THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	Issued July 3, 2019
WILLIAM E. WALLACE,	:	
	:	Board Docket No. 17-BD-001
Respondent.	:	Bar Docket Nos. 2015-D147;
	:	2015-D161; 2015-D162;
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 298000)	:	2015-D239; & 2016-D079

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

I. INTRODUCTION

This matter presents the question whether the Rules of Professional Conduct permit an attorney (i) to refuse to answer questions from his former clients and their new counsel about the nature of his fee claim and (ii) to maintain fee claims against only those former clients who filed complaints with the Office of Disciplinary Counsel ("ODC"). We agree with an Ad Hoc Hearing Committee that Respondent William E. Wallace violated D.C. Rule of Professional Conduct 1.16(d) (protection of client interests in connection with termination of representation) when he engaged in such conduct. But, we disagree with the Committee that the conduct violated Rules 1.3(b)(2) (prejudice or damage a client) and 8.4(d) (interference with the administration of justice). Based on the violation and the aggravating findings that Respondent provided intentionally false testimony to the Hearing Committee, we recommend that Respondent be suspended for 30 days.

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

II. FINDINGS OF FACT

Upon review of the record, we find that almost all the Hearing Committee's findings are supported by substantial evidence in the record. We summarize those findings below and make additional findings of fact supported by clear and convincing evidence in the record. *See* Board Rule 13.7; *see also In re Speights*, 173 A.3d 96, 102 (D.C. 2017) (per curiam) (weight and relevance of evidence is "within the ambit of the Hearing Committee's discretion"); *In re Outlaw*, 917 A.2d 684, 688 (D.C. 2007) (per curiam) (defining "substantial evidence" as "enough evidence for a reasonable mind to find sufficient support for the conclusion reached"). Respondent objects to many of the Committee's findings, citing portions of the record in support. R. Br. at 11-26. We agree with a few of Respondent's objections and, as discussed below, find there are several findings not sufficiently supported by the record. But, those findings are not material to the charges. We also note that while Respondent cites the record in support of his objections, the mere existence of contrary facts in the record does not change our conclusion, especially where the Hearing Committee made findings about the credibility of witness testimony. *See In re Robbins*, 192 A.3d 558, 564 (D.C. 2018) (per curiam) (providing that the Court will uphold findings of fact that are supported by substantial evidence "even where evidence may support a contrary view as well" (citing *In re Szymkowicz*, 124 A.3d 1078, 1084 (D.C. 2015) (per curiam))); *see also In re Micheel*, 610 A.2d 231, 234 (D.C. 1992) (noting the Board "must defer to

'subsidiary findings of basic facts,' which include such things as credibility determinations").

A. Respondent's engagement by victims of an investment fraud.

Respondent opened a solo practice in 2013, which he titled "Capital Legal Group." Finding of Fact ("FF") 1. In 2014, Respondent agreed to represent Richard Cole in an investment fraud case against Charter Investments. FF 2. Charter purported to offer certificates of deposit at above-market rates, but when investors wired funds to Charter's account at the East West Bank in California, the funds were immediately withdrawn and never invested. FF 2. The representation expanded to include eleven individual victims and one home owners' association ("HOA").[1] FF 3. Each client signed an engagement agreement that provided for a 34% contingency fee on any recovery and waived Respondent's standard rate of $950/hour. FF 4. The agreement permitted Respondent or the client to terminate the engagement but "subject on [the client's] part to a continuing obligation to honor [Respondent's] right to a recovery of [his] contingent fee . . . ." FF 4. And it provided that any fee disputes would be resolved in arbitration. FF 4.

Respondent communicated with his clients both individually and in group emails and conference calls. FF 7; Tr. 523-24. After Respondent began work, several clients became dissatisfied with the representation because of disagreements

[1] Along with Richard Cole, Respondent represented: Michael Charpentier, Loralee Freilich, Sue Haynes, Rae H. Lorenz, Kenneth Nelson, Irving B. Ruppel, Paula and Steven Tamkin, William E. Ward, William Woolbright, and Forest Glen Condominiums. Stipulation No. 3. Patrick Shea was a member of the HOA. FF 6. Most of the clients were retirees and the purported investments came from their life savings. FF 3.

over Respondent's legal strategy and level of communication.[2] FF 9 (citing testimony from two former clients).[3]

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[2] There is a dispute as to how much work Respondent performed. The Hearing Committee criticized Respondent's evidence in this regard. FF 30-31. However, Respondent provided evidence that he performed some work, including drafting a letter to Congressman Chaffetz and communicating with the FBI. *See* RX 36; Tr. 492-94, 518-19. In any event, the exact amount of work performed, and the exact amount of fees to which Respondent was entitled, are immaterial to the charges.

[3] The Hearing Committee found that in response to "one client's request for better communication," Respondent suggested the client—Mr. Nelson—find different counsel, citing Tr. 109-10 and DX 23 at 4 in support of its finding. However, we conclude that the Hearing Committee's finding is not fully supported by the emails in the record or referenced by Mr. Nelson in his testimony. On September 1, 2014, Mr. Nelson wrote:

> My wife and I have been a bit under the weather lately and I haven't been too focused on our case but I wanted to know what if anything is going on. When are we having another conference call? I haven't heard anything from the FBI as to their progress on the case. Have you? Are we still waiting for the FBI to make their move before we proceed? I haven't seen any Capital Legal web site information yet. Is your office fully up and running? I saw some questionable information on the web supposedly from your former wife. Does this change your ability to successfully win our case?

DX 23 at 4. Respondent responded the same day:

> Ken, I am sorry to hear you have not been feeling well. I am not aware of any developments since last we spoke. We have been and continue to wait for law enforcement to make an arrest in the hope that the culprit(s) will implicate [East West Bank].
>
> As for the rest of your email, I think you should find different counsel to represent you. I will have a check issued to refund to you your share of the expense fund, none of which has been spent to date.

