DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
WILLIAM N. ROGERS,	:	
	:	Board Docket No. 12-BD-012
Respondent.	:	Bar Docket No. 2003-D274
An Administratively Suspended Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 73221)	:	

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

I. Background

An Ad Hoc Hearing Committee found that Respondent violated Rules 4.2(a) (contact with a represented party) and 8.4(c) (dishonesty). It recommended that he be suspended for 90 days, and be required to prove his fitness to practice law as a condition of reinstatement.

Neither party filed an exception to the Hearing Committee report.

The Hearing Committee's Findings of Fact are supported by substantial evidence in the record, and there is clear and convincing evidence that Respondent's conduct violated Rules 4.2(a) and 8.4(c). The Board agrees with the recommendation of the Hearing Committee that Respondent be suspended for 90 days, and that he be required to prove his fitness to practice law as a condition of reinstatement.

II. Findings of Fact

As detailed by the Hearing Committee, the key facts are as follows:

Respondent William N. Rogers is a member of the Bar of the District of Columbia Court of Appeals. He was admitted by motion on April 23, 1970, and assigned Bar number 73221. He

is administratively suspended for non-payment of dues. HC Rpt. at 2, FF 1.[1]

In 1995, 82-year old Sally Jumper executed estate planning documents prepared by her attorney, Cassandra L. Kincaid. Those documents included powers of attorney appointing Allen Anderson, her long-time companion, to act on Ms. Jumper's behalf. The documents also established a trust, in which Mr. Anderson was to receive 40% of the residual trust funds. HC Rpt. at 2-3, FF 3-4.

In 2001, Ms. Jumper revised her estate plan, again with the assistance of her attorney, Ms. Kincaid. Mr. Anderson would no longer receive a 40% interest in the residual trust fund. Instead, the trustee would distribute funds to Mr. Anderson that the trustee, in its discretion, deemed necessary to provide for his support. Funds remaining after Mr. Anderson's death were to be distributed to charities. Col. Jan Verfurth, Ms. Jumper's financial adviser and friend, was designated as successor trustee to Ms. Jumper. HC Rpt. at 3-4, FF 5-6.

In 2002, Ms. Jumper, who was blind, lived in a continuing care facility in the District of Columbia. HC Rpt. at 2, FF 2. In May of that year, Mr. Anderson, who intensely disliked Col. Verfurth, hired Respondent to represent him in connection with matters relating to Ms. Jumper. Mr. Anderson contended that Col. Verfurth had not adequately disclosed information about Ms. Jumper's finances to him. HC Rpt. at 4, FF 7-9.

On June 28, 2002, Respondent filed a Petition in the Probate Division of the Superior Court seeking the appointment of Mr. Anderson as Ms. Jumper's guardian and conservator. The Petition asserted that Ms. Jumper lacked comprehension of her personal situation and that her property might be wasted or dissipated unless properly managed. HC Rpt. at 4, FF 8. Despite

[1] References to the Report and Recommendation of the Hearing Committee are designated "HC Rpt. at __," and references to the Findings of Fact made by the Hearing Committee are designated "FF __."

knowing of her role, Respondent did not advise the probate court that Ms. Kincaid was Ms. Jumper's estate planning attorney. Hence the probate court appointed an attorney to serve as Ms. Jumper's counsel during the guardianship proceeding. HC Rpt. at 7, FF 19-20.

On August 2, 2002, the probate court granted the Petition, finding Ms. Jumper to be "an adult whose ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that . . . she lacks the capacity to take actions necessary to . . . dispose of real and personal property." The probate court appointed Mr. Anderson to act as Ms. Jumper's guardian, and appointed another attorney to act as her conservator. HC Rpt. at 7, FF 20.

Several weeks later, after she learned from Ms. Kincaid about the 1995 and 2001 estate planning documents (which provided for the management of Ms. Jumper's affairs in the event of her incapacity), the conservator filed an emergency petition seeking to vacate her own appointment. HC Rpt. at 7-8, FF 21-22. However, because Mr. Anderson had questioned Ms. Jumper's mental capacity, the conservator also asked the probate court to determine the validity of the 1995 and 2001 estate plans. As a consequence, the probate court appointed an examiner to determine whether Ms. Jumper had the "capacity to make and communicate financial decisions and to manage her estate," and "whether she had the mental capacity to execute" her 2001 estate plan. HC Rpt. at 8-9, FF 24-25.

At a hearing on October 24, 2002, the examiner opined that Ms. Jumper was competent to make decisions regarding her estate. The probate court agreed, and Respondent conceded that the appointment of both the conservator and the guardian should be vacated. On October 30, 2002, the probate court issued an order to that effect. HC Rpt. at 12-13, FF 30-31.

Immediately thereafter, rather than appeal the probate court's ruling or otherwise seek reconsideration, Respondent and Mr. Anderson "embarked upon a course of conduct designed to have Ms. Jumper revoke the 2001 estate planning documents without the knowledge of her attorney, Ms. Kincaid." HC Rpt. at 13, FF 33. Their scheme effectively disregarded the examiner's report and the court's ruling as to Ms. Jumper's capacity; rather, it was premised entirely upon the wholly unsubstantiated contention of Mr. Anderson that Ms. Jumper had been "taken advantage of" when she signed her 2001 estate plan. HC Rpt. at 13-14, FF 33-43.

In furtherance of the plan, Respondent contemplated personal meetings among Ms. Jumper, Mr. Anderson and Respondent, which (despite the fact that Respondent well knew that Ms. Kincaid represented Ms. Jumper) were to be held without notice to, or consent of, Ms. Kincaid. HC Rpt. at 16-19, FF 39-41. Their objective was to convince Ms. Jumper to revoke the 2001 Will and Trust that Ms. Kincaid had prepared, and thereby to restore Mr. Anderson's earlier interest in the Jumper estate.[2] HC Rpt. at 14, FF 34.

Respondent did not notify Ms. Kincaid of his intention to meet with Ms. Jumper, and did not obtain Ms. Kincaid's permission to do so. HC Rpt. at 14-15, FF 36. Thus on November 9, 2002, Mr. Anderson, at Respondent's instigation, visited Ms. Jumper at her nursing home, and attempted, in a misleading way, to secure Ms. Jumper's agreement that she was not represented by Ms. Kincaid.[3] HC Rpt. at 16-17, FF 39.

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[2] Respondent and Mr. Anderson focused their attention on the 1995 and 2001 estate planning documents. They were evidently unaware that Ms. Jumper, who was understandably distraught by Mr. Anderson's filing of the guardianship Petition, had asked Ms. Kincaid again to revise her estate plan in order to remove Mr. Anderson as beneficiary. Ms. Jumper signed the revised documents on October 28, 2002, four days after the examiner testified. HC Rpt. at 13, FF 32.

[3] Mr. Anderson did not directly ask Ms. Jumper if she was represented by Cassandra Kincaid. Instead, he asked Ms. Jumper if Troxell Kincaid & Mullen was her law firm, to which she replied, "No, not that I know of." HC Rpt. at 13, FF 32.

Two weeks later, Mr. Anderson and Respondent both visited Ms. Jumper at the nursing home. Respondent's avowed purpose was to "revive" Ms. Jumper's 1995 estate planning documents, and to rescind the 2001 documents. Again, the dialogue concerning legal representation of Ms. Jumper was duplicitous: Mr. Anderson introduced Respondent to Ms. Jumper only as "an attorney practicing in the State of Maryland," not as his attorney. HC Rpt. at 17-18, FF 40. Although Respondent later mentioned that he was Mr. Anderson's attorney, he did not say whether he was acting as Ms. Jumper's attorney. Respondent presented Ms. Jumper with a document entitled "Statement of Sally Jumper" and, because she was blind, read the document to her, which she signed. The statement purported to revoke any documents related to Ms. Jumper's estate plan made after 1995, and to adopt the 1995 Trust, thus reinstating the 40% bequest to Mr. Anderson. HC Rpt. at 17-18, FF 40.

On February 1, 2003, Mr. Anderson and Respondent once more visited Ms. Jumper at the nursing home, again without notice to Ms. Kincaid. Mr. Anderson re-introduced Respondent, this time simply as an "attorney"; neither he nor Respondent specified whom Respondent represented. Once again, Respondent obtained Ms. Jumper's signature on an estate planning document. HC Rpt. at 18, FF 41.

A week later, on February 8, 2003, Mr. Anderson and Respondent both visited Ms. Jumper for a third time, again without telling Ms. Kincaid, and convinced Ms. Jumper to sign documents purporting to remove Col. Verfurth as trustee. HC Rpt. at 18-19, FF 42. The Hearing Committee, after assessing the hearing testimony and listening to the tape recordings Mr. Anderson had made of portions of the various meetings, concluded that Ms. Jumper did not understand what she had been asked at those meetings, and could have been persuaded to sign anything that was put before her, without understanding the significance of the documents.

Indeed, Respondent confirmed that assessment, stating that she "was barely competent to do anything," that he considered her to be "feeble minded in the extreme," and that he was "dubious about her mental capacity." HC Rpt. at 19-20, FF 43-46.

On May 30, 2003, Respondent petitioned for an award of attorneys' fees incurred in connection with the filing of the guardianship proceeding. In response, the conservator objected, and sought sanctions against Respondent and Mr. Anderson. HC Rpt. at 21, FF 47-48. The probate court imposed sanctions against Respondent for, among other reasons, initiating meetings with Ms. Jumper without informing Ms. Kincaid. *In re Jumper*, 984 A.2d 1232, 1245-46 (D.C. 2009).

Respondent appealed the sanctions award, and on December 10, 2009, the Court of Appeals (the "Court") affirmed (remanding for a determination of its amount). The Court found that Respondent had engaged in sanctionable conduct when he met with Ms. Jumper, whether or not she was represented by an attorney at the time. *Id*. at 1249-50.

The Court also directed that a copy of its opinion be forwarded to the Office of Bar Counsel, which filed a Specification of Charges in May 2012 alleging that Respondent violated the following Rules:

> a. Rule 4.2(a): Bar Counsel claimed that in the course of representing Mr. Anderson, he improperly communicated with Ms. Jumper without the consent of Ms. Kincaid;
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> b. Rule 1.7(b)(2): Bar Counsel claimed that in drafting testamentary documents for Ms. Jumper's signature, he acted as her attorney, and that his representation was likely to be adversely affected by his simultaneous representation of Mr. Anderson.[4]

[4] The Hearing Committee concluded that Bar Counsel did not clearly and convincingly prove that Respondent violated Rule 1.7(b)(2). It found that no attorney-client relationship existed between Respondent and Ms. Jumper because there was no writing establishing an attorney-client relationship; no evidence that Ms. Jumper asked Respondent to provide legal services to

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c. Rule 8.4(c): Bar Counsel claimed that Respondent dishonestly failed to seek the permission of Ms. Kincaid to speak with her client, and drafted testamentary documents for Ms. Jumper that favored his client's interests, despite claiming that Ms. Jumper lacked consistent lucidity or comprehension of her situation.

III. Conclusions of Law

At the time of Respondent's actions, Rule 4.2(a) provided that, while representing a client:

> a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party known to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.

Respondent knew that Ms. Jumper was represented by Ms. Kincaid in her estate planning matters. Despite that knowledge, and for the specific purpose of undoing the estate plan Ms. Kincaid had crafted, Respondent repeatedly and intentionally met with Ms. Jumper without Ms. Kincaid's knowledge or permission. His violation of Rule 4.2(a) was palpable.

