THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Issued July 9, 2021

In the Matter of:	:	
	:	
SAMUEL BAILEY, JR.	:	
	:	
Respondent.	:	Board Docket No. 18-BD-054
	:	Disc. Docket No. 2015-D144
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 384974)	:	

REPORT AND RECOMMENDATION OF THE BOARD ON PROFESSIONAL RESPONSIBILITY[1]

Respondent, Samuel Bailey, Jr., is charged with violating Rules 1.1(a), 1.1(b), 1.4(a), 1.4(b), 1.5(a), 1.5(e), and 8.4(c) of the District of Columbia Rules of Professional Conduct (the "Rules") in connection with his representation of a client in a civil rights case in the U.S. District Court for the District of Columbia and a discrimination claim before the D.C. Office of Human Rights ("OHR"), and is charged with violating Rule 8.4(d) in connection with his conduct during the Office of Disciplinary Counsel's investigation.

The Ad Hoc Hearing Committee ("Hearing Committee" or "Committee") found that Disciplinary Counsel had proven each of the charges by clear and convincing evidence and recommended the sanction of a one-year suspension with a fitness requirement and restitution upon any application for reinstatement.

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[1] We additionally order that an exhibit be placed under seal for inclusion in the record of this matter before the Court, *see infra* n.15 & p.38.

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

Before the Board, Respondent argues that the Hearing Committee erred in denying his motion to strike the testimony of Disciplinary Counsel's expert witness and, in the alternative, contends that the expert's testimony was insufficient to establish a standard of care. Respondent additionally takes exception to the Hearing Committee's factual findings and argues that Disciplinary Counsel did not meet its burden of proving any of the charges. Respondent recommends that the Board issue an order of dismissal.

Disciplinary Counsel takes no exception to the Hearing Committee's Report and Recommendation and adopts its sanction recommendation.[2]

Having reviewed the record and the parties' briefing to the Board, and in consideration of the case law as well as the parties' oral argument, the Board finds that Disciplinary Counsel has proven violations of Rules 1.4(a), 1.4(b), 1.5(a), 1.5(e), and 8.4(c) by clear and convincing evidence. We, however, find that the Rule 1.1(a) and (b) and 8.4(d) charges were not proven by clear and convincing evidence for the reasons described below. The Board recommends that Respondent be sanctioned with a one-year suspension — but without a fitness or restitution requirement.

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[2] *See* Corrected Disciplinary Counsel's Brief in Opposition to Respondent's Exceptions to the Hearing Committee's Report and Recommendation (filed Sept. 15, 2020) ("ODC Br.") at 31-32. Disciplinary Counsel initially recommended before the Hearing Committee that a sanction of a two-year suspension with partial restitution and a fitness requirement was appropriate. *See* Corrected Disciplinary Counsel's Proposed Findings of Fact, Conclusions of Law, and Recommended Sanction (filed July 1, 2019) at 36.

I. MOTION TO STRIKE THE EXPERT WITNESS[3]

On September 14, 2018, a pre-hearing conference took place before the Chair of the Hearing Committee with the Office of Disciplinary Counsel represented by Assistant Disciplinary Counsel Traci M. Tait, Esquire, and with Respondent's counsel, Johnny M. Howard, Esquire, and Respondent. During the pre-hearing conference, in addition to scheduling the hearing dates, the parties agreed to dates for the exchange of the witness lists ("with . . . a brief description of their anticipated testimony"), exhibits, and stipulations. *See* Preh. Tr. at 3, 38-39. Respondent did not object to scheduling the exchange of witness lists ten days prior to the first day of the hearing. On September 20, 2018, the Chair issued an order memorializing the agreed-upon filing dates and the hearing schedule. On December 19 and 20 of 2018, Respondent's counsel went to the Office of Disciplinary Counsel to review the case file.

Disciplinary Counsel filed its witness list on January 23, 2019, in compliance with the Chair's scheduling order. Disciplinary Counsel's witness list included the contact information (address, email, and phone number) of its expert witness, Mr. Hanna, Esquire, and the following statement: "Mr. Hanna will testify as an expert regarding the standard of care and customary legal fees for attorneys handling cases like that of Mr. Laster, including before relevant courts and agencies."

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[3] The Hearing Committee's Report and Recommendation did not include a discussion on Respondent's Motion to Strike Expert Witness, so we provide the procedural background here.

On January 31, 2019, Respondent filed a Motion to Strike Expert Witness in which he argued that Disciplinary Counsel had not provided a sufficient statement of Mr. Hanna's anticipated testimony and complained that Respondent did not have enough time to take the expert's deposition before the hearing or to engage his own expert. Because Respondent's Motion to Strike was filed a few days before the first day of the hearing, the Hearing Committee allowed Disciplinary Counsel to respond orally to the Motion to Strike Expert Witness. Disciplinary Counsel argued that (1) it had complied with the notice required by the Board Rules and the Chair's scheduling order, (2) Respondent had received Mr. Hanna's contact information on January 23 and could have communicated with him directly, (3) the Office of Disciplinary Counsel had only recently retained Mr. Hanna as its expert so his identity was not withheld during Respondent's review of the file on December 19 and 20, and (4) Respondent should not have been surprised by Disciplinary Counsel's retention of an expert due to the Rule 1.1(a) and (b) charges in this matter. *See* Tr. 12-14, 19-21, 25. The Hearing Committee denied Respondent's Motion to Strike Expert Witness. *See* Tr. 41-42.

Before the Board, Respondent objects to the Committee's denial of his Motion to Strike Expert Witness because (1) Disciplinary Counsel disclosed the identity of its expert without the "specificity" as to what his testimony would be on the standard of care and on the customary legal fees for cases similar to that of Respondent's former client, Allen Laster; (2) when Respondent's counsel reviewed the case file materials at the Office of Disciplinary Counsel on December 19 and 20 of 2018,

Disciplinary Counsel did not include in the files any suggestion that an expert witness would be called to testify; (3) when Respondent's counsel asked Disciplinary Counsel earlier if any attorney witnesses would be called, Disciplinary Counsel responded that no attorney witnesses were expected[4]; and (4) Disciplinary Counsel did not produce Mr. Hanna's professional credentials or qualifications for review prior to his taking the stand and did not provide an expert report. Additionally, as will be discussed separately below, *see* Part III.A, Respondent contends that Mr. Hanna never actually articulated "the minimum standards of care for 'handling cases involving the intersection of employment law and laws governing [labor] unions including customary billing practices. . . .'" Resp. Br. at 16.[5]

We first address Disciplinary Counsel's failure to disclose its retention of an expert after Respondent already had reviewed Disciplinary Counsel's file on December 19 and 20, 2018. *See id.* at 14. Board Rule 3.1 describes the following access that Disciplinary Counsel shall provide concerning its case file:

> During the course of an investigation of a complaint and following the filing of a petition, respondent shall have access to all material in the

[4] Disciplinary Counsel does not address the aforementioned conversation but responds that "[t]he factual assertion by Mr. Bailey's counsel that he was told no attorney witnesses would be called, is contradicted by Disciplinary Counsel's witness list and unsupported by any evidence in the record." ODC Br. at 6-7.

