THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Issued
March 11, 2020

In the Matter of:	:	
WAYNE R. ROHDE, ESQUIRE,	:	Board Docket No. 15-BD-107
	:	Bar Docket No. 2013-D336
Respondent.	:	
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 421213)	:	

REPORT AND RECOMMENDATION
OF THE BOARD ON PROFESSIONAL RESPONSIBILITY

Disciplinary Counsel charged that Respondent failed to disclose prior disciplinary proceedings when applying for admission *pro hac vice* in federal courts in Virginia and New York. After examining the facts surrounding each application, the Ad Hoc Hearing Committee found that Respondent had violated Virginia Rules 3.3(a)(1) and 8.4(c), but not any New York Rules, and recommended that he be publicly censured. Disciplinary Counsel took exception to the failure to find New York Rule violations, and argues that Respondent should be suspended for one year. Respondent does not contest the Hearing Committee's findings and recommendations. The Board agrees with the Hearing Committee's findings of fact, its conclusion that Respondent violated the Virginia Rules (although on narrower grounds), and its conclusion that Disciplinary Counsel did not prove that he violated the New York Rules. The Board agrees with the Hearing Committee's

* 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.

recommendation that Respondent be publicly censured by the D.C. Court of Appeals.

FINDINGS OF FACT

We adopt and incorporate the Hearing Committee's factual findings, which are supported by substantial evidence in the record. Those findings are summarized below.

A. *Respondent's Prior Disciplinary Matter*

The chronology of Respondent's prior disciplinary matter ("*Rohde I*") is relevant to these proceedings, and thus is set out in detail.

On August 10, 2005, Respondent pleaded guilty to felony hit and run in Virginia, following an October 20, 2004, automobile collision that occurred while he was "blacked out" after drinking. Hearing Committee Finding of Fact ("FF") 4. He notified the D.C. Court of Appeals of his conviction on October 18, 2005, and requested that the Court not suspend him pursuant to D.C. Bar R. XI, § 10 (interim suspension based on conviction of a serious crime). FF 6. Over Disciplinary Counsel's objection, the Court declined to suspend Respondent, and on March 16, 2006, it referred the case to the Board to determine whether Respondent had been convicted of a crime of moral turpitude. FF 7-8.

On July 27, 2006, the Board determined that Respondent had not been convicted of a crime of moral turpitude *per se*, and referred the case to a hearing committee. FF 9. Disciplinary Counsel filed charges against Respondent on December 19, 2006, and a hearing was held in December 2007 and January 2008.

FF 10-11. The Hearing Committee issued its report on January 16, 2015, recommending that the Court find that Respondent had committed a serious crime (but not a crime involving moral turpitude), and suspend him for two years (with fitness), but that the period of suspension and fitness requirement be stayed in favor of probation because Respondent proved that he was entitled to mitigation of sanction due to a disability (alcoholism) pursuant to *In re Kersey*, 520 A.2d 321 (D.C. 1987).[1] FF 13. On August 3, 2015, the Board agreed with the Hearing Committee's recommendation, as did the Court, on August 30, 2018. *In re Rohde (Rohde I)*, 191 A.3d 1124 (D.C. 2018); FF 13.

B. *The Conduct at Issue Here*

On June 27, 2013, because over five years had passed since the *Rohde I* hearing, that Hearing Committee requested that the parties provide an update to the evidence regarding Respondent's treatment and rehabilitation. FF 11. In connection with this update, Disciplinary Counsel learned that in 2010, Respondent had not disclosed the existence of *Rohde I* when he applied for admission *pro hac vice* in the U.S. District Courts for the Eastern District of Virginia and the Southern District of New York. FF 12, 19, 30.[2] Disciplinary Counsel argued in *Rohde I* that Respondent's alleged dishonesty bore negatively on his assertion that he had been substantially rehabilitated from alcoholism. FF 12. The Hearing Committee disagreed, finding

[1] The Hearing Committee report does not explain the reason for the regrettable delay in the issuance of the *Rohde I* Hearing Committee report, and neither Respondent nor Disciplinary Counsel argues that that delay is substantively relevant to the current matter.

[2] Section III below contains a detailed discussion of the *pro hac vice* applications.

that the evidence regarding the *pro hac vice* applications did not affect its conclusion that Respondent was credible, or that he had proven his rehabilitation from alcoholism by "overwhelming" evidence. *In re Rohde*, Board Docket No. D347-05, at 56 (HC Rpt. Jan. 16, 2015). The Board rejected Disciplinary Counsel's request for additional fact-finding arising out of the *pro hac vice* applications, finding a lack of relevance and uncontroverted proof of Respondent's sobriety. *In re Rohde*, Board Docket No. D347-05, at 32 (BPR Aug. 3, 2015). The Court "defer[red] to the Board's reasonable assessment of [this evidence's] significance." *Rohde I*, 191 A.3d at 1137.

