lawyer shall act with reasonable promptness in representing a client."

When Ms. Manago retained Respondent, she trusted Respondent to investigate her claims, file the appropriate pleadings on her behalf, and take whatever legal steps were necessary to protect

her claims in the case. FF 3. When Respondent's initial efforts to resolve Ms. Manago's dispute with UDC proved unavailing,[6] Respondent filed a rambling, overly long and unorganized Complaint that was little more than a regurgitation of Ms. Manago's summary; the Complaint lacked numbered paragraphs and was riddled with Ms. Manago's first-person observations and rhetorical questions, with grammatical errors, with client communications that should have been kept confidential, and with inapposite and/or incomprehensible information. BX 17. Respondent obviously did not do the necessary factual and legal research that Ms. Manago expected and was entitled to before filing the Complaint, and there is no reliable documentary evidence that she did so. FF 9. Respondent also failed to consult with Ms. Manago about the factual allegations prior to filing the Complaint. FF 8, 10, 62; BX 57 at 2. Even more egregiously, after the dismissal was affirmed on appeal, Respondent promised to file a new lawsuit for Ms. Manago but did not do any work on a new cause of action, much less file it. FF 26. In sum, Respondent's pattern of inadequate attention to, thoughtfulness about and, ultimately, desertion of her client's matter repeatedly demonstrated an "indifference and a consistent failure to carry out the obligations that the lawyer has assumed to the client [and] a conscious disregard of the responsibilities owed to the client." *Wright*, 702 A.2d at 1255. Respondent's neglect did not meet the requirement that she pursue her client's matter diligently and zealously.

Respondent initiated negotiations with UDC personnel within five weeks after commencing the representation, filed the Complaint approximately four months after those negotiations ended unsuccessfully, and appears to have met all subsequent deadlines in filings in the Superior Court

[6] Respondent appears to have proceeded diligently, competently and expeditiously in her pre-filing efforts to negotiate a resolution with UDC, measures in which she had experience. FF 1, 8. Disciplinary Counsel has not charged that her work at this stage was deficient.

and the Court of Appeals. FF 3, 8, 15, 17, 19, 22, 24. Thus the record does not show that Respondent failed to act promptly in the matter.

The Hearing Committee recommends therefore that the Board find that Disciplinary Counsel has established by clear and convincing evidence that Respondent violated Rules 1.3(a) but has not established by clear and convincing evidence that she violated Rule 1.3(c).

C. Respondent Violated Rules 1.3(b)(1) and 1.3(b)(2) Because She Intentionally Failed to Seek Her Client's Lawful Objectives and Intentionally Prejudiced Her Client

Rule 1.3(b) provides that "[a] lawyer shall not intentionally: (1) fail to seek the lawful objectives of a client through reasonably available means permitted by law and the disciplinary rules; or (2) prejudice or damage a client during the course of the professional relationship." *See In re Reback*, 487 A.2d 235, 240 (D.C. 1985), *adopted in pertinent part*, 513 A.2d 226, 229 (D.C. 1986) (en banc). Intent can be found when the lawyer is aware of his or her neglect, or when the neglect is "so pervasive that the lawyer must be aware of it." *Lewis*, 689 A.2d at 564; *see In re O'Donnell*, 517 A.2d 1069, 1072 (D.C. 1986) (appended Board Report) (attorney's "inaction was coupled with an awareness of his obligations, and he thus made a deliberate and conscious choice not to pursue his client's objectives in violation of DR 7-101(A)(1)," the predecessor to Rule 1.3(b)(1)); *see also In re Robertson*, 612 A.2d 1236 (D.C. 1992); *In re Haupt*, 444 A.2d 317 (D.C. 1982) (appended Board Report); *In re Haupt*, 422 A.2d 768 (D.C. 1980); *In re Fogel*, 422 A.2d 966 (D.C. 1980).

The trial court's first dismissal of Ms. Manago's case put Respondent on notice of the need to cure the deficiencies that resulted in the dismissal. FF 13-14, 16. These deficiencies included the breach of contract claim that failed to state "what the contract was that purportedly was breached." FF 13; BX 18 at 6. Respondent filed an amended Complaint that did not cure the identified deficiencies, once again suing the wrong parties and failing to serve the UDC Board of Trustees –

the only party that potentially was a properly named defendant. FF 18-22, 26. Respondent's failures to identify, research and properly set forth the asserted causes of action issues or to file suit against the appropriate parties or serve all the defendants, despite clear notice from the court in its first dismissal of the case, constitute an intentional failure to seek her client's lawful objectives. *See, e.g.*, *In re Delate*, 598 A.2d 154, 155, 158 (D.C. 1991) (per curiam) (appended Board Report) (finding that the respondent intentionally failed to make required accountings for an estate because she made the first filing, but failed to make subsequent ones despite "warnings and demands" from the court reminding her to do so); *In re O'Donnell*, 517 A.2d 1069, 1072 (D.C. 1986) (per curiam) (appended Board Report) (finding that the respondent failed to pursue a liquor license despite having been reminded to do so by his client, and since his "inaction was coupled with an awareness of his obligations, . . . he thus made a deliberate and conscious choice not to pursue his client's objectives").

Following the adverse ruling by the Court of Appeals, Respondent convinced Ms. Manago to continue paying legal fees by promising to file a new case against the UDC Board of Trustees. FF 30. Rather than work to resurrect her client's claims, however, Respondent did nothing; she continued to take money from Ms. Manago without providing any additional legal services. FF 26, 30. This dereliction by Respondent caused Ms. Manago substantial harm and prejudice and constituted intentional prejudice because by the time Ms. Manago's case had been dismissed twice for failure to state a claim and those dismissals had been affirmed on appeal, Respondent had taken over $8,000 from Ms. Manago, had provided legal services of minimal, if any, value in exchange, had thereby denied Ms. Manago the chance to have her case decided on the merits, and had eliminated any hope of obtaining Ms. Manago's desired result – the opportunity to return to the respiratory program and complete her studies. FF 26; *see In re Mance*, 869 A.2d 339, 340 (D.C. 2005) (attorney's failure to protect his client's appeal rights ripened into an intentional violation

after the attorney was on notice that the appeal was not timely and the attorney did nothing to address the problem); *In re Robertson*, 612 A.2d 1236, 1250 (D.C. 1992) (appended Board Report) (attorney's failure to file timely claim for tax refund was sufficient to establish that the attorney intended to cause damage when attorney understood that such damage would occur if the attorney did not act, even if it was not the attorney's purpose or motive to cause damage or prejudice to the client); *In re Joyner*, 670 A.2d 1367, 1368 (D.C. 1996) (intentional prejudice or damage to client found when attorney's inaction caused client to miss statutory deadline for filing a claim against the District of Columbia).

Accordingly, the Hearing Committee recommends that the Board find that Disciplinary Counsel has established by clear and convincing evidence that Respondent violated Rules 1.3(b)(1) and 1.3(b)(2).