Rule 8.4(c) provides that "it is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Dishonesty includes:

> 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) (quoting *Tucker v. Lower*, 434 P.2d 320, 324 (Kan. 1967)). Respondent's approaches to Ms. Jumper were clearly wrongful. Respondent was aware that Ms. Kincaid represented Ms. Jumper in estate planning matters, but

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her; no evidence that Ms. Jumper believed Respondent to be her attorney; and Respondent denied acting in that capacity. HC Rpt. at 29-32, FF 64-71. Bar Counsel has not excepted to that conclusion, and, for the reasons set forth in the Hearing Committee's report, we agree with it.

ignored that relationship. Instead, without any evidence to support it, Respondent embraced the suspicion of Mr. Anderson, who notoriously detested Col. Verfurth, that Ms. Kincaid secretly represented the interests of Col. Verfurth, not Ms. Jumper. Despite the fact that the guardianship litigation—commenced by Respondent himself—had resulted in a judicial determination that the 2001 estate planning documents prepared by Ms. Kincaid were valid, Respondent chose not to accept the probate court's ruling, or even to challenge it by appeal or motion for reconsideration. Instead, Respondent opted, surreptitiously and repeatedly, to meet with Ms. Kincaid's client in order to end-run the probate court's decision and persuade Ms. Jumper to disavow her estate plan, all to benefit his own client. Respondent's dishonesty was manifest, because he deliberately and systematically took advantage of a vulnerable, 89-year old blind woman, whose condition he himself assessed as "feeble-minded in the extreme." HC Rpt. at 33-34, FF 73. We agree with the Hearing Committee that Respondent's conduct was dishonest within the meaning of Rule 8.4(c).

IV. Recommended Sanction

In considering the appropriate sanction, the Hearing Committee rejected Bar Counsel's request for a six-month suspension with a fitness requirement, and concluded that a 90-day suspension, with a fitness requirement, was appropriate. Neither party excepted to that recommendation. As did the Hearing Committee, we have assessed the standard factors in determining the appropriate sanction, and endorse the Hearing Committee's well-reasoned determination.

The gravamen of Respondent's misconduct lies in his violation of Rule 4.2(a), and a 90-day suspension is in line with the limited precedent. *See In re Thompson*, 492 A.2d 866 (D.C. 1985) (90-day suspension for violation of Disciplinary Rule 7-104(A)(1) (predecessor to Rule

4.2(a)) coupled with other violations); *In re Roxborough*, 692 A.2d 1370 (D.C. 1997) (per curiam) (60-day suspension for violation of Rule 4.2(a) coupled with other violations); *In re Jones-Terrell*, 712 A.2d 496 (D.C. 1998) (60-day suspension for violation of Rule 4.2(a) coupled with other violations). In recommending a sanction at the upper end of these precedents, the Hearing Committee was particularly influenced by the dishonesty that inspired Respondent's misconduct, as are we.

We also agree that Respondent should be required to prove fitness as a condition of reinstatement. A fitness requirement is appropriate where clear and convincing evidence creates "serious concerns about whether the [respondent] will act ethically and competently in the future, after the period of suspension has run." *In re Cater*, 887 A.2d 1, 22 (D.C. 2005). An attorney's lack of remorse is a factor to be considered in this assessment. *See In re Guberman*, 978 A.2d 200, 211 (D.C. 2009). Despite the unequivocal denunciation of his misconduct by the Court, Respondent refused in this disciplinary proceeding to acknowledge his misconduct or its severity. Rather, he continues to insist that he did nothing wrong, contends that his conduct was "ethical" (HC Rpt. at 40-41, FF 89) and maintains that if he "had to do it over again, [he] would do essentially the same thing . . . ." Resp. Br. at 12, *see* HC Rpt. 40-41. We believe that his inflexibility in this respect, in light of his serious misconduct, mandates a fitness requirement. *See*, *e.g.*, *In re Bradley*, 70 A.3d 1189, 1196 (D.C. 2013) (per curiam) (fitness imposed where, *inter alia*, the respondent did not recognize the seriousness of her misconduct or take responsibility for her actions); *In re Vohra*, 68 A.3d 766, 789 (D.C. 2013) (appended Board Report) (same).

V. Conclusion

For the reasons stated in the Hearing Committee's report, which we adopt, incorporate and append hereto, the Board recommends that Respondent be suspended from the practice of

law for a period of 90 days and be required to prove fitness to practice law as a condition of reinstatement. For purposes of reinstatement, the period of Respondent's suspension should not begin to run until such time as he files an affidavit that fully complies with D.C. Bar R. XI, § 14(g). *See* D.C. Bar R. XI, § 16(c); *see also In re Slosberg*, 650 A.2d 1329, 1331-33 (D.C. 1994).

BOARD ON PROFESSIONAL RESPONSIBILITY

By: /RCB/
Robert C. Bernius

Dated: December 31, 2013

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

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

In the Matter of:	:	
WILLIAM N. ROGERS,	:	
	:	Board Docket No. 12-BD-012
Respondent.	:	Bar Docket No. 2003-D274
An Administratively Suspended Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 73221)	:	

REPORT AND RECOMMENDATION
OF THE AD HOC HEARING COMMITTEE

INTRODUCTION

This matter came on for a hearing before the Ad Hoc Hearing Committee pursuant to Rule XI of the District of Columbia Court of Appeals. Having heard the testimony of the witnesses at the hearing, reviewed the exhibits admitted into evidence, and considered the briefs and arguments of the parties, the Hearing Committee issues its Findings of Fact and Conclusions of Law as set forth below.

PROCEDURAL BACKGROUND

Bar Counsel served Respondent with its Specification of Charges on May 1, 2012. BX B, C.[1] Bar Counsel charged that Respondent violated D.C. Rules of Professional Conduct ("Rules") 1.7(b)(2), 4.2(a) and 8.4(c) when he met with Sally Jumper, an elderly woman, without the consent of her counsel, and when he prepared testamentary documents for Ms. Jumper that benefitted his client, Allen Anderson. Respondent answered on May 23, 2012. BX D. A pre-hearing conference was held before Wallace A. Christensen, Esquire, Chair of the Ad Hoc

[1] "BX" refers to Bar Counsel's Exhibits.

Hearing Committee, on June 22, 2012. The hearing was held on September 11, 2012, before Mr. Christensen; David Bernstein, Public Member; and Andrea L. Berlowe, Esquire, Attorney Member. Bar Counsel was represented by Assistant Bar Counsel Hamilton P. Fox, III, Esquire, and Office of Bar Counsel Senior Staff Attorney Joseph C. Perry, Esquire. Respondent appeared *pro se.*

Bar Counsel called the following witnesses: Respondent, Cassandra Kincaid, and Andrea Sloan. Respondent testified on his own behalf, and called no other witnesses. No written objections to any exhibits were submitted by either party, and the parties stipulated that all exhibits submitted to the Hearing Committee were admissible in evidence. Tr. 205:2-206:2.[2] As such, BX A-D and 1-30, and RX 1-12[3] were received in evidence.

FINDINGS OF FACT

A. Background

1. Respondent William N. Rogers is a member of the Bar of the District of Columbia Court of Appeals, having been admitted by motion on April 23, 1970 and subsequently assigned Bar number 73221. He is administratively suspended for non-payment of dues. BX A, B; Tr. 6.

2. In 2002, the time of the events in question, Sally Jumper was a blind, 89-year-old woman who lived in a continuing care facility in the District of Columbia.

B. Ms. Jumper's 1995 and 2001 Estate Planning Documents

3. In 1995, Ms. Jumper had executed estate planning documents in which she was represented by I. Mark Cohen and Cassandra L. Kincaid. Tr. 98:21-99:5. These documents

[2] "Tr." refers to the transcript of the September 11, 2012 hearing before the Hearing Committee.

[3] "RX" refers to Respondent's Exhibits.

included a Durable Medical Power of Attorney, which appointed Allen Anderson, a long-time companion, to act for Ms. Jumper in the event that she became incapacitated, and a Durable Limited Power of Attorney, which appointed Mr. Anderson as her attorney-in-fact to perform a number of tasks with respect to her finances. (A second Durable Medical Power of Attorney with essentially the same terms was executed in 1996.) BX 1.

4. The estate planning documents executed in 1995 also created the Sally A. Jumper Trust. BX 1A. Ms. Jumper was the initial trustee, and Mr. Cohen was designated as the successor trustee. *Id.* The 1995 Trust provided that upon Ms. Jumper's death, 40% of her residual trust fund was to be distributed to Mr. Anderson. *Id.* Ms. Kincaid prepared these documents for Ms. Jumper, under the supervision of Mr. Cohen. Tr. 99:9-12.

5. In 2001, Ms. Jumper revised her estate planning documents. Ms. Kincaid, who had left Mr. Cohen's firm and was then practicing at the law firm of Troxell Kincaid and Mullin, prepared the new estate planning documents for Ms. Jumper. Tr. 103:21-104:16. Ms. Jumper paid for Ms. Kincaid's services. Tr. 110:3-5. Ms. Kincaid considered Ms. Jumper an ongoing client of the firm, and testified that her services were never terminated by Ms. Jumper. Tr. 110:6-15.[4]

6. The 2001 Sally A. Jumper Trust provided that, at her death, instead of an outright distribution of the 40% residual trust fund to Mr. Anderson, the trustee instead was to pay and distribute to or for Mr. Anderson's benefit as much of the net income and principal as the trustee in its discretion deemed necessary to provide for Mr. Anderson's health, support, and maintenance. BX 3A. According to Ms. Kincaid, Ms. Jumper had become concerned about Mr. Anderson's interest in her money, and wanted to insure that any funds remaining after Mr.

[4] Respondent admitted that he understood that estate planning clients are considered to be ongoing clients even after their estate planning documents have been prepared. Tr. 242:1-19.

Anderson's death be distributed to certain charities. Tr. 105:19-106:5. Ms. Jumper continued to be the trustee of the 2001 Trust. *Id.* Col. Jan Verfurth, a financial adviser and friend of Ms. Jumper, was designated to act as successor trustee in place of Mr. Cohen. *Id.* Col. Verfurth also replaced Mr. Anderson as the attorney-in-fact in the Durable Limited Power of Attorney. BX 3B.

C. Respondent's May 2002 Petition to Appoint Mr. Anderson as Ms. Jumper's Guardian

7. In May 2002 Mr. Anderson hired Respondent, William N. Rogers, to represent him in connection with this matter. Mr. Anderson previously had attempted to obtain information about Ms. Jumper's finances from Col. Verfurth, without success. Tr. 7:9-8:15.[5] Respondent advised Mr. Anderson to file a petition in Probate Court asking that Mr. Anderson be appointed Ms. Jumper's guardian and conservator.

8. On June 28, 2002, Respondent filed in the Probate Division of the Superior Court a Petition in which Mr. Anderson sought to have himself appointed as Ms. Jumper's guardian and conservator. BX 5. The grounds alleged included that Ms. Jumper lacked consistent lucidity and comprehension of her situation and that her property might be wasted or dissipated unless it were properly managed. *Id.* Respondent did not speak with Ms. Jumper or Col. Verfurth, or otherwise seek to ascertain Ms. Jumper's views, before filing the Petition. Tr. 14:1-8.

9. At the time of the events in question, Mr. Anderson had a high degree of animosity towards Col. Verfurth, which he often expressed in strong language. *See In re Jumper*, 984 A.2d 1232 (D.C. 2009), BX 29; *see also* Tr. 185:5-186:7.

[5] Respondent acknowledged that Mr. Anderson had "no legal right" to obtain such information. Tr. 10:1-6.