C. *The Pro Hac Vice Applications*

1. *The DAMCO Litigation* – Respondent practiced law at Sher & Blackwell LLP from 1991 until September 2010, when it merged with Cozen O'Connor. FF 3, 14. Prior to joining Cozen O'Connor as a "Member" following the merger, Respondent had disclosed to the firm that there was a disciplinary proceeding pending against him. FF 15. Shortly after the merger, Marc Fink—Respondent's longtime colleague who had also moved from Sher & Blackwell to Cozen O'Connor—asked Respondent to enter his appearance on behalf of Damco USA, Inc., in litigation pending in the United States District Court for the Eastern District of Virginia (the "EDVA"). FF 17.

2. *The EDVA Application* – As neither Mr. Fink nor Respondent was admitted in the EDVA, Mr. Fink asked Kathryn Schellenger, Esquire, to move their admission *pro hac vice.* FF 19. When reviewing the application, Respondent noticed

that the "Personal Statement" section of the application required him to certify that he had "not been reprimanded in any court nor [had] there been any action in any court pertaining to [his] conduct or fitness as a member of the bar." FF 21. Respondent brought this to Mr. Fink's attention, telling him that "I'm not sure I can sign this application." FF 22. Mr. Fink, who was aware of the *Rohde I* proceedings, discussed the issue with Respondent for fifteen to twenty minutes, and concluded that Respondent did not need to disclose *Rohde I* because Respondent had not been reprimanded by any court, and there was no action in any court pertaining to Respondent's conduct (because *Rohde I* was then before a Hearing Committee and was not before the Court). FF 23-24.

When considering the EDVA application, Respondent did not have the prior proceedings in the Court of Appeals "in [his] mind"; as he testified, "five years later it just didn't occur to me," instead, "my focus was just on" the pending Hearing Committee proceeding, not "what the court had done before then." FF 25. Mr. Fink concurred, he "knew that there had been an action before the court, but [he] thought the court had simply referred the matter . . . to the Board for determination," and he advised Respondent to sign the Personal Statement. FF 24.

Ms. Schellenger finalized Respondent's application and met with him in person for him to review it for accuracy, and to confirm that he was comfortable signing it. FF 26. Respondent did not tell Ms. Schellenger about his criminal conviction or *Rohde I* before he signed the application. FF 26. Ms. Schellenger filed the application with the EDVA, affirming that Respondent possessed "all of the

qualifications required for admission," and that his "personal and professional character and standing are good." FF 27. Ms. Schellenger would not have filed the application had she known of Respondent's felony conviction or the pending disciplinary proceedings because she thought they were relevant to his "conduct or fitness as a member of the bar." FF 28. The court admitted Respondent *pro hac vice.* FF 29.

3. *The SDNY Application* – Shortly after Respondent was admitted to the EDVA *pro hac vice*, the Damco Litigation was transferred to the United States District Court for the Southern District of New York (the "SDNY"). FF 30. Because Respondent was not admitted in the SDNY, he asked David Loh, Esquire—a Cozen O'Connor lawyer in the firm's New York office—to sponsor his admission *pro hac vice.* FF 30. The SDNY application differed from the EDVA application in that Respondent was not required to sign it, and Mr. Loh, as Respondent's sponsor, was required to certify only that "[t]here are no pending disciplinary proceeding[s] against Wayne Rohde in any State or Federal court." FF 31. Unlike the EDVA application, the SDNY application did not call for the disclosure of past disciplinary proceedings. Mr. Loh supported Respondent's *pro hac vice* application with an affidavit averring, among other things, that he had "found Mr. Rohde to be a person of integrity and a skilled attorney." FF 31. Had Mr. Loh known of *Rohde I,* at most, he would have been prompted to consult with the firm's ethics counsel before

sponsoring Respondent's admission. FF 32. The SDNY admitted Respondent *pro hac vice*. FF 33.[3]

CONCLUSIONS OF LAW

A. Respondent Violated Virginia Rule 3.3(a)(1)[4]

Virginia Rule 3.3(a)(1), like its District of Columbia counterpart, provides that "[a] lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal."[5] The term "knowingly," "denotes actual knowledge of the fact in question," and "may be inferred from circumstances." Virginia Rules of Professional Conduct (Terminology). There was no dispute that Respondent had known, at least in 2005, that there were proceedings in the Court of Appeals. The Hearing Committee characterized the question before it as whether Disciplinary Counsel proved by clear and convincing evidence that Respondent "still possessed that knowledge in 2010, when he submitted the *pro hac vice* application." HC Rpt. at 27.

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[3] As discussed below, there is no evidence in the record that Respondent discussed the content of the SDNY application with Mr. Loh, as he had the EDVA application with Ms. Schellenger, that he knew the assertions that Mr. Loh would make on his behalf, or that he ever considered whether *Rohde I* must be disclosed to the SDNY.

[4] Pursuant to D.C. Rule of Professional Conduct 8.5(b)(1), the Hearing Committee applied the Virginia Rules of Professional Conduct to the conduct regarding the EDVA application and the New York State Rules of Professional Conduct to the SDNY application because each of those Rules apply in the relevant federal courts. *See* E.D. Va. Local Civ. R. 83.1(I); S.D.N.Y. Local Civ. R. 1.5(b)(5); D.C. Rule 8.5(b)(1) ("For conduct in connection with a matter pending before a tribunal, the rules to be applied shall be the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise.").

