THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Issued
March 4, 2024

In the Matter of:	:	
	:	
MATTHEW A. LEFANDE,	:	
	:	
Respondent.	:	Board Docket No. 22-BD-024
	:	Disc. Docket Nos. 2020-D018, 2019-D050, 2019-D041, & 2018-D061
A Temporarily Suspended Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 475995)	:	

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

The Board on Professional Responsibility hereby submits its unanimous findings of fact and conclusions that Respondent has violated D.C. Rules of Professional Conduct 3.1 and 8.4(d), and Maryland Rules 19-303.1, 19-303.3(a)(1), 19-308.4(c) and 19-308.4(d), as well as a majority finding that Respondent violated D.C. Rule 3.4(c), in an opinion drafted by Board Member Michael E. Tigar. Three Board members find that Disciplinary Counsel has failed to prove a violation of Rule 3.4(c), in a dissenting opinion drafted by Board Member Robert L. Walker.

There is no majority recommendation on sanction. Mr. Tigar, joined by Board Chair Bernadette C. Sargeant, Board Member Margaret M. Cassidy, and Mr. Walker, recommends a three-year suspension with a requirement that Respondent prove fitness prior to reinstatement. Board Member Thomas E. Gilbertsen, joined by

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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.

Board Members Sara K. Blumenthal, Sharon R. Rice-Hicks, and William V. Hindle, recommends disbarment.

Vice Chair Sundeep Hora is recused from this matter and did not participate in the decision.

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REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILIY

I. Introduction

This matter began after Respondent was found guilty of criminal contempt, in violation of 28 U.S.C. § 636(e)(2), in the United States District Court for the District of Columbia, for refusing to sit for a deposition. *In re LeFande*, 297 F. Supp. 3d 1 (D.D.C. 2018), *aff'd*, 919 F.3d 554 (D.C. Cir. 2019). Based on D.C. Bar R. XI, § 10, Disciplinary Counsel notified the D.C. Court of Appeals of Respondent's conviction, and on May 31, 2019, the Court temporarily suspended Respondent and directed the Board to institute a formal proceeding to determine the nature of Respondent's offense and whether the crime involved moral turpitude within the meaning of D.C. Code § 11-2503(a). The Board concluded that the crime was not one of moral turpitude *per se* and referred the matter to a hearing committee, giving Disciplinary Counsel the option of filing a petition charging one or more violations of the Rules of Professional Conduct. Order, *In re LeFande*, Board Docket No. 19-

BD-036 (July 29, 2019). The Specification of Charges ultimately charged four Counts, which included counts related to the contempt conviction.

Despite having been provided notice of these proceedings, Respondent has not responded to the Specification of Charges or participated in the proceedings before the Hearing Committee and the Board.

Based on its findings of fact summarized below, the Hearing Committee concluded that Disciplinary Counsel proved violations of D.C. Rules 3.1, 8.4(b) and 8.4(d) and Maryland Rules 19-303.1, 19-303.3(a)(1), 19-308.4(c) and 19-308.4(d), but did not prove violations of D.C. Rule 3.4(c) and Maryland Rules 19-301.4(a)(3) and 19-301.16(d). Because it found that Respondent engaged in flagrant dishonesty, the Hearing Committee recommended that Respondent be disbarred. Disciplinary Counsel objected to the Hearing Committee's finding that it had not proven a violation of D.C. Rule 3.4(c), but declined to file a brief with the Board because Respondent did not file an exception and the additional Rule violation would not affect the sanction. Disciplinary Counsel added, however, that if the Board adopts the Hearing Committee's finding that Respondent did not violate Rule 3.4(c), it reserves its right to pursue its objection with the Court of Appeals.

For the reasons set forth below, the Board agrees with the Hearing Committee that Respondent violated D.C. Rules 3.1 and 8.4(d), and Maryland Rules 19-303.1, 19-303.3(a)(1), 19-308.4(c) and 19-308.4(d). The Board disagrees with the Hearing Committee in two respects and finds that Disciplinary Counsel proved a violation of

Rule 3.4(c) and failed to prove a violation of Rule 8.4(b) by clear and convincing evidence.

II. Findings of Fact

The Board finds that the Hearing Committee's findings of fact, summarized below, are supported by substantial evidence, except for Finding of Fact ("FF") 36. That finding is not supported by substantial evidence, as discussed in Part III, *infra*.

A. Count I (The District Title Litigation)

In July 2014, Anita Warren erroneously received a large sum of money ($293,514.44) from District Title, a title company, in connection with the sale of a property she owned. That money ought to have been paid to Wells Fargo Bank, who had a security interest in the property. FF 2. When District Title asked Ms. Warren to return the funds, she declined to do so, and instead transferred them to her son, Timothy Day, and other relatives for their personal use. FF 3. Respondent represented Ms. Warren and Mr. Day when District Title filed suit against them in D.C. Superior Court. FF 4. After the case was removed to federal court, on November 19, 2014, District Title sought an injunction to prevent Ms. Warren and Mr. Day from dissipating assets. FF 5. The following day, in connection with his representation of Mr. Day in an unrelated real estate transaction, Respondent directed that the proceeds from the unrelated real estate transaction (over $80,000) be wired to a bank account in New Zealand that was not in Mr. Day's name. FF 6.

Several weeks later[1], the court granted District Title's motion, and enjoined Ms. Warren and Mr. Day from selling or encumbering real property, requiring them to account for withdrawals from any bank accounts, and requiring court approval for withdrawals of over $500. FF 7. The court ultimately granted summary judgment against Ms. Warren and Mr. Day for the entire amount they had received from District Title, plus prejudgment interest. FF 8. They did not pay the judgment. *Id.*

After the court's entry of judgment, District Title sought to conduct post-judgment discovery to recover the funds, including by serving Respondent and three others with subpoenas for testimony and documents related to an alleged fraudulent conveyance of property owned by Mr. Day. FF 9. At the time, District Title was unaware of Respondent's direct involvement in the November 2014 property sale. FF 11. After finding out, it filed a motion for Respondent to be ordered to show cause why he should not be held in contempt for concealing or failing to reveal assets and renewed its request for a subpoena. FF 12. Respondent opposed the motion and sought a protective order for his examination, raising attorney-client privilege and his Fifth Amendment right against self-incrimination. FF 13. The court granted the motion and denied Respondent's request for a broad protective order, instructing him to assert privilege on a question-by-question basis. FF 14-15. After Respondent evaded service of the subpoena and failed to respond to requests to schedule his

[1] The Hearing Committee Report erroneously lists the date of the order granting the motion for an injunction as December 15, 2015 – which would be after the date the court granted summary judgment (November 13, 2015). *See* FF 7-8. The correct date of the first order is December 15, 2014. *See* DX 8 at 1.

deposition, District Title sought and received a court order requiring him to appear for an in-court deposition. FF 16-17. Shortly before the date of the deposition, Respondent filed a motion to dismiss the case as to Mr. Day, since he had recently died, and as to Ms. Warren, for whom he had recently filed a bankruptcy petition that created an automatic stay of any enforcement action. FF 18-20. The court acknowledged the automatic stay of the case against Ms. Warren but denied the motion to dismiss Mr. Day from the case and ordered Respondent to appear for the scheduled deposition. FF 22.

When Respondent appeared in court, he refused to take the witness stand, be sworn in, or be deposed, citing the attorney-client privilege and citing to his Fifth Amendment rights that had previously been rejected. FF 23. After refusing to comply with seven court orders to take the stand, the court held him in criminal contempt and fined him $5,000. *Id.* It subsequently held a hearing on the still-pending motion for civil contempt (FF 12) and granted the motion, imposing a fine of $1,000 per day until Respondent complied with court orders to sit for a deposition. FF 26-27. As of the date of the disciplinary hearing (January 2023), Respondent still had not complied. FF 28.

After Disciplinary Counsel opened its investigation, Respondent refused to respond to its inquiries or to comply with its subpoena for his client files for Ms. Warren and Mr. Day. FF 29-31. Although Disciplinary Counsel determined it did not have sufficient evidence to charge Respondent with knowingly assisting his

clients' unlawful concealment of assets, the Hearing Committee found that the conclusion was supported by clear and convincing evidence. FF 35-36.