D. RESPONDENT VIOLATED RULES 1.4(a) AND 1.4(b) BY FAILING TO COMMUNICATE ADEQUATELY WITH HER CLIENT

Rule 1.4(a) provides that "[a] lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." *See In re Hallmark*, 831 A.2d 366, 374 (D.C. 2003). Rule 1.4(b) provides that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." *See In re Baron*, 808 A.2d 497 (D.C. 2002). Comment [1] to Rule 1.4 states that "[t]he client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued." "[F]ull and complete communication with the client is an essential part of the attorney's role." *In re Stanton*, 470 A.2d 272, 278 (D.C. 1983).

"The guiding principle for evaluating conduct under [Rule 1.4(a)] is whether the lawyer fulfilled the client's reasonable . . . expectations for information." *In re Schoeneman*, 777 A.2d 259,

264 (D.C. 2001) (internal quotations omitted). "To meet that expectation, a lawyer not only must respond to client inquiries but also must initiate communications to provide information when needed." *In re Hallmark*, 831 A.2d 366, 374 (D.C. 2003). Here, Ms. Manago was forced to initiate all information exchanges with Respondent. FF 27.

Specifically, Respondent routinely failed to consult with and keep Ms. Manago informed about the status of her matter in several respects. Respondent frequently did not respond to Ms. Manago's telephone calls. Tr. 588 (Manago) ("[N]o, she never returned my calls . . . ."). Respondent also failed to provide her with copies of pleadings filed on her behalf or filed by defendants in the case. FF 10, 25. Respondent also did not provide Ms. Manago with the first Order dismissing the case for two or three weeks, and then only after a number of inquiries and requests by Ms. Manago. FF 16. Respondent's dominant concern appears to have been collecting money from Ms. Manago. Tr. 452 (Manago) ("Well, she didn't want to talk about my case when I went in there. She would just, you know, get my money from me and give me my receipt . . . ."). In March 2008, when Ms. Manago visited Respondent's office to discuss the case, Respondent refused to see her and left without talking to her. Tr. 589 (Manago) ("So, when I went there in March, I sat in the lobby . . . from 4:00 o'clock to 6:00 o'clock, two hours. And the receptionist told her that I was there when she was leaving. . . . She never came to me.").

Consequently, the Hearing Committee recommends that the Board find that Disciplinary Counsel has proved by clear and convincing evidence that Respondent violated Rules 1.4(a) and 1.4(b).

E. RESPONDENT VIOLATED RULE 1.5(a) BY CHARGING HER CLIENT AN UNREASONABLE FEE

Rule 1.5(a) provides that "[a] lawyer's fee shall be reasonable." *See In re Cleaver-Bascombe*,

892 A.2d 396, 403 (D.C. 2006).[7]

Respondent and Ms. Manago disagree as to whether the retainer agreement provided for a flat fee or an hourly fee. *See* FF 4-5. We are unable to resolve this question, since neither individual's testimony was more credible than the other on this issue and the retainer agreement itself is unclear on this point. *See* FF 7. However, as explained below, the fee charged was unreasonable regardless of whether it was a flat fee or advance payment toward hourly fees.

If, as Ms. Manago understood, the retainer agreement provided for a flat fee of $5,000, FF 5, Respondent's initiation and receipt of additional installment payments after Respondent had collected the full $5,000 seems to the Hearing Committee to be *per se* unreasonable.[8] *See* FF 29, 31, 33.[9] The fact that Ms. Manago later agreed that Respondent could retain the extra fees – to draw down on them when she provided future legal services on the appeal – may arguably have mitigated the potential degree of abuse that would have occurred absent the eventual repayment, FF 63, but does not retroactively absolve Respondent from her misstep of charging and collecting additional fees without a written amendment of the retainer agreement proper.

If, as Respondent contends, the retainer agreement provided for a $250 hourly fee without any cap, FF 4, after the Court of Appeals dismissed Ms. Manago's case with prejudice Respondent charged and received legal fees from Ms. Manago to file a new Complaint against the UDC Board of Trustees, but failed to do the additional work she promised. FF 30, 32. "It cannot be reasonable

[7] Disciplinary Counsel does not contend that the $5,000 flat fee or the $250/hour rate were unreasonable amounts at the beginning of the representation.

[8] By definition, Respondent must have considered the $5,000 fee reasonable or she could not have entered into it in the first place.

[9] The engagement letter is not limited to services only at the trial stage and does not implicitly or expressly exclude services at the appellate stage. BX 15.

to demand payment for work that an attorney has not in fact done." *Cleaver-Bascombe*, 892 A.2d at 403.

In sum, the Hearing Committee cannot determine by clear and convincing evidence whether the inadequate and confusing form engagement agreement called for an hourly fee or flat fee. However, in either event, as discussed above, the fees collected by Respondent were unreasonable under the circumstances as the representation evolved. Accordingly, the Hearing Committee recommends that the Board find that Disciplinary Counsel has established by clear and convincing evidence that Respondent violated Rule 1.5(a).

F. Respondent Violated Rule 1.15(a) and 1.15(e) by Misappropriating Client Funds and Failing to Safe-keep Advanced Unearned Fees

1. Did a Misappropriation Occur?

Rule 1.15 provides:

> (a) A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with representation separate from the lawyer's own property. Funds of clients or third persons that are in the lawyer's possession (trust funds) shall be kept in one or more trust accounts maintained in accordance with paragraph (b). Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.
>
> * * * *
>
> (e) Advances of unearned fees and unincurred costs shall be treated as property of the client pursuant to paragraph (a) until earned or incurred unless the client gives informed consent to a different arrangement.

Misappropriation is defined as "any unauthorized use of a client's [or third party's] funds entrusted to [the lawyer], including not only stealing but also unauthorized temporary use for the lawyer's own purpose, whether or not [the lawyer] derives any personal gain or benefit therefrom." *In re Cloud*, 939 A.2d 653, 659 (D.C. 2008) (internal citation omitted); *see also In re Harrison*, 461 A.2d 1034, 1036 (D.C. 1983) (citation and quotation marks omitted). Misappropriation is essentially

a *per se* offense and does not require proof of intent. *Id.*; *see also In re Anderson*, 778 A.2d 330, 335 (D.C. 2001). When entrusted funds have been deposited into a particular account, a misappropriation occurs when the balance in that account falls below the amount held for a client or third party. *In re Pels*, 653 A.2d 388, 394 (D.C. 1995); *In re Edwards*, 990 A.2d 501, 518 (D.C. 2010). Disciplinary Counsel bears the burden of proving by clear and convincing evidence that Respondent's use of funds was unauthorized. *See Anderson*, 778 A.2d at 335.