10. In a blank in the Petition that asks about "[a]ny counsel to the subject known to petitioner," Respondent wrote "unknown (but almost certainly NONE)." BX 5, p. 92 (capitalization in original).

11. After the Petition was filed, the Probate Court appointed Sheryll Ellison to serve as Ms. Jumper's counsel during the guardianship proceeding. Ms. Jumper told Ms. Ellison that she was upset that the Petition was filed, and did not want Mr. Anderson appointed as her guardian. BX 27 at p. 291.

12. A hearing on the Petition was set for August 1, 2002.

13. Prior to the August 1, 2002, hearing, Ms. Kincaid contacted Ms. Ellison, and informed her that Ms. Jumper had executed estate planning documents prepared by Ms. Kincaid, which, among other things, designated whom she wished to act as her fiduciaries in the event that she became incapacitated. Tr. 110:16-111:22. Ms. Kincaid also advised Ms. Jumper that Mr. Anderson had initiated proceedings in Probate Court to have himself appointed as her guardian and conservator. Ms. Jumper was "extremely upset" when she learned this information. Tr. 111:12 – 112:5.

14. On July 31, 2002, Respondent placed a telephone call to Ms. Kincaid. There is conflicting evidence as to whether Ms. Kincaid told Respondent that she represented Ms. Jumper for estate planning purposes.

15. Ms. Kincaid testified that she told Respondent, in the telephone call, that she had represented Ms. Jumper for estate planning purposes, and that she continued to represent Ms. Jumper. Tr. 112:9-113:18; 114:11-19. This is corroborated by Ms. Kincaid's contemporaneous notes of the conversation. RX 12.

16. Respondent admitted that he called Ms. Kincaid the day before the August 1, 2002 hearing, and spoke with her for 20 minutes about Ms. Jumper's need for a guardian and a conservator. Tr. 26:7-27:8. He also said that Ms. Kincaid said she was bringing "documents" to the hearing, but he did not know if she said they were "estate planning" documents. *Id.* He initially testified that he "forgot" whether Ms. Kincaid told him that she represented Ms. Jumper for estate planning purposes (Tr. 25:17-20), and subsequently denied that she did. Tr. 26:7-17.

17. Based upon our consideration of the testimony and our assessment of the credibility of the witnesses, we find that Ms. Kincaid told Respondent on July 31, 2002 that she represented Ms. Jumper in connection with estate planning matters. At the same time, we do not believe the evidence supports a finding that Respondent testified falsely, because it appears that he knew, prior to speaking with Ms. Kincaid, that she represented Ms. Jumper in connection with estate planning matters. Specifically, he admitted receiving a copy of a report prepared by Ms. Ellison on July 31, prior to his call to Ms. Kincaid, which contained a letter from Ms. Kincaid stating that she represented Ms. Jumper in estate planning matters.[6] Indeed, it was his review of

[6] *See also In re Jumper*, 984 A.2d 1232, 1240 (D.C. 2009), BX 29 at 322 ("Mr. Rogers also has acknowledged that on the day before the hearing, he received from Ms. Ellison (Ms. Jumper's court-appointed counsel) a report that included a letter from Ms. Kincaid. Ms. Kincaid's letter advised that she had represented Ms. Jumper since 1995, and that she had prepared for Ms. Jumper a slew of documents, including a will, a trust, a revocable trust agreement, a durable limited power of attorney, a durable medical power of attorney, and an advance directive. Ms. Kincaid also wrote that over the years, Ms. Jumper had modified the initial estate-planning documents. Crucially, Ms. Kincaid wrote: 'At this time, all of the planning arrangements continue in effect. In the event that Miss Jumper is no longer able to handle her financial affairs or make her own medical decisions, appropriate arrangements have already been made, and individuals appointed, to address these matters on Miss Jumper's behalf.'") The Court's opinion is hearsay evidence as to these facts; however, hearsay evidence is admissible in disciplinary proceedings. *In re Shillaire*, 549 A.2d 336, 343 (D.C. 1988); *see also*, Board Rule 11.3 ("[e]vidence that is relevant, not privileged, and not merely cumulative shall be received, and the Hearing Committee shall determine the weight and significance to be accorded all items of evidence on which it relies."). We also note that Respondent did not object to the introduction of

the Ellison report that prompted Respondent to telephone Ms. Kincaid in the first place. Tr. 23:12-24:14. Thus, it appears that Respondent learned of Ms. Kincaid's role in this case prior to speaking with her on the telephone, and simply may not have remembered (as he initially testified) that she verified that on the telephone.

D. The August 1, 2002 Hearing

18. The hearing proceeded as scheduled on August 1, 2012.

19. Neither Respondent nor Ms. Ellison advised the Court of Ms. Kincaid's representation of Ms. Jumper. Ms. Kincaid was in the courtroom for the hearing, but she said nothing to the Court either. Tr. 137:10-139:9.

E. Events following the August 1, 2002 hearing

20. On August 2, 2002, Judge Jose Lopez issued an Order granting the Petition filed by Respondent on behalf of Mr. Anderson. Judge Lopez found that Ms. Jumper "is an adult whose ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that . . . she lacks the capacity to take actions necessary to . . . dispose of real and personal property. . . ." BX 7, p. 110. The Order appointed Mr. Anderson to act as Ms. Jumper's guardian and appointed Andrea Sloan, a member of the District of Columbia Bar, to act as her conservator. *Id.*

21. Several weeks after the hearing, Ms. Kincaid told Ms. Sloan (who had no prior involvement in the case) about the existence of the 1995 and 2001 estate planning documents, which set forth a specific plan for the management of Ms. Jumper's affairs in the event of her incapacity. Tr. 117:15-118:5. It was at this point that Respondent and Mr. Anderson learned, for

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any of Bar Counsel's exhibits, which included the Court's opinion in *In re Jumper*, as BX 29. *See* Tr. 205-06.

the first time, that Mr. Anderson was a beneficiary under the 1995 documents, and that the terms of the bequest to him had been modified in the 2001 documents. Tr. 9:6-22.

22. On September 10, 2002, Ms. Sloan filed an emergency petition to vacate her appointment as conservator (the "Emergency Petition"). BX 8. A copy of the Emergency Petition, and various documents constituting Ms. Jumper's 2001 estate plan, was served on Respondent. *Id.*

23. The Emergency Petition specified that Ms. Sloan had received the 2001 estate planning documents from Ms. Kincaid, "who had performed work for Ms. Jumper." *Id.* at p. 116. It also described a letter from Ms. Kincaid dated July 25, 2002 (attached as an exhibit to an earlier pleading) which identified a revocable living trust agreement and powers of attorney "prepared by Ms. Kincaid on behalf of Ms. Jumper." *Id.* at p. 117. Respondent testified that while he now understands that Ms. Kincaid had prepared these estate planning documents for Ms. Jumper, he "didn't think about it at the time." Tr. 45:2-46:6. Ms. Kincaid was added to the certificate of service for the Emergency Petition and all subsequent filings in the case. Tr. 42:1-20.

24. The Emergency Petition also noted that three letters authored by Mr. Anderson in February and March 2001 that discuss Ms. Jumper's "contemporaneous mental capacity" "give rise to questions regarding the validity of [the] documents executed in January 2001." BX 8 at p. 117-18. Accordingly, Ms. Sloan asked, among other things, for the following relief:

> 2. *Petitioner seeks a determination from this Court as to the validity of either the Sally A. Jumper Trust dated January 12, 2001 or the Sally A. Jumper Trust dated October 6, 1995* and a determination of which, if any, of the Powers of Attorney are valid.
>
> 3. If this Court finds that the Sally A. Jumper Trust, together with the Powers of Attorney executed by Sally Jumper on any given date are valid and the need for a Conservator is obviated,

> then Petitioner respectfully requests that this Court vacate the appointment of a Conservator pursuant to DC Code §21-2073 and determine the proper person to be a Successor Trustee for Sally Jumper.
>
> 4. In the alternative, should this Court find that a Conservator of the Estate of Sally A. Jumper is needed, Petitioner seeks a specific order appointing her as Successor Trustee of the Sally A. Jumper Trust pursuant to DC Code §21-2066, so that she may access the urgently needed funds for the care, and maintenance and support of Sally A. Jumper.

Id. (emphasis added).

25. Judge Lopez conducted a hearing on the Emergency Petition on September 24, 2002, which Respondent attended on behalf of Mr. Anderson. On September 30, 2002, Judge Lopez issued an Order (BX 9) noting that the parties jointly requested the appointment of an Examiner

> to address the issue of the onset and duration of Sally Jumper's dementia or other disability to make decisions regarding her person and the disposition of her estate. Specifically, the parties requested that the Examiner determine, if possible, whether or not Sally Jumper lacked the capacity in January and August of 2001 to execute the estate and trust documents.

Id. at pp. 122-23.

26. Judge Lopez issued a second Order on September 30, 2002, explaining the reasons for the appointment of an Examiner. BX 9 at pp. 126-27. The Court stated that:

> An Examiner is necessary for two reasons. First, the Court must learn if in her present condition the Subject has the capacity to make and communicate financial decisions and to manage her estate. In addition, Ms. Jumper executed certain documents in January 2001, which include a trust and a Power of Attorney. Accordingly, the Examiner is to review the Subject's medical records, consult with her attending physician and other individuals he may deem appropriate to determine whether she had the mental capacity to execute those documents at that time, this is the second reason why we need the Examiner.

Id. at p.126. The Court further noted that:

> The report of the Examiner is necessary because at this point Ms. Jumper has two sets of documents that comprise and [sic] estate plan. One set was drafted in 1995 and the other in 2001. The Guardian disputes the validity of the 2001 documents. However, they would not have any objection to stipulation to their validity if Ms. Sloan was appointed Successor Trustee to the Sally Jumper Trust.

Id. at p. 127.

27. Finally, the Court scheduled a hearing for October 24, 2002, to resolve the issues raised by the Emergency Petition. *Id.*

28. Prior to the October 24, 2002, hearing, it is clear that Respondent's client, Mr. Anderson, questioned the validity of the 2001 Trust and Will, and Col. Verfurth's purported role in it, as reflected in a series of emails authored by Mr. Anderson, which the Court quoted in *In re Jumper*:

> In a September 14, 2002 email, with the subject line of "Enough Already!", Mr. Anderson wrote to Mr. Rogers that he had become tempted to ask Mr. Rogers "about the wisdom (and possibility) of....petitioning the Court to permit [Mr. Anderson] to withdraw as Guardian for Sally Jumper and to name Andrea Sloan as both Conservator and Guardian." Mr. Anderson complained that he was "afraid" that Ms. Jumper had been taken advantage of "starting in 1995, at least" and that he was frustrated by the "sorry tale [of] duplicity, deceit, greed and behind the scenes machinations." Mr. Anderson wrote that he had "already told one person [Col. Verfurth] that while he is burning in Hell, [Mr. Anderson] want[ed] him to know he is there….for eternity." (Ellipsis in original.) Apparently feeling that the afterlife was not enough, Mr. Anderson wrote: "But he should also start to pay HERE, in this life," before signing off, enigmatically, "Shalom."
>
> On September 15, 2002, Mr. Anderson wrote that "[e]ven on the surface," the 2001 documents "smell." Mr. Anderson felt that Col. Verfurth and his family (whom Mr. Anderson blamed because they had witnessed some of Ms. Jumper's 2001 documents) had "railroad[ed] Sally Jumper" and that Col. Verfurth was "the SOB" who had the 2001 Trust altered against Mr. Anderson's interests.