[5] "Resp. Br." refers to Respondent's Exceptions to Report and Recommendation of the Ad Hoc Hearing Committee (filed on August 25, 2020). "Resp. Supplement" refers to Respondent's Supplement to Exceptions to Report and Recommendation of the Ad Hoc Hearing Committee (filed on August 26, 2020). "Resp. Reply Br." refers to Respondent's Reply to the Corrected Disciplinary Counsel's Brief in Opposition to Respondent's Exceptions to the Hearing Committee's Report and Recommendation (filed on October 1, 2020).

> files of Disciplinary Counsel pertaining to the pending charges that are neither privileged nor the work product of the Office of Disciplinary Counsel. Respondent may, upon two days' notice, orally request access to such files. Any dispute arising under this chapter shall be resolved, after the filing of a petition, by the Hearing Committee Chair upon written application by respondent.

Although we ultimately find that the Hearing Committee properly denied the motion to strike, we do not agree with Disciplinary Counsel's suggestion that Respondent could not have relied on his prior review of the case file on December 19 and 20 and assumed it was a complete file. Once a respondent has reviewed the case file, Board Rule 3.1 still requires that the "respondent shall have access to all material in the files of Disciplinary Counsel pertaining to the pending charges that are neither privileged nor the work product of the Office of Disciplinary Counsel . . . ." If additional materials are added to the case file after the respondent's Board Rule 3.1 review, the respondent should be so advised by Disciplinary Counsel or he or she would have no reason to make an oral request under Board Rule 3.1 to return to the Office of Disciplinary Counsel. The purpose of Board Rule 3.1 would be lost if discoverable evidence is added after a respondent has been granted access to the file and the respondent has not been so informed.

The Board Rules themselves do not require pre-hearing discovery of expert reports. Parties, however, can agree to exchange expert reports or make a formal request for such an exchange during pre-hearing conferences. Here, at the pre-hearing conference, Respondent failed to request that an exchange of expert reports be included in the scheduling order. Respondent also could have asked for an earlier date for the exchange of witness lists (which could have allowed time to seek to

depose any experts).[6] As to any possible prejudice suffered by the late disclosure of the expert witness's identity and expected testimony, we note that Respondent had a full opportunity to cross-examine Mr. Hanna, and these proceedings were subsequently continued for more than three months to May 13, 2019. Respondent had sufficient time to retain his own expert, yet he did not amend his witness list to add an expert witness at any point in these proceedings.

For all these reasons, we find that the Hearing Committee did not err in denying Respondent's motion to strike Mr. Hanna as a witness.

II. FACTUAL SUMMARY

"In disciplinary cases, the Board must accept the Hearing Committee's evidentiary findings, including credibility findings, if they are supported by substantial evidence in the record." *In re Ukwu*, 926 A.2d 1106, 1115 (D.C. 2007) (quoting *In re Cleaver-Bascombe*, 892 A.2d 396, 401 (D.C. 2006)). The Board is to "accord considerable deference to credibility findings by a trier of fact who has had the opportunity to observe the witnesses and assess their demeanor" unless unsupported by substantial evidence. *In re Bradley*, 70 A.3d 1189, 1193-94 (D.C. 2013) (per curiam).

Substantial evidence is "'more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."'

[6] While procedures exist for depositions upon a showing of a "compelling need" in a disciplinary proceeding, requests for the taking of depositions must be made by motion and with time permitted for the filing of the other party's possible opposition. *See* Board Rules 3.2, 3.4.

Giles v. D.C. Dep't of Employment Servs., 758 A.2d 522, 524 (D.C. 2000) (citation omitted); *In re Evans*, 578 A.2d 1141, 1149 (D.C. 1990) (per curiam) (appended Board Report). "Substantial evidence means enough evidence for a reasonable mind to find sufficient to support the conclusion reached." *In re Thompson*, 583 A.2d 1006, 1008 (D.C. 1990) (per curiam). Existence of contrary evidence does not preclude a determination that there is "substantial evidence." *In re Szymkowicz*, 124 A.3d 1078, 1084 (D.C. 2015) (per curiam).

In this matter, we adopt the Hearing Committee's Findings of Fact, which are supported by substantial evidence, although we reach some different conclusions of law in our *de novo* review of the Hearing Committee's proposed conclusions. For example, as explained below, we do not find support in the record that Respondent's conduct failed to meet the standard of care in violation of Rule 1.1 as we do not adopt the Committee's conclusion that Respondent's work product was "substandard" (*see* Findings of Fact ("FF") 49-51). We make any additional factual findings based on clear and convincing evidence, supported by citations to the record. *See* Board Rule 13.7. Each of our supplemental factual findings are noted by citation directly to the transcript of the evidentiary hearing or to the exhibits.[7]

[7] Upon our review of the hearing transcripts, it has come to our attention that the following exhibits were admitted at the hearing, but not noted as admitted exhibits in Respondent's Exhibit List Form or in the Hearing Committee Report. We hereby amend the record to add the following as admitted exhibits: Volume II RX 111 (a)-(g), 116, and 117. *See* Tr. 1018, 1020.

A. The Retention Agreement and Representation of Mr. Laster Before the U.S. District Court

In April 2013, Mr. Laster filed his initial *pro se* complaint and an amended complaint in the U.S. District Court for the District of Columbia against four defendants: his Local Union 491, the Labor Management Training Committee, the Mid-Atlantic Council of Carpenters, and the Carpenters Local 491 Annuity Fund ("Annuity Fund"). FF 12. Approximately two months later, on June 28, 2013, the Defendants filed a motion to dismiss or, in the alternative, for a more definite statement. FF 13.

In early September 2013, Respondent and Mr. Laster had their first meeting, during which they discussed the federal discrimination case Mr. Laster had filed *pro se*, as well as his related discrimination claims he had brought before the D.C. Office of Human Rights ("OHR"). FF 2-3. At the time, Mr. Laster had spent at least three months trying to find *pro bono* counsel, as he was concerned that the case was about to be dismissed. FF 2. Mr. Laster's case involved a duty of fair representation, which requires a showing that one's union is "acting arbitrarily, discriminatorily, or in bad faith." Tr. 338. Mr. Laster brought several documents with him to this initial meeting, and Respondent agreed with Mr. Laster that the case was "on the verge" of being dismissed. FF 3.

Respondent informed Mr. Laster that he lacked sufficient expertise in the matter, but he offered to serve as co-counsel with Clifford G. Stewart, Esquire (a New Jersey attorney with employment law expertise). FF 3. Mr. Stewart is not a member of the D.C. Bar. Hearing Committee Report ("HC Rpt.") at 8 n.6.

Respondent told Mr. Laster that he could file a *pro hac vice* motion for Mr. Stewart and that Respondent would act as local counsel. FF 3.[8] Respondent thereafter contacted Mr. Stewart, and by September 11, 2013, he and Mr. Stewart submitted a request to OHR for copies of all the complaints Mr. Laster had filed. *Id.* On October 3, 2013, Respondent and Mr. Stewart met with Mr. Laster to discuss his claims, and Mr. Laster paid a $600 consultation fee for the meeting. FF 4. Mr. Laster testified that it was at this meeting that he agreed that Mr. Stewart would be retained as co-counsel in the federal discrimination case and in the OHR claims. *Id.*

The following month, on November 19, 2013, the U.S. District Court ordered Mr. Laster to file a more definite statement by December 16, 2013. FF 14. Before entering his appearance on December 11, 2013, Respondent emailed Mr. Laster a written agreement setting forth the scope of representation and agreed-upon fees. FF 5, 14. The agreement was unclear and poorly written. FF 6. It contained multiple confusing inconsistencies. *See* FF 9-10. The agreement provided that Respondent would associate with Mr. Stewart, but it did not explain the division of responsibility or how they would split their fees. *See* FF 10. The agreement included a provision that "[i]f associated counsel is retained no additional costs will be required of Client." *Id.*

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[8] As local counsel, Respondent continued to be ethically responsible for Mr. Laster's case. *See In re Fay*, 111 A.3d 1025, 1030 (D.C. 2015) (per curiam) (by facilitating the practice of an attorney admitted *pro hac vice*, the respondent had the same duties and ethical obligations toward the client); *see also* HC Rpt. at 34.