Disciplinary Counsel contends that Respondent committed misappropriation because she took funds that had been advanced as unearned fees before she earned them. *See* BX 62; ODC Brief at 28. Respondent did not substantively respond to this argument in her post-hearing brief, arguing instead that Ms. Manago did not pay for all of the services that Respondent provided. We need not determine whether Ms. Manago paid all the funds Respondent earned over the course of the representation because a client's failure to pay for all services rendered is not a defense to a misappropriation charge. Rather, unauthorized use of unearned fees belonging to the client, no matter how brief, amounts to misappropriation. *See In re Robinson*, 74 A.3d 688, 694 (D.C. 2013) ("The level of proof is not a demanding one here, for misappropriation occurs whenever 'the balance in the [attorney's trust] account falls below the amount due to the client,' making misappropriation 'essentially a per se offense.'") (quoting *Anderson*, 778 A.2d at 355).

We must determine how much Respondent was required to hold in trust at any given time, and whether she ever held less than that amount. Usually, this inquiry requires nothing more than the application of the terms of the parties' engagement agreement and an analysis of the respondent's account records showing the client's payments and the respondent's withdrawals. Here, however, the parties disagree as to the payment terms. Respondent testified that Ms. Manago agreed to pay her $250 an hour, with no cap on the amount of fees to be charged. FF 4. Ms. Manago testified that she agreed would pay an initial flat fee of $5,000 to "cover [her] educational matter" and that any

additional work would be billed at $250 per hour. FF 5-6; Tr. 430. The engagement agreement itself is unclear. We find that the evidence on this question is in equipoise, and consequently we cannot determine by clear and convincing evidence whether the parties agreed that Ms. Mango would pay a $5,000 flat fee for Respondent to represent her in the trial court, as Ms. Manago understood, or an hourly fee for all work, as Respondent apparently understood. Because we cannot determine the terms of the payment agreement, we must determine whether Respondent's handling of Ms. Manago's payments constituted misappropriation under both possible interpretations of the engagement agreement. As discussed below, we find that Respondent engaged in the unauthorized use of Ms. Manago's funds whether there was a flat fee or an hourly fee agreement.

Misappropriation analysis if the engagement agreement provided for an hourly fee. As quoted above, pursuant to Rule 1.15(e), "[a]dvances of unearned fees and unincurred costs shall be treated as property of the client pursuant to paragraph (a) until earned or incurred unless the client gives informed consent to a different arrangement." Here, there is no evidence that Ms. Manago consented to Respondent taking her funds before they were earned. Thus, if this was an hourly engagement as Respondent testified, she was required to hold Ms. Manago's payments in trust unless she had already earned them. Respondent testified that she never had to hold any of Ms. Manago's funds in trust because that is, Ms. Manago always made her payment *after* Respondent had earned it. *See* FF 37. Respondent testified as follows:

> Q. . . . if Ms. Manago had paid you $1,000, but you had only put in three hours worth of time for $750, what would you do with that $250 that you had not yet earned?
> A. That wasn't the case in this instance. *She was never ahead.*
> Q. If she had been ahead in her payments, what would you have done with that money?
> A. That doesn't even make sense, because that does not apply in this case. *She was never ahead.* She paid an installment. I did more work for her before she paid. So *she was never ahead*. So, I can't base her issues that she presented on something that didn't happen [sic]. *She was never ahead*.

Tr. 76 (emphases added). Respondent's records do not support her testimony. Ms. Manago's payments exceeded the $250/hour value of Respondent's services at least in the early stages of the representation.

Respondent produced a number of documents that she called "invoices" that purported to show the amounts received from Ms. Manago, and the amounts earned by Respondent. Although these documents are not entirely consistent in all respects, and we find that the June 2, 2008 invoice was created in response to the disciplinary complaint and was inconsistent with prior invoices, FF 47-48, they are consistent regarding the payments made and work done in the first few weeks of the representation. *See* BX 57 at 10-11 (invoice dated March 28, 2006), 12-13 (invoice dated June 27, 2006), 14-15 (invoice dated May 10, 2007), 16-19 (invoice dated June 2, 2008).[10] As summarized on the chart below, the invoices show that early in the representation, Respondent had not earned all of the money Ms. Manago paid her. For instance, according to the 2008 invoice, Ms. Manago made $250 payments on May 13 and May 24, 2005, but Respondent did not earn $500 at a $250/hour rate until June 15, 2005. *See id.* Thus, until June 15, 2005, Respondent should have held some of Ms. Manago's money in trust, but by her own testimony, she did not.[11] She also should have held in trust some of the $250 payment received on June 15, 2005, until she earned it on June 20, 2005, when she had a meeting at UDC. *See id.* Again, by her testimony, she did not. FF 38.

[10] As explained above, we cannot determine whether Respondent wrote a letter to UDC on June 9, as reflected on certain early invoices, but not reflected on subsequent ones. *See* FF 28 n.4. We need not resolve this issue because even if Respondent earned $250 on June 9, 2005, she engaged in misappropriation before June 9, when she took more than she had earned.

[11] As explained above, we do not credit Respondent's testimony that she "probably" put Ms. Manago's first $250 payment in a trust account. *See* FF 38. Even assuming that she had done so, she did not say that she held the second payment in trust until earned, and thus, the deposit of the first $250, if it happened, does not change our conclusion that Respondent engaged in misappropriation.

Date	Description	Amount received	Amount earned	Amount required to be held in trust
5/13/2005	installment payment	$250.00		$250.00
5/23/2005	installment payment	$250.00		$500.00
5/24/2005	write letter to UDC		$250.00	$250.00
6/7/2005	leave a message for Ms. Martin - Legal Counsel		$20.83	$229.17
6/7/2005	leave a message for Ms. Martin - Legal Counsel		$20.83	$208.34
6/13/2005	phone conference w/Elizabeth of University counsel		$41.67	$166.67
6/13/2005	leave a message w/Ms. Godding Jones		$41.67	$125.00
6/15/2005	phone conference w/Dr. Webster		$100.00	$25.00
6/15/2005	phone conference jaque Jordan		$20.83	$4.17
6/15/2005	phone conference w/Ms. Martin & Dr. Webster		$62.50	-$58.33
6/15/2005	phone conference jaque jordan		$20.83	-$79.16
6/15/2005	installment payment	$250.00		$170.84
6/20/2005	meeting at UDC		$750	-$579.16

Based on the foregoing, we conclude that Disciplinary Counsel has proved by clear and convincing evidence that Respondent failed to hold unearned fees in trust, if she was billing on an hourly basis.[12]