[5] The Court has recognized that Virginia Rule 3.3(a)(1) is one of several Virginia Rules that "are either identical to or not materially different from the corresponding District of Columbia rules." *In re Beattie*, 930 A.2d 972, 978 (D.C. 2007) (per curiam).

The Hearing Committee concluded that Respondent had actual knowledge of the 2005 Court proceeding, based on its conclusion that there is no way he could have forgotten such an important event in his professional life, especially after conducting the "reasonable inquiry" required of all lawyers before making representations to a court. In short, the Hearing Committee "inferred from the circumstances" that Respondent must have known about the 2005 court proceeding when he signed the EDVA *pro hac vice* application. HC Rpt. at 29.

However, the Hearing Committee report also finds very clearly that Respondent *did not* testify falsely when he testified that it "just didn't occur to" him to disclose the 2005 court proceeding. HC Rpt. at 30-31. Respondent's truthful testimony that it did not occur to him to disclose the 2005 court proceeding supports the conclusion that Respondent did not "knowingly" fail to disclose. The Hearing Committee's contrary conclusion suggests that the Hearing Committee may have concluded that Respondent violated Rule 3.3(a)(1) because he "should have known" that he was making a false statement, rather than finding that he "actually knew" that he was making a false statement, the state of mind required by Rule 3.3(a)(1)'s plain language. *Cf. In re Thomas-Edwards,* Board Docket No. 15-BD-030, at 13-14 (BPR July 25, 2019) (rejecting a Hearing Committee recommendation that the respondent violated Rule 3.3(a)(1) because she "should have known" that she was making a false statement on a federal court renewal application), *review pending*, D.C. App. No. 19-BG-659.

We cannot reconcile this apparent contradiction in the Hearing Committee report, and we need not do so, as neither party has taken exception to the Hearing Committee's finding that Respondent's failure to disclose the 2005 Court proceeding on the EDVA *pro hac vice* application was a knowing false statement to a tribunal in violation of Virginia Rule 3.3(a)(1). Thus, we adopt the Hearing Committee's conclusion, without adopting all of its reasoning.

B. Disciplinary Counsel Proved by Clear and Convincing Evidence that Respondent Violated Virginia Rule 8.4(c)

The Hearing Committee found that Respondent's failure to disclose *Rohde I* and his criminal conviction to Ms. Schellenger violated Virginia Rule 8.4(c), which provides that "[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law." The Hearing Committee based this conclusion on its finding that, given the time and attention Ms. Schellenger gave to the *pro hac vice* application, including her in-person meeting with Respondent to go over the form, he understood that she wanted to know about *Rohde I* and the criminal conviction before filing the motion, and that he intentionally failed to tell her because he did not want to create an obstacle to his *pro hac vice* admission. HC Rpt. at 34-37. Respondent does not take exception to the Hearing Committee's recommendation.

We agree with the Hearing Committee that Disciplinary Counsel proved by clear and convincing evidence that Respondent violated Virginia Rule 8.4(c) when

he deliberately failed to disclose his prior disciplinary and criminal history in an effort to mislead Ms. Schellenger to believe that there was no such history.

C. Disciplinary Counsel Failed to Prove by Clear and Convincing Evidence That Respondent Violated New York Rule 8.4(c).

Disciplinary Counsel argues that Respondent's failure to tell Mr. Loh that he was a convicted felon, or that disciplinary proceedings were pending against him in the D.C. Court of Appeals, violated New York Rule 8.4(c), because those omissions "fraudulently induced" Mr. Loh to falsely certify to the SDNY that "[t]here are no pending disciplinary proceeding[s] against WAYNE ROHDE in any state or federal court." ODC Br. to Board at 11-12. Respondent supports the Hearing Committee, arguing that the proceeding before Hearing Committee Three was not pending before a "court" because a Hearing Committee is not a "court." Respondent argues that even if the *Rohde I* proceedings were pending before a "court," Disciplinary Counsel did not prove that he violated New York Rule 8.4(c) because it did not prove that he acted with "venal intent." R. Br. to Board at 25-30.

Like its District of Columbia counterpart, New York Rule of Professional Conduct 8.4(c) prohibits a lawyer from "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation." As the Hearing Committee recognized, New York law is not entirely clear on the state of mind necessary to sustain a violation under Rule 8.4(c). In *In re Liu*, 664 F.3d 367, 372 & n.4 (2d Cir. 2011), the Second Circuit recognized that some New York courts find a violation of Rule 8.4(c)—or its predecessor, D.R. 1-102(A)(4)—when the respondent "knew or should have known" that the failure to make a disclosure would mislead, while others hold that

a Rule violation requires a showing of "venal intent," which has been defined as "scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations." *Peters v. Committee on Grievances for U.S. Dist. Court for S. Dist. of N.Y.*, 748 F.3d 456, 461 (2d Cir. 2014) (quoting *Matter of Altomerianos,* 559 N.Y.S.2d 712, 715 (N.Y. App. Div., 1st Dep't 1990) (per curiam)).