> On September 16, 2002, Mr. Anderson wrote that he was suspicious of the 2001 documents and that those documents had to be "challenged, in court, and overturned." The e-mail went on: "But more than anything else, Verfurth simply HAS to be dealt with….he is a son of a bitch….for what he and his family did to Sally" (ellipses in original); indeed, Mr. Anderson felt that Col. Verfurth's conduct "border[ed]" on "the criminal." The solution, Mr. Anderson felt, was "to pick up some rocks and see what kind of Verfurth vermin has been crawling under them." Mr. Anderson concluded his e-mail: "Now, do you believe what I have been saying about him??"
>
> On September 21, 2002, Mr. Anderson wrote: "My little pea-sized brain thinks that THE way to go is to have the 2001 documents declared void….Sally's dementia started at least in 1999 and maybe far before." (Ellipsis in original.) Feeling that he had been "had" by Col. Verfurth, Mr. Anderson concluded: "If Sally Jumper's being manipulated and 'used' by all four (4) of the Verfurth's is not blatant enough fraud, then tell me what is…don't you lawyers have a favorite phrase….'res ipsa loquitur.'" (Ellipses in original.)
>
> On September 22, 2002, Mr. Anderson wondered whether there was "any real possibility that what Verfurth has so expertly done can be undone?" Mr. Anderson assured Mr. Rogers that he was "NOT motivated by [Col. Verfurth's] having effectively cut [Mr. Anderson] out of the provisions Sally had made" for Mr. Anderson. That said, Mr. Anderson wrote (to Mr. Rogers, with Ms. Sloan copied) that he could not stand being "bested" by Col. Verfurth – "he who deserves the worst." "The pusillanimous efforts of the THREE of us," Mr. Anderson wrote with an air of resignation, "have in no way been able to counter his malevolent….but successful….moves. Maybe the smartest thing we can do is fold our tents and slowly fade away….a la Douglas MacArthur." (Ellipses in original).

Jumper, 984 A.2d at 1241-42 (BX 29 at pp. 325-26).[7]

[7] The underlying emails themselves are not in evidence, and as such, the Court's opinion is hearsay evidence as to the content of the emails; however, hearsay evidence is admissible in disciplinary proceedings. *See* note 6, *supra*.

29. At no point prior to the October 24, 2002 hearing did Respondent petition the Court for discovery of any documents from Col. Verfurth or Ms. Kincaid. Nor did he seek to take depositions of any persons with knowledge of the validity of the 2001 Will or Trust, including Col. Verfurth or Linda Thompson.[8] Likewise, Respondent did not subpoena any of these witnesses to testify at the October 24, 2002 hearing in order to substantiate his client's concerns about the validity of the 2001 Will and Trust. *See* February 13, 2004 Order, BX 27 at p. 8, ¶ 20.

30. The hearing proceeded as scheduled on October 24, 2002. Respondent appeared as counsel for Mr. Anderson. BX 10 at p.131. At the hearing, the only witness called to testify was Dr. Sack,[9] the doctor appointed by the Court as the Examiner. Dr. Sack testified that, in his opinion, Ms. Jumper was competent to make decisions regarding her estate. He also testified that Ms. Jumper complained to him that she was being "controlled" by Mr. Anderson. *Id.* at p. 135:8-20. Respondent did not cross-examine Dr. Sack,[10] nor did he call any witnesses (including Mr. Anderson, who also was present at the hearing) or offer any evidence to support Mr. Anderson's previously expressed concern that the 2001 estate documents were "not valid." *Id.* at p. 137:8-138:10. At the conclusion of the hearing, Judge Lopez found that Ms. Jumper was competent when she signed the 2001 estate planning documents. Tr. 50:5-10. Respondent advised the Court that he was "in agreement" with Ms. Sloan's statement that "there's clearly a

[8] Ms. Thompson exercised control over one or more of Ms. Jumper's financial accounts, and provided nursing care services to her. *See* BX 27 at 6 (Bates No. P288).

[9] The September 30, 2002 Order appointing the Examiner identified him as Dr. Lawrence Sack. The October 24, 2002 hearing transcript identifies him as "Dr. Willard Zack."

[10] Ms. Sloan said that, outside of the courtroom, Respondent became "incredibly angry" and "almost [came] to blows" with Dr. Sack because Respondent disagreed with Dr. Sack's opinion. Tr. 190:1-15. However, he chose not to ask Dr. Sack any questions on cross-examination during the hearing.

plan in place here and Ms. Jumper has put that into place and the appointment of both the Conservator and the Guardian should be vacated." BX 10 at p. 137:17-138:10.

31. On October 30, 2002, the Court issued an Order vacating Mr. Anderson's appointment as Guardian and Ms. Sloan's appointment as Conservator. BX 14. Citing Dr. Sack's testimony and the estate planning documents from both 1995 and 2001, the Court found that "Sally Jumper ha[d] the present competency to make decisions regarding her medical affairs and financial affairs including the ability to appoint persons to assist her with these matters; and that Sally Jumper has created the Sally A. Jumper Trust encompassing the whole of her present and future estate." BX 14 at p. 185.

32. Ms. Kincaid spoke with Ms. Jumper shortly before, and again shortly after, the October 24, 2002 hearing. Tr. 119:17-120:6. Ms. Jumper told Ms. Kincaid that she was very upset that Mr. Anderson had filed the Petition for Appointment of a Guardian and Conservator, and wanted to remove him as a beneficiary. Tr. 120:10-121:8. Ms. Kincaid prepared a revised set of estate planning documents effectuating this intent, and Ms. Jumper signed them on October 28, 2002, in the presence of Ms. Kincaid and several witnesses. Tr. 122:17-123:8.

F. Respondent's efforts to have Ms. Jumper revoke her 2001 estate planning documents

33. Immediately after the Court issued its October 30, 2002 Order, Respondent and Mr. Anderson embarked upon a course of conduct designed to have Ms. Jumper revoke the 2001 documents without the knowledge of her attorney, Ms. Kincaid. Notwithstanding Dr. Sack's testimony, and Judge Lopez's determination that Ms. Jumper was competent, and that the 1995 and 2001 Will and Trust documents were valid, Respondent testified that he and Mr. Anderson "knew that [Ms. Jumper] had been taken advantage of in 2001 at a time when she was barely

competent to do anything. But the dilemma was if we did nothing, that bogus document of 2001 would stand. So we had to take some action." Tr. 83:15-20.[11]

34. Based on our consideration of Respondent's testimony, we find that he devised a plan to arrange for a number of meetings between Ms. Jumper, Mr. Anderson, and himself, without prior notice to, or consent from, Ms. Kincaid, in order to procure from Ms. Jumper signed documents purporting to revoke the 2001 Will and Trust, thereby restoring Mr. Anderson's earlier interest in her estate. *See* Tr. 63:8-67:2; 73:2-74:10.

35. At the time this plan was devised, Respondent realized that his client, Mr. Anderson, and Ms. Jumper were adverse in these proceedings, at least as of that August 1, 2002 hearing. Mr. Anderson had petitioned to have himself appointed guardian; Ms. Jumper's appointed lawyer, Ms. Ellison, has written a report stating that Ms. Jumper opposed the appointment (Tr. 36-7 (Respondent)); and they had separate counsel in the matter. Respondent represented to the court in a petition in which he sought to have his fees paid from Ms. Jumper's estate, "Almost immediately [after the initial August 1 hearing], the proceedings became adversarial in nature such that my representation was of Allen Anderson, individually." BX 25 at 276. In an earlier proceeding, before the disciplinary hearing, he also testified that his client's position and Ms. Jumper's were adverse. Tr. 39-40 (Respondent).

36. Respondent admitted that he knew, before proceeding with the meetings with Mr. Anderson, and Ms. Jumper, that Ms. Kincaid's firm "was claiming to be Sally Jumper's attorney. We knew that was the case." Tr. 65:10-12. He also knew that Ms. Kincaid had prepared the 2001 Will and Trust, documents that he considered to be "bogus." Tr. 45:2-46:6; 68:19-69:10.

[11] Because Respondent and Mr. Anderson focused their attention on the 1995 and 2001 documents, it appears that they did not know that Ms. Jumper had signed another set of estate planning documents on October 28, 2002.

He assumed that Ms. Jumper had paid Ms. Kincaid to prepare these documents.[12] He knew that Judge Lopez had upheld the validity of the 2001 Will and Trust. *See* BX 14. He knew that Ms. Kincaid had sent an October 28, 2002 letter to Ms. Jumper's nursing home stating that her current law firm, Troxell Kincaid and Mullin, represented Ms. Jumper. Tr. 58:6-59:8. Respondent admitted that if he had written Ms. Kincaid a letter asking whether she represented Ms. Jumper at the time, he assumed that Ms. Kincaid would have said that she did, because "they have got to say that." Tr. 235:19-236:8. Nevertheless, Respondent decided that he would not contact Ms. Kincaid for permission to meet with her client, Ms. Jumper. Tr. 65:6-17. Respondent, in fact, did not notify Ms. Kincaid of his intention to meet with Ms. Jumper, nor did he request or obtain Ms. Kincaid's permission to do so. *Id.; see also* Tr. 62:22-63:7.

37. Respondent says he did not contact Ms. Kincaid because even though she "was claiming" to be Ms. Jumper's lawyer (Tr. 65:6-13), he decided that Ms. Kincaid really did not represent Ms. Jumper, but instead represented Col. Verfurth.[13] Tr. 60:7-18. Respondent said he considered that Ms. Kincaid "if anything, was – I don't know what to call her, *a mole*. *She had been planted by Verfurth to alter documents* that [Ms. Jumper] had done when she was very competent, and then he was taking advantage of her feeblemindedness." Tr. 208:8-15 (emphasis added). Respondent testified that Ms. Kincaid's assertion in her October 28, 2002 letter to Ms. Jumper's nursing home (BX 13) that the Troxell firm represented Ms. Jumper was a "misstatement." Tr. 213:9-12. He testified that she was "working for the enemy" (Tr. 219:9-10), and had "prepared documents *which she knew were contrary to [Ms. Jumper's] interests*. . . ." Tr. 220:1-5. After hearing Ms. Kincaid testify before this Hearing Committee that she was Ms.

[12] Ms. Kincaid testified that she was, in fact, paid by Ms. Jumper. Tr. 110:3-5.

[13] Ms. Kincaid testified that she did not represent Col. Verfurth. Her testimony was unchallenged at the hearing in this matter, and we find it to be credible. Tr. 105:6-8.

Jumper's attorney at the time in question, Respondent testified that she was, essentially, lying under oath: "I understand her testimony here. *If she told you what she was really doing, she would be disbarred.*" Tr. 219-220 (emphasis added). Yet the only "evidence" he had to support these highly-charged allegations was the fact that Mr. Anderson simply "thought" that the Troxell firm was Col. Verfurth's law firm, and even then, Mr. Anderson never told Respondent of the basis for this belief. Tr. 61:13-22.[14]

38. In an early response to a request for information from Bar Counsel, Respondent indicated that he "[o]bviously" would have filed a declaratory judgment action to have the 2001 estate planning documents declared invalid, had he known about them before he filed the Petition for appointment of a guardian and conservator for Ms. Jumper. RX 9 at 235. Yet Respondent never requested a judicial ruling that Ms. Kincaid did not represent Ms. Jumper once he had learned about the 2001 documents. As he testified, "we would have no reason to. And besides, my client couldn't afford it." Tr. 72:5-11.