DX 23 at 4. The first part of Respondent's email responds to Mr. Nelson's request for information about the case to include an update on contacts with the FBI and the strategy for waiting on the FBI to act. The second part of his email, following "[a]s for the rest of your email," responds to Mr. Nelson's more personal questions about "questionable information" posted online by Respondent's ex-wife and whether that information will affect Respondent's ability on the case. In response to the more personal questions—not a request for "better communication"—Respondent suggested they terminate the relationship. This finding, however, is not material to the charges.

In early 2015, Respondent hired attorney Jeannie Yim Figer to draft a memorandum on whether the clients could sue East West Bank and whether they could obtain pre-complaint discovery. FF 10. Respondent paid Ms. Figer $5,000 from a common expense fund that contained about $10,000, supplied by the clients to cover out-of-pocket expenses. FF 5, 10.

On April 9, 2015, Mr. Cole informed Respondent by email that the clients identified lawyers in California, specifically attorneys Chris Hagen and Steve Nunez, to start litigation over their claims and that the clients would be voting during a conference call (presumably the vote was whether to retain Messrs. Hagen and Nunez). RX 127. Later that day Respondent sent Ms. Figer's memorandum to the clients by email and in the same email he acknowledged that Mr. Cole informed him that the clients intended to terminate his representation and hire Messrs. Hagen and Nunez to complete the case. FF 13; DX 8 (same as RX 128). But the clients did not terminate the relationship at that time.

Unrelated to the clients' identification of Messrs. Hagen and Nunez as counsel, on April 16, 2015, Respondent terminated his representation of Mr. Ruppel.[4]

[4] The termination of Mr. Ruppel followed an email exchange where Mr. Ruppel complained that Respondent did not respond to his suggestions and Respondent replied that he had responded but that Mr. Ruppel's suggestions were not viable. DX 9 at 1. Respondent also explained that if Mr. Ruppel was unhappy with the representation, he should terminate the relationship with "no hard feelings." DX 9 at 2. The next day, Mr. Ruppel emailed Respondent (but it appears he intended to send it to someone else): "Wallace is a bad attorney. We waste time with him. I'll stay with him till we [get] better." DX 9 at 3. Mr. Ruppel also stated about Respondent: "He lies!!!!" DX 9 at 3. About two hours later, appropriately, Respondent sent Mr. Ruppel a termination letter. DX 9 at 3.

Respondent spoke to Messrs. Hagen and Nunez on the telephone on or around April 22, 2015, and asked to serve as their co-counsel, but Mr. Hagen declined. FF 14; RX 142; Tr. 416-17. Then, between May 5 and 7, 2015, five clients (Ward, Cole, Lorenz, Nelson, and the Tamkins) terminated their relationship with Respondent. FF 12; DX 11-19. All the individual Charter clients ultimately hired Mr. Hagen, although the HOA never terminated Respondent.[5] FF 13 & n.8.

B. Respondent's interactions with Mr. Hagen about his claim for fees.

On May 7, 2015, Respondent sent Mr. Hagen the engagement letters between him and some clients and pointed out his right to a fee upon termination of the representation. FF 15; DX 20. Twenty minutes later, Mr. Hagen asked Respondent by email to "advise what your lien/fee is for each client." FF 15; DX 20. Respondent did not reply. On May 12, 2015, Mr. Hagen emailed again, informing Respondent that he would not honor a lien on the file if Respondent did not specify a dollar or percentage amount for his lien for each client. FF 16. Respondent replied that same day, asking to verify that Mr. Hagen was representing the clients and stating:

> Second, there is no lien on the file, per se. The lien is on any monetary recovery that might be secured on the claims arising from or associated with Charter Investment fraud.
>
> Third, you can pretend there is no lien, and I can pretend that that the moon is made of cheese. But that doesn't get anyone anywhere. You have the letters of engagement and can see that Capital Legal is entitled to 34% of any recovery (assuming, of course that you are not going to pretend that away, too). Capital Legal's contingent entitlement to a

[5] The Hearing Committee did not make a finding as to whether or when the remaining individual clients terminated Respondent. FF 13 n.8. Respondent testified that they all did so "eventually." Tr. 242.

> percentage of any recovery is not lost on you, since you discussed this very fact with one or more of my former clients.

FF 16; DX 20 (same as RX 167).

Mr. Hagen understood Respondent's email to be asserting a right to a separate 34% lien on any recovery, in addition to whatever fee Mr. Hagen would be owed. FF 16.[6] Mr. Hagen explained that he needed clarity on the fee and Respondent's lien so that he could address it in his representation agreements with the clients. He explained that he did not want to "mislead" the clients who "have lost substantial assets" through the Charter investment fraud. FF 17; DX 20. Specifically, Mr. Hagen asked:

> If you are asserting a lien of 34% of each client's recovery regardless of any work done by a subsequent attorney then just tell us that so we know your position. We are not arguing with you. We just need to know what you are asserting.
>
> If you are instead asserting a quantum meruit lien whereby you share the 34% fee with subsequent counsel based upon the time spent on the file, then please tell us that.
>
> The clients just need to know whether they are dealing with a 34% fee or a 68% fee.

DX 20. Respondent did not reply to that email or to a follow-up email Mr. Hagen sent two days later. FF 17; DX 20.

Mr. Hagen informed the Charter clients that they might be subject to two separate 34% contingency fees and advised them to seek clarification from

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[6] We agree with the Hearing Committee that Mr. Hagen's testimony on this point was "consistent with the plain meaning of Respondent's written communications." *See* FF 16.

Respondent. FF 18. Several clients asked Respondent to clarify his position about the lien, but he failed to respond. FF 19. One client (Lorenz) emailed Respondent on May 26, 2015, stating specifically that she had not retained other counsel "because of the lien," and that she would expect Respondent to continue to represent her if he was really asking for 34%. FF 19. Respondent did not respond and, at the hearing, did not provide an explanation for his failure to do so. FF 19; *see* Tr. 277-79.