Mr. Laster testified that the only terms in the agreement that had been discussed previously were (1) the $30,000 upfront payment and (2) Mr. Laster's obligation to pay the $30,000 amount in increments of $1,000 a month. FF 6. Mr. Laster signed the agreement without understanding the other terms in the agreement, but Respondent assured him that he would explain those terms at their next meeting. *Id.* However, that conversation never took place. *Id.* The Hearing Committee credited Mr. Laster's testimony concerning Respondent's failure to discuss and explain the agreement's terms beyond the $30,000 that would be due. *Id.* We find no reason to disturb this credibility finding.

Upon entering his appearance on December 11, 2013, Respondent requested an extension of time to file the more definite statement, which the court granted. FF 14. Respondent filed a more definite statement on January 15, 2014, and a third amended complaint on March 14, 2014. *Id.* Respondent did not include the Annuity Fund as a defendant in the third amended complaint, and the Hearing Committee noted that the scope of representation in the written agreement did not include filing suit against the Annuity Fund; it only mentioned filing suit against the three other Defendants identified in Mr. Laster's initial *pro se* complaints. FF 15.[9] On July 14,

[9] Disciplinary Counsel erroneously alleged in the Specification that the Annuity Fund was a party to the third amended complaint (when it was not), and that Respondent improperly failed to oppose the Annuity Fund's motion to dismiss. *See* Specification, ¶7. The Annuity Fund, however, was no longer a defendant in the case, so Respondent had no reason to oppose the Annuity Fund's motion to dismiss.

2014, the remaining Defendants filed a motion to dismiss the third amended complaint. FF 16.

Respondent did not move for Mr. Stewart's *pro hac vice* admission until April 29, 2014, and it was granted by the U.S. District Court on July 31, 2014. FF 14.[10] That same day, in a separate order, the court granted Respondent's motion to extend time to September 15, 2014, for his response to the Defendants' motion to dismiss. DX 13 at 10. Respondent's opposition to the motion to dismiss was electronically filed on September 18, 2014. FF 17; *see also* DX 13R at 422.[11]

Before the Defendants had filed a reply to Mr. Laster's opposition to the motion to dismiss, the court suggested that the Defendants file a joint motion for mediation. FF 18. The parties met for a mediation session on October 21, 2014.

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[10] The court granted the *pro hac vice* motion with the condition that Mr. Stewart or a member of his firm undergo CM/ECF training and "agree to file papers electronically." *See* DX 13 at 10; FF 14. The order noted that "[n]o court papers will be mailed to any lawyer." DX 13 at 10.

[11] Respondent claims that Federal Rule of Civil Procedure 6(d) allowed an additional three days for Respondent to file the opposition to the motion to dismiss. *See* Resp. Br. at 31. Respondent correctly notes that his opposition to the motion to dismiss was accepted for filing by the court; none of the Defendants challenged the opposition as being filed late. We do not find that Respondent had any obligation to communicate to Mr. Laster that the opposition was filed late given this record, and the Hearing Committee similarly did not so find. We agree with Respondent that Paragraph 9 of the Specification of Charges was not a factual allegation that could be relied upon to establish a failure to communicate in violation of Rule 1.4(a):

> On September 18, 2014, Respondent filed a response to LMTC *et al.*'s motion to dismiss (after the original deadline of September 15). The next day, he filed a "Notice to Supplement Exhibits." Respondent did not file a motion for leave to file out of time for either submission. He did not inform his client that he had missed the deadline.

Specification, ¶ 9.

FF 19. During that session, Respondent and Mr. Stewart advised Mr. Laster to accept a settlement offer of about $50,000 or $60,000, but Mr. Laster rejected it as too low. *Id.*

Approximately three months later, in late January 2015, Mr. Laster fired Respondent through an emailed letter, and Respondent filed a motion to withdraw (on behalf of himself and Mr. Stewart) on February 2, 2015. FF 20-21. The court granted the motion to withdraw and appointed *pro bono* counsel to represent Mr. Laster for the limited purpose of attempting to settle the case. FF 22. After further mediation sessions and a status hearing on May 14, 2015, the court ordered that the attorneys with the successor law firm, who continued to represent Mr. Laster before the OHR, could participate in the mediation process "to facilitate a global resolution" of Mr. Laster's claims. DX 13 at 13-14; *see* FF 27. The mediation was ultimately successful, settling both the federal case and the OHR claims for an amount greater than had been offered for settlement of the federal case alone.

B. Lack of Communication with Mr. Laster on the Disability OHR Claim

On April 1, 2014, Respondent submitted a reconsideration request for Mr. Laster's disability claim before the OHR. FF 25. Three months later, on July 3, 2014, Respondent checked the status of the reconsideration request and the OHR general counsel's office advised Respondent that the agency was still reviewing the request. FF 26. Respondent did not subsequently check the status of the request with the OHR general counsel's office. *Id.* The Hearing Committee credited Mr. Laster's testimony that his phone calls to Respondent about the OHR disability claim were never

returned. FF 27. As Mr. Laster became more frustrated by Respondent's failure to provide an update on the status of his claim, Mr. Laster decided to retain another law firm to handle each of his OHR claims. *Id.* Mr. Laster testified that he hired other counsel because both Respondent and Mr. Stewart were not responding to his emails or his phone calls "in a responsible way." Tr. 136.

C. Unfair and Duplicative Billing Practices[12]

The representation agreement itself did not identify a single hourly rate for legal fees. *See* FF 10 (references in the agreement to an hourly rate of $400, $450, and $500). Further, it did not clearly explain under what circumstances the hourly rate would apply and suggested that "no additional costs" would result from the retention of Mr. Stewart as associated counsel. *Id*. As drafted, the agreement was deliberately misleading, and it was not possible for Mr. Laster to understand his financial obligations for the legal services provided by Respondent. FF 5-11.

Mr. Laster made at least $12,300 in payments to Respondent during the approximately 16-month period of representation, between October 2013 and

[12] Respondent raises several objections to the Findings of Fact related to unfair, duplicative, and false billing entries. Respondent argues that the Hearing Committee should have found that the "contingency fee percentage mentioned in the agreement was 40%," Resp. Br. at 27, but, in fact, the Hearing Committee did make that finding. *See* FF 8 ("The discernible contingency aspect of the Agreement consists of a clause reserving '40% percentage [sic] of Clients [sic] recovery after deduction of costs' for counsel. DX 2 at 15."). Respondent also contends that the Hearing Committee "misinterprets the retainer agreement" and should have found that the non-contingency aspect of the Representation Agreement clearly set a billing rate of $400 per hour, *see* Resp. Br. at 28, but those objections go to the weight of the evidence and credibility findings that the Board does not disturb in its review, unless unsupported by substantial evidence in the record. *Ukwu*, 926 A.2d at 1115; *Bradley*, 70 A.3d at 1193-94. We conclude that substantial evidence in the record supports the Hearing Committee's findings concerning the confusing and inconsistent terms in the Representation Agreement, as well as Respondent's unfair, duplicative, and false billings entries.