39. Respondent instructed Mr. Anderson to first meet with Ms. Jumper on his own (*i.e.* without Respondent) to ask her whether she was represented by a lawyer, and to tape record the conversation. Tr. 56:11-58:2. On November 9, 2002, Mr. Anderson visited Ms. Jumper at the nursing home. Mamie Boyd, Ms. Jumper's friend, was present, and the meeting was tape-recorded. BX 16. Mr. Anderson asked Ms. Jumper if she was aware that the law firm, Troxell Kincaid & Mullen had told him that he could not visit Ms. Jumper before 1:00 p.m. He then

[14] When asked at the hearing what evidence he had to support his contention that Ms. Kincaid represented Col. Verfurth, not Ms. Jumper, Respondent said "I don't know. You're going to have to ask [Mr. Anderson]." Tr. 70:14-20. Mr. Anderson previously had asked Respondent to contact Col. Verfurth for information, but Respondent did not do so, because he thought it would have been "a waste of time and money." RX 7 at p. 1223:13-19. When Mr. Anderson was asked, during an earlier proceeding, what evidence he had to support his belief that Col. Verfurth procured the changes to Ms. Jumper's estate plan, he admitted "there's no hard paper evidence." RX 2 at p. 1168:18-22.

asked "Are they your law firm?" She replied, "No, not that I know of." He did not ask her specifically if she was represented by Cassandra Kincaid. *Id.* Respondent did not inform Ms. Kincaid of Mr. Anderson's visit in advance, nor did he obtain her consent to communicate with Ms. Jumper in this manner. Tr. 64:20-65:17; Tr. 126:21-127:9. Rather than contact Ms. Kincaid, or seek a ruling from Judge Lopez, Respondent said he thought it best to "let [Ms. Jumper] be the judge" by going to her directly. Tr. 237:1-9.

40. On November 23, 2002, Mr. Anderson and Respondent visited Ms. Jumper at the nursing home. Respondent's purpose in attending this meeting was to "revive" Ms. Jumper's 1995 estate planning documents and rescind the 2001 documents (all of which were prepared by Ms. Kincaid). Tr. 73:10-15. Respondent did not inform Ms. Kincaid of this visit in advance or obtain her consent to speak with Ms. Jumper. Tr. 127:10-128:1. Mr. Anderson tape-recorded the meeting, which was also attended by Mamie Boyd and Nancy Ludewig, friends of Ms. Jumper. BX 17. Respondent admitted that he also had conversations with Ms. Jumper at each of these meetings that were not recorded. Tr. 93:5-11. At the start of the meeting, Mr. Anderson introduced Respondent to Ms. Jumper only as "an attorney practicing in the State of Maryland." BX 17, at p. 199:13-14. Mr. Anderson did not say that Respondent was his attorney. *Id.* Respondent thereafter mentioned that he was Mr. Anderson's attorney; he did not specify, one way or the other, whether he thought he was acting as Ms. Jumper's attorney. BX 17, p. 202 at 19-21. Respondent did not advise Ms. Jumper to retain counsel because he "didn't think she needed a lawyer." Tr. 75:9-18. Respondent presented Ms. Jumper with a document entitled "Statement of Sally Jumper." Because Ms. Jumper was blind, he read the document to

her, and she then signed it.[15] BX 17, p. 203:18-208:12. This statement purported to revoke any documents related to Ms. Jumper's estate plan made after 1995, and to adopt the 1995 Trust, which left 40% of her estate to Mr. Anderson. BX 18. Respondent prepared this document at the request of Mr. Anderson, not Ms. Jumper. Tr. 74:1-5.

41. On February 1, 2003, Mr. Anderson and Respondent again visited Ms. Jumper at the nursing home. Ms. Ludewig and Ms. Boyd were again present, and the meeting was again tape-recorded. BX 20. Respondent did not inform Ms. Kincaid of this visit in advance and did not obtain her consent to speak with Ms. Jumper. Tr. 128:20-129:12. Mr. Anderson introduced Respondent to Ms. Jumper simply as an "attorney"; he did not say Respondent was acting as his attorney. BX 20, p. 223:12. Respondent did not specify on whose behalf he was acting at this meeting. Respondent suggested that Col. Verfurth was trying to take over, and asked Ms. Jumper if she wanted to have Ms. Ludewig serving as trustee. Tr. BX 20, p. 228:21-230:3. When Ms. Jumper said that she would, he read to her and then had her execute a document he prepared, in which Ms. Jumper resigned as trustee of her trust and appointed Ms. Ludewig as trustee. BX 21. Respondent prepared this document at the request of Mr. Anderson, not at the request of Ms. Jumper. Tr. 88:2-16.

42. On February 8, 2003, Mr. Anderson and Respondent went to visit Ms. Jumper for a third time. Ms. Ludewig (but not Ms. Boyd) was again present, and the meeting was again tape-recorded. BX 22. Respondent did not inform Ms. Kincaid of this visit in advance and did not obtain her consent to speak with Ms. Jumper. Tr. 130:7-21. At the beginning of the meeting, Respondent noted that this was his third visit with Ms. Jumper, and said to her that "[e]ach time I

[15] Respondent asserts that Ms. Jumper was "feeble-minded in the extreme" (Answer, BX D, ¶ 7) at the time he met with her, but claims that he spoke with her during brief periods of lucidity. Tr. 82:18-83:3.

came down here as Alan's [sic] attorney. You understand I'm Alan's [sic] attorney. You understand that." BX 22 at p. 241:3-9. Ms. Jumper responded that she did. *Id.* Respondent and Mr. Anderson had learned after their previous meeting that Ms. Jumper had executed additional estate planning documents in October 2002. They asked Ms. Jumper whether she remembered appointing Col. Verfurth as co-trustee; she said she did (BX 22, p. 244:19-21), and seemed to say she thought it was a "good idea." *Id.* at p. 245:6-15. Nevertheless, Respondent and Mr. Anderson asked Ms. Jumper to sign two documents removing Col. Verfurth, even though the transcript (and audiotape) show that Ms. Jumper was drifting off when they read the documents to her. *See* BX 22, p. 251:6-252:6 (Respondent asked Ms. Jumper if she could still hear him, and Ms. Ludewig told Ms. Jumper not to "fade on us now."). The first, "Dismissal, Resignation and Appointment," purported to dismiss Col. Verfurth as trustee, to effectuate the resignation of Ms. Jumper as trustee, and to appoint Nancy Ludewig as trustee. BX 23. The second, "Statement of Sally Jumper," provided that Ms. Jumper wanted Ms. Ludewig to act as sole trustee of her trust, to act as attorney-in-fact in both medical and legal matters, and to act as guardian *ad litem* in any legal proceedings. It further provided that she did not want Col. Verfurth, Mr. Anderson, or anyone else to speak or act on her behalf, and that she revoked and renounced any documents that permitted them to do so. The documents were not prepared at Ms. Jumper's request. Tr. 94:2-8. All of the documents that Respondent had Ms. Jumper sign were contrary to the estate planning documents prepared by Ms. Kincaid for Ms. Jumper. Tr. 128:8-131:16.

43. During the hearing in this matter, the Hearing Committee listened to the tape recordings of the November 23, 2002, February 1, 2003, and February 8, 2003 meetings. The recordings convey the impression that Ms. Jumper did not clearly understand what she was being asked, and that her answers were not based on a sound recollection of facts. To the contrary,

Ms. Jumper seemed tired, and sometimes confused. She was asked nothing but a series of leading questions, and conveyed the impression that she simply was giving answers that the questioner wanted to hear. She never was asked to explain her understanding in a narrative fashion. At the hearing, Respondent acknowledged that during the tape recorded meetings, Ms. Jumper never uttered a sentence "longer than four words." Tr. 83:12-15. He admitted "that was the problem we faced" because they were dealing with a woman who "was barely competent to do anything." Tr. 83:12-18. Respondent also described Ms. Jumper as being "very marginal" and admitted that he "was concerned about [her] competence." Tr. 160:17-161:5.

44. In his Answer to Bar Counsel's Specification of Charges, Respondent admitted that, at the time he was dealing with Ms. Jumper, he considered her to be "feeble minded in the extreme," and that he was "dubious about her mental capacity." BX D, ¶ 7. He also acknowledged that Ms. Jumper "was a very vulnerable and gullible person who could be persuaded to sign documents presented to her, whether by [Mr. Anderson] or [Col.] Verfurth." BX D, ¶ 15.

45. Notwithstanding his significant concerns about Ms. Jumper's mental abilities, Respondent thought it was unnecessary to suggest to her that she retain her own attorney. Tr. 82:12-83:7. Respondent testified that he proceeded this way because "if we did nothing, what Verfurth had foisted on her would prevail." Tr. 161:6-7.

46. Having listened to the tape recordings of Respondent's undisclosed meetings with Ms. Jumper, we agree with his assessment that she could be persuaded, at that time, to sign anything that was put before her, without understanding the significance of the document.

G. Subsequent events

47. On May 30, 2003, Respondent filed a Verified Petition for Allowance of Attorneys Fees, for fees incurred in connection with the filing of the Petition for the appointment of a guardian and conservator for Ms. Jumper. BX 25. In the fee petition, Respondent asserted that he believed it was necessary to appoint a guardian and conservator for Ms. Jumper due to her "dementia and general feeblemindedness." *Id.* at 275. Respondent further stated that "almost immediately after [the August 1, 2002 hearing before Judge Lopez], the proceedings became adversarial in nature, such that my representation was of Allen Anderson individually." *Id.* Respondent testified that he did not seek fees for work done after August 1, because "I was representing Allen, not Sally or her interests" thereafter. Tr. 39:8-14.

48. On June 13, 2003, Ms. Sloan filed a motion seeking sanctions against Respondent and Mr. Anderson for filing the guardianship petition for an improper purpose.[16] *See* BX 27 at p. 294. The probate court granted sanctions for among other things, inducing Ms. Jumper to sign documents intended to undo the 2001 Trust (BX 27 at p. 300-01), although the Court of Appeals later reversed and remanded for further proceedings. *Jumper*, 984 A.2d at 1245. On remand, the probate court reinstated the sanctions for, among other reasons, initiating meetings with Ms. Jumper without informing Ms. Kincaid. *Id.* at 1245-46.

49. Respondent appealed. On December 10, 2009, the Court of Appeals affirmed the Superior Court's sanction of Respondent (and Mr. Anderson) in part, and vacated and remanded in part. (The remand concerned the amount of legal fees the sanctioned parties were to reimburse. *Id.* at 1254-55). The Court of Appeals found that Respondent had violated Rule

[16] Even though Ms. Sloan's appointment as Conservator had been vacated on October 28, 2002 (BX 14), Judge Lopez's sanction order noted that she "remained a party to the proceedings via service and participation in communications with other counsel." BX 27 at 3 (Bates No. 285).

4.2(a) by communicating with a represented person about the subject of the representation without the prior consent of the lawyer.[17] *See Jumper*, 984 A.2d at 1249-50. Specifically, the Court of Appeals held that:

> . . . the trial court plainly did not abuse its discretion in holding that Mr. Rogers' post-filing conduct was sanctionable. It is elementary that "[d]uring the course of representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a person known to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the lawyer representing such other person or is authorized by law or a court order to do so." D.C. Rule of Professional Conduct 4.2(a). Even if Mr. Rogers did not know when he filed the Petition that Ms. Kincaid represented Ms. Jumper in connection with the 2001 Trust, he clearly should have become aware of that fact on the day before the hearing when Ms. Ellison forwarded to him a letter from Ms. Kincaid describing Ms. Kincaid's representation of Ms. Jumper. At the latest, Mr. Rogers must have become aware that Ms. Kincaid was Ms. Jumper's lawyer by September 2002, when Ms. Sloan disclosed the existence of the 2001 Trust in her emergency petition. Yet even after the guardianship was vacated, Mr. Rogers drafted legal documents for Ms. Jumper and participated in tape-recorded meetings with her, all without inviting Ms. Kincaid or any of the attorneys who had represented Ms. Jumper over the years. The trial court did not abuse its discretion in holding that this was sanctionable.