B. Count II (The Warren Bankruptcy Petition)

As stated in Count I, Respondent filed a bankruptcy petition for Ms. Warren in the United States Bankruptcy Court for the District of Maryland, which created an automatic stay of the District Title enforcement action with respect to her. FF 18-19, 37. The bankruptcy court found that the petition, which came one day after Respondent filed a motion to dismiss Mr. Day from the case, was filed for the improper purpose of avoiding being deposed in the District Title case. FF 37-38. The Hearing Committee found that there was no legitimate basis for the filing, as Ms. Warren was not bankrupt. FF 38.

Shortly after filing the petition, Respondent filed a motion for contempt against District Title's attorneys, claiming they were violating the automatic stay because they continued to try to depose Respondent in the enforcement action. FF 40; DX 38. Respondent failed to disclose the fact that the case remained active because his motion to dismiss Mr. Day from the case had been denied and failed to disclose the purpose of the deposition. FF 41. The court denied the motion and ordered Respondent to show cause why he should not be sanctioned for making frivolous arguments designed to harass District Title's attorneys and unnecessarily delay both proceedings. FF 43-44. Respondent did not appear at the show-cause hearing, and the court imposed monetary and non-monetary sanctions based on the pleadings and his failure to appear. FF 46-48. When he did not make the required

payments, the court issued an enforcement order against him. FF 49-51. Respondent belatedly paid the penalties but failed to file proof that he complied with the court's order as required by the court. FF 55.

C. Count III (The Warren Estate)

Ms. Warren died in March 2018. FF 56. On December 31, 2018, the court-appointed personal representative of her estate, Samuel Baldwin, Jr., wrote a letter to Respondent requesting any information about assets or claims she held at the time of her death, including his client files. FF 57-58. Respondent did not respond to that letter or two follow-up attempts. FF 59-61. After Mr. Baldwin filed a disciplinary complaint, Respondent explained that he withheld the information because his duty of confidentiality to Ms. Warren continued after her death. FF 62. The Hearing Committee ultimately found that Respondent's justification was plausible because the attorney-client privilege generally survives the death of the client and it was unclear whether Ms. Warren would have wanted Respondent to cooperate with a court-appointed personal representative. HC Rpt. at 37-40.

D. Count IV (The Carvalho Bankruptcy Matter)

Respondent represented a client, Teodora Simu, in a contract dispute against Sharra Carvalho in D.C. Superior Court. FF 63. After Ms. Simu was awarded a judgment of $90,250 plus interest, Respondent asked the court to also award attorney's fees and costs totaling $374,741.45. FF 64. Ms. Carvalho then filed for Chapter 7 bankruptcy in the U.S. Bankruptcy Court for the District of Columbia, listing Ms. Simu as a creditor, which created an automatic stay of the contract case.

FF 65. After receiving notice of the bankruptcy case, Respondent appealed three adverse rulings in the contract case, which Ms. Carvalho's counsel believed to be in violation of the automatic stay. FF 66. Ms. Carvalho's counsel filed a motion for contempt with the bankruptcy court, which was granted. FF 67-68. More than one year later, Respondent filed motions to remove the trustee of the bankruptcy case, for leave to sue the trustee, and to dismiss the case for bad faith. FF 69. The court denied the motion to dismiss. FF 70. Respondent then filed a motion to convert the Chapter 7 bankruptcy to a Chapter 11 bankruptcy, which repeated the arguments Respondent had previously made in his unsuccessful motion to dismiss. FF 71. Ms. Carvalho's counsel filed a motion for sanctions based on the motion to convert. FF 72. The bankruptcy court ultimately denied the Respondent's three remaining motions and granted the motion for sanctions, finding that Respondent had made frivolous arguments in the motion to convert. FF 74-77.

Separately, shortly after Ms. Carvalho had filed her bankruptcy petition, Respondent filed an adversary complaint against her in the bankruptcy court, alleging that the debts to Ms. Simu were not dischargeable. FF 78. The Hearing Committee found that Respondent made numerous frivolous claims in the adversary proceeding, including by misrepresenting the facts and repeating arguments that the court had already rejected. FF 79-81. Ms. Carvalho filed a motion for sanctions based on Respondent's baseless allegations and vexatious multiplication of the proceedings, which the court granted in part, ordering Respondent to pay Ms. Carvalho $32,250 plus interest for attorney's fees. FF 82-84.

E. Facts in Aggravation

During the disciplinary investigation, Respondent filed his own Chapter 7 bankruptcy petition in the U.S. Bankruptcy Court for the Southern District of Florida. FF 85. The bankruptcy court dismissed the case, finding that the petition was filed in bad faith and noting that Respondent had "vanished" after a series of adverse rulings. *Id.*

III. Discussion

The Board may make its own findings of fact, but it "must accept the Hearing Committee's evidentiary findings, including credibility findings, if they are supported by substantial evidence in the record." *See In re Klayman*, 228 A.3d 713, 717 (D.C. 2020) (per curiam) (quoting *In re Bradley*, 70 A.3d 1189, 1193 (D.C. 2013) (per curiam)). Substantial evidence is "enough evidence for a reasonable mind to find sufficient to support the conclusion reached." *In re Thompson*, 583 A.2d 1006, 1008 (D.C. 1990) (per curiam). The existence of substantial evidence supporting the opposite conclusion is not a basis to overturn a Hearing Committee's factual finding. *See In re Szymkowicz*, 124 A.3d 1078, 1084 (D.C. 2015) (per curiam).

We review *de novo* the Hearing Committee's legal conclusions and its determinations of ultimate facts. *See Klayman*, 228 A.3d at 717; *Bradley*, 70 A.3d at 1194 (Board owes "no deference to the Hearing Committee's determination of 'ultimate facts,' which are really conclusions of law and thus are reviewed de novo"). Nevertheless, "sometimes a Hearing Committee's factual and credibility

findings preclude the Board from reaching a particular conclusion regarding an ultimate fact." *In re Krame*, 284 A.3d 745, 753 (D.C. 2022).

A. Finding of Fact 36

Disciplinary Counsel foreswore alleging that Respondent assisted in his clients' criminal conduct, *see, e.g.*, Specification of Charges ¶ 51; ODC Post-Hearing Br. at 40 (Respondent sought to "avoid questioning about his own role in his clients' efforts to hide assets and thereby obstruct justice."). Nonetheless, the Hearing Committee made a finding of fact that, based on the evidence taken as a whole, "Respondent's clients purposefully acted to retain the funds that were mistakenly given to them, knowing that in doing so they were acting in violation of the law and that Respondent knowingly acted to assist in their endeavors." FF 36.

Disciplinary Counsel determined that it had not presented enough evidence to show that Respondent knowingly assisted in his clients' commission of a crime, with the intent to bring about an unlawful result. *See* Hearing Transcript at 53. If Respondent had participated in these proceedings, he would have had the opportunity to challenge Factual Finding 36 on due process grounds. *See* Order, *In re Morten*, Board Docket No. 18-BD-027, at 2-3 (BPR May 7, 2021) (dismissing a misappropriation charge based on a theory that had not been developed until closing arguments and post-hearing briefing, thus depriving the respondent of adequate notice to defend the allegation); *see also In re Ruffalo*, 390 U.S. 544, 552 (1968) (absence of fair notice of "the reach of the grievance procedure" violated due process). It is arguable that Respondent has not been prejudiced by the lack of

notice, as he has declined to defend against any of the charges. *See In re Fay*, 111 A.3d 1025, 1031 (D.C. 2015) (per curiam) (providing that a due process violation requires a finding of "substantial prejudice" (quoting *In re Thyden*, 877 A.2d 129, 140 (D.C. 2005))); *see, e.g.*, *In re Marks*, Board Docket No. 18-BD-059, at 31 & n.9 (BPR Apr. 14, 2021) (finding a violation of Rule 8.4(c) on a theory not advocated by disciplinary counsel, where the respondent did not raise a due process argument and suffered no prejudice because he adopted a dissenting hearing committee member's analysis before the Board), *recommendation adopted after no exceptions filed*, 252 A.3d 887 (D.C. 2021) (per curiam).