February 2015. FF 29. Mr. Laster often paid in cash, but Respondent did not provide receipts upon request. FF 30. However, Mr. Laster retained copies of his bank withdrawal slips when paying in cash and he had a bank record of his checks that Respondent deposited. *Id.* Mr. Laster received an invoice (dated February 23, 2015) for $85,270 for 221.75 hours of legal services, after he had fired Respondent and Mr. Stewart.[13] The invoice included erroneous charges. *See* FF 32, 35. When Mr. Laster came to Respondent's office to pick up his client file, he was given a cover letter informing him that a lien had been filed by Respondent's firm against Mr. Laster for uncollected fees. *See* FF 33.

Disciplinary Counsel's forensic accountant, Mr. O'Connell, testified that Respondent engaged in double billing (charging Mr. Laster for both his and Mr. Stewart's time) and included numerous mistakes in his invoice that resulted in Mr. Laster being overcharged. *See* FF 37-41. The Hearing Committee concluded that some of the entries in the invoice were "either erroneously duplicative or intentionally false." FF 43; *see also* FF 44. Mr. O'Connell estimated that

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[13] FF 31 provides that "[d]uring his representation of Mr. Laster, Respondent failed to provide invoices for legal services rendered . . . [and] [o]nly after Mr. Laster fired Respondent, and after Respondent filed his motion to withdraw on February 2, 2015, did Respondent produce an invoice for legal services rendered." Respondent argues that an email message from Respondent to Mr. Laster on or about August 1, 2014, included an attached proposed draft of a billing statement for Mr. Laster's review. *See* Resp. Br. at 40-41. The original email with the attachment was returned to Respondent as undelivered. The record is ambiguous as to what Mr. Laster received and when he received it, *compare* Volume I RX 54 *with* Tr. 142-43 (Mr. Laster), but it is undisputed that the August 2014 billing statement was only a proposed draft which Respondent asked Mr. Laster to review and make corrections. *See* DX 4H at 108. For these reasons, and because it is only the February 2015 invoice which is at issue for its erroneous and duplicative charges, we do not find the possible discrepancy in FF 31 to be material to our recommendations on the Rule violations.

Respondent's $85,270 invoice included at least $12,618.17 in overcharges attributable to Respondent and $10,900 in overcharges attributable to Mr. Stewart (totaling $23,518.17). FF 45.

In the end, Mr. Laster did not have to pay the invoice total of $85,270, as the Attorney/Client Arbitration Board ("ACAB") determined that Mr. Laster only was responsible for an additional $16,500 under the terms of the fee agreement. *See* FF 46. Including this ACAB award with Mr. Laster's prior payments, Respondent and Mr. Stewart were compensated an approximate total of $28,800 for their legal services. *See* FF 29, 46.

D. Mr. Hanna's Testimony

Respondent, noting that Mr. Hanna had not previously been qualified as an expert, challenged Mr. Hanna's qualifications to testify as an expert in this disciplinary matter, but the Chair cited Mr. Hanna's having practiced in the area of employment law since 2000 and his having expertise in union and plaintiff employment matters. Tr. 323-25; *see* FF 47; Tr. 327, 336-37. We find that the Hearing Committee did not abuse its discretion in qualifying Mr. Hanna as an expert in the standard of care in employment and labor union representations and as an expert on customary billing practices, *see, e.g.*, *See Washington Metropolitan Area Transit Authority v. L'Enfant Plaza Properties, Inc.*, 448 A.2d 864, 867 (D.C. 1982) ("The trial court's decision to qualify a witness as an expert is not to be reversed absent a clear showing of abuse of discretion."), but do not adopt all of the Committee's conclusions related to his testimony.

Mr. Hanna, without specificity, found fault with Respondent's more definite statement because it used "citations to broad statutes" as opposed to case law. *See* Tr. 389. Mr. Hanna described the third amended complaint filed by Respondent as poorly written and noted that it did not cite the more specific subclause of Title VII for labor union discrimination. Tr. 385-86. Mr. Hanna, however, did not ever identify a standard of care, but stated generally, "[Y]ou've got atmospheric problems, things that are unprofessional." Tr. 385. Mr. Hanna testified that the third amended complaint could have been dismissed at any time, *see* FF 49, but he did not actually describe a standard of care for lawyers filing complaints.

As to the quality of Respondent's and Mr. Stewart's opposition to the motion to dismiss, Mr. Hanna testified: "[t]hey are making arguments, [but] they are rarely citing cases to support their arguments." Tr. 387. Mr. Hanna noted that a date was erroneously omitted and the opposition cited to "stale legal standards." FF 50. When Mr. Hanna was asked by the Chair to explain why the U.S. District Court judge did not grant the motion to dismiss if the third amended complaint and the opposition to the motion to dismiss were so obviously deficient, Mr. Hanna speculated that the judge must have seen "an injustice." *See* Tr. 439-40.[14] It is undisputed that instead of granting the motion to dismiss, the U.S. District Court judge ordered the parties

[14] On cross-examination, Mr. Hanna conceded that he was speculating when he claimed that the U.S. District Court was acting out of sense of justice in not dismissing the third amended complaint. *See* Tr. 439-443.

to return to mediation, and Mr. Laster ultimately received a substantial settlement from the Defendants. *See* FF 22.

III. CONCLUSIONS OF LAW

Disciplinary Counsel bears the burden of proving the alleged Rule violations by clear and convincing evidence, which is "evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *In re Cater*, 887 A.2d 1, 24 (D.C. 2005). We review *de novo* the Hearing Committee's legal conclusions and its determination of "ultimate facts," that is, those facts that have a "clear legal consequence." *In re Micheel*, 610 A.2d 231, 234-35 (D.C. 1992) (internal quotations omitted); *see also In re Evans*, 902 A.2d 56, 60 (D.C. 2006) (per curiam) (appended Board Report) (Board noting that it owes no deference to the Hearing Committee's determination of "ultimate facts," such as whether the facts establish a violation of a Rule).

A. Disciplinary Counsel Failed to Prove the Rule 1.1(a) (Competence) and (b) (Skill and Care) Charges by Clear and Convincing Evidence.

Rule 1.1(a) requires a lawyer to "provide competent representation to a client." The Court has determined that competent representation requires the "legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Rule 1.1(a); *see In re Drew*, 693 A.2d 1127, 1132 (D.C. 1997) (per curiam) (appended Board Report) (lawyer who has requisite skill and knowledge, but who does not apply it for particular client, violates obligations under Rule 1.1(a)). 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." In *In re Evans*, the Board explained that the evidence required to establish a violation must reach a "serious deficiency":

> To prove a violation [of Rule 1.1(a)], [Disciplinary] Counsel must not only show that the attorney failed to apply his or her skill and knowledge, but that this failure constituted a serious deficiency in the representation . . . . The determination of what constitutes a "serious deficiency" is fact specific. It has generally been found in cases where the attorney makes an error that prejudices or could have prejudiced a client and the error was caused by a lack of competence . . . . *Mere careless errors do not rise to the level of incompetence*.