BX 29 at 341-42. The Court further directed that a copy of its opinion be forwarded to the Office of Bar Counsel.

50. Respondent and Mr. Anderson complied with the sanctions order in 2010. *See* BX 30.

[17] At the pre-hearing conference, the Hearing Committee Chair asked Bar Counsel whether it took the position that the Court's opinion in *In re Jumper* precluded Respondent from litigating any of the issues in the Specification of Charges under doctrines of issue preclusion or collateral estoppel. Bar Counsel responded that it was not taking that position. Pre-hearing Tr. 8-9. Although we recognize that collateral estoppel applies in disciplinary proceedings, *see In re Wilde*, 68 A.3d 749, 761-62 (D.C. 2013), in light of Bar Counsel's decision not to invoke collateral estoppel, we rely on the Court's opinion as evidence, but have not given it preclusive effect.

CONCLUSIONS OF LAW

51. Bar Counsel alleges that Respondent William N. Rogers's conduct violated the following provisions of the D.C. Rules of Professional Conduct:

a. Rule 4.2(a), in that in the course of representing a client, Mr. Anderson, he communicated about the subject of the representation with Ms. Jumper, a person known to be represented by another lawyer in the matter, Ms. Kincaid, without having obtained the consent of the lawyer;

b. Rule 1.7(b)(2), in that by drafting testamentary documents for Ms. Jumper he was representing her as a client, even though this representation was likely to be adversely affected by his representation of Mr. Anderson, and without obtaining the informed consent of Ms. Jumper to that representation.

c. Rule 8.4(c), in that he engaged in conduct evincing a lack of honesty, probity, or integrity in principle and that lacked fairness and straightforwardness (conduct involving dishonesty, fraud, deceit, or misrepresentation) by failing to seek the permission of Ms. Kincaid to speak with her client, or even to inquire if she still represented Ms. Jumper, and then drafting testamentary documents for Ms. Jumper, in favor of his client Mr. Anderson's interests despite Respondent's claim that Ms. Jumper lacked consistent lucidity or comprehension of her situation.

We analyze each of these charges in turn.

1. Violation of Rule 4.2(a)

At the time of Respondent's actions, Rule 4.2(a) provided that, while representing a client,

> a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party known to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law or a court order to do so.

The Terminology section of the Rules provides that "'[k]nowingly,' 'known,' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." *See* Rule 1.0(f). Thus, we must determine whether Respondent had actual knowledge that Ms. Jumper was being represented by counsel at the time in question. In arriving

at this determination, we take into account not only Respondent's testimony, but also all of the evidence bearing on the issue.

52. Bar Counsel alleges that Respondent knew that Ms. Jumper was represented by counsel, yet communicated with her about the subject of the representation without obtaining the consent of Ms. Jumper's lawyer. Respondent denies that Ms. Jumper was represented by counsel at the time, and claims that Ms. Kincaid, the attorney in question, actually was representing Col. Verfurth, and not Ms. Jumper.

53. We find, by clear and convincing evidence, that Respondent did, in fact, have actual knowledge that Ms. Jumper was represented by Ms. Kincaid for estate planning purposes when he met with Ms. Jumper to discuss revisions to her estate plan. Respondent knew, prior to the August 1, 2002, hearing, that Ms. Kincaid represented Ms. Jumper on estate planning matters, either through his July 31, 2002, telephone conversation with Ms. Kincaid, or through his review of the Ellison report.

54. In addition, the Petition for Emergency Relief filed by Ms. Sloan on September 12, 2002, informed the Court and the parties that, after she had been appointed as Conservator, she was given a series of previously undisclosed estate planning documents prepared for Ms. Jumper in 1995, and a revised set of estate planning documents prepared in 2001. BX 8 at p.116-17. Ms. Sloan's Petition asserted that Ms. Kincaid "had performed work for Sally Jumper." *Id.* Copies of the documents were attached as exhibits to the Petition. *Id.* Respondent was served with a copy of the Petition, as was Ms. Kincaid. *Id.* Thus, at least as of this date, Respondent had actual knowledge that Ms. Kincaid was Ms. Jumper's estate planning attorney.

55. Respondent admits that he knew that Ms. Kincaid said that she was Ms. Jumper's attorney, and that she drafted the 2001 estate planning documents that he sought to undo by

meeting with Ms. Jumper behind Ms. Kincaid's back.[18] He nevertheless claims that he was free to speak with Ms. Kincaid's client, without her permission, because he simply did not believe Ms. Kincaid – he was suspicious that she was really Col. Verfurth's attorney, not Ms. Jumper's. Yet Respondent has no evidence other than his client's "belief" that Ms. Kincaid was "secretly" working for Col. Verfurth, not Ms. Jumper, and his client admitted that he had no "hard evidence" to support that belief. Respondent did nothing to determine whether his suspicions were well founded, even though he had every opportunity to do so, and he offered no evidence in the proceedings in Probate Court, or at this hearing, to substantiate his suspicions.

56. In the Petition to vacate her appointment, Ms. Sloan asked, among other things, that the Court determine "the validity of either the Sally A. Jumper Trust dated January 12, 2001 or the Sally A. Jumper Trust dated October 6, 1995 and a determination of which, if any, of the Powers of Attorney are valid." BX 8 at p. 5, ¶ 2. Thus, Respondent had every opportunity to substantiate his theory that Ms. Kincaid was acting as Col. Verfurth's lawyer, rather than Ms. Jumper's. For example, Respondent could have subpoenaed documents from Ms. Kincaid and Col. Verfurth. He could have sought leave to take their depositions. He could have subpoenaed either or both of them to testify at the hearing to resolve the issues raised by the Emergency Petition, including specifically the validity of the 2001 documents. Yet Respondent neither sought nor obtained any evidence to support his "suspicions" as to whom Ms. Kincaid "really" was representing, and the Court subsequently found that the 2001 estate planning documents that Ms. Kincaid prepared for Ms. Jumper were valid.

[18] "I knew this law firm was claiming to be Sally Jumper's lawyer. We knew that was the case." Tr. 65:6-13. Respondent also understood that Ms. Kincaid prepared Ms. Jumper's 2001 estate planning documents. Tr. 45:2-46:6.

57. If Respondent had *any* evidence to support his suspicion that Ms. Kincaid was secretly acting on Col. Verfurth's behalf, not Ms. Jumper's, he should have submitted it to the Court. Yet he offered nothing. If Respondent thought the Court's conclusion that Ms. Jumper's estate planning documents were valid was erroneous, he should have challenged that conclusion, either by a motion for reconsideration or by appeal, yet he did neither. Instead, Respondent simply decided to ignore the Court's findings, and act on his own, unsubstantiated suspicions.

58. The only evidence that Respondent cites to justify his conduct is the tape recorded November 2002 meeting he directed his client, Mr. Anderson, to have with Ms. Jumper. During this meeting, Mr. Anderson said to Ms. Jumper that "he had been told that the law firm of Troxell Kincaid and Mullin [have been] acting on your behalf," then asked Ms. Jumper "are they your law firm?" Ms. Jumper's response was "no, not that I know of." Mr. Anderson did *not* ask whether Cassandra Kincaid – a name Ms. Jumper presumably would have been more likely to recognize – was Ms. Jumper's lawyer. For the reasons set forth below, we do not find this after-the-fact evidence sufficient to explain or excuse Respondent's failure to request or obtain Ms. Kincaid's consent before meeting with Ms. Jumper.

59. First, the validity of Ms. Jumper's 2001 documents already had been established by the Court's October 30, 2002 Order. Respondent neither sought nor obtained evidence to challenge the validity of the 2001 documents during the proceeding, when Ms. Jumper was represented by independent counsel; it was improper for him to seek to meet with Ms. Jumper directly after the proceeding had been concluded.

60. Second, as noted above, the fact that Ms. Jumper did not remember the name of Ms. Kincaid's law firm (if she ever knew it in the first place), proves little. She never was asked the more pointed question – one she may have been more likely to answer in the affirmative –

whether Ms. Kincaid was her lawyer. Respondent himself recognized that Ms. Jumper had a very hard time remembering anything; indeed, he acknowledged that she very likely would have quickly forgotten she met with him. *See* RX 8 at 840:13-14 ("I would not doubt that the next day she might not remember having done that."). Moreover, Respondent himself never asked Ms. Jumper whether she was represented by counsel at all.

61. Third, the questions Respondent and Mr. Anderson put to Ms. Jumper – in bed, in a nursing home – were entirely leading, suggesting the answers they wished to hear. Yet Respondent acknowledged that Ms. Jumper "was a very vulnerable and gullible person who could be persuaded to sign documents presented to her, whether by [Mr. Anderson] or [Col.] Verfurth." Respondent thus engaged in the same tactics in which, without evidence, he accused Col. Verfurth of engaging.

62. Finally, based upon what he already learned, Respondent believed Ms. Jumper was, to use his own words "feeble minded in the extreme," and both he and his client "were dubious about her mental capacity." Answer, BX D, ¶ 7. Although Respondent contended that Ms. Jumper occasionally had "lucid moments," he acknowledged that, even on the few occasions Ms. Jumper was "clear-minded," she "had very limited mental capacity." Answer, BX D, ¶ 9. In a separate Memorandum to Bar Counsel, Respondent reported that "by the time I got involved in this matter (and for a considerable time before) Sally lacked the capacity to enter into – or maintain – a bona fide attorney-client relationship." RX 10 at 196. He cited excerpts from Ms. Jumper's medical records from 1998 through June 2002, reporting on "increasing dementia" (1998), "increasing confusion, disorientation and dementia" and "altered mental state" (2000), "increasing confusion and disorientation" (2001), "DEMENTIA PROGRESSIVE" (all caps in original) and "patient affable and cooperative but totally confused" (2002). *Id.* at 196. He told

Bar Counsel that "[his] concern was that Sally's mental capacity was so diminished, could she even understand what she was doing if she signed documents to restore her original plan" (*i.e.* the documents that Respondent was asking her to sign). *Id.* at 199. Thus, considering Respondent's acknowledgement of Ms. Jumper's mental state, it was patently unreasonable for him to rely on Ms. Jumper's inability to recognize the name of Ms. Kincaid's law firm in order to justify – after-the-fact – his failure to request or obtain Ms. Kincaid's permission for him to meet directly with her client about the subject of the representation. Indeed, Respondent admitted that he thought it was "possible" that Ms. Kincaid was, in fact, Ms. Jumper's lawyer, but that Ms. Jumper simply did not remember that. RX 7 at 1268:18-21.