Respondent argues that Disciplinary Counsel must show "venal intent," and attempts to distinguish the contrary New York cases. R. Br. to Board at 29-30. Disciplinary Counsel seems to agree with Respondent that "venal intent" must be proven, but argues that conduct that was intended to deceive was "venal." *See, e.g.*, ODC Br. to Board at 12 (arguing that Respondent "fraudulently induced" Mr. Loh to assert that there were no pending disciplinary proceedings), 13 (arguing that Respondent "intended to conceal" information about *Rohde I* from Mr. Loh).

As discussed below, we find that *Rohde I* was pending in a "court" when Mr. Loh filed the SDNY application, but that Disciplinary Counsel failed to prove that Respondent understood that it was pending before a court, or that he withheld the information from Mr. Loh in order to mislead him, much less "fraudulently."

1. *Rohde I was Pending in a "Court"* – As both parties note, the Hearing Committee declined to determine whether *Rohde I* was pending before a "court" when Mr. Loh sponsored Respondent's SDNY *pro hac vice* application. *See* HC Rpt.

at 26 n.8.[6] Disciplinary Counsel argues that *Rohde I* was pending before a "court" because the Court of Appeals refers disciplinary matters to the Board and its Hearing Committees, similar to a reference to a special master. ODC Br. to Board at 12. Respondent relies on *In re Battle*, Board Docket No. 15-BD-061 (BPR Apr. 21, 2017), appended Hearing Committee Report at 17-18, which concluded that a Hearing Committee Chair's order is not a "court" order for purposes of D.C. Rule 1.6(e)(2)(A) because a Hearing Committee is not a court.[7] Respondent's reliance on *Battle* is unavailing because Respondent misperceives Disciplinary Counsel's argument. Disciplinary Counsel does not argue that a "hearing committee" is the same as a "court" for purposes of the New York application. Instead, it argues that *Rohde I* was pending before a "court" when it was pending before Hearing Committee Number Three because the hearing committee proceedings were part of the disciplinary proceedings against Respondent that were still pending in the Court of Appeals. Other than his misplaced reliance on *Battle*, Respondent does not argue that *Rohde I* was not before a court at the relevant time.

As discussed below, we agree with Disciplinary Counsel that *Rohde I* was pending before the Court of Appeals when Mr. Loh sought Respondent's *pro hac*

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[6] The Hearing Committee distinguished between the proceeding that had been pending directly in the Court of Appeals and that pending before Hearing Committee Number Three. As discussed herein, we find that the proceedings before Hearing Committee Number Three were a part of the proceeding still pending in the Court of Appeals.

[7] D.C. Rule 1.6(e)(2)(A) provides that "A lawyer may use or reveal client confidences or secrets . . . when permitted by these Rules or required by law or court order." The Court did not consider *Battle* because neither party took exception to the Board's Order reprimanding the respondent.

vice admission in New York because the hearing before Hearing Committee Number Three was a part of the Court's effort to determine the appropriate sanction to impose following Respondent's criminal conviction.

i. *Disciplinary Proceedings Following a Criminal Conviction* – An attorney's conviction of a "serious crime"[8] "triggers a formal proceeding in which the sole issue to be determined shall be the nature of the final discipline to be imposed" for the criminal conduct. *In re Allen*, 27 A.3d 1178, 1183 (D.C. 2011). Pursuant to D.C. Code § 11-2503(a), an attorney who has been convicted of a crime of moral turpitude shall be disbarred. *Id.* Thus, the Court must determine whether the respondent has been convicted of a crime that involves moral turpitude, and if not, to determine the appropriate sanction for the respondent's "serious crime."

To make that determination, the Court refers the matter to the Board to consider whether the crime "inherently involves moral turpitude—that is, moral turpitude *per se*." *Id.* If so, the Board recommends that the Court disbar the respondent. *See, e.g.*, *In re Torres*, 221 A.3d 101 (D.C. 2019) (per curiam). If the crime does not involve moral turpitude *per se* the matter is referred to a Hearing Committee to determine whether the underlying conduct involved moral turpitude,

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[8] The definition of a "serious crime" includes

> (1) any felony, and (2) any other crime a necessary element of which, as determined by the statutory or common law definition of such crime, involves improper conduct as an attorney, interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a "serious crime."

D.C. Bar R. XI, § 10(b).

and to recommend the sanction to be imposed. *Allen*, 27 A.3d at 1183; *see also In re McBride*, 602 A.2d 626, 629 (D.C. 1992); *In re Colson*, 412 A.2d 1160, 1183 (D.C. 1979) (en banc) (Ferren, J., concurring) (recognizing that in the process described above, the Court "invite[s] the Board, as an arm of the court, to develop the record at a fair hearing and make a recommendation with respect to moral turpitude," and describing the Board's role as "indispensable" to the moral turpitude analysis.); D.C. Bar R. XI, § 10; *Rohde*, Board Docket No. D347-05, Bd. Rpt. at 31 (recognizing that the Board and its Hearing Committees act as an arm of the Court of Appeals in adjudicating disciplinary cases).

ii. *The Relevant Proceedings Following Respondent's Conviction – Rohde I* began when Respondent notified the Court of his conviction on October 18, 2005. Following litigation in the Court of Appeals as to whether Respondent should be suspended pursuant to D.C. Bar R. XI, § 10(c)[9], the Court ordered the Board to

> [I]nstitute a formal proceeding to determine the nature of the final discipline to be imposed and to review the elements of the statute of which respondent was convicted to determine whether his conviction involved moral turpitude *per se* or on its facts.