902 A.2d at 69-70 (appended Board Report) (emphasis added). The "serious deficiency" requirement applies equally to 1.1(b). *See In re Yelverton*, 105 A.3d 413, 421-22 (D.C. 2014).

The Hearing Committee based its finding of the Rule 1.1(a) and (b) violations on its independent review of the third amended complaint and the opposition to the motion to dismiss and on Mr. Hanna's description of faults he identified in Respondent's work. *See* FF 51. We, however, disagree that the evidence was sufficient to establish a violation of either Rule 1.1(a) or (b).

Rule 1.1 violations are "worthy of sanction only when they involve conduct that is truly incompetent, fraudulent, or negligent and that prejudices or could have prejudiced the client." *Yelverton*, 105 A.3d at 422. The Court of Appeals' examples of "serious deficiencies" include failing to attend court hearings, failing to comply with court orders, aggressively pursuing a legally unfounded strategy, failing to file a timely notice of appeal, filing the wrong forms in the wrong place, naming the wrong defendants, and simply abandoning the matter altogether. *See, e.g.*, *In re*

Speights, 173 A.3d 96, 99-100 (D.C. 2017) (per curiam); *Yelverton*, 105 A.3d at 422-23; *In re Vohra*, 68 A.3d 766, 780 (D.C. 2013) (appended Board Report); *Drew*, 693 A.2d at 1131-32 (appended Board Report); *In re Lewis*, 689 A.2d 561, 564 (D.C. 1997) (per curiam) (appended Board Report). Here, we find the shortcomings found by the Hearing Committee in the third amended complaint and the opposition to the motion to dismiss to fall well short of a serious deficiency. The more definite statement, the third amended complaint, and the opposition to the motion to dismiss that were prepared by Respondent and Mr. Stewart were not so facially deficient or "truly incompetent, fraudulent, or negligent" that they prejudiced or could have prejudiced Mr. Laster. *See Yelverton*, 105 A.3d at 422.

We believe that Respondent also correctly argues that Mr. Hanna's simply stating that Respondent's work product fell below the standard of care "without citing a rule, regulation, or guideline [that] establishes a standard of care in the substantive area of law" is not sufficient evidence to establish a standard of care for purposes of Rule 1.1. *See* Resp. Supplement at 1-2 (citing *Blair v. District of Columbia*, 190 A.3d 212, 230 (D.C. 2018) (expert's conclusory statement that the supervision of a police officer fell below the national standard of care does not describe what the standard of care requires or how the District's actions were deficient)). Respondent also asserts that "[s]anctioning an attorney for typographical errors is unheard of . . . ." *Id.* at 9.

Typically, the expert will clearly articulate and refer to a standard of care by which an attorney's actions can be measured. However, Mr. Hanna testified in

conclusory terms that in his opinion, Respondent's pleadings did "not conform with the standard of care," Tr. 353, and "f[e]ll below the standard of care of practitioners," Tr. 370, without ever articulating a standard of care. In regard to the third amended complaint, Mr. Hanna testified that it was not a "viable plausible complaint" and "if [it] were litigated, I am confident [it] would have gotten dismissed," Tr. 384-85, but without providing any further explanation.

Mr. Hanna emphasized that he would have acted differently if it were his case, but a statement that he would have personally handled a matter differently, also does not establish a standard of care. Conclusory statements that work fell below the standard of care and a personal opinion that he would have handled matters differently, do not establish a standard of care or prove by clear and convincing evidence that Respondent's conduct deviated from a standard of care. *See Clark v. District of Columbia*, 708 A.2d 632, 635 (D.C. 1997).

We also observe that Mr. Hanna's testimony lacked the specificity observed in other disciplinary cases involving the standard of care. In *In re Hargrove*, Board Docket No. 15-BD-060, at 12-13 (BPR Apr. 26, 2016), *findings and recommendation adopted*, 155 A.3d 375 (D.C. 2017) (per curiam), the description of the respondent's incompetent representation, which fell below the standard of care, was very detailed. For example, the respondent in *Hargrove* mistakenly believed for six years that the Estate had title to a property despite the existence of a deed transferring title to the guardian, continued to treat the property as Estate property even after realizing her error, disregarded the court's advice to petition for

a guardian to correct the deed, and unnecessarily delayed the closing of the Estate such that the unpaid real estate taxes totaled $113,000. *Id.*

Similarly, in *Speights*, 173 A.3d 99, the Court described in detail the respondent's incompetent representation during a multi-year representation: suing the wrong defendants, failing to amend the complaint to name the proper defendants, failing to conduct discovery, failing to take steps to preserve evidence, failing to request an extension of time to produce an "essential expert's report," and repeatedly violating local court rules, pretrial procedures, and court orders. 173 A.3d at 99-100.

Having reviewed the entirety of his testimony, we conclude that Mr. Hanna testified in conclusory terms on whether Respondent's conduct fell below a standard of care without adequately defining or explaining the standard of care, *see Varner v. District of Columbia*, 891 A.2d 260, 270 (D.C. 2006) (conclusory assertion by expert witness is "insufficient to establish an objective standard of care"), and without the specificity typical in our disciplinary case law.

Accordingly, Mr. Hanna's statement that Respondent's drafting "fell below the standard of care" without tying that assessment to any "standard" is not clear and convincing evidence of a violation of either Rule 1.1(a) or 1.1(b). And the pleadings filed by Respondent and Mr. Stewart were not so obviously deficient as to constitute clear and convincing evidence of a violation of either Rule.[15]

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[15] We do not find that this is one of those circumstances where expert testimony on the standard of care was not required. We have independently reviewed each pleading filed by Respondent and they are not "so obviously lacking" that expert testimony is not needed to show what other lawyers generally would do. *See In re Nwadike*, Bar Docket No. 371-00, at 28 (BPR July 30, 2004),

B. Disciplinary Counsel Established a Violation of Rule 1.4(a) (Communication) and (b) (Failure to Explain Matter to Client) by Clear and Convincing Evidence.

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." Under Rule 1.4(a), an attorney must not only respond to client inquiries, but must also initiate contact to provide information when needed. *See, e.g.*, *In re Bernstein*, 707 A.2d 371, 376 (D.C. 1998); *In re Hallmark*, 831 A.2d 366, 374 (D.C. 2003) (citing Rule 1.4, cmt. [1]). The purpose of this Rule is to enable clients to "participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued." Rule 1.4, cmt. [1].

Similarly, Rule 1.4(b) states than an attorney "shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." This Rule provides that the attorney "must be particularly careful to ensure that decisions of the client are made only after the client has been informed of all relevant considerations." Rule 1.4, cmt. [2]. The Rule places the burden on the attorney to "initiate and maintain the consultative and decision-making process if the client does not do so and [to] ensure that the ongoing process is thorough and complete." *Id.* In determining whether Disciplinary Counsel has established a violation of Rule 1.4(a) and (b), the question is whether Respondent

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findings and recommendation adopted, 905 A.2d 221, 227, 232 (D.C. 2006); *see also In re Schlemmer*, Bar Docket Nos. 444-99 & 66-00, at 13 (BPR Dec. 27, 2002), *recommendation adopted in relevant part*, 840 A.2d 657 (D.C. 2004).

fulfilled his client's reasonable expectations for information. *See In re Schoeneman*, 777 A.2d 259, 264 (D.C. 2001) (citing Rule 1.4, cmt. [3]).