The Charter clients ultimately agreed to give Mr. Hagen's firm a 34% contingency fee "in addition to and regardless of any fee owed" to Respondent. FF 20. The clients individually signed Mr. Hagen's retainer agreement between June 3 (Nelson) and June 28 (Freilich), 2015. DX 21.

Respondent did not provide Mr. Hagen with client files or work product to help him handle the matter, FF 26, although the Hearing Committee did not make a finding whether Mr. Hagen requested such materials. Mr. Hagen testified that he "asked [the clients] to ask [Respondent] to get their client files over to our office" and that he "received nothing from Mr. Wallace." Tr. 429. But Respondent's undisputed testimony is that clients "had all asked for [their files] and they had all been returned to [the clients]." Tr. 546. The fact that Mr. Hagen did not receive the files is not clear and convincing evidence that Respondent did not return the files to the clients, and thus, we do not find that there is sufficient evidence to support a finding that Respondent failed to return any materials that had been requested.

C. Respondent's claim to fees from four former clients.

Five clients (Ruppel, Nelson, Lorenz, Cole, and the Tamkins) filed complaints against Respondent with Disciplinary Counsel between May 2015 and January 2016. FF 21; DX 22-26. Respondent learned of the complaints no later than May 2016. FF 22.

On May 27, 2016, Mr. Hagen emailed Respondent, advising him that the case against East West Bank had settled and resulted in a monetary compensation. FF 22. Mr. Hagen asked: "Please now tell me whether you are asserting any lien(s) and if so then as to which clients, what dollar amounts and the basis for the lien(s); e.g.[,] number of hours worked on the file, etc." RX 167; FF 22.

In a series of emails on May 31, 2016, between Mr. Hagen and Respondent, Respondent advised that he was foregoing a fee for the HOA and six individual clients (Ruppel, Ward, Woolbright, Charpentier, Haynes, and Freilich). FF 23; RX 175. Mr. Hagen paid out settlement funds to those clients and emailed Respondent on June 3, 2016, asking whether he was asserting a lien over the remaining four clients (Nelson, Lorenz, Cole, and the Tamkins). FF 23. Mr. Hagen explained he needed to know what amount to keep in his trust account. FF 23 (citing RX 176). Respondent did not provide an amount. Instead, he told Mr. Hagen that the fee owed to him was less than what is reflected in the engagement letters and that those four clients should make a reasonable proposal for his fee or he would file a claim with the Attorney Client Arbitration Board ("ACAB"). FF 23; RX 175. Respondent also asked the amount of fees the clients had paid Mr. Hagen. RX 175.

The four remaining clients retained George Clark, an attorney in the District of Columbia, to handle the anticipated fee arbitration. In June 2016, Respondent told Mr. Clark that he would not release his fee claims against the four clients in part because they filed disciplinary complaints against him and that he would not file anything with ACAB until the complaints were resolved.[7] FF 24. At the hearing, Respondent explained his rationale for preserving his fee claims against clients who had filed complaints against him: "The claimants had become adverse to me and we were in essentially a legal matter before the Bar, and I was not going to change legal positions as to the people with whom I was effectively litigating the fee issue." Tr. 365. However, at the same time, he invited Mr. Clark to propose a settlement, with proof of how much was earned by and paid to Mr. Hagen and stated that he was open to non-binding mediation to resolve the dispute. DX 30. Mr. Clark emailed Respondent on June 23, 2016, explaining that the clients could not evaluate his claim without information on the work he performed and asking him to make a fee demand. FF 24; DX 30. Respondent did not reply. FF 24.

On September 1, 2016, Respondent's counsel notified Mr. Hagen that Respondent did not claim any right to funds Mr. Hagen was holding in escrow and that any fee claim would be raised before the ACAB. FF 25. As a result, Mr. Hagen released the funds to Cole, Lorenz, Nelson, and the Tamkins. FF 25. As of the

[7] Respondent testified that he did not seek a fee from Mr. Ruppel, even though he had filed a complaint against him, because Respondent had initiated the termination of the representation. Tr. 356-57.

hearing, Respondent had not filed a claim with ACAB, though he asserts his continuing right to do so. FF 25.

III. DISCUSSION

A. Respondent's Motions for Sanctions.

Before the Hearing Committee, Respondent filed two Motions for Sanctions and a Motion for an Order to Show Cause, in which he contended that Disciplinary Counsel should be sanctioned for (1) allegedly bad-faith efforts to supplement the record with impeachment evidence that were ultimately unsuccessful, (2) violating the Hearing Committee's witness sequestration order, and (3) failing to serve certain filings by electronic mail or other means. The Hearing Committee recommends that the Board deny these motions. Pursuant to Board Rule 7.16(a), and for the reasons set forth in the Confidential Appendix to the Hearing Committee Report, we find no sanctionable conduct on the part of Disciplinary Counsel and deny Respondent's motions.

B. False Testimony.

The Hearing Committee's credibility findings are subject to the substantial evidence standard of review, but its findings of Respondent's false testimony are material to the sanction recommendation and are reviewed *de novo*. *See In re Bradley*, 70 A.3d 1189, 1194 (D.C. 2013) (per curiam) ("[T]he Board and [the Court] owe no deference to the Hearing Committee's determination of 'ultimate facts,' which are really conclusions of law and thus are reviewed *de novo*."). The Hearing Committee found that Respondent testified falsely that he (1) did the

research for the memorandum produced by Ms. Figer; (2) did not receive the email from Mr. Clark asking him to make a fee demand; (3) maintained his fee claims against former clients who had filed complaints against him merely to "preserve the status quo"; and (4) performed an inflated amount of work on behalf of his clients. FF 10 n.5, 24 n.10, 29-31.[8] The Board reviews each of these findings *de novo*.

