District of Columbia Court of Appeals
Board on Professional Responsibility
Hearing Committee Number Nine

In the Matter of:	:	
	:	
Larry E. Klayman,	:	
	:	Board Docket No. 13-BD-084
Respondent.	:	Bar Docket No. 2008-D048
	:	
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 334581)	:	

REPORT AND RECOMMENDATION

Respondent Larry E. Klayman is charged with violating the Rules of Professional Conduct by representing three individuals in litigation against his former client Judicial Watch, Inc., a nonprofit organization.

The three cases were brought by: a former employee of Judicial Watch (Sandra Cobas); a donor to the organization (Louise Benson); and a former client (Peter Paul). Disciplinary Counsel charges that the three matters were the same or substantially related to matters that Respondent handled as Judicial Watch's general counsel and that his conduct violated Rule 1.9 (or its Florida equivalent) and in one of the matters seriously interfered with the administration of justice in violation of Rule 8.4(d). Disciplinary Counsel recommends that Respondent be suspended for 90 days, with 60 days stayed, pending his completion of a continuing legal education course on conflicts of interest.

The matter is before Hearing Committee Number Nine: Theodore (Jack) Metzler, Esq., Chair; Trevor Mitchell, public member; and William Corcoran, Esq., attorney member. As described below, we find by clear and convincing evidence that Respondent violated the rules in all three matters. We recommend that Respondent be suspended for 90 days, with reinstatement conditioned upon a showing of his fitness to practice law.

I. Procedural History

This matter originated with a specification of charges filed in October 2013 and assigned to an Ad Hoc Hearing Committee. DCX-B.[1] In his answer, Respondent largely admitted the factual allegations of the specification and asserted nine "affirmative defenses." DCX-C. Disciplinary Counsel sought to amend the specification to add the allegation that Respondent is a member of the Florida Bar and to charge that his conduct in one count of the specification violated the Florida Rule of Professional Conduct 4-1.9(a) in addition to D.C. Rule 1.9. Respondent did not oppose the amendment; however, the Ad Hoc Hearing Committee determined *sua sponte* that Disciplinary Counsel may not charge that the same conduct violated both the D.C. and Florida rules. Accordingly, it approved the amended specification with a further modification—removing the D.C. Rule 1.9 charge in favor of the Florida Rule 4-1.9(a) charge. *See* DCX-B1 ¶¶ 1, 13. Respondent did not file an answer to the amended specification.

[1] DCX-__ refers to Disciplinary Counsel's exhibits; RX-__ refers to Respondent's exhibits.

The matter was subsequently assigned to this Hearing Committee. A prehearing conference was held before the Chair on October 8, 2015. Disciplinary Counsel was represented by H. Clay Smith III, Esq.; Respondent appeared *pro se*. On October 29, 2015, Respondent filed a motion to strike or dismiss Count I of the Amended Specification. In keeping with Board Rule 7.16(a), the Hearing Committee deferred ruling on the motion. *See In re Ontell*, 593 A.2d 1038, 1040 (D.C. 1991). As explained below, we now recommend the motion be denied.

The matter was heard on January 26-28, 2016. Disciplinary Counsel was again represented by H. Clay Smith III, Esq., and Respondent again appeared *pro se*. Disciplinary Counsel called one witness in its case-in-chief, Thomas Fitton, the President of Judicial Watch, and offered Exhibits A-D and 1-52, which were admitted into evidence. Tr. 236. Respondent testified on his own behalf and also called three witnesses: Paul Orfanedes, Esq.; Judge Royce C. Lamberth; and Respondent's expert, Professor Ronald Rotunda. Judge Lamberth and Professor Rotunda testified remotely. Respondent's exhibits 1-26 were admitted into evidence. Tr. 344, 656. In its rebuttal case, Disciplinary Counsel called Daniel Dugan, Esq., who testified remotely.

The Hearing Committee made a preliminary, non-binding determination that Disciplinary Counsel had proved at least one of the violations in the amended specification. Tr. 701. Disciplinary Counsel then submitted one additional exhibit (DCX-53) as evidence in aggravation, which was received

into evidence. Tr. 702. On the last day of the hearing, the parties submitted a joint stipulation agreeing to a number of facts. Following the hearing, Judge Lamberth wrote a note to Disciplinary Counsel regarding his testimony, attaching a document that he suggested was relevant. The note and its attachment were admitted into evidence on Respondent's unopposed motion. *See* Order dated February 18, 2016.

II. Recommended Disposition of Respondent's Motion to Dismiss

Respondent's motion argues that Count I of the amended specification (involving former Judicial Watch employee Sandra Cobas) violates the choice-of-law provisions of Rule of Professional Conduct 8.5(b) because it alleges a violation of Florida's disciplinary rules rather than D.C.'s.

Rule 8.5(b) contains two choice-of-law rules: Rule 8.5(b)(1) applies to "conduct in connection with a matter pending before a tribunal"; Rule 8.5(b)(2) applies to "any other conduct." Count I involves Respondent's representation of Sandra Cobas before two tribunals, so Rule 8.5(b)(1) is the proper rule. For such conduct, "the rules to be applied shall be the rules of the jurisdiction in which the tribunal sits." D.C. R. Prof'l Conduct 8.5(b)(1). Here, both of the tribunals (a trial court and an appellate court) were in Florida, and the amended specification properly charges violations of the Florida rules.

Respondent's argument that the D.C. Rules should apply fails because it relies on the wrong Rule 8.5 standard. Respondent argues that he "princi-

pally practiced" in D.C. and that his conduct did not have a "predominant effect" in Florida. Mot. 6-7. Those factors come from Rule 8.5(b)(2), which applies to conduct that is *not* "in connection with a matter pending before a tribunal." They are not relevant here, where the conduct involved matters pending before courts in Florida. We therefore recommend that Respondent's motion be denied.

III. Findings of Fact

The relevant facts are largely undisputed. Respondent admitted most of the factual allegations described in the amended specification, the parties stipulated to many additional facts, and Respondent did not dispute most of Disciplinary Counsel's proposed findings. In particular, Respondent admits that the three matters all arose from events that began while he was Judicial Watch's general counsel and that he was involved with them as general counsel. More specifically:

In Count I, Judicial Watch employee Sandra Cobas complained to Respondent about how another employee was treating her. Respondent discussed the matter with the leadership of Judicial Watch and gave the organization legal advice. Later, after Respondent and Cobas had both left the organization, Respondent represented Cobas in a lawsuit against Judicial Watch that was based on the very same complaints.

In Count II, Respondent solicited a donation from Louise Benson to purchase a building that was to be Judicial Watch's headquarters, signing the

solicitation letter as chairman and general counsel of Judicial Watch. Benson donated $15,000. After Respondent left the organization, Benson sued Judicial Watch twice, claiming that it breached Respondent's promise (in the letter) to purchase the building. Respondent appeared as counsel for Benson in the second lawsuit.

In Count III, Respondent signed two representation agreements on Judicial Watch's behalf and as its general counsel, agreeing to provide legal representation to an individual named Peter Paul. He later appeared in a lawsuit brought by Paul, claiming that Judicial Watch had breached the agreements.