[12] In reaching this conclusion, we do not rely on Disciplinary Counsel's Exhibit 62, which is a chart purporting to show that Respondent engaged in misappropriation when the balance in her operating account fell below the amount that she should have held in trust. This exhibit assumes that $1,617.51 (the amount showed as being owed to Ms. Manago on a May 10, 2007 invoice (BX 57 at 14-15)) had actually been deposited into Respondent's operating account by that date. From that assumption, Disciplinary Counsel argues that misappropriation occurred whenever the balance in Respondent's operating account fell below the amount that she was required to hold in trust, which varied as Ms. Manago made more payments or Respondent performed more work. However, comparing the amount that Respondent should have held in trust with the amount in her operating account is not apposite unless Disciplinary Counsel first proves that the $1,617.51 in entrusted funds were actually deposited into the bank account. *See In re Edwards*, 808 A.2d 476, 484 (D.C. 2002) ("The fact that the balance in the escrow account fell below [the amount required to be held in trust] . . . is without significance because the [client's] money was never deposited into the account."); *see also In re Ingram*, 584 A.2d 602, 602-603 (D.C. 1991) (Disciplinary Counsel did not establish unauthorized use where the client's funds were kept intact in the client's file). Disciplinary Counsel

Misappropriation analysis if the engagement agreement established a flat fee. In September 2009, in *In re Mance*, the Court "announce[d] for the first time that under Rule 1.15(d) flat fees are an advance of unearned fees that belong to the client until earned by the lawyer (unless other reasonable arrangements have been made)." 980 A.2d 1196, 1205-06 (D.C. 2009). The Court recognized that Rule 1.15(d)'s "application to flat fees is not clear on its face and, as not only respondent but his expert testified, the understanding among lawyers with respondent's type of practice has been that flat fees belong to the lawyer upon receipt, and therefore need not be kept separately in a trust account." *Id.* at 1206.[13] Thus, the Court held that its ruling would apply only prospectively. *Id.* ("Our purpose is not to discipline attorneys for inadvertent violations based on reasonable, but mistaken interpretations of the rules, but to make lawyers' obligations clear so that the interest of the public will be protected."). Because the events at issue here occurred before the Court decided *Mance*, if Respondent and Ms. Manago agreed that Ms. Manago would play a $5,000 flat fee, Respondent was entitled to treat the first $5,000 paid as her property.

Ms. Manago testified that she realized in August 2006 that she had overpaid Respondent by $3,000 more than the $5,000 she had agreed to pay, and that she and Respondent agreed that Respondent would hold any overpayment in trust and would use it to pay for services related to an appeal. FF 30. However, Disciplinary Counsel did not offer evidence to corroborate Ms. Manago's testimony that she had paid about $8,000 by August 2006. Yet it is undisputed that Ms. Manago had paid *some* amount in excess of $5,000 by August 2006: According to Respondent's own records, by August 2, 2006, Ms. Manago had paid Respondent $6,300. *See* BX 57 at 16 (total of payments

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did not adduce any such evidence.

[13] While allowing the past practice of treating a flat fee as a lawyer's property when paid, the Court reiterated the holding in *Hallmark*, 831 A.2d at 366, that a flat fee must be refunded if not earned at the conclusion of the representation. *See Mance*, 980 A.2d at 1205.

credited to Ms. Manago between May 13, 2005 and August 2, 2007). Respondent learned of the trial court's dismissal on August 14, 2006. *Id.* 8/14/2006 entry ("receive and read order of dismissal"). Consequently, if the parties had agreed that Respondent would represent Ms. Manago until the conclusion of the trial for a flat fee of $5,000, Ms. Manago had overpaid by at least $1,300, and Respondent was required to hold that amount in trust until earned.

Disciplinary Counsel did not provide any evidence of Respondent's bank account for August 2006, so as to enable the Hearing Committee to determine whether the $1,300 at issue had been deposited into Respondent's bank account and remained there. *See* BX 49 at 10-32 (Disciplinary Counsel issued a subpoena for Respondent's bank records from May 2005 to December 2007, but offered into evidence only records covering the period March 1, 2007 to December 31, 2007). However, by her own testimony, Respondent never held any money in trust for Ms. Manago because Respondent believed that Ms. Manago was always behind. *See* FF 38. Relying on Respondent's testimony, we find that Respondent spent $6,300 she received from Ms. Manago while the case was still pending in the trial court. Consequently, even if the engagement agreement called for a flat fee of $5,000 for representation in the trial court, Respondent was entitled to only $5,000, and thus, engaged in misappropriation when she took the additional amount.

2. Was the Misappropriation Intentional, Reckless or Negligent?

In the Hearing Committee's view, the record in this matter does not contain clear and convincing evidence of the extreme, intentional misappropriations that occurred in such cases as *In re Ukwu*, 980 A.2d 1227, 1228 (D.C. 2009) (per curiam), *In re Mooers*, 910 A.2d 1046, 1046 (D.C. 2009) (per curiam), *In re Cappell*, 866 A.2d 784 (D.C. 2004), or *In re Marshall*, 762 A.2d 530 (D.C. 2000). Respondent clearly deposited Ms. Manago's payments into her operating account or otherwise utilized them essentially as soon as she received them, FF 34-40, but the Hearing Committee cannot find clear and convincing evidence in the record that she did so intentionally or

maliciously and instead concludes, as discussed below, that the evidence establishes only that Respondent mishandled her client's funds "only" out of carelessness with respect to the status of the amount of her work and the amount of Ms. Manago's payments at various points in time.[14]

We turn therefore to the issue of whether Respondent's carelessness amounted to recklessness or negligence. With respect to reckless misappropriation *vel non*, the Court of Appeals has instructed that in determining whether a respondent's unauthorized use of funds was reckless, one must ascertain whether the act "reveal[s] an unacceptable disregard for the safety and welfare of entrusted funds . . . . " *Anderson*, 778 A.2d at 338; *see also id.* at 339 (internal citations and quotation marks omitted) ("[R]ecklessness is a state of mind in which a person does not care about the consequences of his or her action."). The Court has further explained that reckless misappropriation occurs where an attorney handles entrusted funds "in a way that reveals . . . a conscious indifference to the consequences of his behavior for the security of the funds." *Id.* at 339 (citations omitted). Further, "[r]eckless misconduct requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts that would disclose this danger to *any reasonable person*." *Id.* (internal citations and quotation marks omitted). Thus, an objective standard should be applied to the recklessness assessment.