First, Respondent testified that he did the research in the Figer memorandum, stating he "fed it to Jeannie Figer, which [sic] fed it back to me." Tr. 527. The Hearing Committee found that this was intentionally false because there was no evidence corroborating his statement and it is "hard to believe that Respondent would pay $5,000 for a memo based on his own research." FF 10 n.5. Following our *de novo* review, the Board agrees with the Hearing Committee. We also find that the emails between Ms. Figer and Respondent do not reflect that Respondent shared research with Ms. Figer but show Ms. Figer produced research to Respondent. *See* RX 124.

[8] Respondent takes exception to the Hearing Committee's criticism in FF 32 that he "lacked candor" when he testified that he refers to "contract attorneys" as "associates," about the reason for his retirement from "big law," about the timing of opening a Florida branch of his firm, and whether he charged expenses to the clients. R. Br. at 16. We understand the Hearing Committee's finding that Respondent "lacked candor in areas less central to the charges" reflects a general finding that Respondent was not entirely honest or was vague with the Committee. FF 32. But, because these issues are not material to the charges and the record was not fully developed before the Hearing Committee, the Board, reviewing it *de novo*, cannot conclude that the testimony was false or intentionally false. For example, Respondent's testimony about opening the Florida office responded to whether his firm was an LLC, PLLC, or PLLP; there was no follow-up questions about opening the Florida office and no testimony about the reason the engagement letter includes Florida in the letterhead—a state where Respondent is licensed. FF 32; Tr. 283-85, 523.

Second, Respondent testified that he did not receive Mr. Clark's June 23, 2016 email. The Hearing Committee found this was false because Mr. Clark did not receive a "bounce back" indicating the email was undelivered, Mr. Clark used the correct email address, and the record is replete with instances of Respondent failing to respond to emails asking him for the basis of his fee. FF 24 n.10. The Hearing Committee did not state whether this testimony was intentionally false or just incorrect. Based on our review, the Board cannot find that this was an intentionally false statement. We find that it is not clear from the record why Respondent would intentionally mislead the Hearing Committee about this particular communication when he acknowledged that he did not respond to other emails from his former clients and Mr. Hagen. Moreover, the evidence that Mr. Clark used the correct email address and did not receive a "bounce back" establishes that the email was sent—not that it was received *and* read by Respondent.[9]

Third, Respondent testified that he did not waive his fees to the former clients with pending ODC complaints "because he wanted to 'preserv[e] the status quo' in his legal relationships with them, and that he 'couldn't do a *darned thing*' about the fee claims." FF 29 (quoting Answer ¶ 16; Tr. 553 (emphasis added)). We disagree with the Hearing Committee that there is clear and convincing evidence that this testimony was "untruthful." To be sure, there is evidence contradicting Respondent's position. For instance, even after he learned about the former clients'

[9] Respondent testified that he did not see the email before it was produced as an exhibit in this matter. Tr. 396-97.

complaints, he showed a willingness to resolve his fee claims. Respondent "suggest[ed]" to Mr. Hagen that his former clients make a "reasonable proposal" for his fee. RX 176. He also explained that he would take the matter to arbitration. FF 29; RX 176. Respondent continued this theme in his email to Mr. Clark on June 22, 2016, offering to discuss non-binding mediation to reach a reasonable fee amount and asking the former clients to provide information about the settlement, time spent by successor counsel, and amount paid to successor counsel. FF 29; RX 179. These emails establish that Respondent could do a "*darn* thing" about the claim—but that he would not do so until the former clients offered him a reasonable fee and provided information about the basis for Mr. Hagen's fee—a question he refused to answer about his own claim.

But, there are also legitimate reasons why Respondent did not want to waive his fee claims against those former clients during the pendency of the disciplinary complaint. Such a waiver may have been construed as a concession that he had not zealously represented the clients or that he had charged an unreasonable fee, or as an attempt to interfere with their disciplinary complaints. Similarly, we understand why Respondent would not pursue resolving the claims during the pendency of the disciplinary complaint because filing a petition at ACAB could be interpreted as further retaliation. *See* ODC Br. at 8 (referring to Respondent's proposal to resolve the matter in arbitration as a threat). It is understandable that a respondent in a fee dispute with a client and who is also facing a disciplinary complaint brought by that client would proceed with caution. Thus, although there is evidence that would

support the contention that Respondent's proffered explanation was false, there is not clear and convincing evidence to support that contention.

Fourth, the Board disagrees with the Hearing Committee's finding that Respondent falsely inflated the work he claimed to have performed on behalf of his clients. FF 30-31. The record was not developed sufficiently to establish the quantity of work completed by Respondent, but there is enough evidence to conclude that he did some work.[10] *See, e.g.*, RX 187 (summary of work with references to other exhibits supporting that work). We recognize that the Hearing Committee criticized Respondent's "exemplars" of his work and found some of that work was performed *after* the clients terminated Respondent. FF 31 n.14 (citing RX 24). Specifically, Respondent offered a list of documents with a "Date modified" column that includes dates as late as July 2015, after Respondent was terminated by all but one client. RX 24. The Hearing Committee concluded that the dates in RX 24 demonstrate that Respondent was not truthful when he stated in RX 187 that the background research reflected in RX 24 was done between March and May 2014. RX 24, 187; *see also* Tr. 580-84 (describing RX 187). Respondent asserts that the "Date modified" column may not reflect the date the document was created. R. Br. at 14-15. In addition, there was no testimony about the meaning of the dates listed in the "Date modified" column and whether this would contradict Respondent's assertion. Thus, we find that without testimony directly on this issue, there is not

[10] *See* footnote 2, *supra*.

clear and convincing evidence that Respondent was untruthful about the work he did.