None of this is seriously disputed. We find the following facts by clear and convincing evidence:

A. Background

1. Respondent is admitted to practice law in the District of Columbia and Florida. Stip. ¶ 1; DCX-A.

2. Respondent was employed as chairman and general counsel of Judicial Watch from its founding in 1994 until September 19, 2003. Stip. ¶ 2. As general counsel, Respondent was the organization's lead attorney. *Id.* His legal advice to Judicial Watch included vetting and analyzing the advice of outside counsel hired on behalf of the organization to handle particular matters or subject areas. Tr. 112-113 (Fitton).

3. When Respondent left Judicial Watch, he entered into a severance agreement with the organization. Tr. 329:8-13. The relationship between Respondent and Judicial Watch soured soon thereafter. Respondent testified that Judicial Watch was his "little baby," that he believed those at Judicial Watch were misusing the organization after he left it and had betrayed him, and that he had tried to take the organization back. Tr. 337, 340, 361-363, 418 (Klayman). Since his separation, Respondent has sued Judicial Watch approximately seven times. Tr. 92-94 (Fitton).

B. Count I: Respondent's Representation of Sandra Cobas Against Judicial Watch

4. During Respondent's tenure as the general counsel of Judicial Watch, Sandra Cobas was the director of the organization's Miami Regional Office, a position she held until September 2003. Stip. ¶¶ 2-3; DC Proposed Finding 4 (*admitted*, Resp. Br. 1 n.2).

5. Cobas complained to Judicial Watch about the conditions of her employment, claiming that she was subject to a hostile work environment during the period between June 5 and August 29, 2003. Stip. ¶ 4. Cobas's complaints are reflected in several memoranda she wrote during this period and in her resignation letter. *See* DCX-15(a) to 15(f); DCX-16.

6. In his capacity as general counsel, Respondent provided legal advice to Judicial Watch about Cobas's claims, advising the organization to take action against a second employee—the subject of Cobas's complaints.

DC Proposed Finding 8 (*admitted*, Resp. Br. 1 n.2); Resp. Br. 6; *see also* Tr. 444-445 (Klayman); Stip. ¶¶ 5-6. Cobas's contemporaneous writings describe her understanding of Respondent's involvement: in one memorandum she wrote, "I know [Respondent] has tried to get this to stop." DCX-15(f) at 68.[2] And her resignation letter to Messrs. Fitton and Orfanedes says, "I asked [Respondent] to talk to you about this on many occasions. He said he did." DCX-16 at 69.

7. After Respondent and Cobas had both left Judicial Watch, Cobas filed a complaint against Judicial Watch in Florida state court. Stip. ¶ 6; DCX-17. The lawsuit alleged the same complaints that Cobas described in her internal memoranda during her employment. DC Proposed Finding 10 (*admitted*, Resp. Br. 1 n.2). The trial court granted a motion to dismiss the case, commenting that the complaint was "silly and vindictive." DCX-18; DCX-20 at 81; Stip. ¶ 7.

8. Cobas was not represented in the matter by Respondent prior to the dismissal. Stip. ¶ 6; DCX-17 at 75. Subsequently, however, and without seeking consent from Judicial Watch, Respondent entered an appearance on Cobas's behalf. Stip. ¶ 8; Tr. 442-443 (Klayman). He filed a motion asking that the trial court vacate its order of dismissal, which was denied. Stip. ¶ 8. Respondent then filed a notice of appeal on Cobas's behalf and later a brief

[2] Disciplinary Counsel's exhibits DCX-1 to DCX-52 are continuously numbered at the bottom of the page; citations to these exhibits refer to those page numbers.

in a Florida appellate court. Stip. ¶¶ 9-10; DCX-19; DCX-20; Tr. 442 (Klayman).

9. The appellate court affirmed the dismissal. Stip. ¶ 11; DCX-21.

C. Count II: Respondent's Representation of Louise Benson Against Judicial Watch

10. As part of a campaign to raise funds to purchase a building for Judicial Watch, in 2002 Respondent solicited a donation from Louise Benson for a "building fund." Stip. ¶¶ 12-13; DCX-22; Tr. 446-447 (Klayman). Respondent was acting in his capacity as both chairman and general counsel when he solicited the donation. Stip. ¶¶ 12-13; DCX-22 at 102. The organization relied on Respondent as its general counsel to protect its interests in all aspects of the potential building purchase, including its fundraising efforts.[3] Tr. 66-67 (Fitton).

11. Benson pledged $50,000 to the building fund, of which she later paid $15,000. Stip. ¶ 14; Tr. 449 (Klayman).

12. Judicial Watch did not ultimately purchase the building. Stip. ¶ 15.

[3] Respondent contests whether Judicial Watch relied on his legal skills in the building project. Resp. Br. 9 n.11. Given his role as the general counsel and chief legal officer, his use of the General Counsel title in the solicitation letter, and the lack of any contemporaneous evidence suggesting to the contrary, we find that Respondent's denial is not credible. *See* Tr. 327 ("I was the chairman and general counsel . . . [a]nd I was the one that guaranteed the building that's at issue here, personally."), 430 ("And I had every intention as chairman and general counsel to buy it."), 447 ("and the letter was reviewed by others at Judicial Watch, and they had no problem with my designation as chairman and general counsel"); Stip. ¶ 13 ("Respondent, as Chairman and General Counsel for Judicial Watch, directly solicited a donation from Louise Benson for the Building Fund.").

13. In 2006, after Respondent left Judicial Watch, he and Benson filed a lawsuit against the organization in federal court, *Klayman, et al. v. Judicial Watch, et al.*, No. 1:11-cv-874 (D.D.C.). Stip. ¶ 16; DCX-35; Tr. 449 (Klayman). Respondent and Benson were both represented by attorney Daniel Dugan, Esq. BCX-35 at 242-243; BCX-36 at 358. Although Respondent and Benson were co-plaintiffs in the case, their claims did not overlap. Stip. ¶ 16; *see* DCX-36 at 344-358. Benson claimed (in three counts) that she had relied on the solicitation she received from Respondent and specific representations in the solicitation (an alleged promise to purchase a building) when she made her donations. DCX-36 at 344-348. She sought relief for fraudulent misrepresentation, breach of contract, and unjust enrichment. *Id.* Respondent's claims involved his severance agreement with the organization and other alleged wrongs; they did not arise from Benson's donation. *Id.* at 348-358; Tr. 452-453 (Klayman).

14. The district court dismissed Benson's claims (but not Respondent's) from the case for lack of subject-matter jurisdiction because the amount in controversy ($15,000) was less than the amount required by 28 U.S.C. § 1332 ($75,000), and Benson's claims were not "so related" to Respondent's claims that they formed part of the same case or controversy. DCX-37 at 377-379; Stip. ¶ 17; Tr. 453 (Klayman).

15. About a week later, Benson sued Judicial Watch on her own in D.C. Superior Court, *Benson v. Judicial Watch, Inc.*, Civ. No. 520-07. Stip. ¶ 18;

DCX-24. Benson was initially represented in the lawsuit by Mr. Dugan, the same attorney who represented her and Respondent in the earlier case. Benson again alleged that Judicial Watch fraudulently misrepresented its intent to purchase a headquarters building, that it breached a contract with her for naming rights to an office in the building, and that the organization was unjustly enriched because it had not used her donation as promised. DCX-24 at 141, 145-146, 148.

