DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
OSCAR S. MAYERS, JR.,	:	
	:	Board Docket No. 10-BD-129
Respondent.	:	Bar Docket No. 2008-D515
	:	
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 407619)	:	

REPORT AND RECOMMENDATION OF
THE BOARD ON PROFESSIONAL RESPONSIBILITY

This matter comes before the Board on Professional Responsibility (the "Board") after an Ad Hoc Hearing Committee (the "Committee") concluded that Respondent Oscar S. Mayers, Jr., committed multiple violations of the District of Columbia Rules of Professional Conduct (the "Rules"). Respondent's alleged misconduct occurred during his representation of Alexander Shepard ("Shepard") in 2007 and 2008 and during Bar Counsel's investigation of his representation of Shepard. After briefing, testimony, and argument, the Committee recommended that Respondent be disbarred for reckless misappropriation of client funds. The Committee further recommended that Respondent be required to pay restitution with interest at the legal rate as a condition of reinstatement.

The Board, having reviewed the record, concurs with the Committee's findings of fact and with its recommended sanction. Further, with a few noted exceptions, the Board agrees with the Committee's conclusions of law. The Board recommends that Respondent be disbarred, and that he be required to pay restitution in the amount of $1,500, with interest at the legal rate.

I. PROCEDURAL HISTORY

Respondent is a member of the Bar of the District of Columbia Court of Appeals; he was admitted on February 6, 1987, and assigned Bar Number 407619. In November 2008, a complaint alleging attorney misconduct by Respondent was filed, and Bar Counsel docketed the matter for investigation. On December 10, 2010, after conducting an investigation, Bar Counsel filed its initial two count Specification of Charges against Respondent. Bar Counsel twice amended its Specification of Charges, ultimately filing its Second Amended Specification of Charges on April 20, 2011. The Second Amended Specification of Charges alleged that Respondent committed one or more violations of the following Rules:

- Rules 1.1(a) and (b) (lack of competence, skill and care)
- Rule 1.3(a) (failure of diligence and zeal)
- Rules 1.4(a) and (b) (failing to keep client reasonably informed and to explain matters as reasonably necessary)
- Rules 1.15(a) and (d) (intentional or reckless misappropriation; commingling; failure to treat advance of unearned fees as client property)[1]
- Rule 1.16(d) (failure to take timely steps to the extent reasonably practicable to surrender papers and property to which the client is entitled and to refund unearned fees and unincurred costs)
- Rule 3.3(a) (knowingly false statements of fact or law to a tribunal)
- Rule 3.4(a) (obstruction of access to evidence and/or alteration, destruction, or concealing of evidence where the attorney reasonably should know that the evidence is or may be the subject of discovery or subpoena in any pending or imminent proceeding)
- Rule 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal)
- Rule 5.5(a) (unauthorized practice of law)
- Rule 8.1(a) (false statements in a disciplinary matter)
- Rule 8.4(b) (criminal act that reflects adversely on honesty, trustworthiness, or fitness as a lawyer)
- Rule 8.4(c) (dishonesty, fraud, deceit, or misrepresentation)
- Rule 8.4(d) (conduct that seriously interferes with the administration of justice)
- D.C. Bar R. XI, § 2(b)(3) (failure to comply with an order of the Board or Court)

[1] As the Committee noted, Rule 1.15(d) was re-numbered as Rule 1.15(e), effective August 2010. Order, M-235-09 (D.C. Mar. 22, 2010). The Board refers to Rule 1.15(d), which was in effect at the time of the alleged misconduct.

Respondent filed Answers to the Specifications of Charges on April 7, 2011, and April 20, 2011.[2] Respondent also filed motions to dismiss the Specifications of Charges on December 30, 2010, March 14, 2011, and April 7, 2011.

On April 28, 2011, the Committee conducted an evidentiary hearing. During the hearing, Bar Counsel submitted numerous exhibits and called two witnesses, one of whom was Respondent. Respondent represented himself at the hearing, submitted one exhibit into evidence, called no witnesses, and cross-examined Bar Counsel's other witness.

Following the evidentiary hearing, Bar Counsel and Respondent filed briefs with proposed findings of fact, conclusions of law and recommendations as to sanction on June 13, 2011, and December 6, 2011, respectively. On August 23, 2011, Respondent also filed a fourth motion to dismiss. On February 24, 2012, Respondent filed a "Petition of Suggestion of Death of Complainant," seeking dismissal of the Second Amended Specification of Charges in light of the death of the complainant, Alexander Shepard, on January 30, 2012.

On June 18, 2013, in a 41-page Report and Recommendation, the Committee unanimously concluded that Bar Counsel had presented clear and convincing evidence that Respondent had violated Rules 1.15(a) and (d); 1.16(d); 3.3(a); 3.4(a) and (c); 5.5(a); 8.1(a); 8.4(b), (c) and (d); and D.C. Bar R. XI, § 2(b)(3).[3]

[2] Respondent did not Answer the Second Amended Specification of Charges. The Second Amended Specification of Charges differs from the Amended Specification of charges only insofar as it alleges that Respondent's misappropriation was "intentional" or "reckless."