Although it is a close call, in the Hearing Committee's view the record in this matter also does not contain clear and convincing evidence of reckless misappropriation under the standards set forth in *Anderson*. There is no evidence that Respondent knew that some of Ms. Manago's payments should have been held for a brief time in trust. A lack of concern "for the safety and welfare of entrusted funds" and "the consequences of his or her action" and/or "a conscious indifference to the consequences of his behavior for the security of the funds" do not seem applicable here or to have

[14] Disciplinary Counsel does not discuss the intentionality question and does not identify any evidence that might support a finding of intentionality. DC Brief at 26-28.

been proved or even addressed in the evidence in the record. There is also no evidence of "a *conscious* choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts that would disclose this danger to *any reasonable person*." (emphasis added). Turning to the facts in *Anderson*, the respondent there had virtually no recordkeeping system to track client funds and "kept no separate trust or escrow account nor ledgers or books reflecting receipts and disbursements." *Id.* at 333. Rather, he used cashier's checks to pay settlement funds to clients, tried to keep track of each case in his head, and made only notations in the client file as to who had been paid. *Id.* As a result of this slipshod system, the respondent failed to pay a third-party medical provider because he mistakenly believed that he already had, and the balance in his account fell below the amount due to the provider. *Id.* at 332-33. Observing that Disciplinary Counsel cannot prove recklessness by establishing "inadequate record-keeping alone combined with commingling and misappropriation." the Court found that this constituted negligent misappropriation. *Id.* at 339-42. The facts proven in this matter seem to the Hearing Committee to be materially less serious than those in *Anderson* that the Court of Appeals found to constitute negligent misrepresentation.[15]

Since the Hearing Committee has concluded that the record does not contain clear and convincing evidence of intentional or reckless misappropriation, the Hearing Committee finds that Respondent, on occasions, negligently commingled client funds that she had not yet earned with her personal funds. *See Anderson*, 778 A.2d at 338 (where Disciplinary Counsel establishes the first element of misappropriation (unauthorized use), but fails to establish that the misappropriation was

[15] Similarly the facts here do not rise to the level of recklessness in *In re Micheel*, 610 A.2d 231, 232-36 (D.C. 1992), where an attorney failed to keep track of client funds, commingled personal or business funds with client funds, *and* indiscriminately wrote and bounced checks on the account in which the funds are being held, or *In re Pels*, 665 A.2d 388, 395-97 (D.C. 1995) where an attorney "indiscriminate[ly] mingl[ed] . . . personal and client funds" in an account over the course of almost a year and wrote "a great many personal and unrelated business checks" on the account.

intentional or reckless, "'then [Disciplinary] Counsel proved no more than simple negligence.'") (quoting *In re Ray*, 675 A.2d 1381, 1388 (D.C. 1996)).

In the Hearing Committee's view, as discussed above, Respondent's misappropriation does not rise even to the level at issue in *Anderson*. More analogous is the misconduct at issue in *In re Edwards*, 870 A.2d 90, 92-93 (D.C. 2005), in which the Court of Appeals found negligent misappropriation where the respondent's "mishandling of client funds was a product of confusion and disorganization within her office." Like the respondents in *Anderson* and *Edwards*, Respondent commingled personal funds with client funds and failed to keep track of client funds. And in *Anderson* and *Edwards*, there was no evidence that the respondents indiscriminately wrote and bounced checks on their accounts like the respondents in *Micheel* and *Pels*; the same is true with respect to Respondent in this matter.

3. Recommended Conclusion of Law

Accordingly, the Hearing Committee recommends that the Board find that Disciplinary Counsel has established by clear and convincing evidence that Respondent negligently engaged in misappropriation in violation of Rules 1.15(a) and 1.15(e).

F. RESPONDENT VIOLATED RULE 1.16(d) BY FAILING TO RETURN UNEARNED LEGAL FEES

Rule 1.16(d) provides that "in 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 . . . 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."

In March 2008, Ms. Manago requested a refund of the fees she paid Respondent. FF 33. Respondent did not immediately refund any monies to Ms. Manago. *Id*. In October 2008, the ACAB issued an award in favor of Ms. Manago for $9,000 concluding that Respondent had not

earned and was not entitled to retain that amount from the legal fees paid to her. FF 58, 59. The D.C. Superior Court affirmed the award on January 5, 2009 and ordered Respondent to pay Ms. Manago $9,000. FF 62. Respondent did not start making payments towards fulfilling the award until late November of 2013, almost five years later. It seems obvious to the Hearing Committee that delaying the remittance of Ms. Manago's funds for almost five years after being ordered to do so cannot be considered a "timely" refund as required by the rule.

Accordingly, the Hearing Committee recommends that the Board find that Disciplinary Counsel has proved by clear and convincing evidence that Respondent violated Rule 1.16(d).

G. DISCIPLINARY COUNSEL HAS NOT ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT VIOLATED RULE 3.1 BY FILING A FRIVOLOUS LAWSUIT OR RULE 8.4(d) BY ENGAGING IN CONDUCT THAT SERIOUSLY INTERFERED WITH THE ADMINISTRATION OF JUSTICE

1. Rule 3.1

Rule 3.1 prohibits a lawyer from bringing or defending a proceeding, or asserting or controverting an issue therein, unless there is a basis in law and fact for doing so that is not frivolous. "In deciding whether a claim is warranted under existing law, among the factors for consideration are the plausibility of the position taken, and the complexity of the issue." *In re Spikes*, 881 A.2d 1118, 1125 (D.C. 2005) (citing *District of Columbia v. Fraternal Order of Police*, 691 A.2d 115, 119 (D.C. 1997)).

Respondent received a copy of the ACAB award letter along with a copy of the D.C. statute that described the circumstances under which the court may vacate the arbitration award. FF 60. Respondent then moved to vacate the award. FF 61. Disciplinary Counsel argues that Respondent's appeal of the ACAB award abused the litigation process and constituted a retaliatory action against her client to avoid giving the client a refund (without any citation to the record in support of the latter contention). Disciplinary Counsel also points out that the issue was not complicated and

contends that a reasonable attorney – after an objective appraisal of the legal merits – would have concluded that the motion to vacate was so "wholly lacking in substance" that it was "not based upon even a faint hope of success[.]" *In re Yelverton*, 105 A.3d 413, 424-25 (D.C. 2014); *see* ODC Brief at 29-30. The attorney members of the Hearing Committee have encountered numerous such appeals (of arbitrations, for example) and other filings in their many years of legal experience that do not differ materially from the Application to Vacate that Respondent filed, *see* BX 45, and that have not been sanctioned, and the Hearing Committee is wary of a sole practitioner like Respondent possibly being treated differently in this regard than other attorneys in various types of practices and in law firms of differing sizes.

2. Rule 8.4(d)

Rule 8.4(d) provides that a lawyer shall not "engage in conduct that seriously interferes with the administration of justice." In order to violate Rule 8.4(d), the lawyer's conduct must (1) be "improper"; (2) "bear directly upon the judicial process . . . with respect to an identifiable case or tribunal"; and (3) "taint the judicial process in a more than a *de minimis* way," meaning that it "'at least potentially impacts upon the process to a serious and adverse degree.'" *In re White*, 11 A.3d 1226, 1230 (D.C. 2011) (quoting *In re Hopkins*, 677 A.2d 55, 60-61 (D.C. 1996)).