16. In her discovery responses, Benson listed Respondent as a potential fact witness, describing him as "generally familiar with facts relating to representations made to Plaintiff in connection with her donation to the building fund." DCX-25 at 152; DCX-26 at 162. This is consistent with Respondent's testimony in this proceeding, that the "representations made to Plaintiff" were his own representations while at Judicial Watch: "I represented we were going to buy a building. It proved to be that it was not honored by the subsequent owners of Judicial Watch." Tr. 456-457.

17. To settle Benson's claim, Judicial Watch unilaterally returned $15,000 to her. Stip. ¶ 19; DCX-31 at 217; DCX-34(a).

18. Following the payment, there did not appear to be any substantial dispute remaining between Benson and Judicial Watch. Nevertheless, the litigation continued and, without seeking consent from the organization, Respondent entered an appearance in the case as co-counsel for Benson. Stip. ¶ 20; DCX-27; Tr. 454-455, 458 (Klayman). Judicial Watch requested that

Respondent withdraw, noting that he had organized the fundraising effort at the center of Benson's complaint while he was Judicial Watch's attorney, and that Benson had identified him as a fact witness. DCX-28 at 167-168.

19. Respondent did not withdraw from the representation and Judicial Watch moved to disqualify him. Stip. ¶ 21; DCX-29. Benson opposed the motion, claiming that Respondent had not represented Judicial Watch with regard to the donation and that—contrary to the discovery responses submitted a month before—Respondent would not be a fact witness. DCX-30 at 197-198, 200-201. The motion contains Mr. Dugan's and Respondent's electronic signatures. *Id.* at 201. Attached to the motion was an affidavit in which Benson claimed, "The source and substance of my allegations against Judicial Watch do not involve Larry Klayman, other than that he acted as my counsel at all relevant times." *Id.* at 206.

20. Respondent testified that he appeared in the case on the advice of his counsel, Mr. Dugan, and that Mr. Dugan wrote and agreed with the opposition to Judicial Watch's motion. Tr. 359 ("I believed that Mr. Dugan had given the advice of counsel that I could do this, otherwise he wouldn't have prepared the pleading."); *see also*, *e.g.*, Tr. 358, 409. We find that Respondent's testimony was false. Mr. Dugan testified credibly that Respondent did not seek his advice on whether to appear in Benson's case: "I was not asked for, nor did I give my advice, as to whether Mr. Klayman should enter his appearance on behalf of Louise Benson." Tr. 685-686. Respondent cannot

have inferred the advice from Dugan's brief opposing the motion to disqualify because Dugan did not write the opposition. He testified that he believed that the motion to disqualify was "well-founded on its face," that it was Respondent who wrote the opposition, and that he believed Respondent "was going to lose this motion." Tr. 682, 683-684; *see also* Tr. 691-692 ("[T]his was a document that was put together by [Respondent] in the first instance . . . [he] did the work on this.").

21. The motion was never decided because the parties stipulated to the dismissal of the case. Stip. ¶ 22; DCX-34.

D. Count III: Respondent's Representation of Peter Paul Against Judicial Watch

22. In 2001, Judicial Watch entered into a representation agreement with Peter Paul, agreeing to evaluate legal issues arising from his fundraising activities during the election campaign for New York's state Senate in 2000. Stip. ¶ 23; Tr. 365-366 (Klayman). Respondent drafted, edited, and approved the representation agreement. DC Proposed Finding 32 (*admitted*, Resp. Br. 1 n.2); Tr. 471-472 (Klayman). Respondent signed the agreement as the organization's chairman and general counsel.[4] *Id.*; DCX-38; Tr. 369 (Klayman).

[4] Strictly speaking, Respondent authorized Judicial Watch's president, Thomas Fitton, to sign on his behalf. Tr. 369, 471 (Klayman). However, there is no dispute that Respondent authorized the signature. Tr. 369 (Klayman).

23. About a month later, Judicial Watch and Paul agreed to modify the representation agreement. DCX-39. Respondent discussed how the agreement would be revised with others at Judicial Watch, and he drafted, edited, and approved the modified agreement. DC Proposed Finding 33 (*admitted*, Resp. Br. 1 n.2); Tr. 473-474 (Klayman). In the new agreement, Judicial Watch agreed to represent Paul in connection with an investigation into alleged criminal securities law violations arising from his fundraising activities, and potentially in civil litigation regarding the same matters. *Id.*; Stip. ¶ 24. The modified representation agreement was again signed by Respondent as the chairman and general counsel of Judicial Watch. DCX-39 at 412. As Respondent testified, in signing the agreement between Paul and Judicial Watch, Respondent was representing Judicial Watch. Tr. 371, 373.

24. Judicial Watch then represented Paul in a civil lawsuit brought in California state court, *Paul v. Clinton, et al.*, No. BC304174, (Cal. Super. Ct.). DCX-40. After Respondent left Judicial Watch, Judicial Watch withdrew from the representation, with the court's approval. DCX-41; DCX-44.

25. Paul then sued Judicial Watch in the United States District Court for the District of Columbia alleging, among other theories, that the organization breached its representation agreement with him. DCX-46; DC Proposed Finding 36 (*admitted*, Resp. Br. 1 n.2); Tr. 477-479 (Klayman). Paul was initially represented by Daniel J. Dugan, Esq. DCX-46 at 492.

26. Without seeking Judicial Watch's consent, Respondent entered an appearance in the case. DCX-47; DC Proposed Finding 37 (*admitted*, Resp. Br. 1 n.2); Tr. 480-481 (Klayman). Judicial Watch moved to disqualify Respondent, DCX-48, and Respondent opposed the motion, DCX-49.

27. The district court (Judge Lamberth) granted the motion. DCX-52. The court found that Respondent's representation of Paul violated D.C. Rule of Professional Conduct 1.9. *Id.* at 548. The court found it uncontested that Respondent "directed and supervised negotiation and drafting of" the agreement to represent Paul, and that Respondent was therefore the former attorney of Judicial Watch. *Id.* at 549. The court further found it "plain that the interests of Paul and [Judicial Watch] are materially adverse," and that the matter was "*at least* substantially related to, if not the very same as, a matter in which Mr. Klayman previously represented Judicial Watch." *Id.* The court continued: "Succinctly put, Mr. Klayman is representing the current plaintiff in a matter directly arising from an agreement he signed in his capacity as General Counsel for the current defendant. Klayman's present representation of Paul is the very type of 'changing of sides in the matter' forbidden by Rule 1.9." *Id.* Given the "clear violation of Rule 1.9," the court granted the motion to disqualify. *Id.* at 558-559.

IV. Conclusions of Law

A. Rule 1.9 and Florida Rule 4-1.9(a)

Rule 1.9 prohibits a lawyer from representing a client against a former client in a matter that is the same as or substantially related to a matter in which the lawyer represented the former client, unless the former client consents. D.C. R. Prof'l Conduct 1.9. Florida's rule is almost identical. *See* Fla. R. Prof'l Conduct 4-1.9(a). (One slight difference in the commentary, irrelevant here, is discussed below.)