Putting aside issues of notice, opportunity to be heard, and potential waiver from refusal to appear and defend, the dispositive question is whether a "reasonable mind" could find "sufficient support" for Finding of Fact 36. We conclude that it could not, due to the absence of any testimony from Respondent, his clients, or third parties bearing on whether Respondent culpably participated in his clients' activities, as distinct from acting as their lawyer – albeit in a manner that violated several disciplinary rules. Indeed, Paragraph 51 of the Specification of Charges notes that Disciplinary Counsel had not completed its investigation on this issue, but would need "new evidence." Additionally, Disciplinary Counsel's investigator testified that Disciplinary Counsel was unable to complete its investigation and that it could not "determine how involved Respondent was in his clients' hiding of assets." FF 35. Such an investigation would have included examination of relevant documents as well as interviews with witnesses.

The evidence before the Hearing Committee does support an inference that Respondent's clients committed a theft, by converting what they knew to be District Title's and Wells Fargo Bank's property to their own use and interfering with return of that property to its rightful owner.[2] That part of Finding of Fact 36 is supported by substantial evidence. Respondent acted in ways that furthered his clients' arguably unlawful activity and violated Rules of Professional Conduct in doing so. However, given Disciplinary Counsel's concession, and the lack of evidence, we do not find substantial evidence that Respondent acted with the intent to steal District Title's property. Throughout the District Title litigation, Respondent continually asserted legal defenses to District Title's claim. Those defenses were unavailing, but Disciplinary Counsel did not charge that they were frivolous.

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[2] D.C. Code § 22-3211(b) provides:

> A person commits the offense of theft if that person wrongfully obtains or uses the property of another with intent: (1) To deprive the other of a right to the property or a benefit of the property; or (2) To appropriate the property to his or her own use or to the use of a third person.

The theft statute thus covers not only permanent deprivation of property, but actions that interfere with the rightful owner's full use of the property. The legal prohibition on such interference has been part of theft law for millennia. *See* Michael E. Tigar, *The Right of Property and the Law of Theft*, 62 Tex. L. Rev. 1443 (1984) (biblical, Roman law, and common law background to modern theft law). Principles of liability for aiding and abetting are set out in 1A Kevin F. O'Malley et al., *Fed. Jury Prac. & Instr.* § 18.01 (6th ed.). *See also* Judge Cardozo's iconic opinion in *People v Swersky*, 216 N.Y. 471, 476 (1916) ("words that sound in bare permission make not an accessory.") (citation omitted). Merely acting in ways that further deprival of another's property is not enough to prove theft. The intent to steal is, time out of mind, the hallmark of criminal liability for stealing. *See generally Morissette v. United States*, 342 U.S. 246 (1952).

B. Rule Violations

The Board agrees with the Hearing Committee that:

- In Count I, Respondent violated Rule 8.4(d) (serious interference with the administration of justice), but Disciplinary Counsel did not prove that Respondent committed a crime of moral turpitude pursuant to D.C. Code § 11-2503(a). .
- In Count II, Respondent violated Maryland Rules 19-303.1 (frivolous proceeding), 19-303.3(a)(1) (knowingly false statement to tribunal), 19-308.4(c) (dishonesty, fraud, deceit, or misrepresentation), and 19-308.4(d) (conduct prejudicial to the administration of justice), as well as D.C. Rule 8.4(d).
- In Count III, Disciplinary Counsel did not prove that Respondent violated Maryland Rules 19-301.4(a)(3) (failure to communicate) and 19-301.16(d) (failure to protect client interests on termination of representation).
- In Count IV, Respondent violated D.C. Rules 3.1 (frivolous proceeding) and 8.4(d).

However, as more fully detailed below, the Board disagrees with the Hearing Committee in some respects. The Board therefore adopts and incorporates Part III (Conclusions of Law) of the Hearing Committee Report, with the exception of Parts III.A.2 (Rule 3.4(c)) and III.A.3 (Rule 8.4(b)).

1. Rule 3.4(c)

D.C. Rule 3.4(c) provides: "A lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists."

Disciplinary Counsel argued in its post-hearing brief that Respondent violated Rule 3.4(c) in Count I when he refused to be deposed in the District Title litigation,

in violation of multiple court orders and instructions. It contended that his claim of attorney-client privilege "did not provide a colorable basis for Respondent's refusal" given that the court had ordered that any assertion of privilege must be made on a question-by-question basis. ODC Post-Hearing Br. at 27. Because the privilege argument was frivolous, Disciplinary Counsel contended, Respondent's actions did not qualify as an "open refusal based on an assertion that no valid obligation exists." *Id.*

The Hearing Committee disagreed, pointing out that Disciplinary Counsel had not accounted for Respondent's argument that his Fifth Amendment rights precluded him from answering to questions and had failed to cite authority for its view that frivolous arguments did not qualify as "open refusal." HC Rpt. at 28-29. Because Respondent was open about his refusal to sit for the deposition and provided explanations for his behavior, the Hearing Committee found that his actions qualified as "open refusal" and thus Disciplinary Counsel had failed to prove a violation of Rule 3.4(c).

i. Factual Background

At issue is Respondent's refusal to provide evidence regarding his clients' alleged concealment of assets and his own efforts to assist them. Respondent's attorney-client privilege and his right to assert the Fifth Amendment were first raised in Respondent's Opposition to Plaintiff's Motion to Show Cause and Request for a Protective Order, filed on April 23, 2017 and submitted as DX 18. There, he contended, *inter alia*, that "[b]ecause [District Title] has now alleged a multitude of

criminal violations by the attorney, his Fifth Amendment rights are implicated[;] he now asserts those rights without prior waiver, and no testimony may be taken from him." DX 18 at 1. Though his argument largely consisted of quotations from court opinions without further discussion, he essentially argued that his view of "the possibility of prosecution" was "more than fanciful or merely speculative" because any question about his representation of Ms. Warren and Mr. Day "could furnish a link in the chain of evidence in demonstrating [his] knowledge of, participation in, or complacency with wrongdoing on [their] part." *Id.* at 7-8 (first quoting *In re Master Key Litig.*, 507 F.2d 292, 293 (9th Cir. 1974); then quoting *In re Grand Jury Proceedings: Samuelson*, 763 F.2d 321, 324 (8th Cir. 1985), and then quoting *Anton v. Prospect Café Milano, Inc.*, 233 F.R.D. 216, 218 (D.D.C. 2006)); *see also Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977) ("[S]ince the test is whether the testimony might later subject the witness to criminal prosecution, the privilege is available to a witness in a civil proceeding, as well as to a defendant in a criminal prosecution."). Notably, in the *Anton* case, which Respondent cited three times, the court explained that "[a] district court must review assertions of privilege on a question-by-question basis." 233 F.R.D. at 218 (citing *United States v. Argomaniz*, 925 F.2d 1349, 1355 (11th Cir. 1991)).

On June 2, 2017, the court denied Respondent's request for a protective order, explaining that "the applicable authorities require that claims of such privileges be made in response to a specific question or questions actually posed . . . ." DX 19 at 8-9. It construed Respondent's argument as an "impermissible 'blanket' claim[] of

privilege." *Id.* at 9 (quoting *Banneker Ventures, LLC v. Graham*, 253 F. Supp. 3d 64, 70 (D.D.C. 2017)).

At a status hearing on September 15, 2017, Respondent stated that he "still refuse[d] to testify" based on his Fifth Amendment and attorney-client privileges, adding that "[u]pon review of the caselaw, [Respondent] feels that he must take the risk of going to jail rather than speaking against the attorney-client privilege." DX 27 at 1-2. The court again rejected that argument, ordering him to be sworn in, answer each question while under oath, and "state the factual basis of the invocation of each privilege claimed." DX 23 (order dated September 15, 2017) (citing *Byers v. Burleson*, 100 F.R.D. 436, 439 (D.D.C. 1983) ("A party who asserts a privilege in response to a notice of deposition should attend the deposition and submit to the court for resolution any matters which allegedly violate the privilege.")).