We agree with the Hearing Committee's conclusion that Respondent violated Rule 1.4(a) when he failed to communicate and respond to Mr. Laster's numerous requests for information about the status of his OHR claim. We also agree with the Hearing Committee's conclusion that Respondent violated 1.4(b) by failing to explain the scope of his legal services, *see* HC Rpt. at 38, as well as the legal fees and costs that Mr. Laster would incur. *See, e.g.*, *In re Gonzalez*, Board Docket No. 17-BD-071 (BPR Oct. 24, 2018)(appended Hearing Committee Report at 61-62), *recommendation adopted where no exceptions file*d, 207 A.3d 170 (D.C. 2019) (per curiam).

C. Disciplinary Counsel Established a Violation of Rule 1.5(a) (Unreasonable Fee) by Clear and Convincing Evidence.

Rule 1.5(a) provides that:

> A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
>
> > (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> >
> > (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> >
> > (3) The fee customarily charged in the locality for similar legal services;
> >
> > (4) The amount involved and the results obtained;

> (5) The limitations imposed by the client or by the circumstances;
>
> (6) The nature and length of the professional relationship with the client;
>
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) Whether the fee is fixed or contingent.

The Court of Appeals has held that "Rule 1.5(a) can be violated by the act of charging an unreasonable fee without regard to whether the fee is collected." *Cleaver-Bascombe*, 892 A.2d at 403. "The prototypical circumstance of charging an unreasonable fee is undoubtedly one in which an attorney did the work that he or she claimed to have done, but charged the client too much for doing it." *Id.* However, "[i]t cannot be reasonable to demand payment for work that an attorney has not in fact done." *Id.*

Disputing that he violated Rule 1.5(a), Respondent points to the fees obtained by the successor law firm as evidence of how reasonable his own fees were in the representation of Mr. Laster and emphasizes that the successor law firm both engaged in ethical misconduct and "colluded" with the Office of Disciplinary Counsel during the investigation of Respondent's disciplinary matter. *See* Resp. Supplement at 3-5.[16] Respondent also argues that the Hearing Committee improperly used the ACAB judgment reducing his fees as evidence of overbilling. *Id.* at 2.

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[16] Respondent's reply brief refers to Volume I RX 83, *see* Resp. Reply Br. at 10, 20-21, which the Hearing Committee had stricken from the record because Respondent's counsel failed to file a copy that redacted personal identifying information despite repeated orders to do so. *See* Board

We are not persuaded by any of Respondent's defenses to the Rule 1.5(a) charge. Disciplinary Counsel's forensic accountant, Mr. O'Connell, identified evidence of double billing and numerous mistakes in the invoice provided to Mr. Laster, including at least $12,618.17 in overcharges attributable to Respondent alone. *See* FF 45. Disciplinary Counsel has met its burden of proving the Rule 1.5(a) charge.

D. Disciplinary Counsel Has Proven a Violation of Rule 1.5(e) (Limitations on Fee Splitting) by Clear and Convincing Evidence.

Rule 1.5(e) provides that:

> A division of a fee between lawyers who are not in the same firm may be made only if:
>
> > (1) The division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation.
> >
> > (2) The client is advised, in writing, of the identity of the lawyers who will participate in the representation, of the contemplated division of responsibility, and of the effect of the association of lawyers outside the firm on the fee to be charged;
> >
> > (3) The client gives informed consent to the arrangement; and
> >
> > (4) The total fee is reasonable.

Rule 19.8(g)(i). Before the Board, Respondent did not take exception to the Hearing Committee's ruling, or otherwise object to RX 83 having been excluded from the record of admitted exhibits. We agree that it was properly excluded, and, in any event, its consideration would have had no impact on our findings. In consideration of the foregoing and because it was never properly redacted, pursuant to the Board's authority under D.C. Bar R. XI § 17(d) and Board Rule 11.1, RX 83 has been included (under seal) in the record filed with the Court. *See infra* Part V.

In violation of subsection (2), Respondent's and Mr. Laster's written agreement included a paragraph that identified co-counsel Stewart but did not advise in writing the "contemplated division of responsibility" nor how the association would affect "the fee to be charged." In regard to the latter, Paragraph M of the written agreement did not state that Mr. Laster would be charged for both lawyers' fees when they were present at meetings (as was charged in invoice) or when they both worked on the same pleading. If anything, the language in Paragraph M misrepresented how Mr. Laster would be later charged:

> Client acknowledges that Counsel may associate other counsel at his discretion. *If associated counsel is retained no additional costs will be required of Client*. If client is 'prevailing plaintiff' in this action associate counsel will share in Counsel's recovery and not in Client's share of any recovery without Client's express written agreement. Counsel intends to associate Clifford G. Stewart, Esq. in this matter. As Mr. Stewart is not a member of the District of Columbia bar, Counsel will file a motion *pro hac vice* on behalf of Mr. Stewart for temporary admission in the D.C. Bar.

DX 4I at 119 (emphasis added).

We additionally agree with the Hearing Committee that the evidence is clear and convincing that Mr. Laster's informed consent was not obtained, contrary to subdivision (3) of Rule 1.5(e), because the poorly written agreement failed to adequately explain the fee-sharing arrangement or the division of responsibility. *See* HC Rpt. at 42.

Accordingly, the Rule 1.5(e) charge was proven by clear and convincing evidence.

E. Disciplinary Counsel Has Proven a Violation of Rule 8.4(c) (Dishonesty) by Clear and Convincing Evidence.

Rule 8.4(c) provides that it is professional misconduct for a lawyer to "[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Dishonesty is the most general category in Rule 8.4(c), defined as:

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

In re Shorter, 570 A.2d 760, 767-68 (D.C. 1990) (per curiam) (internal quotation marks and citation omitted); *see also In re Scanio*, 919 A.2d 1137, 1142-43 (D.C. 2007). Dishonesty in violation of Rule 8.4(c) does not require proof of deceptive or fraudulent intent. *See In re Romansky*, 825 A.2d 311, 315 (D.C. 2003). Thus, when the dishonest conduct is "obviously wrongful and intentionally done, the performing of the act itself is sufficient to show the requisite intent for a violation." *Id.* Conversely, "when the act itself is not of a kind that is clearly wrongful, or not intentional, [Disciplinary] Counsel has the additional burden of showing the requisite dishonest intent." *Id.* A violation of Rule 8.4(c) may also be established by sufficient proof of recklessness. *See id.* at 317. To prove recklessness, Disciplinary Counsel must prove by clear and convincing evidence that the respondent "consciously disregard[ed] the risk" created by his actions. *Id.*

The Hearing Committee found that Respondent charged Mr. Laster over $80,000 for "a handful of poorly drafted court filings and several months of supposed case workup and communications." HC Rpt. at 40; *see* FF 32-33, 36, 48-

51. Crediting Mr. O'Connell's testimony, the Hearing Committee found that Respondent overbilled at least $23,000 based on his finding of time charged for "duplicative work, erroneous billings, and false billing entries." HC Rpt. at 40 (citing FF 45). The Hearing Committee did not credit Respondent's explanations for his false billing entries and concluded that Respondent was dishonest "in generating and charging for false billing entries." HC Rpt. at 48.

Having reviewed the record and Mr. O'Connell's testimony, which the Committee credited, we find that Respondent engaged in dishonesty in his drafting and explanation of his Representation Agreement and in his billing for false, erroneous, and duplicative time entries. *See Romansky*, 825 A.2d at 317.[17]

F. Disciplinary Counsel Has Not Proven a Violation of Rule 8.4(d) (Serious Interference with the Administration of Justice).