The concern behind Rule 1.9 is that an attorney will turn against his client and use information learned in the course of the representation to help a new client who is adverse to the original client. If that happened, the original client would understandably feel betrayed. If the Rules of Professional Conduct allowed such behavior, it's easy to see how the attorney-client relationship and ultimately the adversary system itself would be undermined—there is no point in hiring a lawyer who can dump you and start working for your adversary, using your secrets against you. But despite its motivating concern, a Rule 1.9 violation does not require that the attorney misused confidential information. Indeed, Disciplinary Counsel need not show that confidential information was learned by the attorney or revealed to an adversary to establish a violation. *See* D.C. R. Prof'l Conduct 1.9, cmt. [3]. Instead, the conclusion that the lawyer received confidential information may be based on the nature of the services the lawyer provides to the client. *Id.*

Under both the Florida and D.C. versions of Rule 1.9, a lawyer violates the rule by undertaking a representation if: (1) an attorney-client relationship existed between the lawyer and the former client; (2) the new representation is adverse to the interests of the former client; (3) the new matter is the same as or substantially related to the earlier matter; and (4) the former client has not provided informed consent.

Two of these four requirements require little discussion: First, Judicial Watch is the former client and the defendant in lawsuits brought by Cobas, Benson, and Paul. Respondent appeared on behalf of the plaintiffs in all three cases, and there is no dispute that his representations were adverse to Judicial Watch. Second, there is no suggestion that Judicial Watch consented to the representations.

The other two requirements are at least party contested. Although the record is clear that Respondent had an attorney-client relationship with Judicial Watch as its general counsel, Respondent argues that he did *not* have such a relationship in the Benson matter, and that he did *not* represent the organization with regard to Cobas's employment complaints. Respondent also disputes whether his prior representation of Judicial Watch involved matters that were the same as or substantially related to Cobas's, Benson's, and Paul's lawsuits.

1. The attorney-client relationship

We find that Respondent had an attorney-client relationship with Judicial Watch with respect to all three matters. An attorney-client relationship is formed when attorney and client "explicitly or by their conduct, manifest an intention to create the attorney/client relationship." *In re Ryan*, 670 A.2d 375, 379 (D.C. 1996) (cleaned up); *Headfirst Baseball LLC v. Elwood*, 999 F. Supp. 2d 199, 209 (D.D.C. 2013). Here, the relationship is established by the undisputed fact that Respondent was Judicial Watch's general counsel. That was true when Cobas complained to him about her employment conditions, when Respondent solicited the donation from Benson, and when he approved Judicial Watch's initial and revised representation agreements with Paul. Findings ¶¶ 2, 4, 10, 22, 23, *supra* pp. 6, 7, 9, 13, 14.

Respondent's contrary arguments rest on the erroneous assumption that an organization must re-establish an attorney-client relationship with its general counsel for each discrete matter that comes to his attention. Thus, he suggests that he did not have an attorney-client relationship with Judicial Watch with regard to Cobas because Judicial Watch retained another attorney for employment issues. Resp. Br. 7-8, 18. At most, that argument shows that he was less involved in the specific matter (the import of which is discussed below), not that there was no attorney-client relationship. With respect to the Benson matter, Respondent argues that sending a solicitation letter does not establish an attorney-client relationship because nonlawyers can

send such letters. Resp. Br. 9, 19-20. This is true, but irrelevant. Our finding does not rest on Respondent's sending the solicitation letter; it rests on the already existing attorney-client relationship between Respondent and Judicial Watch when he sent the letter.

2. The same or substantially related matters

We turn now to the heart of the dispute in this case: whether Respondent's representation of Judicial Watch involved the same or substantially related matters in which he later represented Cobas, Benson, and Paul. We conclude that it did in all three cases.

Rule 1.9 and its commentary are designed to induce lawyers to be cautious when considering a representation adverse to a former client. *See In re Sofaer*, 728 A.2d 625, 628 (D.C. 1999). First, matters that involve "the same transaction or legal dispute" are the same matter for purposes of the Rule. D.C. R. Prof'l Conduct 1.9, cmt. [3]; Fla. R. 4-1.9, cmt. "Where any substantial relationship can be shown between the subject matter of a former representation and that of a subsequent adverse representation, the latter will be prohibited." *Brown v. D.C. Bd. of Zoning Adjustment*, 486 A.2d 37, 42 (D.C. 1984) (quoting *T.C. Theatre Corp. v. Warner Brothers Pictures, Inc.*, 113 F. Supp. 265, 268 (S.D.N.Y. 1953)). Thus, a lawyer cannot justify taking on a new matter adverse to a former client (as Respondent attempts to do) by claiming it is not *exactly* the same as the one handled for the former client. Indeed, there is no need to carefully delineate between matters that

are "the same" and those that are "substantially related" because the Court of Appeals considers matters "the same if [they are] substantially related to one another." *Id*. In Florida, a prior representation "need only be akin to the present action in a way reasonable persons would understand as important to the issues involved." *Bedoya v. Aventura Limousine & Transp. Serv.*, 2012 U.S. Dist. LEXIS 59862 at *17 (S.D. Fla. Apr. 30, 2012) (cleaned up). And when "two matters involve the same facts," they are "generally considered to be substantially related." *United States ex rel. Bumbury v. Med-Care Diabetic & Med. Supplies, Inc.*, 101 F. Supp. 3d 1268, 1275 (S.D. Fla. 2015). Matters can also be substantially related when they do not arise from the same transaction or legal dispute "if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." D.C. R. Prof'l Conduct 1.9, cmt. [3].

These concepts are illustrated by a number of examples in the commentary to Rule 1.9. But this is not a close case in which it is necessary to draw fine lines. All three of the matters in question were the same as matters that Respondent handled for Judicial Watch because there was a substantial relationship—indeed a direct and obvious one—between the subject matter of the former representations and that of the subsequent adverse representations; therefore, the later representations were prohibited. *See Brown*, 486 A.2d at 42.

In the Cobas matter (Count I, which is charged under Florida's rule), Respondent admits that he provided advice to Judicial Watch about Cobas's employment claims and that he advised the organization to take action against another employee. Findings ¶ 6, *supra* p. 7. He then appeared in a lawsuit *against* Judicial Watch arising from the very same complaints. Findings ¶¶ 7-8, *supra* p. 8. Because the two matters arose from the same facts, Florida's Rule 4-1.9(a) prohibited Respondent from taking on the later representation. *Bumbury*, 101 F. Supp. 3d at 1275; *Bedoya*, 2012 U.S. Dist. LEXIS 59862 at *17.

The Benson and Paul matters were also the same as matters that Respondent handled for Judicial Watch—they both involved: (a) "specific transaction[s]" in which Benson's and Paul's interests were (b) "materially adverse" to Judicial Watch's interests. D.C. R. Prof'l Conduct 1.9, cmt. [2].

The Benson matter involved a transaction by which Benson pledged to and did donate money to Judicial Watch, which accepted the pledge and the donation. Respondent was "directly involved" (in the language of Rule 1.9, cmt. [2]) because he was the one who asked Benson to make the donation. Findings ¶ 10, *supra* p. 9. In fact, Respondent's solicitation contained the very representations that later became the subject of Benson's lawsuit. As Respondent testified: "I represented we were going to buy a building. It proved to be that it was not honored by the subsequent owners of Judicial Watch." Tr. 456-457. Respondent was also directly involved because Judi-

cial Watch relied on him as its general counsel to protect its interests in the fundraising effort. Findings ¶ 10, *supra* p. 9 & n.3.