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[9] D.C. Bar R. XI, § 10(c) provides

> *Action by the Court*—Serious crimes. Upon the filing with this Court of a certified copy of the record or docket entry demonstrating that an attorney has been found guilty of a serious crime or has pleaded guilty or *nolo contendere* to a charge of serious crime, the Court shall enter an order immediately suspending the attorney, notwithstanding the pendency of an appeal, if any, pending final disposition of a disciplinary proceeding to be commenced promptly by the Board. Upon good cause shown, the Court may set aside such order of suspension when it appears in the interest of justice to do so.

Rohde, Board Docket No. D347-05, HC Rpt. at 4. This did not terminate *Rohde I* in the Court of Appeals, but rather sent the case to the Board for a recommended disposition.

On July 27, 2006, the Board determined that Respondent's crime did not involve moral turpitude *per se*, and referred the case to a hearing committee to determine whether Respondent's crime involved moral turpitude on the facts, and to recommend the sanction for his criminal conviction.[10] *Id.* This matter thus followed the process described above, and the Board and Hearing Committee Number Three acted as arms of the Court of Appeals, to develop the factual record and to make a recommendation with respect to moral turpitude and sanction. Because *Rohde I* was pending before Hearing Committee Number Three when Respondent asked Mr. Loh to seek his *pro hac vice* admission, *Rohde I* was pending before a "court," the District of Columbia Court of Appeals.

2. *Disciplinary Counsel Failed to Prove that Respondent Misled Mr. Loh* – Disciplinary Counsel has failed to present clear and convincing evidence that Respondent failed to disclose the existence of *Rohde I* or his felony conviction in an effort to mislead or defraud Mr. Loh.

Importantly, unlike the EDVA *pro hac vice* application, there is very little evidence regarding the preparation of the SDNY application. In fact, Disciplinary Counsel proved only that Respondent asked Mr. Loh to seek his admission *pro hac*

[10] This order also permitted Disciplinary Counsel to charge additional violations of the D.C. Rules of Professional Conduct, if such charges were warranted.

vice, that Mr. Loh did so making the assertions discussed above, that Respondent did not tell Mr. Loh about *Rohde I* or his criminal conviction, and that Mr. Loh would have consulted with internal ethics counsel had he known about either. FF 30-33. There is no evidence that Respondent and Mr. Loh had any substantive conversations regarding the *pro hac vice* application, that Respondent saw a draft of the application, or that he otherwise knew what representations Mr. Loh would make regarding Respondent.[11] Although Respondent did not inform Mr. Loh about *Rohde I* or his criminal conviction, there is no evidence that Respondent was aware that Mr. Loh needed such information in order to apply for Respondent's *pro hac vice* admission, as such information was not required by the SDNY application.

Even if Respondent had been aware of Mr. Loh's assertion that "[t]here are no pending disciplinary proceeding[s] against WAYNE ROHDE in any state or federal court," Disciplinary Counsel has not proven by clear and convincing evidence that Respondent failed to tell Mr. Loh about *Rohde I* in an effort to mislead him.

Disciplinary Counsel makes much of the fact that the legend on the first page of every document filed in *Rohde I* identified the "DISTRICT OF COLUMBIA COURT OF APPEALS." ODC Br. to Board at 12. This supports, but does not require, the conclusion that the matter appearing under that legend was "pending" in the Court of Appeals. As discussed above, we find that as a practical matter *Rohde I*

[11] While one might be tempted to infer that such communications must have happened, there is no clear and convincing evidence to support such an inference.

was pending before the Court of Appeals at the relevant time, but there is no evidence that Respondent understood that to be the case. Indeed, both he and Mr. Fink testified that they thought that the Court action had ended, and the matter was then before a Hearing Committee. *See* FF 24-25. While we conclude that they were incorrect, they were not obviously so.

Disciplinary Counsel argues in its reply that

> There is no conceivable reason why an honest lawyer would not have made these disclosures to Mr. Loh. Indeed, to the extent the Southern District's required certification contains any ambiguity, an honest lawyer would have made the disclosure out of an abundance of caution.

ODC Reply Br. to Board at 4. We disagree. An honest lawyer may have understood, incorrectly in our view, that the proceedings before the Court of Appeals ended with the referral order to the Board, and thus had seen no reason to disclose.

We find that Disciplinary Counsel failed to prove by clear and convincing evidence that Respondent violated New York Rule 8.4(c) because it failed to prove that Respondent did not tell Mr. Loh about *Rohde I* in an effort to mislead Mr. Loh or to fraudulently induce him to seek Respondent's *pro hac vice* admission in the SDNY.

RECOMMENDED SANCTION

Disciplinary Counsel argues that Respondent should be suspended for one year. ODC Br. to Board at 24. Respondent argues that the Board should adopt the Hearing Committee's recommendation of a public censure. R. Br. to Board at 6. We

agree with the Hearing Committee and recommend that the Court publicly censure Respondent.