Pursuant to the September 15, 2017 order, when he appeared in court for his deposition on September 21, 2017, the court instructed Respondent to be sworn in and raise any claims of privilege from the witness stand. FF 23; DX 28 at 12. Respondent repeatedly "respectfully declined" to comply with the instruction, without citing a basis therefor. FF 23; DX 28 at 10-13. When the court offered to allow him to confer with his counsel before risking being held in contempt, Respondent stated: "I assert my Fifth Amendment privilege and . . . I appear here under duress. I have never been served in this case. I am not a party in this case. . . . I respectfully decline to testify." DX 28 at 12-13. Following the break, he repeated "I respectfully decline to testify" and was held in contempt. FF 23; DX 28 at 14-15.

ii. Discussion

Rule 3.4 reads:

> A lawyer shall not:
>
> (a) Obstruct another party's access to evidence or alter, destroy, or conceal evidence, or counsel or assist another person to do so, if the lawyer *reasonably* should know that the evidence is or may be the subject of discovery or subpoena in any pending or imminent proceeding. Unless prohibited by law, a lawyer may receive physical evidence of any kind from the client or from another person. If the evidence received by the lawyer belongs to anyone other than the client, the lawyer shall make a *good-faith* effort to preserve it and to return it to the owner, subject to Rule 1.6;
>
> (b) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
>
> (c) Knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
>
> (d) In pretrial procedure, make a *frivolous* discovery request or fail to make *reasonably* diligent efforts to comply with a legally proper discovery request by an opposing party;
>
> (e) In trial, allude to any matter that the lawyer does not *reasonably* believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused;
>
> (f) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
>
> > (1) The person is a relative or an employee or other agent of a client; and
> >
> > (2) The lawyer *reasonably* believes that the person's interests will not be adversely affected by refraining from giving such information; or

(g) Peremptorily strike jurors for any reason prohibited by law.

(emphasis added). In construing the Rule, we heed the Court of Appeals' direction to focus on the text, for the plain meaning of the relevant words will usually dictate the result. The court held in *Providence Hosp. v. D.C. Dep't. of Emp. Servs.*, 855 A.2d 1108, 1112-13 (D.C. 2004):

> Our first step when interpreting a statute is to look at the language of the statute. *See National Geographic Soc'y*[*v. D.C. Dep't of Employment Servs.*], 721 A.2d [618,] 620[(D.C. 1998)]. We are required to give effect to a statute's plain meaning if the words are clear and unambiguous. *See Office of People's Counsel v. Public Serv. Comm'n*, 477 A.2d 1079, 1083 (D.C. 1984). "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used." *Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751, 753 (D.C. 1983). Furthermore, "in examining the statutory language, it is axiomatic that 'the words of the statute should be construed according to their ordinary sense and with the meaning commonly attributed to them." *Peoples Drug Stores*, 470 A.2d at 753 (quoting *Davis v. United States*, 397 A.2d 951, 956 (D.C. 1979)).

The italicized words in the above quotation of Rule 3.4 impose limits on the lawyer's freedom of action: "reasonably," "frivolous." No such limiting language appears in 3.4(c). Mr. Walker's Dissenting Opinion contends that a literal reading of the Rule makes sense, and that the disobedient lawyer is not subject to professional discipline. The obdurate lawyer is subject to being held in criminal contempt, fined and jailed, and held in civil contempt, incurring incarceration or a monetary penalty until compliance. The lawyer will also suffer whatever reputational harm befalls someone whose open refusal is objectively frivolous or capricious. The disobedient lawyer can also incur sanctions under 28 U.S.C. § 1927

and the court's inherent power. *See Chambers v. Nasco, Inc.*, 501 U.S. 32 (1991). Rule 3.4 does not spare the lawyer from these consequences.

However, we reject a literal reading of the Rule, for three reasons.

First, the Rule's caption places the text in the context of respecting the rights of one's adversary: "fairness to opposing party and counsel." We should read Rule 3.4(c) in a way that honors the Rule's stated purpose, as that purpose is expressed in the caption's text. Respondent's obdurate conduct displayed disrespect for the rights of opposing counsel and the opposing party, as well as for the rules of the tribunals before which he appeared and the Rules of Professional Conduct. His refusal to be sworn was part of a pattern of improper conduct.

We read the rule as demanding, where possible, an accommodation of its ostensibly competing interests. The court offered Respondent a solution that would accommodate the legitimate interests at stake. The court directed that he be sworn and invoke his privileges on a question-by-question basis. One is reminded of the maxim that he who demands equity must do equity. A lawyer who respects the rights of every participant in the litigation should seek a way to serve his or her own interests at minimal cost to the rights of others.

Second: In general, a literal, text-based reading that conduces to an unreasonable result should be avoided. The textual imperative must be tempered with common sense: excessive and solitary focus on the statutory words can lead to absurd results.

Third, we are persuaded by *People v. Brown*, construing Colorado Rule of Professional Conduct 3.4(c). The Presiding Disciplinary Judge of the Supreme Court of Colorado held:

> Colo. RPC 3.4(c) prohibits a lawyer from knowingly disobeying an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists. Although the rule does not define the term "open refusal," commentators suggest that such a refusal is premised on "good faith and open noncompliance in order to test an order's validity." "An open refusal permits the . . . court to assess the attorney's argument and allows opposing counsel to take action to protect her client from the opposing attorney's noncompliance." Under the open refusal exception, a lawyer cannot "unilaterally and surreptitiously flout a court order."

461 P.3d 683, 695-96 (Colo. 2019) (quoting 2 Geoffrey C. Hazard Jr. & W. William Hodes, *The Law of Lawyering* § 30.9, at 30-21 (3d ed. 2001, 2011 Supp.); and then quoting *Gilbert v. Utah State Bar*, 379 P.3d 1247, 1257 (Utah 2016)) (additional citations omitted).

Brown makes sense. In litigation, the usual practice is that the objecting lawyer must state a reason, so that the tribunal can intelligently decide whether to honor the objection. Here, Respondent's "reason" was not provided in good faith. His assertions of Fifth Amendment and attorney-client privileges were not responsive to the trial judge's instruction to take the stand and raise his privilege claims there. Respondent was aware of the proper method of raising his objections; as previously noted, in his Opposition to Plaintiff's Motion to Show Cause and Request for a Protective Order, filed on April 23, 2017, Respondent cited three times to an opinion that explained that "[a] district court must review assertions of

privilege *on a question-by-question basis*." *Anton*, 233 F.R.D. at 218 (emphasis added); *see* DX 18 at 7-8.

Rule 3.4(c) creates a safe harbor for lawyers who feel impelled to confront judicial authority. However, we read the Rule as requiring respect for the stated purpose of enforcing fairness and the Rule's evident respect for the lawyer's sense of professional duty. When an attorney does not make a good-faith assertion that there is no valid obligation under the rules of a tribunal, his failure to obey that obligation violates Rule 3.4(c).

2. Rule 8.4(b)

Under Rule 8.4(b), "[i]t is professional misconduct for a lawyer to . . . [c]ommit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." The Hearing Committee concluded that Respondent's criminal contempt reflected adversely on his honesty because

> Respondent had knowledge of the whereabouts of at least some of the disputed funds, and his multiple efforts to frustrate the pursuit of that knowledge, particularly his refusal to take the stand at his deposition, were designed to avoid being questioned about his clients' fraudulent diversion of funds and the role he played in that. Honest lawyers do not participate in covering up their clients' dishonest conduct and thus his crime violated Rule 8.4(b).

HC Rpt. at 30.

To the contrary, individuals who have committed crimes or who may have committed crimes are entitled to the assistance of counsel; and their attorney in the representation consistent with the rules of professional conduct owes both loyalty

and confidentiality to the client. Further, lawyers are protected by the Fifth Amendment and so, consistent with applicable legal principles, may avoid being questioned by asserting their Fifth Amendment privilege. Accordingly, a lawyer may avoid answering certain questions and in doing so has acted within the law and the Rules of Professional Conduct. A lawyer may not actively assist the client in committing the crime, nor knowingly assist the client in covering up the criminal activity by unlawful means, but, as discussed above, substantial evidence does not support that Respondent did so in this case.

The Court of Appeals has already deemed Respondent's contempt conviction a "serious crime." The issue under Rule 8.4(b) is whether Respondent's conduct "reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." When a lawyer pleads guilty to or is convicted of the crime of criminal contempt for violating a judicial order, the lawyer risks discipline for committing that crime. Criminal contempt fulfills the first part of Rule 8.4(b). Even so, in this case, we must determine if Respondent's criminal contempt "reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." For essentially three reasons, Respondent's conduct does not violate Rule 8.4(b): First, as noted above, the text, history and evident purpose of Rule 3.4(c) provides a safe harbor for the open refusal that led to the contempt conviction. Second, although Respondent's invocation of attorney-client privilege and testimonial privilege was procedurally inept, these are valid privileges, the invocation of which does not reflect adversely on the lawyer's honesty,

trustworthiness, or fitness. Third, as we have noted, the record does not support a finding that the contempt was part of a criminal design.