Disciplinary Counsel asserts that all three elements of a Rule 8.4(d) violation are present here. Disciplinary Counsel posits, first, that Respondent pursued a claim to vacate the arbitration award without a basis in fact or in law, including submission of a copy of her fabricated invoice to support her claim before the court.[16] In this regard, Disciplinary Counsel also notes that the Superior Court rejected Respondent's challenges to the arbitration award and found that Respondent failed to offer any argument as to why her case met the legal requirements to vacate or modify the decision

[16] The Rule 8.4(c) charge of dishonesty is discussed in the following section of this Report.

of ACAB. Second, Disciplinary Counsel contends that Respondent's misconduct bore directly upon the judicial process in the Court in which she filed the motion to vacate the award – but does not adduce *any* supporting facts or argument or authority for this bare, rote repetition of the second element of Rule 8.4(d) analysis. Third, Disciplinary Counsel argues that Respondent's conduct tainted the judicial process in more than a *de minimis* way because the filing and pursuit of a frivolous claim in the Superior Court wastes the time and resources of the court, delays the hearing of cases with merit, and causes the opposing parties unwanted delay and added expense. *Spikes*, 881 A.2d at 1127. ODC Brief at 30.

The Hearing Committee has considered Disciplinary Counsel's points carefully and has also meticulously compared the acts and omissions by Respondent and by the attorneys in *Spikes* and *Yelverton*. With respect to the first factor – impropriety – it seems plain that Respondent's pursuit of an appeal of the ACAB ruling does not entail anywhere near the extreme and persistent improprieties at issue in *Spikes* and *Yelverton*.[17] We recognize that Rule 3.1 and 8.4(d) violations might well be found in less extreme circumstances than those present in those two cases; we do not engage in that comparison because of our remaining analysis. We think that Disciplinary Counsel's mere assertion of its contention that the second element is present, without reference to any evidence, cannot possibly be found to meet Disciplinary Counsel's burden of proof. With respect to the third factor—taint—the three-month period in which the matter was pending in the Court of Appeals has not been shown by any evidence to be out of the ordinary or to have impacted the judicial process to "to a serious and adverse degree."[18]

[17] Disciplinary Counsel has not charged Respondent with Rule 3.1 or 8.4(d) violations with respect to any other aspect of the Superior Court litigation, ACAB proceeding or this disciplinary matter.

[18] *In re Uchendu*, 812 A.2d 933 (D.C. 2002) (finding a violation of Rule 8.4(d) based on the submission of falsified evidence) seems to the Hearing Committee to be inapposite because, there, over a period of two-to-three years, the Respondent submitted forged signatures on 16 different

3. Recommended Conclusion of Law

Accordingly, the Hearing Committee recommends that the Board find that Disciplinary Counsel has not established by clear and convincing evidence that Respondent violated Rule 3.1 or Rule 8.4(d).

H. RESPONDENT VIOLATED RULE 8.4(c) BY ENGAGING IN CONDUCT INVOLVING DISHONESTY, FRAUD AND MISREPRESENTATION

Rule 8.4(c) proscribes conduct involving dishonesty, fraud, deceit, or misrepresentation. "The term 'dishonesty,' while encompassing fraud, deceit, and misrepresentation, also includes 'conduct evincing a lack of honesty, probity or integrity in principle; a lack of fairness and straightforwardness.'" *In re Shorter*, 570 A.2d 760, 767-68 (D.C. 1990) (per curiam) (citations omitted). The four types of misconduct encompassed in Rule 8.4(c) "should be understood as separate categories, denoting differences in meaning or degree," *id.* at 767, and each of the four elements requires proof of different elements. *In re Romansky*, 825 A.2d 311, 315 (D.C. 2003).

Respondent reconstructed a final invoice relating to Ms. Manago's case to include time entries that had not appeared on previous invoices that she had provided to Ms. Manago. FF 48-51, 68. Respondent also claimed in that invoice to have met with Ms. Manago for 45 minutes on a day that she could not have – when Ms. Manago was at a doctor's appointment – and on days that her own records expressly stated that a meeting did not occur. FF 67, 69. Respondent submitted this false document to Disciplinary Counsel, to the ACAB, and to the Superior Court in the lawsuit she filed against her client to vacate the ACAB award. FF 57, 61.

The Hearing Committee has carefully considered whether Respondent might have submitted the revised invoice not to collect additional fees from Ms. Manago but "only" in a misguided effort to "set the record straight" with respect to the allegedly significant amounts of additional time that

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occasions and also falsely notarized most of those documents. 812 A.2d at 934, 940-41.

she had purportedly devoted to the matter (leaving aside the misjudgment of any such step). However, Respondent's own testimony expressly refutes that possibility. Tr. 54 ("Q. Your intent was to . . . be paid for that time, correct? A. Yes."). Moreover, Respondent did not bring to the attention of the Court or the ACAB that the June 2, 2008 invoice differed from prior invoices.

"Documents are an attorney's stock in trade, and should be tendered and accepted at face value in the course of professional activity." *In re Schneider*, 553 A.2d 206, 209 (D.C. 1989). Respondent's revised invoice was not a minor or trivial document; it formed almost the entire basis for her defense in the ACAB proceeding. It was meant to establish a different accounting of her work in the UDC litigation than the accountings she had previously issued – and neither the new invoice nor Respondent brought that deviance to anyone's attention. The June 2, 2008 invoice contained specific entries purporting to reflect precise time periods and events which the Hearing Committee, after painstaking analysis of the pertinent documents and careful consideration of the testimony of Ms. Manago, FF 48-51, 68-70, finds to be deliberately false.

Dishonesty, the most general category in Rule 8.4(c), is defined as "fraudulent, deceitful or misrepresentative behavior [and] evincing a lack of honesty, probity or integrity in principle; a lack of fairness and straightforwardness. . . ." *Shorter*, 570 A.2d at 767-68 (internal quotation marks and citation omitted). Fraud "embraces all the multifarious means . . . resorted to by one individual to gain an advantage over another by false suggestions or by suppression of the truth." *Id.* at 767 n.12 (citation omitted). Fraud requires a showing of intent to deceive or to defraud. *See Romansky*, 825 A.2d at 315; *In re Hutchinson*, 534 A.2d 919, 923 (D.C. 1987) (en banc). 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. *Id*. at 767. The failure to disclose a material fact also constitutes a misrepresentation. *See In re Outlaw*, 917 A.2d 684, 688

(D.C. 2007) (per curiam).[19] The record demonstrates by clear and convincing evidence that Respondent acted dishonestly and engaged in fraud and misrepresentation in creating and submitting the document and in attempting to support it before the ACAB, the Superior Court, and in this proceeding.

Accordingly, the Hearing Committee recommends that the Board find that Disciplinary Counsel has proved by clear and convincing evidence that Respondent violated Rule 8.4(c).

IV. RECOMMENDATION AS TO SANCTION

A. THE FACTORS TO BE CONSIDERED

The Court of Appeals has instructed that, in determining the appropriate sanction for a disciplinary infraction, the factors to be considered include (1) the seriousness of the misconduct, (2) the presence of misrepresentation or dishonesty, (3) Respondent's attitude toward the underlying conduct, (4) prior disciplinary violations, (5) mitigating circumstances, (6) whether counterpart provisions of the Rules of Professional Conduct were violated, and (7) prejudice to the client. *See, e.g.*, *In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013); *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc).