In support of the Committee's finding of a Rule 8.4(d) violation, Disciplinary Counsel describes Respondent's *counsel's* conduct in producing only some documents in response to Disciplinary Counsel's October 2, 2015 subpoena and not responding to an October 12, 2017 letter from Disciplinary Counsel which identified

[17] Mr. Hanna testified that the Representation Agreement did not meet the standard of care because it is "a very convoluted, internally inconsistent representation agreement." Tr. 353. In regard to the actual bills submitted by Respondent and Mr. Stewart to Mr. Laster, Mr. Hanna testified that it was his opinion that the bills fell below the standard of care because of (1) the increments of time seem to be mostly .5 and one-hour increments, and (2) the explanations for the billed time were general, such as "review e-mail." As discussed above, we do not believe Mr. Hanna's testimony adequately described a standard of care related to the pleadings that were filed; we similarly do not find that he adequately described a standard of care for billing practices, but that does not affect our finding that the violations of Rules 1.5(a) and 8.4(c) were proven, as there is sufficient evidence in the record beyond Mr. Hanna's testimony.

"specific deficiencies in the earlier document production." ODC Br. at 17-18. Disciplinary Counsel emphasizes that the supplementation to the production of documents in compliance with the subpoena was not made until February 4, 2019, in a pre-hearing exhibit submission, and then again on May 13, 2019, the last day of the hearing. *Id.* at 18.[18] As described by Disciplinary Counsel: "Mr. Bailey, through his counsel, filed 'additional voluminous exhibits' and 'belatedly produced over 1,000 pages of records.'" *Id.* (quoting FF 54, 57).

During the hearing, Disciplinary Counsel objected to Respondent's late submission of Mr. Stewart's time log because it was not produced earlier even though the time log was responsive to Disciplinary Counsel's earlier subpoena. *See* Tr. 637, 897-98. Respondent testified that he had not personally reviewed nor read the subpoena but, on Disciplinary Counsel's request, he would review it to ensure that the record was not missing any other relevant documents that needed to be produced. Tr. 736, 740. Co-counsel Stewart stated he provided his time log to Respondent's *counsel* in the latter half of 2018. Tr. 903-05. The record does not establish Respondent's knowledge of either Stewart's production to his counsel or his counsel's failure to timely forward the time log to Disciplinary Counsel.[19]

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[18] Here, the Specification alleged that "[i]n response to Disciplinary Counsel's inquiries and subpoenas, Respondent has produced no contemporaneous time records documenting the hours he and co-counsel claimed to have worked." Specification, ¶ 40.

[19] We are mindful of the fact that Respondent's counsel repeatedly filed pleadings late in these disciplinary proceedings, despite the Hearing Committee and Board granting him numerous extensions of time. We do not impute Respondent's counsel's delays to Respondent.

Rule 8.4(d) provides that it is professional misconduct for a lawyer to "[e]ngage in conduct that seriously interferes with the administration of justice." Failure to respond to Disciplinary Counsel's inquiries constitutes a violation of Rule 8.4(d). Rule 8.4, cmt. [2]. Comment [2] to Rule 8.4 provides that conduct that "seriously interferes with the administration of justice" includes a lawyer's "failure to cooperate with Disciplinary Counsel; [or] failure to respond to Disciplinary Counsel's inquiries or subpoenas . . . ." However, Disciplinary Counsel did not establish that Respondent was responsible for or aware of the failure to completely respond to Disciplinary Counsel's inquiries or subpoenas.

In *In re Krame*, Board Docket No. 16-BD-014 (BPR July 31, 2019), *review pending*, D.C. App. No. 19-BG-0674, the Board held that a respondent is not responsible for false statements in an appellate brief that was drafted and filed by his appellate counsel. The Board concluded that statements in the brief were not the respondent's conduct and "[w]ithout evidence that Respondent read and endorsed the specific offending statements at a relevant time, Disciplinary Counsel did not prove by clear and convincing evidence that Respondent was responsible for false statements to the Court of Appeals." *Krame*, Board Docket No. 16-BD-014, at 37. Here, the evidence is similarly not clear and convincing that Respondent was aware of or endorsed his counsel's delayed production of documents.

Accordingly, we are compelled to disagree with the Committee's finding of a Rule 8.4(d) violation here. The Hearing Committee did not make a finding that the

late production of documents was due to Respondent's conduct and not that of his counsel. *See* HC Rpt. at 45.

IV. RECOMMENDED SANCTION

The Hearing Committee recommended a sanction of a one-year suspension with a fitness requirement and restitution to be determined upon any application for reinstatement. *See* HC Rpt. at 56 (citing *In re Omwenga*, 49 A.3d 1235, 1240 (D.C. 2012) (per curiam) (deferring estimation of restitution until respondent applies for reinstatement)).

Before the Board, Disciplinary Counsel does not take an exception to the Committee's recommended sanction. ODC Br. at 32. Respondent argues that no sanction is warranted because all the charges should be dismissed. *See* Resp. Supplement at 9; Resp. Reply Br. at 21.

A. Standard of Review

The sanction imposed in an attorney disciplinary matter is one that is necessary to protect the public and the courts, maintain the integrity of the legal profession, and deter the respondent and other attorneys from engaging in similar misconduct. *See, e.g.*, *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc); *In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013); *Cater*, 887 A.2d at 17. "In all cases, [the] purpose in imposing discipline is to serve the public and professional interests . . . rather than to visit punishment upon an attorney." *In re Reback* (*Reback II*), 513 A.2d 226, 231 (D.C. 1986) (en banc) (citations omitted); *see also In re Goffe*, 641 A.2d 458, 464 (D.C. 1994) (per curiam). The sanction also must not "foster a

tendency toward inconsistent dispositions for comparable conduct or . . . otherwise be unwarranted." D.C. Bar R. XI, § 9(h)(1); *see, e.g.*, *Hutchinson*, 534 A.2d at 923-24; *In re Berryman*, 764 A.2d 760, 766 (D.C. 2000).

In determining the appropriate sanction, the Court of Appeals considers a number of factors, including: (1) the seriousness of the conduct at issue; (2) the prejudice, if any, to the client which resulted from the conduct; (3) whether the conduct involved dishonesty; (4) the presence or absence of violations of other provisions of the disciplinary rules; (5) whether the attorney has a previous disciplinary history; (6) whether the attorney has acknowledged his wrongful conduct; and (7) circumstances in mitigation or aggravation. *See, e.g.*, *Martin*, 67 A.3d at 1053 (citing *In re Elgin*, 918 A.2d 362, 376 (D.C. 2007)). The Court also considers "'the moral fitness of the attorney' and 'the need to protect the public, the courts, and the legal profession . . . .'" *In re Rodriguez-Quesada*, 122 A.3d 913, 921 (D.C. 2015) (per curiam) (quoting *In re Howes*, 52 A.3d 1, 15 (D.C. 2012)). Although we do not find that the charged violations of Rules 1.1(a), 1.1(b) and 8.4(d) were proven by clear and convincing evidence, we recommend a one-year suspension as appropriate when considering comparable misconduct for violations of Rules 1.4(a), 1.4(b), 1.5(a), 1.5(e), and 8.4(c). We recommend the same length of suspension as the Hearing Committee because we believe the main thrust of the seriousness of the misconduct and prejudice to the client was Respondent's overbilling of thousands of dollars, his false billing entries, and his misleading terms in the Representation Agreement. Both of Respondent's violations of Rules 1.5(a)

and 8.4(c) were connected to Respondent's serious failure to advise Mr. Laster in writing how the fees and responsibilities would be divided with co-counsel in violation of Rule 1.5(e), and his failure to adequately explain the written terms in the confusing and convoluted Representation Agreement in violation of Rule 1.4(b).