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); *In re Cater*, 887 A.2d 1, 17 (D.C. 2005). "In all cases, [the] purpose in imposing discipline is to serve the public and professional interests . . . rather than to visit punishment upon an attorney." *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (en banc) (citations omitted); *see also In re Goffe*, 641 A.2d 458, 464 (D.C. 1994) (per curiam).

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

A.3d at 1053 (citing *In re Elgin*, 918 A.2d 362, 376 (D.C. 2007)). The Court also considers "'the moral fitness of the attorney' and 'the need to protect the public, the courts, and the legal profession . . . .'" *In re Rodriguez-Quesada*, 122 A.3d 913, 921 (D.C. 2015) (per curiam) (quoting *In re Howes*, 52 A.3d 1, 15 (D.C. 2012)).

B. Application of the Sanction Factors

1. The Seriousness of the Misconduct

The Hearing Committee correctly recognized that "[a]ttorney dishonesty is always serious, and dishonesty to a tribunal even more so." HC Rpt. at 43. However, Respondent's dishonesty was isolated in that it was limited to the EDVA *pro hac vice* application and failure to disclose to Ms. Schellenger, was not part of a larger scheme, and was not for personal gain. Thus, Respondent's misconduct is not as egregious as that present in other cases.

2. Prejudice to the Client

No client was prejudiced by Respondent's misconduct.

3. Dishonesty

Respondent's conduct involved dishonesty to the Court and to Ms. Schellenger. Respondent (and Mr. Fink) did not sufficiently analyze the full scope of the proceedings involved in *Rohde I*, and thus Respondent provided inaccurate information to the EDVA and withheld information from Ms. Schellenger. Lawyers in Respondent's circumstance must exercise the utmost care to make certain that their statements on admission applications are entirely correct, which Respondent failed to do. As discussed above, Respondent misled Ms. Schellenger by failing to

disclose *Rohde I* to her because it was clear that she would have wanted to know about it, whether or not it was strictly required by the EDVA *pro hac vice* form. However, Respondent withheld only information that he and Mr. Fink erroneously concluded did not have to be disclosed to the EDVA.

We disagree with Disciplinary Counsel that Respondent's consultation with Mr. Fink shows that Respondent knew that he could not honestly sign the EDVA application. Instead, we find that it reflected a laudable effort to get another opinion as to the disclosures required by the EDVA application. Although Respondent and Mr. Fink reached the wrong conclusion, such consultations should be encouraged, not considered inculpatory. Disciplinary Counsel did not present any evidence that Respondent's consultation with Mr. Fink was a pretext, or anything other than a good-faith effort to deal with Respondent's difficult situation in order to accurately prepare the EDVA application. That this effort failed is not aggravating.

4. Violations of Other Disciplinary Rules

Respondent violated no other Rules.

5. Previous Disciplinary History

Although Respondent has a previous disciplinary history, the Hearing Committee did not consider it in aggravation of sanction because (1) Respondent proved that he was entitled to *Kersey* mitigation in *Rohde I* and (2) "Respondent's prior misconduct was completely different from the misconduct Respondent committed in this matter." HC Rpt. at 46. As is fully discussed in *Rohde I*, Respondent established (1) by clear and convincing evidence that he "suffered from

an alcoholism-related impairment at the time he left the scene of the Virginia accident"; (2) by a preponderance of the evidence that his alcoholism "substantially caused him to engage in that misconduct"; and (3) by clear and convincing evidence that is was "substantially rehabilitated from the effects of the alcoholism." *Rohde I*, 191 A.3d at 1136-38. The *Rohde I* Court imposed a stayed suspension (with probation) because "an attorney who engaged in misconduct as a result of a disability but who no longer poses that danger to the public should not be punished 'simply for punishment's sake.'" *Id.* at 1137-38 (quoting *In re Appler*, 669 A.2d 731, 740 (D.C. 1995)). Thus, the Hearing Committee determined that to aggravate the sanction here for the conduct in *Rohde I* would be to impose a sanction that the Board and the Court found was inappropriate under *Kersey*. HC Rpt. at 46.

Disciplinary Counsel argues that the conduct at issue in *Rohde I* should be considered an aggravating factor here because Respondent engaged in dishonesty here and in *Rohde I*. ODC Br. to Board at 17-18. This argument rests entirely on the fact that in *Rohde I*, Respondent violated Rule 8.4(b), which prohibits a lawyer from committing "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." *Rohde I*, 191 A.3d at 1135 & n.26.

Disciplinary Counsel attempts to equate the misconduct in *Rohde I* with that here by arguing that, following the accident at issue in *Rohde I*, "Mr. Rohde fled the scene of his crime in order to avoid detection and criminal prosecution; a crime that reflects adversely on his honesty and trustworthiness." ODC Br. to Board at 17.

Building on that predicate, Disciplinary Counsel then argues that "[l]ike the Court in *Rohde I*, the Committee in this matter found that Mr. Rohde's misconduct here also reflects adversely on his honesty and trustworthiness." ODC Br. to Board at 17; *see* ODC Reply Br. to Board at 5. These arguments ignore contrary factual findings in *Rohde I*, and overstate the scope of the Rule 8.4(b) violation in *Rohde I*.