The parties' interests were partially aligned in this transaction because they both wanted the organization to have the donation as part of its building fund campaign. But they were also partially adverse, and materially so: Benson's lawsuit demonstrates that her interests included exacting a promise in exchange for her donation that Judicial Watch would purchase the headquarters building. Judicial Watch had a contrary interest—to accept donations without obliging itself to purchase a building, and it relied on Respondent to protect that interest. Findings ¶ 10, *supra* p. 9. The parties' interests thus were "materially adverse" in the transaction on the extent to which Benson's donation would bind Judicial Watch to buy a building. Because Respondent was directly involved in the transaction for Judicial Watch, his subsequent representation of Benson in her claim that the donation *did* bind Judicial Watch "clearly [was] prohibited." D.C. R. Prof'l Conduct 1.9, cmt. [2].

The same analysis applies even more strongly in the Paul matter. Respondent was directly involved—reviewing, drafting, and signing two representation agreements—in the transaction by which Judicial Watch agreed to provide legal representation to Paul. Findings ¶¶ 22-23, *supra* p. 13-14. The parties were materially adverse with respect to the question that ultimately became the subject of litigation between them; namely, whether the agreement would make Judicial Watch liable to Paul for withdrawing from the

representation. On that question, Paul's interest was to secure an agreement that guaranteed him representation to the greatest extent possible, whereas Judicial Watch's adverse interest was to preserve its ability to withdraw. Respondent was directly involved in the transaction for Judicial Watch; he may not thereafter represent Paul.

3. Respondent's arguments

Respondent's attempts to show that the lawsuits against Judicial Watch were not the same as the matters he handled for the organization are sorely lacking. As alluded to above, many of his arguments show only that the lawsuits were not the *exact* same as the matters he handled for Judicial Watch, but Rule 1.9 does not prohibit only cases in which a lawyer literally walks from one counsel's table to the other. So in the Cobas matter, it makes no difference whether "Judicial Watch never litigated with Cobas" while Respondent was general counsel; whether her claims included theories of "intentional infliction of emotional distress, defamation, and false light"; or whether the case was on appeal. Resp. Br. 6, 8 n.10, 17. What does matter is that the claims arose from the same facts—Cobas's complaints—about which Respondent had advised Judicial Watch. Likewise, in the Benson matter it makes no difference that "Respondent never represented Judicial Watch in a Benson fraud suit against it." *Id.* at 9. And in the Paul matter it makes no difference whether Respondent "changed sides" in the civil litigation that Paul brought against Bill and Hillary Clinton (Resp. Br. 11-12)—a

non sequitur because Respondent is not accused of misconduct regarding that litigation.

The scope of Respondent's involvement: Respondent's next set of arguments rely on commentary to Rule 1.9 that the scope of a particular matter may depend on the degree of the lawyer's involvement. Respondent tries to argue that the lawsuits were different matters by minimizing his involvement while representing Judicial Watch, but fails to show that he was so peripherally involved that the lawsuits should be considered distinct matters.

The most plausible (though still insufficient) of these arguments is Respondent's assertion that he did not act in a legal capacity in soliciting the donation from Benson. Resp. Br. 9-10, 19-20. As Respondent points out, soliciting donations is not activity that, by itself, necessarily suggests the practice of law. *Cf.* D.C. Ct. App. R. 49(b)(2) (listing activities that are presumptively the practice of law). But the evidence here is not limited to soliciting a donation. The touchstone of the practice of law is "a client relationship of trust or reliance." *Id.* An organization trusts and relies on its general counsel to consider the organization's legal interests in all of the matters that come to his attention. *See* Black's Law Dictionary 425 (10th ed. 2014) (defining "general counsel" as a lawyer "that represents a client in all or most of the client's legal matters"). Thus, there is a presumption that a company's general counsel is most often acting in his legal capacity. *Boca Investerings Partnership v. United States*, 31 F. Supp. 2d 9, 12 (D.D.C. 1998). Here, Re-

spondent wore both the "general counsel" and "chairman" hats when he signed the solicitation letter, and signing the letter as general counsel strongly suggests that he intended to act in a legal capacity.[5] *See* Findings ¶ 10, *supra* p. 9 & n.3. Moreover, it is reasonable for an organization to rely on its attorneys (especially its general counsel) to look out for the organization's legal interests when they are involved in matters may have legal implications for the organization, even if the activity is not itself the practice of law. Judicial Watch's president credibly testified that Judicial Watch relied just so on Respondent. *Id.* Respondent's suggestion that he acted *only* as a fundraiser, without regard to Judicial Watch's legal interests, is not credible. *See* note 3, *supra* p. 9.

Respondent likewise seeks to minimize his representation of Judicial Watch in the Cobas matter, arguing that he "was not involved in the day-to-day activities of Judicial Watch" when Cobas complained; that he had hired outside counsel to represent Judicial Watch in employment matters; and that he "assigned" the employment dispute to "a specific attorney" other than himself. Resp. Br. 6-8. If these circumstances were enough to question the level of Respondent's involvement (we doubt it), he goes too far by arguing that he could not have been representing *Judicial Watch* in the matter because "he always was supporting Cobas," and when he spoke to "his hired

[5] Given the letter itself and Respondent's own testimony, his argument that the solicitation "has *nothing to do with his role as General Counsel of Judicial Watch*" (Resp. Br. 9 (Respondent's italics)) is preposterous.

counsel" about the matter, he did so "*on behalf of Cobas*." Resp. Br. 6, 7 (emphasis added). This assertion directly contradicts Respondent's testimony, in which he said: "at that time Ms. Cobas was not my client," and "I was representing Judicial Watch." Tr. 444-445. Moreover, it would have violated Rule 1.7 (conflicts of interest) if Respondent represented both Cobas and Judicial Watch in the same matter. In any case, Respondent's general lack of day-to-day involvement would not negate his specific admission that he gave Judicial Watch advice on Cobas's complaints. Nor can an organization's general counsel who has provided advice to the organization in a specific matter escape a conflict by assigning the matter to outside counsel that he hires and supervises.

Respondent's other attempts to minimize his involvement are less plausible. In all three matters, Respondent emphasizes that he did not file the initial complaint, appearing only at a later stage of the litigation. Resp. Br. 11 (Benson); 12, 22 (Paul); 17 (Cobas). Respondent does not explain why that would make any difference and we can see no reason why it should. In general, the involvement of additional lawyers does not lessen an attorney's obligation to his client.

The use of confidential information: The commentary to Rule 1.9 provides that matters may be substantially related if—besides involving the same transaction or legal dispute—"there otherwise is a substantial risk that confidential factual information as would normally have been obtained in

the prior representation would materially advance the client's position in the subsequent matter." D.C. R. Prof'l Conduct 1.9, cmt. [3]. Such a risk "may be based on the nature of the services the lawyer provided and information that would in ordinary practice be learned by a lawyer providing such services." *Id.*

This part of the commentary has no application in this case because we have already concluded that all three matters were the same as matters that Respondent handled for Judicial Watch. Indeed, in Florida, a substantial relationship between two matters creates an "irrefutable" presumption "that confidential information was exchanged or used." *Bedoya*, 2012 U.S. Dist. LEXIS 59862, at *28 (quoting *State Farm Mut. Auto. Ins. v. K.A.W.*, 575 So. 2d 630, 633 (Fla. 1991)). Accordingly, Respondent's arguments about confidential information (Resp. Br. 15-16, 17-25) are beside the point.