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

[19] Proof of deliberateness in making a misrepresentation is not required; a misrepresentation may be proved by clear and convincing evidence that a respondent "acted in reckless disregard of the truth." *In re Rosen*, 570 A.2d 728, 728-730 (D.C. 1989) (per curiam). This element is also present here.

Disciplinary Counsel has presented a helpful analysis of the sanctions question and we incorporate and adopt many of those points, with a few differing observations.

1. Seriousness of the Misconduct

Respondent misappropriated client funds and acted dishonestly during the representation and the ACAB proceeding. Her false testimony during the disciplinary process was a continuation of this pattern of dishonesty.

With respect to the misappropriation, we have not found that Disciplinary Counsel has proved by clear and convincing evidence that Respondent acted intentionally or recklessly in this regard; we have found "only" that Respondent negligently failed to manage properly the receipt and disbursement of those funds out of carelessness and irresponsible unfamiliarity with Rule 1.15(a). We agree with Disciplinary Counsel that Respondent exacerbated the Rule 1.15(e) offense by trying to avoid paying the arbitration award. However, Disciplinary Counsel has not convinced us that Respondent consciously did so in order to retaliate against her client. We have concluded that the clear and convincing evidence shows that Respondent did so only to reduce the amount of the ACAB award.

Respondent's pervasive dishonesty over a period of years and in a number of contexts is obviously a very serious concern.

2. Misrepresentation or Dishonesty

As discussed in preceding sections, we agree with Disciplinary Counsel that Respondent submitted a falsified document in the ACAB and disciplinary proceedings and testified falsely in the evidentiary hearing in this matter.

3. Respondent's Attitude Towards the Underlying Misconduct

Respondent amply demonstrated throughout the evidentiary hearing that she does not recognize or acknowledge her missteps, let alone their gravity. Additionally, throughout her

testimony, Respondent allowed her obvious (and unjustified) anger over this matter to degenerate into a contemptuous manner toward the Assistant Disciplinary Counsel and the disciplinary process (even taking into consideration the normal stresses of testifying) and to affect the truthfulness of her testimony. Tr. 43-44, 55, 57, 61 62, 166, 181, 196, 243, 283, 356, 360, 397, 935, 941, 947, 1051. The Hearing Committee feels obligated to report that, in its view, Respondent, is simply recalcitrant and unrepentant with respect to her conduct in the representation and in the disciplinary process.

4. Prior Discipline

Respondent has no prior disciplinary history in the District of Columbia, as confirmed by Disciplinary Counsel. Tr. 1097.

5. Mitigating Circumstances

Respondent offered three exhibits in mitigation: a list of several CLE courses completed from 2007 through 2015; a brochure from a lecture Respondent delivered in 2008; and five letters and/or emails from organizations thanking Respondent for her participation in moot court panels. RX 20. The Hearing Committee also notes Respondent's mentoring of high school students in her practice, her work in the difficult ADA field and, at the beginning of the representation, her timely and sensible efforts to resolve Ms. Manago's dispute with UDC.

6. Number of Violations

Respondent committed numerous violations in the course of the representation. However, this proceeding does not involve a pattern of misconduct where a respondent has committed violations in more than one representation and/or committed violations over a substantial period of time (other than what appears to be the normal course of a trial and appeal of the nature here in the Superior Court and the Court of Appeals). Thus, the Hearing Committee disagrees in part with Disciplinary Counsel's analysis of this factor. *See* ODC Brief at 32.

7. Prejudice to the Client

Throughout the hearing, Respondent depicted Ms. Manago as a difficult client and the Hearing Committee agrees that she may have been in a difficult client in some respects. However, she was not a dishonest client or one who made unreasonable demands. She was just one of those clients who takes up more than the usual amount of time and has more than the usual number of sometimes trying problems and needs. Thus, as Disciplinary Counsel suggests, Respondent has no cognizable basis for blaming the client for Respondent's professional missteps. In addition, it is abundantly clear to the Hearing Committee that Ms. Manago was materially prejudiced by Respondent's misconduct. "Clients can be harmed by unnecessary anxiety caused by an attorney's procrastination." *Mance*, 869 A.2d at 341 n.6. The Hearing Committee finds that Ms. Manago did indeed, as she testified, experience stress and anxiety as a result of Respondent's failure to file the second action and to communicate adequately with her throughout much of the representation and also as a result of having to testify in this proceeding. The necessity of seeking the return of her legal fees and then waiting several years to receive them also obviously prejudiced Ms. Manago, again as evidenced by her testimony, which the Hearing Committee credits. Tr. 549-51; BX 6 at 1-4; BX 10 at 2, 5, 7; *see also* Tr. 502, 530-31, 541-43, 564, 570-71, 575, 585, 589-90, 594, 613.

B. RECOMMENDED SANCTION

With respect to the Rule 1.15 violation, the typical sanction for negligent misappropriation appears to a six-month suspension. *See Kline*, 11 A.3d at 265 (citing *In re Fair*, 780 A.2d 1106, 1115 (D.C. 2001)); *Anderson*, 778 A.2d 330, 339-42. As in *Kline* and *Anderson*, and applying the analysis set out in *Anderson*, *id*. at 339-340, we have concluded that Disciplinary Counsel has not established intentional or reckless misappropriation by clear and convincing evidence. *Supra* at 34-36. Noting that the Court of Appeals suspended Kline for three years because, in addition to the careless misappropriation, he committed "a criminal act, forgery, and multiple though related acts

of dishonesty besides misappropriation," 11 A.3d at 263, and that Anderson was suspended for six months, *Anderson*, 778 A.2d at 242, we think that the appropriate sanction in this matter, for the negligent misrepresentation without more, would be a six-month suspension.

But, of course, there is more here. Respondent's evidence in mitigation might weigh significantly in other circumstances, but she has shown no remorse for her actions. Additionally, Respondent's conduct also was practice-related; the Court of Appeals has held that misconduct committed while acting as a lawyer generally warrants a more severe sanction than misconduct outside the course of legal practice, because practice-related misconduct presents a heightened risk to the public. *In re Kennedy*, 542 A.2d 1225, 1230 (D.C. 1988). And, most troubling, Respondent acted dishonestly in twice filing the altered invoice and testifying falsely at the disciplinary hearing.

Turning to the appropriate sanction for Respondent's Rule 8.4(c) violation, submission of a falsified document in both the ACAB and the disciplinary proves is obviously a very serious matter. Her dishonest submission of the falsified June 2, 2008 invoice in the ACAB proceeding and in this proceeding is compounded, for sanctions purposes, by her untruthful testimony at the hearing. Dishonesty is "not remotely acceptable ethical behavior." *See In re Goffe*, 641 A.2d 458, 466 (D.C. 1994) (per curiam); *In re Addams*, 579 A.2d 190, 193 (D.C. 1990) (en banc).