C. Rule 1.16(d).

Rule 1.16(d) provides:

> In connection with any termination of representation, a lawyer shall take timely steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by Rule 1.8(i).

By its terms, the Rule provides examples of steps a lawyer must take to protect a client's interests when the relationship terminates. *Id*. ("such as"). There is nothing in the Rule to imply that these examples are exhaustive. In addition, Comment [9] provides that the obligation to "take all reasonable steps to mitigate the consequences to the client" exists even if a lawyer has been unfairly discharged.

1. Failure to Clarify the Fee Claim.

The Hearing Committee found a violation of Rule 1.16(d) based on Respondent's failure to provide clarity on his fee claim that "created confusion and uncertainty" and affected the former clients' ability to "evaluate their risk in changing counsel" and to "meaningfully evaluate the value of any proposed settlement" without "understanding the portion that will be distributed as fees" in a contingency matter. HC Rpt. at 23. Respondent contends that it would have been "impossible" for him to provide greater specificity and that his actions did not

actually interfere with the former clients' ability to hire new counsel. R. Br. at 8, 26-30. The Board agrees with the Hearing Committee's conclusion.

Contrary to Respondent's argument, it is not determinative that there is no proof that his failure to respond to emails from Mr. Hagen and the former clients prevented his former clients from hiring Mr. Hagen. Instead, the Court's focus in Rule 1.16(d) cases has been on whether the attorney's actions were reasonable or in disregard of the client's interests. *See In re Midlen*, Bar Docket No. 165-98, at 66-69 (BPR July 15, 2004) (finding that failure to provide an accounting was "unreasonable" and "demonstrated utter disregard for the interests of his client" where the client repeatedly requested the information both before and after termination of the representation, putting the respondent "on notice that his client considered this financial information to be vital to its interests," but the respondent "met these requests with sarcasm and rudeness rather than information and offers of cooperation"), *recommendation adopted*, 885 A.2d 1280, 1290 (D.C. 2005); *see also In re Thai*, 987 A.2d 428, 430 (D.C. 2009) ("We have previously stated that 'a client should not have to ask twice' for his file.") (quoting *In re Landesberg*, 518 A.2d 96, 102 (D.C. 1986)). Rule 1.16(d) does not require actual harm or prejudice. *See In re Hager*, 812 A.2d 904, 920 (D.C. 2002) (holding that attorney who agreed to withhold information and files from clients as part of settlement agreement violated Rule 1.16(d) even though "no clients were in fact denied their files after respondent executed the Settlement Agreement [because] . . . 'while lack of prejudice may affect sanction, it has no bearing on the question of violation'") (quoting

Landesberg, 518 A.2d at 101); *cf. In re Mance*, 980 A.2d 1196, 1203-04 (D.C. 2009) (noting that a delay in the return of an unearned fee can hinder a client from hiring successor counsel (quoting *In re Cooperman*, 633 N.E.2d 1069, 1071-72 (N.Y. 1994))).[11]

Based on this standard, we agree with the Hearing Committee that there was clear and convincing evidence to show that Respondent's failure to respond to questions about this fee claim after at least five clients had terminated him (*see* FF 12) was unreasonable and in disregard for his former clients' interests because it affected their ability to evaluate their risk of changing counsel. Evaluating the risk of changing counsel is broader than the decision to sign engagement agreements with Mr. Hagen. It includes an evaluation of the financial consequences of owing a fee to two attorneys. This is the very question Mr. Hagen repeatedly asked Respondent: Did the two attorneys share a 34% contingency or a 68% contingency? For victims of fraud trying to recover their retirement funds, this question is significant. And Respondent knew this because Mr. Hagen explained the import of his questions in his emails. Respondent nonetheless unreasonably ignored his former clients' interests by refusing to answer those emails. *See, e.g.*, FF 19; *see also* RX 155, 157, 161, 165 (emails from clients seeking clarity and relief after

[11] Unlike in *Mance*, there is no evidence that Respondent's actions interfered with the clients' ability to terminate the representation. Though Ms. Lorenz told Respondent that she expected him to continue to represent her as long as he was asserting a 34% lien, she did so twenty days after she had already terminated him, and she hired Mr. Hagen sixteen days later. *See* FF 12, 19; RX 6. Nevertheless, even if Respondent's clients were able to discharge him uninhibited, they faced uncertainty similar to the client in *Mance*.

settlement; Respondent, in effect, released their funds by informing Mr. Hagen he would not assert a lien).

Respondent's argument that he was unable to offer any more information to the former clients or Mr. Hagen is unpersuasive. In these disciplinary proceedings, Respondent asserts that he and Mr. Hagen were to share the 34% of the settlement and that the amount would be determined after settlement and evaluation of the work performed by both attorneys—a *quantum meruit* claim. Understandably, such a claim cannot be quantified before there is recovery, as Respondent illustrates with two examples in his brief. R. Br. at 27-28. But the inability to provide a dollar figure or a percentage does not excuse Respondent's failure to answer questions from and on behalf of his clients about the nature of his claim. Indeed, he was explicitly asked if he was seeking to share 34% with successor counsel in a *quantum meruit* lien:

> If you are instead asserting a *quantum meruit* lien whereby you share the 34% fee with subsequent counsel based upon the time spent on the file, then please tell us that.
>
> The clients just need to know whether they are dealing with a 34% fee or a 68% fee.

RX 150 (May 12, 2015 email from Hagen to Respondent that Respondent never answered).

2. Failure to Return Clients' Files.

The Hearing Committee found a separate violation of Rule 1.16(d) based on Respondent's failure to forward his clients' files to Mr. Hagen, although the Specification of Charges makes no reference to Respondent's failure to turn over his clients' files. HC Rpt. at 23. Respondent contends this omission is a due process

violation because he did not have fair notice. Disciplinary Counsel argues that it discussed this failure as a separate basis for finding a Rule 1.16(d) violation in its post-hearing brief, and Respondent did not argue surprise at the hearing or in his post-hearing brief.