The D.C. Rule 8.4(d) and Maryland Rule 19-308.4(d) charges stand in sharp contrast to the Rule 8.4(b) charge. Despite our conclusion as to the Rule 8.4(b) charge, Respondent's misconduct does support the Hearing Committee's findings that under Counts I and IV he violated D.C. Rule 8.4(d), and that under Count II he violated Maryland Rule 19-308.4(d). Entirely aside from his refusal to take the stand when he finally showed up in court, Respondent evaded his responsibility to respond to court orders, his repeated frivolous claims, and his lack of candor to tribunals support findings that he violated these rules.

IV. Sanction

The sanction imposed in an attorney disciplinary matter must protect the public and the courts, maintain the integrity of the legal profession, and deter the respondent and other attorneys from engaging in similar misconduct. *See, e.g.*, *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc); *In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013); *In re Cater*, 887 A.2d 1, 17 (D.C. 2005). "In all cases, [the] purpose in imposing discipline is to serve the public and professional interests . . . rather than to visit punishment upon an attorney." *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (en banc) (citations omitted); *see also Goffe*, 641 A.2d at 464. The sanction must not "foster a tendency toward inconsistent dispositions for comparable conduct or . . . otherwise be unwarranted." D.C. Bar R. XI, § 9(h)(1); *see, e.g.*, *Hutchinson*, 534 A.2d at 923-24; *Martin*, 67 A.3d at 1053; *In re Berryman*, 764 A.2d

760, 766 (D.C. 2000). We concur in the Hearing Committee's analysis of the principles governing the imposition of a sanction. As the Committee noted, the Court of Appeals considers a number of factors, including:

(1) the nature and seriousness of the conduct at issue;

(2) prior discipline;

(3) prejudice to the client;

(4) the attorney's attitude;

(5) circumstances in mitigation or aggravation; and

(6) the mandate to achieve consistency.

In re Baber, 106 A.3d 1072, 1076 (D.C. 2015) (per curiam). The Court also considers "the moral fitness of the attorney" and "the need to protect the public, the courts, and the legal profession." *Goffe*, 641 A.2d at 464.

The Board was unable to reach a majority decision as to the appropriate sanction; rather, as explained in the separate recommendations of Mr. Tigar and Mr. Gilbertsen, *infra*, four members of the Board recommend a three-year suspension with a fitness requirement and four members of the Board recommend disbarment.

V. Conclusion

For the foregoing reasons, the Board finds that Respondent violated D.C. Rules 3.1, 3.4(c), and 8.4(d) and Maryland Rules 19-303.1, 19-303.3(a)(1), 19-308.4(c) and 19-308.4(d). As discussed in the separate opinions that follow, four

members of the Board recommend a three-year suspension with a fitness requirement and four members of the Board recommend disbarment.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: Michael E. Tigar
Michael E. Tigar

All members of the Board concur in this Report and Recommendation except Vice Chair Mr. Hora, who is recused from this matter, and Mr. Walker, Ms. Cassidy, and Dr. Hindle, who dissent from the Board's finding of a violation of Rule 3.4(c) in a separate opinion drafted by Mr. Walker.

In regard to sanction, the Board has two opinions and no majority recommendation. Mr. Tigar, joined by the Board Chair Ms. Sargeant, Ms. Cassidy, and Mr. Walker recommend the sanction of a three-year suspension with fitness. Mr. Gilbertsen, joined by Ms. Blumenthal, Dr. Hindle, and Ms. Rice-Hicks, recommend disbarment.

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
MATTHEW A. LEFANDE,	:	
	:	
Respondent.	:	Board Docket No. 22-BD-024
	:	Disc. Docket Nos. 2020-D018, 2019-
A Temporarily Suspended Member of	:	D050, 2019-D041, & 2018-D061
the Bar of the District of Columbia	:	
Court of Appeals	:	
(Bar Registration No. 475995)	:	

DISSENTING OPINION OF ROBERT L. WALKER AS TO RULE 3.4(c)

We would uphold the Hearing Committee's view that Disciplinary Counsel did not prove a violation of Rule 3.4(c). We agree with the Hearing Committee's findings and conclusions respecting this alleged violation, including its statement that, at the hearing in question, "Respondent was quite open about his deliberate disobedience, and to the extent the Court permitted it, he explained why he would not testify." HC Rpt. at 29 (citing DX 28 at 11-14). We also note that Respondent retained counsel who represented him before the court when he made the decision not to testify despite the court's order to do so, which, in our opinion, further supports that he was open in his disobedience and had sought advice on his position that no valid obligation exists. FF 23.

In reading Rule 3.4(c), on "Fairness to Opposing Party and Counsel," we, like the majority, heed the Court of Appeals' direction to focus on the text, for the plain meaning of the relevant words will usually dictate the result. *See Providence Hosp. v. D.C. Dep't. of Emp. Servs.*, 855 A.2d 1108, 1112-13 (D.C. 2004).

As the majority opinion notes, in specific clauses of Rule 3.4 there are italicized words which represent limits on the lawyer's freedom of action; that is, language in those specific clauses states that the lawyer must be "reasonable" or cannot be "frivolous." However, in clause 3.4(c), there is no such limiting language. And a literal reading of Rule 3.4(c) makes sense. The disobedient lawyer is – as this case demonstrates – subject to being held in criminal contempt, fined and jailed, and held in civil contempt, incurring incarceration or a monetary penalty until compliance.[3] The disobedient lawyer can also incur sanctions under 28 U.S.C. § 1927 and the court's inherent power. *See Chambers v. Nasco, Inc.*, 501 U.S. 32

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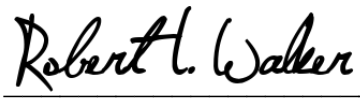
[3] We are aware of *People v. Brown*, cited by the majority, in which the Presiding Disciplinary Judge of the Supreme Court of Colorado held:

> Colo. RPC 3.4(c) prohibits a lawyer from knowingly disobeying an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists. Although the rule does not define the term "open refusal," commentators suggest that such a refusal is premised "good faith and open noncompliance in order to test an order's validity." "An open refusal permits the . . . court to assess the attorney's argument and allows opposing counsel to take action to protect her client from the opposing attorney's noncompliance." Under the open refusal exception, a lawyer cannot "unilaterally and surreptitiously flout a court order."

461 P.3d 683, 695-96 (Colo. 2019) (citations omitted).

This analysis overlooks the evident fact that those who drafted the Colorado and the D.C. Rule 3.4 were, as we have noted, thoughtful in drafting qualifying words that express the ideas of good faith and reasonableness in sections of this Rule, yet did not do so in subsection (c), when they well could have. Moreover, it is arguable that, in the context of a rule aimed at promoting "fairness to opposing party and counsel," "open" refusal to obey an order *is* a refusal undertaken in good faith, in contrast to a surreptitious and secretive refusal providing no notice to a tribunal or to opposing party or counsel.

(1991). Rule 3.4(c) does not spare the lawyer from these consequences: its plain text simply shields the lawyer from professional discipline, if the lawyer acts openly and based on assertion that no valid obligation exists. There may be times, as in this matter, when a lawyer may incur a just finding of contempt yet not violate professional conduct Rule 3.4(c). We should not over-read Rule 3.4(c) in a way that may preclude a lawyer from openly taking a position based on an assertion that no obligation exists.

By: 
Robert L. Walker

Ms. Cassidy and Dr. Hindle concur with this Dissenting Opinion.