63. Respondent's entirely unsubstantiated "suspicions" that Ms. Kincaid was a "mole" secretly acting on Col. Verfurth's behalf do not support the conclusion that he lacked "actual knowledge" that Ms. Kincaid was Ms. Jumper's lawyer. Although we found no District of Columbia cases directly on point, cases from other jurisdictions that employ the same "actual knowledge" definition applicable here suggest that actual knowledge does not turn solely on the subjective beliefs of the person in question; instead, such a standard imparts some degree of reasonableness. *See Bonito v. Statewide Griev. Comm.*, 1997 Conn. Super. LEXIS 3387 (Conn. Super. Ct. Dec. 19, 1997) (finding that respondent had "actual knowledge" under Connecticut's Rules of Professional Conduct that the complainant's client was represented by counsel, even though complainant's client had told the respondent that she had fired her attorney "in my mind," because the other circumstances in the case suggested that the client was in fact represented); *State v. Mucklow*, 35 P.3d 527, 539 (Colo. 2000) (finding Respondent "knowingly" violated procedures of the Colorado Rules of Professional Conduct because Respondent had previously been disciplined for violating the same procedure and therefore had "actual knowledge" of it).

64. We find that Bar Counsel has proven, by clear and convincing evidence, that Respondent had actual knowledge that Ms. Kincaid was Ms. Jumper's attorney for estate planning purposes at the time he met directly with Ms. Jumper. He cannot ignore or disregard this information based on entirely unsubstantiated "suspicions." Thus, we find that Respondent has violated Rule 4.2(a).

2. Violation of Rule 1.7(b)(2)

Rule 1.7(b)(2) provides: "[A] lawyer shall not represent a client with respect to a matter if . . . such representation will be or is likely to be adversely affected by representation of another client. . . ." Bar Counsel alleges that Respondent violated Rule 1.7(b)(2) because he represented both Mr. Anderson and Ms. Jumper, that there was a conflict between the interests of these two individuals that was not disclosed to Ms. Jumper, and that Ms. Jumper, accordingly, could not and did not waive the conflict.

65. The first issue that must be resolved is whether there was an attorney-client relationship between Respondent and Ms. Jumper. It is undisputed that there was no writing, in the form of an engagement letter or other similar document, establishing an attorney-client relationship between Respondent and Ms. Jumper. There was no evidence that Ms. Jumper ever asked the Respondent to provide legal services to her. *See* Tr. 73:10-74:3; 88:5-90:15; 93:12-94:8. Likewise, there was no evidence that Ms. Jumper paid Respondent for any such services.[19] Respondent denies that he acted as Ms. Jumper's counsel. Tr. 74:1-5. When he met with Ms. Jumper, Respondent expressly advised her that he was representing Mr. Anderson.

[19] Respondent did file a petition for an award of fees from Ms. Jumper's estate for work done through the August 1, 2002 hearing, but did not seek fees for any work done thereafter, because at that point he was representing only "Allen and not Sally or her interests." Tr. 39:8-14.

Tr. 92:20-93:11. There was no evidence that Ms. Jumper ever expressed the view that Respondent was her attorney.

66. Whether an attorney-client relationship exists must be determined by the fact-finder based on the circumstances of each case. *In re Bernstein*, 707 A.2d 371, 375 (D.C. 1998). "It is well established that neither a written agreement nor the payment of fees is necessary to create an attorney-client relationship." *See In re Lieber*, 442 A.2d 153, 156 (D.C. 1982) (*citing In re Russell*, 424 A.2d 1087 (D.C. 1980); *In re Fogel*, 422 A.2d 966 (D.C. 1980)); *see also, e.g., Modiri v. 1342 Rest. Group, Inc.*, 904 A.2d 391, 398 (D.C. 2006). Furthermore, "it is not necessary for an attorney to take substantive action and give legal advice in order to establish such a relationship." *Lieber*, 442 A.2d at 156 (finding that an attorney-client relationship existed where attorney placed his name on a roster of attorneys available to assist inmates in *pro se* civil actions, and was subsequently assigned to represent an inmate, but failed to enter his appearance or to notify the court that he did not plan to represent the inmate). Courts will also find that an attorney-client relationship exists where the client "was seeking professional advice and assistance" and the attorney "held herself out as an attorney in delivering her advice and services[.]" *In re Shay*, 756 A.2d 465, 475 (D.C. 2000) (finding that attorney who used her law firm's letterhead and resources for her work "held herself out as an attorney" in delivering the legal advice and services at issue). Moreover, "a client's perception of an attorney as his counsel is a consideration in determining whether a relationship exists." *Lieber*, 442 A.2d at 156; *see also Shay*, 756 A.2d at 475 (discussing the client's "subjective belief that Respondent was her attorney" as an additional factor in support of finding that an attorney-client relationship existed). The attorney-client relationship is further bolstered where the attorney "never said or did anything to indicate to [the client]. . . that she was not acting as [the client's]

lawyer." *Shay*, 756 A.2d at 475; *Bernstein*, 707 A.2d at 375 (noting the client's belief that respondent was acting as her lawyer in upholding Board's conclusion that an attorney-client relationship existed).

67. Bar Counsel's position is that Respondent was Ms. Jumper's attorney because he drafted documents that would have annulled the effect of certain amendments to Ms. Jumper's 1995 estate plan (drafted by another lawyer), advised her about matters related to her estate planning, including the effect of the documents he drafted, and admitted that at least one of the changes he had her implement – the appointment of Nancy Ludewig as a trustee – was for Ms. Jumper's benefit, not Mr. Anderson's. *See* BC Brief at 25-26.

68. Bar Counsel cites three cases - *Lieber*, 442 A.2d at 156, *In re Long*, 902 A.2d 1168, 1172 (D.C. 2006) and *Shay*, 756 A.2d at 475 - for the proposition that an attorney-client relationship can exist notwithstanding the absence of a written retainer agreement and/or the payment of a fee. While each case does stand for this proposition, the facts of these cases differ from the instant case in two critical respects: in each, it was clear that the respondent's engagement was, in fact, on behalf of the client in question, and the client considered the respondent to be his or her attorney.

69. In *Shay* and *Long*, the respondents admitted that the person harmed was, in fact, their client. *See Long*, 902 A.2d at 1168, 1170 ([Respondent] charged [the client] a $75 fee to draft her will, and "concedes, that when he drafted the will for Mrs. Lowery, he incompetently represented her interests and engaged in a conflict of interest without full disclosure to her."); *Shay*, 756 A.2d at 470 ("Respondent admitted at the hearing that E.Y. was her client when she drafted her will."). In *Lieber*, respondent received a letter from the Court advising him "that he had been assigned to represent [the client]" unless he took further action to decline the

representation, and respondent subsequently told the client that he would visit him to discuss his case. *Lieber,* 442 A.2d at 155. In this proceeding, Respondent made it clear that he was representing Mr. Anderson, not Ms. Jumper.

70. A client's perception of an attorney as his counsel also is a consideration in determining whether an attorney-relationship exists. *In re Russell*, 424 A.2d 1087 (D.C. 1980); *Lieber*, 442 A.2d at 156. Here, Bar Counsel proffered no evidence that Ms. Jumper perceived Respondent as her counsel. In fact, during their final meeting on February 8, 2003, Respondent told Ms. Jumper that he had represented Mr. Anderson during each of the meetings. BX 22 at p. 241:3-9.

71. Based on the foregoing, we find that Bar Counsel did not prove, by clear and convincing evidence, that there was an attorney-client relationship between Ms. Jumper and Respondent. As a result, we find that Respondent did not violate Rule 1.7(b)(2).

3. Dishonesty

Rule 8.4(c) provides that it is professional misconduct for a lawyer "to engage in conduct involving dishonesty, fraud, deceit or misrepresentation." The term "dishonesty" is defined as:

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

In re Shorter, 570 A.2d 760, 767-68 (D.C. 1990) (per curium) (quoting *Tucker v. Lower*, 434 P.2d 320, 324 (Kan. 1967)). Thus, conduct that "may not legally be characterized as an act of fraud, deceit or misrepresentation may still evince dishonesty." *Id.* at 768. *In re Carlson*, 745 A.2d 257, 258 (D.C. 2000) (per curiam) (dishonesty may consist of failure to provide information where there is a duty to do so). Dishonesty in violation of Rule 8.4(c) does not

require proof of deceptive or fraudulent intent. *In re Romansky*, 825 A.2d 311, 315 (D.C. 2003); *see also In re Jones-Terrell*, 712 A.2d 257, 258 (D.C. 2000) (per curiam) (violation found despite "lack of evil or corrupt intent"). 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." *Romansky*, 825 A.2d at 315. Conversely, "when the act itself is not of a kind that is clearly wrongful, or not intentional, Bar 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, Bar Counsel must prove by clear and convincing evidence that the respondent "consciously disregarded the risk" created by his actions. *Id*.

72. We find that Respondent acted dishonestly in his representation of Mr. Anderson. Respondent had actual knowledge, prior to his meetings with Ms. Jumper, that Ms. Kincaid was representing Ms. Jumper for estate planning purposes. Although his client told him that he was "suspicious" that Ms. Kincaid secretly was representing Col. Verfurth, and not Ms. Jumper, neither Respondent nor his client had any evidence whatsoever to support that suspicion. Moreover, Respondent proffered no evidence to support his "suspicions" at a Probate Court hearing convened to determine the validity of the 2001 estate planning documents, and the Court subsequently found that those documents – prepared by Ms. Kincaid – were valid.

73. Rather than accept the Court's ruling, or challenge it in further proceedings, Respondent instead decided to surreptitiously meet with Ms. Kincaid's client – repeatedly – in order to attempt to persuade Ms. Jumper to disavow the estate plan Ms. Kincaid had prepared, all for the benefit of his own client. As further evidence of Respondent's dishonesty, he elicited information for the benefit of his client from a person, Ms. Jumper, whose condition he himself

assessed as "barely competent to do anything" (*supra* ¶¶ 33, 43) and "feeble-minded in the extreme" (*supra* at ¶ 44, 62). Even giving Respondent the benefit of every doubt, we find that his conduct in secretly meeting with Ms. Jumper under these circumstances constituted recklessness sufficient to prove dishonesty.

74. Respondent claims that he "wasn't trying to hide anything" because he insisted that his meetings with Ms. Jumper be tape recorded, yet that entirely misses the point. He "hid" from Ms. Kincaid the fact that he was meeting with her client, Ms. Jumper, until after he obtained Ms. Jumper's signature on the documents he drafted that would have eviscerated the 2001 estate plan Ms. Kincaid had prepared for Ms. Jumper. The fact that he tape recorded these meetings constitutes nothing more than additional evidence of Respondent's improper meetings with Ms. Kincaid's client.

RECOMMENDED SANCTION

75. Bar Counsel requests a six-month suspension and reinstatement conditioned on a showing of fitness, arguing that the serious nature of Respondent's conduct, along with his utter lack of remorse for his actions, merit a significant sanction in order to deter similar conduct in the future. Respondent's post-hearing brief is devoid of any discussion of sanction. Rather, Respondent maintains that he violated no ethical obligations and, in fact, would act no differently were he to be faced with the same situation in the future. Respondent states that, "I agree that I should be sanctioned if I knew – or even should have known – that Sally Jumper was represented by counsel at the times I (with my client and others) met with Sally at the nursing home." RX 10 at p. 195. Because we find Respondent did know that Ms. Kincaid represented Ms. Jumper at the time in question, we find that sanctions are appropriate. We now examine the issue of what sanction should be applied under the circumstances.

76. We must consider the following factors in determining the appropriate sanction, including: (1) the seriousness of the misconduct; (2) the prejudice, if any, to the client that resulted from the misconduct; (3) whether the misconduct involved dishonesty; (4) violation of other provisions of the disciplinary rules; (5) the attorney's disciplinary history; (6) whether or not the attorney has acknowledged his wrongful conduct; and (7) aggravating or mitigating circumstances. *In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013) (citing *Elgin*, 918 A.2d at 376); *see also In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc). The goal of the discipline imposed is to maintain the integrity of the legal profession, protect the public and courts, and deter future or similar misconduct by the respondent-lawyer and other lawyers. *Martin*, 67 A.3d at 1053; *Hutchinson*, 534 A.2d at 924; *Reback*, 513 A.2d at 231. Further, the sanction imposed must not "foster a tendency toward inconsistent dispositions for comparable conduct or . . . otherwise be unwarranted." D.C. Bar Rule XI, § 9(h)(1).