As Respondent points out, the *Rohde I* Hearing Committee explicitly rejected the notion that Respondent left the scene of the accident in order to avoid detection, finding instead that due to his alcoholic blackout, he did not understand what had happened:

> The Hearing Committee thus finds that Respondent's actions, considered as a whole, show that he maintained awareness of the collision for only seconds, left the scene not realizing what he had done, and thereafter conducted himself in a way that showed he had no memory of the event. Thus, the evidence supports [an expert's] opinion that Respondent's actions following the collision were not a deliberate effort to elude the authorities or escape responsibility.

Rohde, Board Docket No. D347-05, HC Rpt. at 30-31; *see also id.* at 30 (finding that Respondent was not "consciously aware of the collision" and did not leave the scene and drive home in a "deliberate effort to conceal his involvement").

The *Rohde I* Court cited this factual finding, in concluding that Disciplinary Counsel had failed to prove that Respondent's criminal conduct involved moral turpitude on the facts:

> [T]he Board correctly focused the moral-turpitude-on-the-facts inquiry on Mr. Rohde's mental state when he committed the crime of leaving the scene of an accident and "the testimony of [Mr. Rohde] and the experts" on that subject. That mental state did not manifest moral turpitude. The Board adopted the Hearing Committee's finding that *Mr.*

> *Rohde did not consciously shirk his obligations under Va. Code § 46.2-894 and knowingly drive away from an accident where the other driver had been hurt; instead he was in an alcoholic blackout and unable to conform his conduct to statutory obligations or societal norms.*

Rohde I, 191 A.3d at 1132-33 (emphasis added). The emphasized language shows that *Rohde I* concluded that Respondent did not knowingly leave the scene of the accident, and thus, there is no factual predicate to support Disciplinary Counsel's contention that Respondent's criminal conduct—leaving the scene of the accident—reflected adversely on his honesty or trustworthiness.

Finally, although the *Rohde I* Court found that Respondent violated Rule 8.4(b), in summarizing the Board's recommendation, the Court wrote that Respondent "violated Rule 8.4(b) of the Rules of Professional Conduct by committing 'a criminal act that reflects adversely on [his] . . . fitness as a lawyer." *Rohde I*, 191 A.3d at 1126 (alterations in original). The Court's omission of the words "honesty" and "trustworthiness" from scope of Respondent's Rule 8.4(b) violation does not support Disciplinary Counsel's current contention that the *Rohde I* Court found that his criminal conduct reflected adversely on his honesty or trustworthiness. Similarly, the *Rohde I* Board and Hearing Committee did not cite a lack of honesty or trustworthiness in their Rule 8.4(b) discussions. Instead, they concluded that "[i]n the context of his history of alcohol abuse and drunk driving, Respondent's hit and run fits within a pattern of indifference to legal obligation, and reflects adversely upon his fitness as an attorney." *Rohde*, Board Docket No. D347-05, HC Rpt. at 42; *accord Rohde*, Board Docket No. D347-05, Bd. Rpt. at 22. Thus,

we agree with the Hearing Committee that the criminal conduct at issue in *Rohde I* should not be considered an aggravating factor in determining the sanction here.[12]

6. Acknowledgement of Wrongful Conduct

Respondent has never contested the underlying facts, and has only argued that he lacked the intent to mislead the courts or his colleagues. Before the Board, he does not contest the Hearing Committee's recommendation regarding the EDVA misconduct or the sanction.

7. Other Circumstances in Aggravation and Mitigation

There are no other circumstances in aggravation of sanction. In mitigation of sanction, Respondent presented witnesses attesting to his high level of integrity and character.

C. Sanctions Imposed for Comparable Misconduct

Neither party cites any directly comparable cases, as might be expected given the relatively narrow scope of this case. Disciplinary Counsel cites several cases involving false statements in bar admission applications, with sanctions ranging

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[12] Disciplinary Counsel argues that the *Rohde I* Court "warned [Respondent] not to engage in further misconduct, especially misconduct that reflects adversely on his 'honesty' and 'trustworthiness.' Regardless of that warning, Mr. Rohde misled his colleagues, the Eastern District of Virginia and the Southern District of New York." ODC Reply Br. to Board at 6. This incorrectly characterizes *Rohde I.* Although *Rohde I* makes clear that Respondent would have been suspended for two years (with fitness) absent *Kersey* mitigation, and that one of the conditions of his probation is that he not commit any other Rule violations, it did not specifically warn against future conduct involving dishonesty or a lack of trustworthiness. *See Rohde I*, 191 A.3d at 1138. Moreover, *Rohde I* was issued on August 30, 2018, and the misconduct at issue here occurred in 2010, and thus it is impossible that Respondent disregarded the Court's warning when committing the misconduct at issue here. Thus, the facts of this case cannot conceivably support the notion that Respondent's sanction should be increased because he ignored the Court's specific warning to avoid the very misconduct at issue here.

from a nine-month suspension to disbarment. Disciplinary Counsel seems to concede that the isolated misconduct here, in connection with a *pro hac vice* application for admission to practice in a discrete matter, warrants a lesser sanction than cases involving unrestricted admission to a court. ODC Br. to Board at 19-23.