We further find that Respondent's lack of remorse and prior discipline are significant aggravating factors that warrant the imposition of a lengthy suspension. Despite his fees being significantly reduced by ACAB, Respondent still contends that it was the successor law firm that engaged in billing misconduct; he has not acknowledged his misconduct in this matter despite obvious billing irregularities. Even disallowing the $23,518.17 in erroneous and duplicative charges estimated by Mr. O'Connell, the invoice sought $61,751,83 in fees and costs — well above the total of $28,800 that was ultimately found by the ACAB judgment. *See* DX 10; ODC Br. at 13. Respondent has three instances of prior discipline: a nine-month suspension related to having his client sign a promissory note without giving his client a reasonable opportunity to seek the advice of independent counsel in violation of Rule 1.8(a) and engaging in negligent misappropriation of disputed funds, *see In re Bailey*, 883 A.2d 106, 123 (D.C. 2005), and two Informal Admonitions related to violations of Rules 1.16(d) and 8.4(d), *see In re Bailey*, Bar Docket No. 2005-D136 (Letter of Informal Admonition Aug. 4, 2007); *In re Bailey*, Bar Docket No. 495-97 (Letter of Informal Admonition Feb. 6, 2004).

B. Comparable Cases

In looking at comparable cases, we find that a suspension in the range of nine months to two years would be appropriate. In *In re Bernstein*, 774 A.2d 309 (D.C. 2001) (nine-month suspension with restitution and CLE requirement for charging an unreasonable fee, commingling, failing to segregate client funds, and dishonest conduct), the Court found that the respondent's multiple rule violations, "in particular his dishonesty" and his "prior record of discipline, as well as his lack of remorse" warranted the imposition of a lengthy suspension. 774 A.2d at 317-18; *see also In re Carter*, 11 A.3d 1219, 1223-24 (D.C. 2011) (per curiam) (where the respondent had prior discipline, 18-month suspension with fitness and restitution for misconduct in three separate matters: lack of competence and diligence, failing to communicate with clients, failing to refund unearned fees, and engaging in dishonesty); *In re Ifill*, 878 A.2d 465, 470, 476 (D.C. 2005) (one-year suspension with restitution for failing to pursue client matter zealously, diligently, and promptly, failing to seek lawful objectives of client, failing to keep client reasonably informed, charging an unreasonable fee, making false statements to Disciplinary Counsel, and engaging in dishonest conduct). Respondent's misconduct in this matter is more serious than the misconduct in *Bernstein* and accordingly merits a greater sanction. On the other hand, his misconduct was not as egregious as that in *Carter*, which involved three separate matters and repeated Rule violations. This case is most similar to the misconduct in *Ifill*, in which a one-year suspension was imposed for the respondent's failure to keep his client informed about the status of her case; his

charging of an unreasonable fee — a fee which also was not explained in a written fee agreement; and his engaging in dishonesty toward his client. *Ifill*, 878 A.2d at 476.

C. The Record is Not Clear and Convincing that a Fitness Requirement is Warranted.

A fitness showing is a substantial undertaking. *Cater*, 887 A.2d at 20. Thus, in *Cater*, the Court held that "to justify requiring a suspended attorney to prove fitness as a condition of reinstatement, the record in the disciplinary proceeding must contain clear and convincing evidence that casts a serious doubt upon the attorney's continuing fitness to practice law." *Id.* at 6. Proof of a "serious doubt" involves "more than 'no confidence that a Respondent will not engage in similar conduct in the future.'" *In re Guberman*, 978 A.2d 200, 213 (D.C. 2009). It connotes "real skepticism, not just a lack of certainty." *Id.* (quoting *Cater*, 887 A.2d at 24).

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

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

Cater, 887 A.2d at 22.

In this matter, we do not believe that the five *Roundtree* factors, *see In re Roundtree*, 503 A.2d 1215, 1217 (D.C. 1985), support a fitness requirement; we also do not have a serious doubt of Respondent's continuing ability or fitness to practice law. In particular, the nature and circumstances of the misconduct at hand, while serious, do not suggest that Respondent lacks the qualifications and competence to practice law. The record, as a whole, does not give us a "real skepticism" about Respondent's fitness to practice law. *See, e.g.*, *In re Klayman*, 228 A.3d 713, 719 (D.C. 2020) (Court declining to impose a fitness requirement although recognizing the respondent's flagrant violation of Rule 1.9 on three occasions); *In re Askew*, 225 A.3d 388, 401 (D.C. 2020) (per curiam) (Court imposing a lengthy suspension without a fitness requirement despite the respondent's prior discipline and recurring failure to understand her duties as a court-appointed counsel). The one-year suspension is an appropriate response for Respondent's misconduct in this matter, and we do not have a serious concern about Respondent's ability to act ethically in the future, after that period of suspension has run. *See Cater*, 887 A.2d at 22.

D. Restitution

Mr. O'Connell identified $23,518,17 in duplicate or incorrect charges in Respondent's invoice for his and Mr. Stewart's fees. However, ACAB reduced the fees from $85,270 to $28,800, a reduction that more than offset the errors found by Mr. O'Connell. Because we do not make a finding that the representation was substandard (or not worth the $28,800), restitution is not warranted as part of the sanction in this matter. D.C. Bar Rule XI, § 3(b) empowers the Board to "require an

attorney to make restitution . . . to persons financially injured by the attorney's conduct . . . as a condition of probation or reinstatement." The Court of Appeals has interpreted the Rule restrictively, holding that disciplinary proceedings are an "inappropriate forum" for "reliance or expectation damages under contract doctrine or from reasonably foreseeable damages under tort doctrine," *see In re Robertson*, 612 A.2d 1236, 1239-1241 (D.C. 1992), and we see no reason to depart from that principle here.

V. CONCLUSION

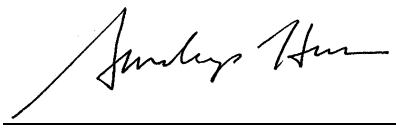
For the foregoing reasons, the Board recommends that the Court conclude that Disciplinary Counsel has proven by clear and convincing evidence that Respondent violated Rules 1.4(a), 1.4(b), 1.5(a), 1.5(e), and 8.4(c) and that Respondent should be sanctioned with a one-year suspension of his license to practice law.

We further recommend that Respondent's attention be directed to the requirements of D.C. Bar R. XI, § 14, and their effect on eligibility for reinstatement. *See* D.C. Bar R. XI, § 16(c).

Additionally, it appearing that good cause exists to support the issuance of a protective order pursuant to D.C. Bar Rule XI § 17(d) and Board Rule 11.1, *see supra* n. 15, it is hereby

ORDERED that the Office of the Executive Attorney is to place Volume I RX 83 under seal for inclusion in the record of this matter before the Court.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: 

Sundeep Hora

All Members of the Board concur in this Report and Recommendation.