The Court has held that due process is satisfied when "the Specification of Charges gave respondent notice of the specific rules she allegedly violated, as well as notice of the conduct underlying the alleged violations." *In re Winstead*, 69 A.3d 390, 397 (D.C. 2013). The Specification of Charges need not explain the factual basis for every Rule violation. The Court has held that due process is satisfied based on the notice afforded by the legal arguments in Disciplinary Counsel's post-hearing brief, to which Respondent here had an opportunity to respond. *See In re Austin*, 858 A.2d 969, 976 (D.C. 2004). Moreover, a due process challenge must show that the Committee erred and that the error resulted in "substantial prejudice." *See In re Fay*, 111 A.3d 1025, 1031 (D.C. 2015) (per curiam); *see also In re Lattimer*, Board Docket Nos. 11-BD-085 & 15-BD-070, at 16-18 (BPR Apr. 3, 2018) (finding no due process violation for failure to allege specific facts that supported additional bases for a charged Rule violation due to absence of prejudice), *review pending*, D.C. App. No. 18-BG-338.

Respondent has not demonstrated that consideration of the uncharged facts related to the client file resulted in "substantial prejudice." In his reply brief to the Board, he asserts that the lack of notice prevented him from preparing an adequate defense and cites instances in his testimony where he was unable to give answers to

whether he sent materials to Mr. Hagen. R. Reply Br. at 13-14. However, Respondent has not proffered what information he would have provided if he had been on specific notice.

But, we do not need to decide the due process issue because we disagree with the Hearing Committee that there is sufficient evidence of a Rule 1.16(d) violation related to Respondent's client files. As noted above, there was no finding that the former clients asked for the files and did not receive them. Neither the Hearing Committee nor Disciplinary Counsel has identified a case with a Rule 1.16(d) violation for failure to provide a file absent a request from the client, and we have found none. *See* HC Rpt. at 23 (citing *Thai*, 987 A.2d at 430 (finding a violation of Rule 1.16(d) where the respondent refused to turn over a client's file *upon request*)). Moreover, requiring proof of an unfulfilled request from the client (or former client) to establish a Rule 1.16(d) violation is consistent with D.C. Bar Legal Ethics Op. 168 (1986) (explaining that Rule 2-110(A)(2) (prior rule) "requires an attorney to deliver, *upon request*, the entire contents of the client's file, including but not limited to all notes, memoranda and correspondence constituting 'work product,' to his former client or substitute counsel, unless the attorney can reasonably conclude that the failure to deliver requested materials will not prejudice his former client's interests") (emphasis added footnote omitted).

Because the record does not establish by clear and convincing evidence that the clients made a request for their files that was unfulfilled, we cannot find a violation of Rule 1.16(d) on this basis.

D. Rule 1.3(b)(2).

Rule 1.3(b)(2) provides that a lawyer shall not intentionally "prejudice or damage a client during the course of the professional relationship." The Hearing Committee found that Respondent violated this Rule when he failed to clarify his fee claim following the termination by his clients, which delayed his former clients' access to settlement funds and required them to hire counsel for an anticipated ACAB matter. In its analysis, the Hearing Committee concluded that an attorney's obligations under Rule 1.3(b)(2) should survive the termination of a representation. *See* HC Rpt. at 27-28 (citing *State ex rel. Counsel for Discipline, Nebraska Supreme Court v. Sipple*, 660 N.W. 2d 502, 510 (Neb. 2003); *In re Gonzalez*, 132 A.D.3d 1, 6 (N.Y. App. Div. 2015)).

Respondent argues there was no violation because he was acting within his rights to collect a fee to which he was entitled, he could not have given more specific information to Mr. Hagen, and there was no actual prejudice to his former clients. R. Br. at 33-37. Respondent does not contest that Rule 1.3(b)(2) applies after the attorney-client relationship ends. Disciplinary Counsel argues that the violation occurred when Respondent imposed a lien on his former clients' funds to secure payment of a fee he was not entitled to collect.[12] ODC Br. at 23. The actual harm,

[12] As discussed below, we do not address the merits of Rule 1.3(b)(2), which unlike Rule 1.16, requires Disciplinary Counsel to establish that Respondent's conduct resulted in actual prejudice or harm to his clients. Disciplinary Counsel's argument here is largely premised on a faulty conclusion—that Respondent was not entitled to *any* fee because his work was of "little or no value" and his fee claim was "phony." ODC Br. at 23-24. As stated above, there is insufficient evidence to quantify Respondent's work with precision, but there is sufficient evidence showing he did work for his clients, including things they specifically asked him to do. *See* footnote 2, *supra*.

Disciplinary Counsel argues, was that Mr. Hagen escrowed settlement funds owed to four clients to satisfy the potential fee claim and the former clients had to hire Mr. Clark to resolve the fee dispute. ODC Br. at 24, 26. Disciplinary Counsel contends that the Rule applies to conduct after the attorney-client relationship terminates. ODC Br. at 22-23.

The Board agrees with Respondent that there is no violation of Rule 1.3(b)(2), but on a different ground. We conclude that Rule 1.3(b)(2) does not apply to conduct after the attorney-client relationship has terminated.[13] Disciplinary Counsel is correct that other Rules apply to conduct after the attorney-client relationship ends, such as Rule 1.6(g) (providing that the obligation to preserve the client's confidences and secrets continues after termination of the lawyer's employment), Rule 1.9 (addressing conflicts of interests of a "former client"), and Rule 1.16 (governing a lawyer's conduct when declining or terminating representation, including fee disputes). ODC Br. at 22. But in each of those Rules, its application to conduct after the termination of the relationship is explicit.