Respondent makes a number of additional arguments against his liability for violating Rule 1.9, none of which has merit:

"Attacking work product": Respondent maintains that no Rule 1.9 violation occurs when a lawyer sues a former client to "enforce" a contract on behalf of a new client who was on the other side of the negotiating table when the lawyer negotiated the contract. *See* Resp. Br. 12-13, 20, 21, 23, 24. Respondent and his expert, Professor Rotunda, stake this interpretation on Comment 1 to Rule 1.9, which uses as an example "seek[ing] to rescind on behalf of a new client a contract drafted on behalf of the former client."

According to Rotunda, this example contains a "negative pregnant"—it does not say "rescind *or support*"—and the failure to use that language means that a lawyer who drafts a contract for one client can later sue that same client on behalf of the other party, so long as he never sued on behalf of the first client, and the lawsuit seeks to "enforce" rather than rescind the contract. Tr. 513, 528. Rotunda takes this further, arguing that matters are the same for Rule 1.9 only if the lawyer changes sides in a specific lawsuit or otherwise attacks his work product. *E.g.*, Tr. 504-506, 509, 512, 513. We reject this reasoning; such a rule would smother Rule 1.9 in contract cases because *every* litigant can claim to be the one "enforcing" the contract.

Rotunda does not offer any support for this theory. So far as we can tell it is not discussed or mentioned in any of his academic writing and has never been adopted in any case. The only authority that is superficially close, oddly enough, is in the commentary to Florida's Rule 4-1.9, which since 2006 has stated that matters are substantially related "if they involve the same transaction or legal dispute, *or if the current matter would involve the lawyer attacking work that the lawyer performed for the former client*." Fla. R. 4-1.9, cmt. (emphasis added). Although the comment mentions "attacking work" for a former client, it cannot plausibly be read to support Respondent's and Rotunda's theory because a contract case will always involve the "same transaction" as the contract itself. A lawyer simply cannot negotiate a contract for one side and then later sue his client on behalf of the other side.

The "attacking work" comment addresses situations where the prior representation did *not* involve the same transaction or legal dispute. For example, Florida courts have found that defending a product-liability suit concerning a particular model of lawn mower was substantially related to a later product-liability suit concerning the same model; whereas defending a hospital in a negligence case was not substantially related to a later negligence suit against the same hospital. *Health Care & Ret. Corp. of Am. v. Bradley*, 961 So. 2d 1071, 1073-1074 (Fla. App. 2007) (discussing *Sears, Roebuck & Co. v. Stansbury*, 374 So. 2d 1051 (Fla. App. 1979)). In the *Stansbury* case, the lawyer sought to represent a plaintiff bringing a product-liability claim on a lawnmower where the lawyer had defended a product-liability case for the same company, based on the same lawnmower. *Id.* at 1073. Because the plaintiff was new, the matter did not arise from the same transaction or legal dispute, but lawyer would nevertheless have been attacking his prior work for the company. *Id.* The negligence case, on the other hand, did not involve attacking the lawyer's work for the hospital because each negligence claim "turns on its own facts." *Id.* at 1073-1074. Thus, Florida's commentary about attacking one's work is no help to Respondent because the three matters here were the same as matters he handled for Judicial Watch.

Advice of counsel: Respondent seriously mischaracterizes the evidence when he argues that he relied on the advice of his counsel Daniel Dugan when he took on the Benson and Paul representations. Resp. Br. 10-11

(claiming that Dugan directed his office to "prepar[e] the Opposition to the Motion to Disqualify"), 12 ("Respondent also relied on Dugan's advice as counsel"), 42 ("Even Respondent's co-counsel, Dugan, had advised and counseled Respondent that there was no conflict of interest and that Respondent did not violate D.C. Bar Rule 1.9 by representing Paul."). The evidence clearly and convincingly establishes that he did not. Dugan specifically testified that he was not asked for advice on whether Respondent could represent Benson and that he did not give any advice on the question. Tr. 685-686. Nor did Dugan advise Respondent to enter an appearance for Paul. Respondent himself testified that he *did not* discuss that appearance with Dugan because it was "essentially the same thing" as the appearance for Benson. Tr. 485.

Respondent also falsely asserts that Dugan "testified unequivocally that he would not have prepared and signed the Opposition [to the motion to disqualify in Benson's case] if he felt that ethics and the law did not support it." Resp. Br. 11 (citing Tr. 358 (Klayman's own testimony)). Actually, Dugan testified unequivocally that he did not draft, construct the arguments, or research the opposition. Tr. 682, 684. When pressed by Respondent to say that it would have be reasonable for Respondent to assume that Dugan agreed with the motion, Dugan simply answered "No." Tr. 691. Dugan testified only that he believed the opposition was not frivolous. Tr. 689.

Accordingly, even assuming that advice of counsel is a defense to a disciplinary charge, it does not apply here. *In re Pye*, 57 A.3d 960, 969 & n.11 (D.C. 2012) (per curiam) (appended Board Report).

Justification/necessity: Respondent suggests that his actions were justified or required by his ethical obligation under Rule of Professional Conduct 1.3 to zealously represent his clients, whom Judicial Watch had purportedly "abandoned." Resp. Br. 4 n.4, 13 & n.17. The simple answer to this argument is that in the three matters in question, Cobas, Benson, and Paul were not Respondent's clients. Judicial Watch was.

Respondent never represented Cobas or Benson until they were engaged in litigation against his former client in matters that he handled while general counsel. And while it could be argued that Paul was both Respondent's and Judicial Watch's client for the purposes of Paul's criminal and civil litigation, as between Paul and Judicial Watch, only Judicial Watch was Respondent's client for the purposes of the representation letter, as Respondent admits. *See* Findings ¶ 23, *supra* p. 14.

Respondent also argues (Resp. Br. 38-39) that his actions were justified by the doctrine of necessity, but he can point to no example in which the doctrine has been applied to a disciplinary case. Respondent suggests that his situation is similar to that of a judge who sits on a case if there is no other judge to hear it. That analogy fails because Respondent was not the only lawyer who could have represented Cobas, Benson, and Paul. Indeed, he was

among the few lawyers who could *not* represent them in a case against Judicial Watch, precisely because Judicial Watch was his prior client.

Selective prosecution: "To prevail on a defense of selective prosecution, [Respondent] has to prove both that he was singled out for prosecution among others similarly situated *and* that the decision to prosecute was improperly motivated." *United States v. Mangieri*, 694 F.2d 1270, 1273 (D.C. Cir. 1982). Respondent fails to adduce any facts suggesting selective prosecution. He suggests that Disciplinary Counsel has failed to investigate Mr. Fitton (Resp. Br. 40), but Fitton is not a lawyer, and thus not subject to professional discipline by the Court. Respondent does not suggest that any other similarly situated lawyers have not been prosecuted. Respondent speculates that there was something nefarious about when the specification of charges was filed, but speculation is not enough.