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
MATTHEW A. LEFANDE,	:	
	:	
Respondent.	:	Board Docket No. 22-BD-024
	:	Disc. Docket Nos. 2020-D018, 2019-
A Temporarily Suspended Member of	:	D050, 2019-D041, & 2018-D061
the Bar of the District of Columbia	:	
Court of Appeals	:	
(Bar Registration No. 475995)	:	

RECOMMENDATION OF MICHAEL E. TIGAR AS TO SANCTION

The Hearing Committee found that Respondent's conduct, which continued for at least six years, "fits comfortably with prior cases in which [the Court] has disbarred attorneys for engaging in a broad, prolonged, and persistent pattern of dishonesty." HC Rpt. at 44 (quoting *In re Mazingo-Mayronne*, 276 A.3d 19, 23 (D.C. 2022) (per curiam)). Specifically, the Hearing Committee found that Respondent was engaged in a coverup of his clients' diversion of funds and his role in it over the course of six years. *See id.* It concluded that the misconduct was most analogous to *In re Shorter*, 570 A.2d 760 (D.C. 1990) (per curiam), in which the respondent was disbarred for willful tax evasion, which might not have risen to the level of affirmative deception but, at a minimum, involved placing his funds beyond the service of process, "know[ing it] would result in preventing the retirement of his acknowledged tax liability." 570 A.2d at 767. Though the respondent in *Shorter* did not commit a crime of moral turpitude, he was disbarred based on his "pattern

of dishonest dealing."[4] *Id.* at 771. Here, the Hearing Committed recommended disbarment for similar reasons, Respondent's misconduct amounted to "flagrant, repeated dishonesty." HC Rpt. at 43 (citing *Baber*, 106 A.3d at 1077-78).

A. Respondent's Misconduct Did Not Rise to the Level of Flagrant Dishonesty.

The Court "reserve[s] the sanction of disbarment for the most extreme attorney misconduct," which, in dishonesty cases, includes intentional or reckless misappropriation and "dishonesty of the flagrant kind." *See In re Johnson*, 275 A.3d 268, 282 (D.C. 2022) (per curiam) (quoting *In re Howes*, 39 A.3d 1, 15 (D.C. 2012)). The Court has defined flagrant dishonesty as "either dishonesty accompanied by aggravating factors or continued and pervasive dishonesty." *See In re Johnson*, 298 A.3d 294, 317 (D.C. 2023) (citing *In re O'Neill*, 276 A.3d 492, 503 (D.C. 2022); then citing *Mazingo-Mayronne*, 276 A.3d at 22; and then citing *Howes*, 52 A.3d at 15); *see also In re Pennington*, 921 A.2d 135, 142 (D.C. 2007) (explaining that disbarment is appropriate for "criminal or quasi-criminal" conduct that "reflect[s] a continuing and pervasive indifference to the obligations of honesty in the judicial system" (quoting *In re Corizzi*, 803 A.2d 438, 443 (D.C. 2002))). In determining whether conduct involves "flagrant dishonesty," the Court has endorsed a "fact-specific approach . . . [that] requir[es] [consideration of a] [r]espondent's particular misconduct, and not simply the rules that he violated." *In re Guberman*, 978 A.2d 200, 206 n.5 (D.C. 2009) (quoting Board Report). There is no bright-line test for

[4] In *Shorter*, the "pattern" was found based on the respondent's prior six-month suspension for similar misconduct – failing to file tax returns. 570 A.2d at 771.

determining flagrant dishonesty. *See id.*; *see also In re Fox*, 66 A.3d 548, 553-54 (D.C. 2013) (collecting cases involving dishonesty and noting that "extenuating or aggravating factors" are typically required to impose disbarment in a case not involving misappropriation).

As the Report and Recommendation explained with respect to Finding of Fact 36, Disciplinary Counsel foreswore alleging that Respondent assisted in his clients' criminal conduct, *see, e.g.*, Specification of Charges ¶ 51; ODC Post-Hearing Br. at 40 (Respondent sought to "avoid questioning about his own role in his clients' efforts to hide assets and thereby obstruct justice") because it did not believe that it had presented enough evidence to show that Respondent knowingly assisted in his clients' commission of a crime. Nonetheless, the Hearing Committee made a finding of fact that, based on the evidence taken as a whole, "Respondent's clients purposefully acted to retain the funds that were mistakenly given to them, knowing that in doing so they were acting in violation of the law and that Respondent knowingly acted to assist in their endeavors." FF 36. And again, adopting the language of the criminal law, "In addition, his dishonesty extended to aiding and abetting his dishonest clients in their dishonest activities." HC Rpt. at 41.

Since we have determined that the Hearing Committee's finding that Respondent was complicit in his clients' crimes is not supported by substantial evidence, *see* Part III.A, *supra*, we do not view Respondent's overall conduct, outside the narrow finding of contempt, as "criminal or quasi-criminal," *see Pennington*, 921 A.2d at 142. Four additional considerations underlie a conclusion

that a finding of flagrant dishonesty, and consequent disbarment, is not appropriate. These might be labelled Policy, Procedure, Proof, and Prudence.

1. Policy

Our disciplinary process is designed to operate as an adversarial system. *See In re Cleaver-Bascombe*, 892 A.2d 396, 412 n.14 (D.C. 2006). With the approval of a Contact Member, Disciplinary Counsel files a Specification of Charges that sets out the nature and extent of charges and defines the case that is to be tried. The Respondent has the right to file an answer and denial, and to assert any affirmative defenses. If a Contact Member disagrees with a charging decision, the matter is referred to the Chair of a Hearing Committee, who will make a final decision, which is not subject to review. *See* Board Rule 2.13. After the Specification has been approved, however, "there is no authority for the Hearing Committee, acting alone, to add charges that were not sought by Disciplinary Counsel or approved by a Contact Member." *In re Robinson*, 225 A.3d 402, 406 (D.C. 2020) (citing D.C. Bar R. XI, §§ 5(c), 6(a)); *see also In re Anderson*, 778 A.2d 330, 341 (D.C. 2001) (noting that the Hearing Committee is a "first-level adjudicator and trier of the facts"). Rather, the Hearing Committee tries the case defined by the pleadings.

Moreover, as a matter of policy, a Hearing Committee should not add additional matters to be tried and ruled upon. As the Board explained in *Robinson*:

> Permitting a Hearing Committee to add charges, even if done (as here) conscientiously and without rancor, would inevitably lead to the perception that Hearing Committee members play a partisan role. That

> perception could fatally undermine the confidence of the Bar and of the public in the fairness and efficacy of our disciplinary system.

In re Robinson, Board Docket No. 15-BD-053, at 12 (BPR Apr. 4, 2018), *recommendation adopted*, 225 A.3d at 404. The Board and the Court should impose on Disciplinary Counsel and Hearing Committees the duty to follow their own rules. *See id.* (citing *Cleaver-Bascombe*, 892 A.2d at 412 n.14 and D.C. Bar R. XI, §§ 4(e)(2), 19(b)) (noting that the Board, rather than Hearing Committees, have oversight authority over Disciplinary Counsel). Judge David Bazelon, inveighing against the contention that procedural rules could be dispensed when it was convenient, was fond of quoting from an English precedent that "[J]ustice must not only be done, but must manifestly be seen to be done." *Gadsden v. United States*, 223 F.2d 627, 631 (D.C. Cir. 1955). A Hearing Committee should have no reason to think that it can do a better job defining the case than all the people who shaped it to begin with.

The fundamental idea of adversary inquiry traces deep roots in our social history, as well as in our legal system:

- He that is first in his own cause seemeth just; but his neighbor cometh and searcheth him. Proverbs 18:17 (King James).
- I cannot praise a fugitive and cloistered virtue, unexercised and unbreathed, that never sallies out and sees her adversary . . . [T]hat which purifies us is trial, and trial is by what is contrary. John Milton, *Areopagitica, A speech of Mr. John Milton for the Liberty of Unlicensed Printing to the Parliament of England* (1644).

2. Procedure

This case is beclouded by the Respondent's decision to refrain from showing up before the Hearing Committee. We can reasonably hold that he waived his right to make objections. *See In re Robertson*, 612 A.2d 1236, 1242 (D.C. 1992) ("[A] respondent attorney who claims lack of notice of the charges or other procedural irregularities, without having raised them before the Hearing Committee or the Board, will be held to have waived such claims, consistent with due process." (citations omitted)). But what is the extent of his waiver? He could read the Specification of Charges and understand that if he did not contest the case as pleaded, he might endure some predictable consequences. He would read ODC's disavowal of a charge that he committed the crime of theft, and ODC's acknowledgement that its investigation did not – as yet – give an evidentiary basis for such a charge. *See* FF 35.

A valid waiver, under these significant circumstances, should satisfy the law's most stringent test. It should reflect "the intentional relinquishment of a known right." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). *See generally* Michael E. Tigar, *The Supreme Court, 1969 Term—Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 Harv. L. Rev. 1 (1970).