Here, the plain language is also explicit: The Rule applies to intentional conduct that "[p]rejudice[s] or damage[s] a client *during the course of the professional relationship*." Rule 1.3(b)(2) (emphasis added). The plain meaning of

[13] Arguably Respondent has waived this argument because he did not address it in his brief. However, we consider it because Disciplinary Counsel's brief acknowledges that no D.C. cases address whether Rule 1.3(b)(2) applies after termination of a representation. *See* ODC Br. at 22. This is not a case in which a respondent concedes that settled law applies to him. Instead, he seems to have conceded a point that has not been decided in this jurisdiction. Thus, we analyze this novel legal issue *de novo*, even though Respondent does not contest the Hearing Committee's conclusion.

this Rule is that it applies only during the attorney-client relationship and, unlike the other rules cited by Disciplinary Counsel, does not apply after termination of the relationship. *See In re Greenspan*, 910 A.2d 324, 335 (D.C. 2006) (providing that under principles of statutory interpretation, "'if the words are clear and unambiguous, we must give effect to [the statute or rule's] plain meaning'") (quoting *McPherson v. United States*, 692 A.2d 1342, 1344 (D.C. 1997)); *see also In re Kline*, 113 A.3d 202, 213 (D.C. 2015) (defining the "intent" element of Rule 3.8(e) by looking to "the context of other ethical rules," particularly those rules proscribing intentional failure to act).

Even if we assume that the language is ambiguous, the Comments provide additional support for our conclusion. Comment [9] addresses the attorney-client relationship and the import of having the relationship defined so that a client does not expect an attorney will continue looking after his affairs when the relationship has ceased. It also refers to Rule 1.16, which, as discussed, applied during and after the termination of the relationship. *See* Rule 1.3, cmt. [9] ("Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client.").

E. Rule 8.4(d).

Rule 8.4(d) provides that it is professional misconduct for a lawyer to "[e]ngage in conduct that seriously interferes with the administration of justice." To establish a violation of Rule 8.4(d), Disciplinary Counsel must demonstrate by clear and convincing evidence that: (i) Respondent's conduct was improper, i.e., that

Respondent either acted or failed to act when he should have; (ii) Respondent's conduct bore directly upon the judicial process with respect to an identifiable case or tribunal; and (iii) Respondent's conduct tainted the judicial process in more than a *de minimis* way, i.e., it must have potentially affected process to a serious and adverse degree. *In re Hopkins*, 677 A.2d 55, 60-61 (D.C. 1996). As Comment [2] explains, subsection (d) "is to be interpreted flexibly," and it lists several examples of misconduct related to disciplinary matters, including: "failure to cooperate with Disciplinary Counsel; failure to respond to Disciplinary Counsel's inquiries or subpoenas; [and] failure to abide by agreements made with Disciplinary Counsel." The Comment also states that the Rule applies to conduct of an "analogous nature."

The Hearing Committee found that Respondent violated Rule 8.4(d) when he selectively maintained fee claims against those clients who filed disciplinary complaints, which "was designed to impact their participation in the disciplinary process." HC Rpt. at 32; *see id.* at 31 (citing *In re Martin*, 67 A.3d 1032, 1052-53 (D.C. 2013) ("It is well-settled that an attorney who enters into an agreement with a client which requires the client either to refrain from filing or to seek dismissal of a bar complaint violates Rule 8.4(d).")). Respondent denies that he retaliated, contending that he merely sought to preserve the status quo with former clients while the disciplinary case was pending, since the two issues were intertwined. R. Br. at 36. He also asserts that he "was entitled to choose which if any clients he would potentially assert a fee against, and to pursue those clients in order to recover his fees." R. Reply Br. at 18.

The Board disagrees with the Hearing Committee that Respondent's conduct violated Rule 8.4(d). First, Disciplinary Counsel did not establish by clear and convincing evidence that Respondent's conduct was improper. Respondent had valid fee claims against his former clients. Disciplinary Counsel contends that it was improper for him to release seven of those clients while maintaining claims for fees against the four former clients who filed disciplinary complaints. His justification, that he was not able to resolve those claims because of the disciplinary complaints, as explained above, is not without merit. *See supra* Section III.B (False Testimony). From the clients' perspectives, this likely felt like retaliation for their disciplinary complaints. However, given that there was also a legitimate reason for Respondent to not want to fully waive his fee claims against former clients, we cannot find by clear and convincing evidence that his actions were improper.

Second, although Respondent's conduct did not bear directly upon the judicial process with respect to an identifiable case or tribunal, disciplinary investigations and proceedings fall within the scope of the Rule; the Court has consistently found violations of Rule 8.4(d) based on failure to respond to disciplinary inquiries. *See* D.C. Bar Legal Ethics Op. 260 (1995); *In re Kanu*, 5 A.3d 1, 12 (D.C. 2010) (providing that failure to respond to Disciplinary Counsel's inquiries violates Rule 8.4(d) even when Disciplinary Counsel does not seek a Board order compelling a response). The Court has found conduct similar to Respondent's conduct here violative of the Rule; however, in those cases, the attempts to silence complainants were explicit. *See Martin*, 67 A.3d at 1051; *In re Green*, Board Docket No. 13-BD-

020, at 18-20 (BPR Aug. 5, 2015) (finding a violation when the respondent refused to settle claims without an agreement to forgo disciplinary complaints), *recommendation adopted*, 136 A.3d 699, 700 (D.C. 2016) (per curiam). Here, Respondent did not condition a settlement on his former clients' withdrawing their disciplinary complaints, but instead maintained the status quo with respect to the complaining former clients. There is not clear and convincing evidence that Respondent tried to coerce his former clients into refusing to cooperate with Disciplinary Counsel or to otherwise interfere in the disciplinary process.