Laches: Respondent argues that the disciplinary charges should be dismissed because of the passage of time (Resp. Br. 35-38), but in D.C. "there is no statute of limitation on disciplinary offenses." *In re Morrissey*, 648 A.2d 185, 189 (D.C. 1994) (per curiam) (appended Board Report). Respondent's laches argument relies heavily on the Board's decision to dismiss the charges in a case that involved an 18-month delay, *In re Williams*, but fails to inform the Committee that—in that very decision—the Court of Appeals reversed the Board's dismissal of the case. 513 A.2d 793, 798 (D.C. 1986) (per curiam). The Court held "that dismissal of disciplinary proceed-

ings *is an inappropriate remedy* when allegations of attorney misconduct remain unresolved." *Id.* (emphasis added). More recently, the Court clarified that under *Williams*, "[w]hat is required for dismissal of the misconduct charges is delay plus actual prejudice that results in a due process violation." *In re Saint-Louis*, 147 A.3d 1135, 1148 (D.C. 2016). Respondent has not demonstrated that he has been prejudiced by the delay in this case.

Due process. Respondent argues that he was not afforded procedural due process because Judicial Watch allegedly provided to Disciplinary Counsel certain documents that supposedly contained prejudicial information about Respondent. Resp. Br. 41. The only evidence about these documents in the hearing was Respondent's own testimony or was prompted by his questions. Respondent cannot have been prejudiced by documents that were not used against him, which we have never seen, and which we know about only because of Respondent's attempt to make an issue of them.

Res Judicata. Respondent argues that Judge Lamberth's order—which found him in violation of Rule 1.9 and disqualified him from the Paul case—should somehow work in his favor; that is, that being disqualified was punishment enough. Resp. Br. 41-44. The argument strikes us as backwards. Having litigated and lost whether he violated Rule 1.9 by representing Paul, it is Respondent who could potentially be precluded (through collateral estoppel) from arguing otherwise in this proceeding. Regardless, Judge Lamberth's resolution has no *res judicata* effect against the imposition of disci-

pline here; the Paul case was in a federal court that regulates the attorneys that appear before it. This proceeding is brought under the authority of the D.C. Court of Appeals, which has separate authority to discipline attorneys like Respondent, who are admitted to the District of Columbia Bar.

B. Rule 8.4(d) – Serious interference with the administration of justice

Disciplinary Counsel charges that Respondent violated Rule 8.4(d) in the Paul matter by engaging in conduct that seriously interferes with the administration of justice. The Court of Appeals has held that a lawyer violates Rule 8.4(d) where his conduct (1) was improper; (2) bore directly upon the judicial process with respect to an identifiable case or tribunal; and (3) tainted the judicial process in more than a *de minimis* way; that is, it must have potentially had an impact upon the process to a serious and adverse degree. *In re Hopkins*, 677 A.2d 55, 60-61 (D.C. 1996). An attorney violates the rule when his improper conduct causes the unnecessary expenditure of time and resources in a judicial proceeding. *In re Cole*, 967 A.2d 1264, 1266 (D.C. 2009).

Disciplinary Counsel argues that Respondent violated Rule 8.4(d) in the Paul matter. DC Br. 20-22. We agree. Having written and executed a representation agreement on Judicial Watch's behalf, Respondent sued his former client on behalf of the other party to that same agreement. The conflict of interest could not have been clearer. Notably, Respondent could not have been under any misunderstanding about whether Judicial Watch would con-

sent to the appearance—it had already objected to his appearance in the Benson case. Nevertheless, he appeared in the case, forcing Judicial Watch to move for his disqualification. He then obtained three extensions of time to oppose the motion before filing a memorandum with the district court making some of the same meritless arguments he makes here. *See* DCX-45, docket entries 22, 23, 26, 28, 29, 30; DCX-49; DCX-50. For example, as here, Respondent argued that he did not receive confidential information as Judicial Watch's general counsel with respect to Paul, and that Judicial Watch did not specify what confidential information he received. DCX-49 at 528. But Judicial Watch was not required to show what confidential information was gained. *See* D.C. R. Prof'l Conduct 1.9, cmt. [2]. Respondent was particularly strident in suggesting it would be "absurd" to require him to obtain Judicial Watch's consent and that the lawsuit—which was based on the agreement he signed for Judicial Watch—was not related to that matter. DCX-49 at 528.

After the disqualification was granted, Respondent further wasted judicial resources by filing a notice of appeal, which was ultimately dismissed for lack of prosecution. DCX-45, docket entries 34, 35. We conclude that Respondent's representation of Paul was improper and that it adversely affected the judicial process by wasting the court's and the parties' time and resources.

* * *

We conclude that Respondent violated D.C. Rule 1.9 in the Benson and Paul matters, Florida Rule of Professional Conduct 4-1.9(a) in the Cobas matter, and Rule 8.4(d) in the Paul matter.

Facts in Aggravation and Mitigation

We find that Respondent's misconduct is aggravated by (1) his prior discipline in a Florida matter; (2) his failure to take responsibility for his actions; and (3) his dishonesty and lack of candor in his testimony and conduct in this proceeding.

In 2011, the Supreme Court of Florida reprimanded Respondent for violating four of Florida's rules of professional conduct in connection with a client dispute. BX-53. Respondent's client claimed that he failed to provide her with legal services despite having received a $25,000 retainer. BX-53 at 11. The parties mediated the dispute through a bar program, with Respondent agreeing to pay the client $5,000 within 90 days of February 3, 2009. BX-53 at 11-12. Respondent failed to abide by the agreement, paying only after more than two years had passed, and after Florida bar counsel had sent numerous letters requesting that he comply. BX-53 at 11-15. Respondent admitted that his conduct violated Florida Rules 3-4.3 (misconduct and minor misconduct), 4-8.4(a) (violating or attempting to violate the rules of professional conduct), 4-8.4(g) (failing to respond to inquiries from bar counsel or a disciplinary agency), and 14-5.1(b) (failing to comply with the terms of

a client mediation agreement without good cause). Respondent agreed to a public reprimand. *Id.* at 5, 18.

Despite having accepted Florida's reprimand, Respondent now denies responsibility for his misconduct there. Resp. Br. 36-37. He denies owing his client any refund in the first place and makes excuses for his repeated failure to abide by his promises to pay. *Id.* Remarkably, Respondent suggests that he agreed to the reprimand "to simply put the matter behind [him]," and claims that his conduct did not involve "any . . . ethical violation." Resp. Br. 37 n.4. That simply is not true. Respondent appears to believe that denying responsibility for misconduct that he previously admitted somehow mitigates his present misconduct. We think the opposite.

We also find that Respondent's conduct in this proceeding was dishonest and lacked candor in further aggravation of his misconduct. The most egregious examples of this are described above: Respondent testified falsely that he acted under the advice of counsel (Mr. Dugan) when he entered his appearance for Benson. He did not. Respondent's post-hearing brief repeatedly mischaracterizes Mr. Dugan's testimony, particularly with regard to whether Dugan prepared the opposition to the motion to disqualify Respondent in the Benson case, agreed with the arguments it contains, and advised Respondent regarding his representation of Paul. We also find Respondent's characterizations of the evidence lack the candor required of an attorney in a disciplinary proceeding. In one particularly inexplicable exam-

ple, Respondent says the letter soliciting Benson's donation, which he signed as General Counsel, had "*nothing to do with his role as General Counsel* of Judicial Watch." Resp. Br. 9 (Respondent's italics).