3. Proof

If Disciplinary Counsel wanted to lay the basis for a charge of criminal complicity, also known as "aiding and abetting" or accessory liability, we ought to expect that it would use an array of investigative tools. It would scour Respondent's

and his clients' bank records and expenditure patterns, to determine whether Respondent received more than a normal and usual legal fee, and whether his spending patterns reflected unusual cash expenditures. *See generally Milam v. United States*, 322 F.2d 104 (5th Cir. 1963) (lawyer not liable as accessory to client's criminal conduct). Perhaps hampered by Respondent's failure to respond to its inquiries, Disciplinary Counsel did none of this. There is an old standard jury instruction on this topic: "If a party offers weaker or less satisfactory evidence when stronger and more satisfactory evidence could have been produced at trial, you may, but are not required to, consider this fact in your deliberations." 1A *Fed. Jury Prac. & Instructions* §14.14 (6th ed.).

4. Prudence

We might ask ourselves whether it makes sense to follow the uncertain path that leads to a finding of flagrant dishonesty and thus disbarment. Whether Respondent may apply for reinstatement after three years or, in the case of disbarment, five years, makes little difference because the most important consideration is that Respondent will not be allowed to practice until and unless he carries the burden of showing that he is fit do so.

B. The Court Should Impose a Three-Year Suspension with a Fitness Requirement.

1. Sanctions Imposed in Comparable Cases

Notwithstanding our finding that Respondent did not engage in flagrant dishonesty, the Board has upheld the Hearing Committee's findings that he violated

D.C. Rules 3.1, 3.4(c)[5], and 8.4 (d) and Maryland Rules 19-303.1, 19-303.3(a)(1), and 19-308.4(c) and (d). Such conduct has repeatedly been held to justify a lengthy suspension and the imposition of a fitness requirement. *See, e.g.*, *In re Samad*, 51 A.3d 486, 500 (D.C. 2012) (per curiam) (three-year suspension with fitness for extensive misconduct involving violations of fourteen Rules across six matters, exhibiting a consistent pattern of neglect that "in nearly every instance prejudiced the administration of justice," and for refusal to acknowledge the wrongful conduct during the disciplinary proceedings); *In re Silva*, 29 A.3d 924 (D.C. 2011) (per curiam) (appended Board Report) (three-year suspension with fitness where the respondent neglected a real estate transaction, created a false document with forged signatures to cover up his neglect, and lied about the matter to his client); *In re Slaughter*, 929 A.2d 433 (D.C. 2007) (three-year suspension with fitness for creating a false contingency fee agreement, forging a signature, and misleading the respondent's law firm about the identity of a client); *In re Steele*, 868 A.2d 146 (D.C. 2005) (three-year suspension with fitness and restitution for pervasive dishonesty, including false statements and document fabrication, to cover up intentional neglect of five client matters); *see also In re Vohra*, 68 A.3d 766 (D.C. 2013) (three-year suspension with fitness for multiple rule violations in a single matter including "sustained neglect" in an immigration matter, criminal conduct (forging clients' signatures), and dishonesty, in addition to lack of competence, failure to

[5] Mr. Walker and Ms. Cassidy, who join this opinion on sanction, do not find a violation of Rule 3.4(c). *See* Dissenting Opinion of Robert L. Walker as to Rule 3.4(c), *supra*.

communicate, and serious interference with the administration of justice, aggravated by two instances of prior discipline and an attitude that fluctuated between expressions of remorse and blaming his clients for his misconduct). The allegations and evidence in this case do not support reliance on the cases cited by the Hearing Committee: *In re Johnson*, 298 A.3d 294, 317 (D.C. 2023), in which, unlike here, "repeated dishonesty was accompanied by an appalling level of indifference to her clients, consistent incompetence that prejudiced her clients, a revelation of client confidences, [and] financial mismanagement," and *In re Corizzi*, 803 A.2d 438, 439 (D.C. 2002), in which the respondent instructed his clients to commit perjury, which led to "the virtual destruction of their causes" – a harm to the clients that is not present here.

2. Fitness

We further recommend that Respondent be required to demonstrate fitness before reinstatement. A fitness showing is a substantial undertaking. *In re Cater*, 887 A.2d 1, 20 (D.C. 2005). Thus, in *Cater*, the Court held that "to justify requiring a suspended attorney to prove fitness as a condition of reinstatement, the record in the disciplinary proceeding must contain clear and convincing evidence that casts a serious doubt upon the attorney's continuing fitness to practice law." *Id*. at 6. Proof of a "serious doubt" involves "more than 'no confidence that a Respondent will not engage in similar conduct in the future.'" *In re Guberman*, 978 A.2d 200, 213 (D.C. 2009). It connotes "real skepticism, not just a lack of certainty." *Id.* (quoting *Cater*, 887 A.2d at 24).

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

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

Cater, 887 A.2d at 22.

The Court in *Cater* listed three factors that should be considered where, as in this case, the respondent has failed to participate in the disciplinary proceedings: "(1) the respondent's level of cooperation in the pending proceeding(s), (2) the repetitive nature of the respondent's lack of cooperation in disciplinary proceedings, and (3) 'other evidence that may reflect on fitness.'" *Id.* at 25-26 (quoting Board Report); *see also In re Lea*, 969 A.2d 881, 889-894 (D.C. 2009) (applying the *Cater* factors and imposing a fitness requirement due in part to the respondent's "deliberate disregard for the disciplinary process," even though she had appeared and testified at the hearing by phone).

Respondent has not participated in the disciplinary proceedings before the Hearing Committee and the Board. Though he responded substantively to the disciplinary complaint filed by Mr. Baldwin (Count III), he refused to comply with Disciplinary Counsel's subpoena for his client files for Ms. Warren and Mr. Day,

and did not file an Answer to the Specification of Charges, appear at the hearing, file a post-hearing brief, or file an exception to the Hearing Committee Report. Furthermore, he has failed to comply with still-outstanding orders of civil or criminal contempt. Finally, as explained above, Respondent's repeated violative conduct was very serious. On reinstatement, Respondent will be obliged to assume the burden of going forward and the burden of proof and will be expected to fill in the gaps in the record occasioned by his non-participation.

By: Michael E. Tigar
_____
Michael E. Tigar

Board Chair Ms. Sargeant, Mr. Walker, and Ms. Cassidy concur with this Recommendation.

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
MATTHEW A. LEFANDE,	:	
	:	
Respondent.	:	Board Docket No. 22-BD-024
	:	Disc. Docket Nos. 2020-D018, 2019-
A Temporarily Suspended Member of	:	D050, 2019-D041, & 2018-D061
the Bar of the District of Columbia	:	
Court of Appeals	:	
(Bar Registration No. 475995)	:	

RECOMMENDATION OF THOMAS E. GILBERTSEN AS TO SANCTION

We would uphold the Hearing Committee's disbarment recommendation in light of this Respondent's notorious and sustained misconduct, consistent with our Court of Appeals precedents disbarring attorneys whose conduct involves flagrant dishonesty.

Based on the uncontested record facts, the Hearing Committee appropriately found that Respondent's six-year course of misconduct "fits comfortably with prior cases in which [the Court has] disbarred attorneys for engaging in a broad, prolonged, and persistent pattern of dishonesty." HC Rpt. at 44 (quoting *In re Mazingo-Mayronne*, 276 A.3d 19, 23 (D.C. 2022)). Addressing the seriousness of Mr. LeFande's misconduct, the Hearing Committee found that it

> was repeated and prolonged, both in the particulars of his frivolous and vexatious filings and in his overall course of conduct. Over a period of years, he defied court orders, ignored court rules, and was thoroughly dishonest in his court filings, demonstrating his utter contempt for our

> judiciary and the rule of law. In addition, his dishonesty extended to aiding and abetting his dishonest clients in their dishonest activities.

HC Rpt. at 41.