Third, there is no evidence that Respondent's conduct tainted the judicial process in more than a *de minimis* way, and there is insufficient evidence that his conduct potentially impacted the process to a serious and adverse degree. *See In re Uchendu*, 812 A.2d 933, 941 (D.C. 2002) ("All that Rule 8.4(d) requires is conduct that 'taints' the process or 'potentially' impact[s] upon the process to a serious and adverse degree." (alteration in original) (quoting *Hopkins*, 677 A.2d at 61)). For example, in *Martin*, 67 A.3d at 1052, the respondent asked his client to withdraw the disciplinary complaint and Disciplinary Counsel was able to continue the investigation but there was potential impact on the disciplinary system and there was evidence that the client was reluctant to testify. *See also Green*, Board Docket No. 13-BD-020, at 19 (finding a violation even though "no one acceded to Respondent's requests" to withdraw or refrain from filing a disciplinary complaint because of the potential effect on the disciplinary proceedings) *recommendation adopted*, 136 A.3d at 700. Here, Disciplinary Counsel offered no evidence showing the effect or

potential effect of Respondent's conduct on the investigation or prosecution of this matter—unlike *Martin* and *Green,* Respondent did not expressly ask or require his former clients to drop their complaints or stop cooperating with Disciplinary Counsel.

IV. SANCTION

Respondent contends that no sanction is warranted because he did not commit any of the alleged Rule violations and he disagrees with the Hearing Committee's discussion of the sanction factors. R. Br. at 40-43. Disciplinary Counsel agrees with the Hearing Committee's recommended sanction of a 60-day suspension, with 30 days stayed in favor of one year of probation with conditions. ODC Br. at 28-30.

In determining the appropriate sanction, we consider the usual factors, *Martin*, 67 A.3d at 1053, and we adopt the Hearing Committee's discussion of those factors, HC Rpt. at 33-35, with one change. We agree with Respondent that his long career without a disciplinary history is a factor in mitigation. *In re Long*, 902 A.2d 1168, 1171 (D.C. 2006) (per curiam) ("We have held repeatedly that an attorney's record, or more accurately a lack thereof, may be considered a mitigating factor when fashioning an appropriate sanction.").[14] We also consider sanctions imposed for comparable misconduct separately. *See* D.C. Bar R. XI, § 9(h)(1).

For the reasons below, we recommend a 30-day suspension.

[14] We also note that whereas the Committee found a violation of three Rules, HC Rpt. at 35 (factor no. 3), the Board finds a violation of one Rule.

Cases involving comparable misconduct have typically resulted in brief suspensions—either served or stayed in favor of probation. For example, in *In re Evans*, 187 A.3d 554 (D.C. 2018) (per curiam), the Court stayed a 30-day suspension in favor of one year of probation where an attorney failed to refund unearned fees for two years, which interfered with his client's ability to hire successor counsel and required a court appointment of counsel. Like here, that misconduct violated Rule 1.16(d). *Id.* at 557-58. But, unlike Respondent, Evans had both aggravating and mitigating factors—his conduct included lack of competence, neglect, and failure to communicate with prejudice to his client and prior discipline, but he cooperated and took steps to avoid future misconduct. *See id*. at 556. Also, unlike Respondent, Evans's misconduct did not include untruthful testimony. *See also In re Pullings*, 724 A.2d 600, 602-03 (D.C. 1999) (per curiam) (appended Board Report) (60-day suspension stayed in favor of one year of probation with conditions for failure to surrender client files in two matters, in violation of Rule 1.16(d), failure to respond to Disciplinary Counsel or Board orders in two matters, in violation of Rule 8.4(d) and D.C. Bar R. XI, § 2(b)(3), in addition to neglect, failure to communicate, and failure to provide a written fee agreement).

Whereas, in *Thai*, the Court imposed a 60-day suspension with 30 days stayed in favor of probation for delaying and obstructing a former client's attempts to obtain his file, in violation of Rule 1.16(d). 987 A.2d at 430-31. The Board noted that Thai's misconduct, which also included lack of competence, neglect, and failure to

communicate, was serious with consequences to his client and required an "actual suspension." *In re Thai*, Bar Docket. No. 154-03, at 19 (July 31, 2008).

On the higher end is *In re Ryan*, 670 A.2d 375, 381 (D.C. 1996). Ryan was suspended for four months for refusal to turn over a client's file until the client paid an outstanding fee balance. The matter involved a pattern of intentional neglect and prejudice to the client that is not present here, but like this case, *Ryan* also involved a finding of dishonesty in aggravation of sanction. *Id*. at 378, 381.

Based on the above review of cases, we find that Respondent's violation of Rule 1.16(d) requires a suspension and his intentionally false testimony and failure to acknowledge the wrongfulness of his conduct warrants an actual suspension instead of one stayed in favor of probation. As the Board recently explained in *In re Wilson*, Board Docket No. 15-BD-064, at 3 (BPR Jan. 17, 2019), these "are sufficiently aggravating to require that Respondent serve the thirty-day suspension." But as the Court allowed in *In re Avery*, 189 A.3d 715, 721-22 (D.C. 2018) (per curiam) and the Board recommended in *Wilson*, we recommend that the 30-day period of suspension shall begin on a date Respondent selects and reports in advance to Disciplinary Counsel within ninety days after the Court's suspension order, provided that he has by that date filed the affidavit required by D.C. Bar Rule XI, § 14(g).

V. CONCLUSION

For the foregoing reasons, the Board finds that Disciplinary Counsel has proven by clear and convincing evidence that Respondent violated Rule 1.16(d), but

did not prove that he violated Rules 1.3(b)(2) and 8.4(d). The Board recommends that Respondent be suspended for 30 days, and the 30-day period of suspension shall begin on a date Respondent selects and reports in advance to Disciplinary Counsel within ninety days after the Court's suspension order, provided that he has by that date filed the affidavit required by D.C. Bar Rule XI, § 14(g).

BOARD ON PROFESSIONAL RESPONSIBILITY

By: 

Lucy Pittman

All members of the Board concur in this Report and Recommendation except Mr. Hora, who is recused.