Several of the arguments discussed above (laches, due process, selective prosecution, and *res judicata*) are also presented in Respondent's brief as circumstances that he argues should mitigate the sanction for his misconduct. Resp. Br. 34-44. For the same reasons discussed above, we do not find Respondent's due process, selective prosecution, or *res judicata* arguments mitigating.

Regarding the "laches" argument, we note that delay may be a mitigating factor in determining the appropriate sanction. *Williams*, 513 A.2d at 798. The Court has commented that the circumstances must be "sufficiently unique and compelling to justify lessening what would otherwise be the sanction necessary to protect the public interest." *In re Fowler*, 642 A.2d 1327, 1331 (D.C. 1994). In particular, delays that are necessary to the decision-making process or that result from the Respondent's own actions or inactions do not qualify. *Id.*

We do not find that the delay here was unique or provides a compelling reason to mitigate the proposed sanction. Judicial Watch's initial complaint (DCX-1) was filed in January 2008. Disciplinary Counsel's exhibits 2-14 show that the complaint was investigated diligently from then until the following August, with Respondent repeatedly asking for extensions, sending

responses after Disciplinary Counsel's deadlines, and with the biggest gap in the correspondence (April 2008-June 2009) appearing when Respondent failed to answer a request for information. *See* DCX-9 to DCX-11. The last letter in the record (DCX-14, August 2009) is likewise a request that Respondent supplement his "partial" response to an earlier request. Although it was another four years before the specification of charges was filed, Respondent is in little position to complain given his failure to respond to Disciplinary Counsel's requests. Further, nothing in the record supports Respondent's accusation that Disciplinary Counsel's prosecution of this case is "malfeasant," or that Disciplinary Counsel is acting to further Judicial Watch's "influence and force for coercive, tactical purposes." Resp. Br. 36. Accordingly, we do not find that this is a case in which delay by Disciplinary Counsel's should mitigate the sanction.

Recommended Sanction

The appropriate sanction is one that is necessary to protect the public and the courts, maintain the integrity of the profession, and deter other attorneys from engaging in similar misconduct. *See In re Scanio*, 919 A.2d 1137, 1144 (D.C. 2007) (quoting *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (en banc) ("*Reback II*")). The sanction imposed must be consistent with sanctions for comparable misconduct. *See* D.C. Bar R. XI, § 9(h)(1); *In re Elgin*, 918 A.2d 362, 373 (D.C. 2007); *In re Berryman*, 764 A.2d 760, 766 (D.C. 2000). In determining the appropriate sanction, the Court of Appeals reviews

the respondent's violations in light of all the relevant factors, including (1) the nature of the violation; (2) mitigating and aggravating circumstances; (3) the need to protect the public, the courts, and the legal profession; and (4) the moral fitness of the attorney. *In re Cleaver-Bascombe*, 986 A.2d 1191, 1195 (D.C. 2010) (quoting *In re Goffe*, 641 A.2d 458, 464 (D.C. 1994) (per curiam)).

The range of sanctions previously imposed for engaging in conflicts of interest and seriously interfering with the administration of justice is wide, from informal admonition to suspension from the practice of law. Sanctions that involve a suspension have ranged from 30 to 90 days, with the more severe sanctions including other violations. *See*, *e.g.*, *In re Butterfield*, 851 A.2d 513, 514 (D.C. 2004) (per curiam) (30 days); *In re Jones-Terrell*, 712 A.2d 496, 502 (D.C. 1998) (60 days).

Respondent's conduct is at the serious end of the spectrum. Respondent repeatedly represented clients against his former client as part of a prolonged and acrimonious dispute over how Judicial Watch was run after Respondent left the organization; it is hard to see Respondent's actions as anything other than improper attempts to prolong litigation, increase costs for Judicial Watch, and further his personal crusade against the organization. In the Cobas case, he appeared as part of an effort to revive a case that the district court described as "silly." He then sued Judicial Watch with Benson as his co-plaintiff, although their claims were completely unrelated. He appeared in

Benson's separate case *after* she had already received a full refund of her donation from Judicial Watch, and persisted even after Judicial Watch moved to disqualify him. Even if Respondent did not fully understand his obligation to a former client when he first appeared in the Benson case, his persistence in the face of Judicial Watch's objection suggests that his violation was intentional. Moreover, Respondent then appeared against Judicial Watch in the Paul matter, in which in which it was certain that the organization would object, forcing the court to disqualify him.

While this case was progressing, Respondent was sanctioned for misconduct in Florida—misconduct that he now attempts to minimize and avoid taking responsibility for. He testified falsely before the hearing committee and misrepresented the testimony in his posthearing brief. In sum, we find that Respondent's conduct was not isolated, innocent, or unintentional. It substantially harms the public, the courts, and the integrity of the profession when lawyers disregard responsibilities to their clients and engage in conduct that seriously interferes with the administration of justice.

We agree with Disciplinary Counsel that Respondent's conduct warrants a suspension of 90 days; however, we do not believe that a course in conflicts of interest will be sufficient to protect the public against Respondent's repeated and prolonged abuse of the judicial system. Rather, we find clear and convincing evidence that Respondent's conduct raises a serious doubt as to his ability to practice in conformance with the rules. We recom-

mend that he be suspended for 90 days, with reinstatement only upon showing his fitness to practice law.

In determining whether a "fitness" condition should be imposed, the Court of Appeals has considered: "(1) the nature and circumstances of the misconduct for which the attorney was disciplined; (2) whether the attorney recognizes the seriousness of the misconduct; (3) the attorney's conduct since discipline was imposed, including the steps taken to remedy past wrongs and prevent future ones; (4) the attorney's present character; and (5) the attorney's present qualifications and competence to practice law." *In re Chisholm*, 679 A.2d 495, 503 (D.C. 1996) (quoting *In re Steele*, 630 A.2d 196, 201 (D.C. 1993)).

As described above, Respondent's misconduct was serious and escalating. He does not recognize the seriousness of the misconduct or even agree that it is misconduct at all. His conduct since the three representations includes both the misconduct in Florida and his misrepresentations and lack of candor to this tribunal. In the view of this hearing committee, Respondent's conduct raises serious concerns about whether he will act ethically after his period of suspension has run, and supports imposing a condition that he demonstrate his fitness before resuming the practice of law. *See In re Cater*, 887 A.2d 1, 24 (D.C. 2005).

CONCLUSION

We find by clear and convincing evidence that Respondent violated Florida Rule 4-1.9(a) in Count I, and D.C. Rule 1.9 in Counts II and III of the Amended Specification of Charges. We likewise find that Respondent violated Rule 8.4(d) in Count III. In light of Respondent's misconduct and the aggravating and mitigating circumstances, we recommend that Respondent be suspended from the practice of law for 90 days with readmission upon showing his fitness to practice law.

HEARING COMMITTEE NUMBER NINE

By: /JM/
Theodore (Jack) Metzler
Chair

/TM/
Trevor Mitchell
Public member

/WC/
William Corcoran, Esq.
Attorney member

Dated: June 19, 2017