The Hearing Committee has reviewed a great many Court of Appeals decisions involving attorney dishonesty. It seems clear that the dishonesty at issue here falls in the more serious part of the spectrum of dishonest conduct addressed in the Court of Appeals' attorney discipline jurisprudence. The Court of Appeals has responded sternly to such misconduct. In *In re Cleaver-Bascombe*, 892 A.2d 396 (D.C. 2006), the Court emphasized the importance to a sanction determination of a finding that an attorney presented false testimony at a disciplinary hearing:

> As noted by the Board, "[a]n attorney who presents false testimony during disciplinary proceedings clearly does not appreciate the impropriety of his or her conduct. *See In re Goffe,* 641 A.2d 458 (D.C. 1994)." Moreover, lying under oath

> on the part of an attorney for the purpose of attempting to cover up previous dishonest conduct is absolutely intolerable; "[t]he Bar[, after all,] is a noble calling." *In re Shillaire*, 549 A.2d 336, 337 (D.C. 1988) (*Shillaire I*).

Cleaver-Bascombe, 892 A.2d at 412 (brackets in original); *see also In re Ukwu*, 926 A.2d 1106, 1118 (D.C. 2007) (Court doubled the length of suspension recommended by Board based on finding that Ukwu gave false testimony at evidentiary hearing; hearing committee found that client paid Ukwu $1,200 in cash, which meant that Ukwu's testimony to the contrary was knowingly false because he "could hardly have 'forgotten' that [the client] paid him in cash"). "Particularly where dishonesty is aggravated and prolonged, disbarment is the appropriate sanction." *In re Howes*, 39 A.3d 1, 15 (D.C. 2012).

Although these determinations are always difficult, the Hearing Committee believes that respondent's dishonesty is somewhat less serious that at issue in *Cleaver-Bascombe*, *Ukwu*, and *Howes*.[20] In the Hearing Committee's view, the most analogous case is *In re Daniel*, 11 A.3d 291 (D.C. 2011), where the respondent hid personal funds from the IRS by placing them in his trust accounts (and thus commingled personal funds with entrusted funds), lied to the IRS, and made materially false statements denying the misconduct in a sworn affidavit submitted to the Hearing Committee. The Court noted that this "misconduct, though serious, d[id] not reach the level of misconduct of attorneys whom [the Court] ha[s] disbarred." *Id.* at 301 (citing *Cleaver-Bascombe II*, 986 A.2d at 1199). The Court looked instead to *In re Moore*, 691 A.2d 1151 (D.C. 1997), where

[20] We do not find quite the extreme, flagrant degree of "continuing and pervasive indifference" or "unexampled patterns of morally reprehensible behavior (as delineated in *In re Pennington*, 921 A.2d 135, 141, 142 (D.C. 2007) (citation omitted)), that were present *In re Corizzi*, 803 A.2d 438, 440-43 (D.C. 2002) (soliciting perjury and falsely denying the same, scheme with chiropractor for case referrals), or *In re Pelkey*, 962 A.2d 268, 281 (D.C. 2008) (continuing theft of funds from two client businesses in violation of his position of trust and threats to clients). The Hearing Committee has also considered such other cases involving serious, protracted dishonesty and resulting in disbarment as *In re Goffe*, 641 A.2d 458 (D.C. 1994), *In re Anya*, 871 A.2d 1181 (D.C. 2005), *In re Kanu*, 5 A.3d 1 (D.C. 2010), *In re White*, 11 A.3d 1222 (D.C. 2011), *In re Omwenga*, 49 A.3d 1235 (D.C. 2012) and *In re Baber*, 106 A.3d 1072 (D.C. 2015).

the respondent was suspended for three years based on pleading guilty to one misdemeanor count of willful failure to file federal income tax returns, directing an attorney in his office to lie on his behalf, and testifying falsely in divorce proceedings concerning his income. *Daniel*, 11 A.3d at 301. In *Daniel*, the Court accepted factual findings and conclusions of law that the respondent had "commingled funds, a serious violation of Rule 1.15(a)," and that, "[l]ike Moore, Daniel also committed multiple violations of the rule prohibiting dishonest conduct." *Id.* The Court further reasoned that the false statements that Daniel had made in the sworn affidavit he submitted to the Hearing Committee could not "meaningfully be distinguished from false testimony, further reinforcing [the Court's] view that Daniel's misconduct [wa]s sufficiently similar to Moore's to warrant the same sanction." *Id.* The Court of Appeals was also concerned with Daniel's lack of remorse and his attitude toward the disciplinary process. *Id*. at 300. In light of all those circumstances, the Court of Appeals suspended Daniel for three years and also imposed a fitness requirement. *Id.* at 302. Here, as in *Daniel*, Respondent mishandled client funds, committed the Rule 8.4(c) offense charged in the Specification of Charges, testified falsely at the evidentiary hearing and appears to have little or no remorse over her misconduct.[21] Leaving aside for a moment Respondent's other violations, we think that the same sanction is appropriate for and consistent with the equally serious dishonesty by Respondent in this matter.

In sum, Respondent's negligent misappropriation seems to require, in and of itself, a six-month suspension. Respondent's dishonesty seems to the Hearing Committee to require, in and of itself, at least a three-year suspension along with a fitness requirement in light of her recalcitrant attitude. In light of Respondent's dishonesty and negligent misappropriation violations, as well as

[21] *See also, e.g.*, *In re Steele*, 868 A.2d 146 (D.C. 2005); *In re Slaughter*, 929 A.2d 433 (D.C. 2007); *In re Silva*, 29 A.3d 924 (D.C. 2011); *In re Vorha*, 68 A.3d 766 (D.C. 2013) (distinguishing *Kanu*, *Howes*, and *Omwenga*).

the other violations and Respondent's attitude toward her misconduct, the Hearing Committee is compelled to recommend disbarment.

V. CONCLUSION

Based on its Findings of Fact and its legal analysis, the Hearing Committee respectfully recommends as conclusions of law for the Board's consideration:

> that Disciplinary Counsel has proved by clear and convincing evidence that Respondent violated Rules 1.1(a) and 1.1(b), 1.3(a), 1.3(b)(1),1.3(b)(2), 1.4(a), 1.4(b), 1.5(a), 1.15(a), 1.15(e), 1.16(d), and 8.4(c);
>
> that Disciplinary Counsel has not proved by clear and convincing evidence that Respondent violated Rules 1.3(c), 3.1, or 8.4(d); and
>
> that Respondent should be disbarred.

AD HOC HEARING COMMITTEE

/WAF/
Warren Anthony Fitch, Esquire, Chair

/SKB/
Sara K. Blumenthal, Public Member

/RAG/
Ronald A. Goodbread, Esquire, Attorney Member

Dated: December 8, 2016

Corrected: December 12, 2016