Disciplinary Counsel argues that the misconduct in *In re Small*, 760 A.2d 612 (D.C. 2000) (per curiam), is the most comparable to that found here. When Small applied to join the D.C. Bar, he correctly answered "no" when asked on his admissions questionnaire "[h]ave you ever been cited, arrested, charged or convicted for a violation of any law (except minor traffic violations)?" While his application was pending, Small was the driver in an accident that resulted in the death of his passenger. Small did not disclose his involvement in the accident, even though the Admissions Committee had informed Small that he was obligated to inform it "of any change in address, employment, or any other circumstances (*e.g.*, bar admissions, disciplinary matters, civil and criminal litigation, credit problems, etc.)," and even though a Supplemental Questionnaire he completed on the day of his admission asked if he had "been convicted of or pled guilty or no contest to a felony, or to a misdemeanor charge, other than a minor traffic charge?" The Court held that Small's failure to disclose the "significant changes in his status after the fatal collision" violated Rule 8.1(b) because he should have known that his responses were likely to mislead the Admissions Committee, even though he had not been criminally charged prior to his admission to the Bar. *Id.* at 613-14. The Court held

that Small also violated Rule 8.4(b), and noted that he had been convicted of criminally negligent homicide arising out of the accident. *Id.* at 613.

The Court agreed with the Board that Small be suspended for three years with fitness for both Rule violations. *Id.* at 614. In making that recommendation, the Board relied on *In re Hoare*, 727 A.2d 316 (D.C. 1999) where a respondent had been suspended for two years for a vehicular homicide and driving while intoxicated. The Board recommended an additional year suspension for Small "because of [his] established pattern of scofflaw behavior"[13] and "his separate violation arising out of failure to disclose the status of the New York State criminal matter" to the Admissions Committee. *In re Small*, Bar Docket No. 11-94, at 9 (BPR Jan. 19, 2000). It is not clear how much of the additional one-year suspension was attributable to Small's "scofflaw behavior" and how much was attributable to his failure to update the Admissions Committee. In any event, *Small* would support the imposition of a period of suspension, although perhaps not a one-year suspension.

Respondent relies on two Informal Admonitions issued by Disciplinary Counsel to respondents who like Respondent here, failed to disclose prior discipline. In *In re Glaser*, when applying *pro hac vice* to appear before the Arizona Corporation Commission, the respondent failed to disclose a private admonition from the Colorado Bar and that he was the subject of an investigation by D.C. Disciplinary Counsel. Bar Docket Nos. 506-02 & 2003-D471 (Letter of Informal

[13] Small had been driving on a suspended license for two years and had five prior speeding violations over a number of years and a prior charge of driving while impaired which resulted in a disorderly conduct conviction. *In re Small*, Bar Docket No. 11-94, at 2 n.2, 7 (BPR Jan. 19, 2000).

Admonition Dec. 29, 2005). In *In re Balsamo*, the respondent had been previously suspended for thirty days for repeated failures to meet court deadlines and misrepresentations to the D.C. Circuit, yet he represented on a *pro hac vice* application filed in the Virgin Islands that the thirty-day suspension was "automatically" imposed when he was one day late in filing a brief. Bar Docket No. 2010-D433 (Letter of Informal Admonition July 13, 2011). The respondent in *Balsamo* failed to clarify his omission when questioned by the court in the Virgin Islands.

The Hearing Committee relied on *In re Hadzi-Antich*, 497 A.2d 1062 (D.C. 1985), where the respondent was publicly censured for fabricating various academic honors in support of his application for a teaching position. The Hearing Committee noted that Hadzi-Antich's false statements were complete fabrications that harmed others competing for the same teaching position, while Respondent's failure to disclose *Rohde I* had some basis in fact, albeit incorrect, and no one was harmed by Respondent's failure to disclose. HC Rpt. at 51-52.

We also consider *In re Austern*, 524 A.2d 680 (D.C. 1987), where the respondent was publicly censured for assisting his client in a fraud: failing to tell purchasers that a check the client purportedly used to fund an escrow account the respondent maintained was in fact, worthless. The Court noted that the respondent's conduct was not motivated by a desire for personal gain, that no one was harmed because the escrow account was funded before any purchaser called on those funds, and that his decision-making may have been affected by his animosity toward the

client and a desire to "bring the troubled attorney-client relationship to a speedy close." *Id.* at 684. Certainly Respondent's conduct here, which was not motivated by personal gain, and could not have resulted in injury to any third-party, is not as egregious as that in *Austern*.

Thus, *Small*, *Hadzi-Antich*, *Austern*, *Balsamo*, and *Glaser* suggest that the relevant sanction range is between an Informal Admonition and a short suspension (less than the one year sought by Disciplinary Counsel). We see no reason to disagree with the Hearing Committee's recommendation that the imposition of a public censure in this matter would constitute a sanction consistent with that imposed for comparable misconduct, and thus we recommend that the Court publicly censure Respondent.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: David Bernstein
David Bernstein

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