Based on application of the *Baber* factors, the Hearing Committee recommended disbarment because Respondent's misconduct (a) was extremely serious, (b) prejudiced the judicial system and third-party victims of the prolonged fraud (District Title and Ms. Simu), (c) was aggravated by Respondent's remorseless attitude in the underlying court proceedings, failure to cooperate with Disciplinary Counsel's investigation, and other attempts to avoid responsibility for his misconduct; and (d) falls within the ambit of prior Court of Appeals precedents disbarring attorneys who engage in sustained and flagrant dishonesty. *Id*. at 41-44. The Hearing Committee cited several Court of Appeals decisions holding that disbarment is the appropriate sanction where a respondent demonstrates "a consistent lack of forthrightness, a willingness to shade the truth for her own benefit, and a disregard for the obligation for honesty and candor that comes with the privilege of membership in our jurisdiction's Bar." HC Rpt. at 43 (quoting *In re Johnson*, 298 A.3d 294, 318 (D.C. 2023)).[1]

[1] The Hearing Committee deemed the Court of Appeals decision of *In re Corizzi*, 803 A.2d 438 (D.C. 2002) to be the most analogous case to the misconduct at issue here. HC Rpt. at 44. There, counsel advised his personal injury clients to lie in depositions to conceal that he and the clients' chiropractor were referring cases to one another. The Court noted that if convicted for soliciting perjury, the conviction would have likely been a crime of moral turpitude, mandating disbarment. 803 A.2d at 442. The Court imposed disbarment even in the absence of a conviction, ruling in part that respondent's "overall conduct reflects a continuing and pervasive indifference to the obligations of honesty in the judicial system . . . ." *Id*. at 443.

The Court of Appeals "reserve[s] the sanction of disbarment for the most extreme attorney misconduct," which, in dishonesty cases, includes intentional or reckless misappropriation and "dishonesty of the flagrant kind." *In re Howes*, 39 A.3d 1, 15 (D.C. 2012) (quoting *In re Pelkey*, 962 A.2d 268, 281 (D.C. 2008)). *See In re Johnson*, 275 A.3d 268, 282 (D.C. 2022) (per curiam). The Court defines flagrant dishonesty as "either dishonesty accompanied by aggravating factors or continued and pervasive dishonesty." *Johnson*, 298 A.3d at 317 (citing *In re O'Neill*, 276 A.3d 492, 503 (D.C. 2022); then citing *Mazingo-Mayronne*, 276 A.3d at 22; and then citing *Howes*, 52 A.3d at 15); *see also In re Pennington*, 921 A.2d 135, 142 (D.C. 2007) (explaining that disbarment is appropriate for conduct that "reflect[s] a continuing and pervasive indifference to the obligations of honesty in the judicial system."). In determining whether conduct involves "flagrant dishonesty," the Court endorses a "fact-specific approach [that] requir[es] [consideration of a] [r]espondent's particular misconduct, and not simply the rules that he violated." *In re Guberman*, 978 A.2d 200, 206 n.5 (D.C. 2009) (quoting Board Report).

Importantly, there is no bright-line test for determining flagrant dishonesty. *See id.*; *see also In re Fox*, 66 A.3d 548, 553-54 (D.C. 2013) (collecting cases involving dishonesty and noting that "extenuating or aggravating factors" are typically required to impose disbarment in a case not involving misappropriation). Even if the Hearing Committee's finding that Respondent was complicit in his clients' crimes cannot be supported by substantial evidence (*see* Part III.A, *supra*)

Respondent's overall misconduct constitutes "flagrant dishonesty" in a number of ways.

As emphasized in our Report above at Section III, the following section of the Hearing Committee's Finding of Fact 36 is supported by substantial evidence:

> Respondent's clients purposefully acted to retain the funds that were mistakenly given to them, knowing that in doing so they were acting in violation of the law The money that Ms. Warren received was, as she knew, intended to pay off her mortgage on the property she had just sold. Instead of returning the money to District Title, or paying her mortgage company herself, she took the money, knowing that it was not hers. Respondent ordered the proceeds of one real estate sale to be sent to New Zealand, effectively putting them out of the reach of District Title. In addition, Respondent took numerous steps to avoid disclosing what steps he and his clients had taken to convert District Title's funds to their own use. Because Respondent refused to cooperate with the district court, and with Disciplinary Counsel, we do not know what, if any, portion of these funds he received as a fee.

HC Rpt. at 13; *see supra* pp. 11-12. We also uphold the Hearing Committee's finding that (a) in Count I, Respondent violated Rule 8.4(d) by seriously interfering with the administration of justice; (b) in Count II, Respondent violated Maryland Rules 19-303.1 (frivolous proceeding), 19-303.3(a)(1) (knowingly false statement to a tribunal); 19-308.4(c) (dishonesty, fraud, deceit, or misrepresentation); and 19-308.4(d) (conduct prejudicial to the administration of justice), as well as D.C. Rule 8.4(d); and (c) in Count IV, Respondent violated D.C. Rules 3.1 (frivolous proceeding) and 8.4(d).

Respondent's litany of Rule violations demonstrates prolonged and notorious misconduct – not just a momentary lapse of reason by an overzealous attorney, nor an expedient indulgence in dishonest conduct. This Respondent embarked upon and

sustained a pattern of repeatedly dishonest misconduct playing out over a six-year course. As the Hearing Committee found, Respondent filed a motion for contempt in the Warren bankruptcy proceeding while intentionally omitting the district court's order rejecting his arguments and falsely claiming that Ms. Warren was the only party in the D.C. lawsuit. HC Rpt. at 32-34. Respondent's lies to the Maryland bankruptcy court were both those of omission and commission, and were part of his scheme to derail the D.C. litigation. Respondent was well aware of the status of the D.C. litigation and thus his falsehoods were deliberate and violated Maryland Rule 19-303.3(a)(1). *Id*.

Like many of the Court of Appeals' cases involving disbarment for flagrant dishonesty, even in the absence of criminal wrongdoing, this Respondent's prolonged pattern of dishonest dealing fits the bill for aggravating circumstances constituting "flagrant dishonesty" and justifying the appropriate consequence of disbarment. *See In re Shorter*, 570 A.2d 760, 771 (D.C. 1990) (per curiam) (even in absence of moral turpitude finding, attorney was disbarred where record demonstrated that placing disputed funds beyond service of process constituted a "pattern of dishonest dealing"); *In re Goffe*, 641 A.2d 458, 465 (D.C. 1994) (per curiam) (disbarment ordered where attorney engaged in dishonesty in separate matters and even in absence of criminality finding, the lawyer's conduct showed a pattern of dishonesty over a number of years); *In re Anya*, 871 A.2d 1181 (D.C. 2005) (per curiam) (blatant lies in the practice of law over a period of time involving more than a single representation reflects a pattern of dishonesty that warrants

disbarment); *In re Pelkey*, 962 A.2d 268, 282 (D.C. 2008) (attorney's misconduct warranted disbarment where his dishonesty (a) was "persistent, protracted, and extremely serious," (b) exploited a position of trust in order to steal funds from a business venture, and (c) included frivolous challenges to an arbitration award.); *In re White*, 11 A.3d 1226, 1232-33 (D.C. 2011) (per curiam) (flagrant dishonesty warranted disbarment where conduct included several episodes of misconduct including filing frivolous complaints, false testimony, and demonstrated lack of remorse).

While it is true that Respondent's conduct was not undertaken for his own personal gain, did not injure his own clients, and cannot on this record be found to be criminal, those are hardly mitigating factors under the circumstances. Respondent's dishonest conduct (including frivolous bankruptcy filings) enabled his clients to perpetuate an ongoing criminal scheme to place mistakenly transmitted District Title funds beyond service of process. We view these foreseeable consequences of Respondent's misconduct as aggravating circumstances because his frivolous bankruptcy filings, prolonged dishonesty, and refusal to obey court orders benefitted his clients' criminal scheme while seriously harming third parties (District Title and the intended recipient of its transmitted funds, Ms. Simu) and seriously interfering with the administration of justice over a six-year period. *See In re Bynum*, 197 A.3d 1072, 1074 (D.C. 2018) (per curiam) (adopting Board's recommendation of disbarment because misconduct at issue – spanning five years

and with no demonstrated remorse – rose to the level of flagrant dishonesty even though attorney was not acting for personal gain nor committing any crimes).

Application of a bright-line test for flagrant dishonesty might save this Respondent from disbarment, but the Court of Appeals warns against that rigid approach. Here, Respondent's prolonged and remorseless course of misconduct included a pattern of dishonesty and should be met with disbarment.

By: Thomas Gilbertsen
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Ms. Blumenthal, Dr. Hindle, and Ms. Rice-Hicks concur with this Recommendation.