77. There are few cases dealing with sanctions for violation of Rule 4.2(a). In *In re Roxborough*, 692 A.2d 1370 (D.C. 1997), the respondent's investigator contacted an adverse party without the respondent's knowledge or consent. When the respondent learned of the conduct, he instructed the investigator to cease the communication. Based on statements made by the respondent's investigator, however, the adverse party came to the respondent's office and informed the respondent that he wished to fire his counsel and hire the respondent. The respondent failed to contact opposing counsel and inform him of these contacts until the adverse party signed a back-dated letter drafted by the respondent dismissing his counsel. Moreover, the respondent also attempted to contact the adverse party after he reinstated his counsel. In light of these Rule 4.2 violations, as well as violations of Rules 1.6 (confidentiality), 1.7 (conflict of interest), 5.3 (supervision of a non-lawyer assistant) and 1.16 (termination of representation), the

Board recommended and the Court agreed to a 60-day suspension with a fitness requirement. *Id.* at 1379.

78. In *In re Thompson*, 492 A.2d 866 (D.C. 1985), the Court addressed a violation of Disciplinary Rule 7-104(A)(1), a predecessor to Rule 4.2. The unauthorized contact occurred when the respondent contacted his client's codefendant in a criminal case on multiple occasions after learning that the codefendant intended to negotiate a plea agreement in exchange for his testimony against the respondent's client. In two separate but concurrent cases, the respondent also was found to have engaged in conduct prejudicial to the administration of justice and neglect of a legal matter entrusted to him. Ultimately, the Board recommended and the Court imposed a 90-day suspension. *See id.* at 251.

79. In *In re Jones-Terrell,* 712 A.2d 496 (D.C. 1998), the respondent, a relatively inexperienced attorney, communicated with a represented party without the consent of counsel and convinced the represented party, Mrs. Wallace, to allow the respondent and her husband to move in with her. The respondent also began representing Mrs. Wallace, even though she was represented by other counsel. Finally, the respondent misrepresented the nature of her representation in a petition to have herself appointed as Mrs. Wallace's guardian. The Court found that the respondent had violated Rules 4.2(a), 1.7(b) (conflict of interest) 1.8(a) (engaging in prohibited business transaction with a client without full disclosure), 7.1(b)(3) (prohibiting personal contact with an incapacitated person regarding potential employment as that person's lawyer), 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation) and 8.4(d) (serious interference with the administration of justice). The respondent was suspended for 60 days. *Id.* at 502.

80. In contrast to violations of Rule 4.2, the Court has imposed a wide range of sanctions for violations of Rule 8.4(c), depending on the nature of the violation and the circumstances in which it occurred. Where the dishonesty is not pervasive or additional misconduct is not egregious, the Court typically will impose relatively brief periods of suspension. *See, e.g.*, *In re Chapman*, 962 A.2d 922, 923-27 (D.C. 2009) (per curiam) (60-day suspension, with 30 days stayed in favor of a one-year period of probation, with conditions, where respondent neglected a client matter and lied to Bar Counsel and Hearing Committee to cover up the misconduct).

81. When the additional misconduct is more serious or the dishonesty is pervasive, however, dishonesty typically results in a greater sanction. *Martin*, 67 A.3d at 1054-55 (imposing 18-month suspension where the respondent charged excessive fees and engaged in protracted dishonesty intended to conceal or excuse earlier misconduct, including falsely stating to Bar Counsel and the Hearing Committee that an attorney with the D.C. Bar Ethics Helpline had advised him to retain disputed funds in his operating account); *In re Boykins*, 999 A.2d 166, 167-74 (D.C. 2010) (two-year suspension plus fitness for negligent misappropriation and misleading and inconsistent explanations to Bar Counsel); *In re Pennington*, 921 A.2d 135, 136-39, 144 (D.C. 2007) (two-year suspension with fitness for missing a statute of limitations, falsifying a settlement with an insurer, intentionally misrepresenting matters in negotiating with third-party health care providers, and providing a false settlement check to the client out of her own funds).

82. Here, we have found that Respondent violated both Rule 4.2(a) and Rule 8.4(c) in the course of his representation of Mr. Anderson and, in particular, his dealings with Ms. Jumper. Respondent believed Ms. Jumper had, at best, questionable mental capacity during the relevant

time period (2001-2003). In fact, he offered that belief as a justification for his otherwise unsupported view that Ms. Jumper would not have agreed to the 2001 changes in her estate documents drafted by Ms. Kincaid absent the alleged control that Col. Verfurth and Ms. Kincaid exercised over her. Yet, Respondent drafted and had Ms. Jumper sign documents benefitting his client in late 2002 and early 2003 when, he claimed, she was clear-minded. Indeed, at the hearing, Respondent acknowledged having "qualms" about this behavior, and rightly so. Tr. at 246. However, despite these "qualms," he "didn't see any alternative but to do something because if we did nothing, then the stuff that [Col.] Verfurth had her sign would be valid, even though she probably wasn't even told what it was." *Id.*

83. We have found above that Respondent acted dishonestly when he and Mr. Anderson surreptitiously met with Ms. Jumper after the court proceedings concluded. He knew that Ms. Jumper was represented by counsel, and that the court had already determined that she was competent to sign the 2001 estate planning documents. Indeed, Respondent never even attempted to prove his unsubstantiated views regarding the relationship between Ms. Kincaid, Col. Verfurth and Ms. Jumper. He simply accepted the word of his client, whom he understood had a high degree of animosity toward Col. Verfurth, and resorted to self-help to undo the estate planning documents that did not favor his client. It appears that Respondent allowed his emotional views about the relative merit of his client's ends to justify means that ran afoul of his own obligations as a member of this Bar to exercise dispassionate legal judgment within the bounds of acceptable ethical conduct.

84. The Court has "held repeatedly that an attorney's record, or more accurately a lack thereof, may be considered a mitigating factor when fashioning an appropriate sanction." *In re Long*, 902 A.2d 1168, 1171 (D.C. 2006). Here, however, any mitigation supported by

Respondent's lack of a disciplinary record must be tempered by his absolute lack of appreciation for the problematic and inappropriate nature of his conduct, even to this day. We believe the totality of the circumstances before us weigh in favor of a suspension of moderate duration because Respondent's contact with a vulnerable represented person was compounded by his dishonesty. *See Jones-Terrell,* 712 A.2d at 501 (the Rules of Professional Conduct are designed to protect vulnerable people); *In re Austin,* 858 A.2d 969, 978 (D.C. 2004) ("'[D]eliberate and continuing' misconduct directed at a vulnerable client will not be tolerated in this jurisdiction."). We therefore recommend that Respondent receive a 90-day suspension.

85. Bar Counsel argues that Respondent should be required to prove fitness as a condition of reinstatement. In order to support the imposition of a fitness requirement, "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." *In re Cater*, 887 A.2d 1, 24 (D.C. 2005) (quoting Board report); *see also id.* at 22 (a fitness requirement is appropriate where clear and convincing evidence creates "serious concerns about whether [respondent] will act ethically and competently in the future, after the period of suspension has run."). "Serious doubt" is "real skepticism, not just a lack of certainty." *Id.* at 24. Evidence that may "tip[] the balance in favor of" a fitness requirement is "evidence of circumstances surrounding and contributing to the misconduct." *Id.* at 22. An attorney's lack of remorse is one such factor. *See In re Guberman*, 978 A.2d 200, 210 (D.C. 2009).

86. Respondent's misconduct was serious, and his lack of remorse and firm conviction that he did nothing wrong is sufficiently troubling that the Hearing Committee has "real skepticism" about Respondent's ability to practice ethically and competently in the future. With respect to the seriousness of the misconduct, Respondent recognized that Ms. Jumper was

"feeble minded in the extreme," and acknowledged that she "was a very vulnerable and gullible person who could be persuaded to sign documents presented to her, whether by [Mr. Anderson] or [Col.] Verfurth," and that he was dubious about her mental capacity. He also knew that she was represented by Ms. Kincaid, but he nonetheless decided to surreptitiously meet with her without informing Ms. Kincaid.

87. During the meetings, he made no real attempt to find out if Ms. Kincaid represented Ms. Jumper, a fact that he knew to be true, but simply refused to believe because it was not in his client's interest. Instead, he attempted to give these meetings a patina of propriety — and give himself a level of deniability — by asking Ms. Jumper whether she was represented by counsel. However, Respondent did not ask such an open-ended question, or even ask if Ms. Kincaid was her lawyer. Instead, Respondent asked Ms. Jumper if she was represented by Troxell Kincaid and Mullin, without informing Ms. Jumper that that was the name of Ms. Kincaid's firm. It is clear that Respondent questioned Ms. Jumper about her representation in a manner designed to cause Ms. Jumper to say that she was not represented, whether that was the truth or not.

88. We also note that, in Respondent's view, Ms. Jumper was lucid only when she took action favorable to his client, and was not lucid when she took action harmful to his client. He does not articulate a principled basis for this distinction, and we see none in the record. Instead, the record reveals that Ms. Jumper was likely to simply agree with the leading questions she was asked.

89. Respondent also utterly fails to recognize the wrongfulness of his conduct. He not only denied his wrongdoing and failed to express remorse, but testified that his conduct was "ethical," that he had "no choice" and that if he "had it to do it over again, [he] would do

essentially the same thing . . . ." Tr. 211:14-17. He gave this testimony to this Hearing Committee after the Court of Appeals upheld sanctions against him for engaging in the very conduct at issue here. Clearly Respondent does not realize that what he did was wrong.

90. Given the seriousness of Respondent's misconduct and his utter lack of acknowledgement of, let alone willingness to take responsibility for, his breach of the Rules of Professional Conduct, we find that there is clear and convincing evidence that casts a serious doubt on Respondent's continuing fitness to practice law, and we recommend that he be required to prove fitness before he is reinstated. *See*, *e.g.*, *In re Bradley*, No. 12-BG-1205, slip op. at 16 (D.C. July 11, 2013) (fitness imposed where, *inter alia*, respondent did not recognize the seriousness of her misconduct or take responsibility for her actions); *In re Vohra*, No. 11-BG-1607, slip op. at 37 (D.C. June 27, 2013) (same); *In re Slaughter*, 929 A.2d 433, 448 (D.C. 2007) (respondent's failure to express remorse among the factors considered in finding a serious doubt as to respondent's fitness to practice law); *In re Chisholm*, 679 A.2d 495, 503-04 (D.C. 1996) (same).

CONCLUSION

For the foregoing reasons, the Hearing Committee finds that Respondent violated Rules 4.2(a), and 8.4(c), and recommends that he be suspended for 90 days, and required to prove his fitness to practice law as a condition of reinstatement. We direct Respondent's attention to the requirements of D.C. Bar R. XI, § 14, and their effect on eligibility for reinstatement. *See* D.C. Bar R. XI, § 16(c).

AD HOC HEARING COMMITTEE:

/WAC/
Wallace A. Christensen, Chair

/ALB/
Andrea L. Berlowe, Attorney Member

/DB/
David Bernstein, Public Member

Dated: October 29, 2013