[3] The Committee's Report is cited herein as "HC Rpt. at __." The Committee's Findings of Fact are cited as "FF __." Bar Counsel's exhibits are cited as "BX." The transcript of the evidentiary hearing is cited as "Tr. __."

After Respondent noted his exception to the Committee's Report and Recommendation, the Board set a schedule for briefing and oral argument. Bar Counsel did not take exception to the Committee's Report. The Board heard oral argument on September 26, 2013.

II. FINDINGS OF FACT

The alleged rule violations in the Second Amended Specification of Charges arise from Respondent's alleged representation of Alexander Shepard in 2007 and 2008, and Respondent's subsequent actions—and inaction—during the investigation of this disciplinary matter. The Committee's Report contains comprehensive and detailed factual findings, and the Board is obligated to accept those findings as true, including findings on credibility, as long as they are supported by "substantial evidence on the record as a whole." Board Rule 13.7; *see In re Cleaver-Bascombe,* 892 A.2d 396, 401 (D.C. 2006) (per curiam).

After reviewing the record and both parties' briefs and conducting an oral argument in this matter, the Board adopts the Committee's findings of fact as fully supported by substantial evidence on the record. A summary of the Committee's factual findings follows. Where appropriate, we supplement the Committee's findings with additional factual findings, citing directly to the transcripts and exhibits. *See* Board Rule 13.7 (authorizing the Board to make its own findings of fact based on clear and convincing evidence).

A. Prior Disciplinary Action

Respondent was admitted to the Bar of the District of Columbia Court of Appeals on February 6, 1987. FF 1. At one point in his career, Respondent served as an Assistant United States Attorney in the District of Columbia. FF 4.

On March 15, 2006, in an unrelated disciplinary matter, the Board directed Respondent: (1) to give Bar Counsel 90-days' advance notice of his intention to resume the practice of law (at the time he was, voluntarily, not practicing); and (2) to submit a medical report to Bar Counsel

demonstrating his fitness to resume practice. FF 2; Order, *In re Mayers*, Bar Docket No. 443-03 at 7 (BPR Mar. 15, 2006); BX 10.[4]

In the disciplinary matter related to the Board's March 15, 2006 Order, the Court suspended Respondent's license to practice law in the District of Columbia for 18 months, effective March 20, 2008. FF 3; *In re Mayers*, 943 A.2d 1170, 1172 (D.C. 2008) (per curiam) ("*Mayers I*"). In connection with his suspension, on March 31, 2008, Respondent filed an affidavit with the Court pursuant to D.C. Bar R. XI, § 14(g), (BX 9), in which he asserted that he "currently [had] no clients, no client papers or property, [and] no active matters . . . ." FF 27.

B. Respondent's Representation of Alexander Shepard

1. Consultation

Respondent and Shepard met during Respondent's service as an Assistant United States Attorney for the District of Columbia. FF 4. As a police officer for the Metropolitan Police Department of the District of Columbia ("MPD"), Shepard worked with Respondent on multiple cases. *Id.*

In or around April 2007, Respondent agreed to consult with Shepard concerning a potential medical malpractice claim and potential claims against the MPD relating to Shepard's health issues. *Id.* Any such claims arose in the District of Columbia and involved District of Columbia law. FF 5. Although Respondent contends that the purpose of his consultations with Shepard was to assist Shepard in finding an attorney, there is no evidence in the record that Respondent ever referred Shepard's case to another attorney. *Id.*

Respondent's consultation with Shepard consisted of assessing the viability of the potential medical malpractice claim and claim against the MPD. FF 5. To do so, Respondent

[4] The Board's order is confidential and thus has been placed under seal in the record filed with the Court.

researched applicable statutes of limitations and evaluated potential damages associated with the claims. *Id.*

In or about April 2007, Shepard began providing his medical records and other documents to Respondent to facilitate Respondent's assessment of Shepard's potential legal claims. FF 14. In all, Shepard provided Respondent with approximately 1,500 pages of medical records. *Id.* In addition to reviewing Shepard's medical records on his own, Respondent consulted with a medical expert. FF 15.

Ultimately, Respondent provided Shepard legal advice concerning the applicable statutes of limitations, the potential for legal damages, and the applicable standard of care for a medical malpractice claim in the District of Columbia, and advised Shepard of the viability of his potential claims. FF 5, 15.

Respondent did not give Bar Counsel 90-days' notice or submit a medical report to Bar Counsel demonstrating his fitness to practice prior to commencing his consultations with Shepard. FF 4.

2. Payment from Shepard to Respondent

During the course of Respondent's consultation with Shepard, Shepard provided Respondent with a check, dated April 22, 2007, for $1,500. FF 6. A copy of the check, which was admitted into evidence by the Committee, indicates that it is from Shepard and payable to Respondent. FF 6. While Respondent at one point testified that he did not recall receiving a check from Shepard or the amount of any such payment, (Tr. 65), his other testimony and the documentary evidence presented at the hearing belie that representation. FF 7; Tr. 115. Indeed, Respondent ultimately admitted receiving a $1,500 check from Shepard. FF 9.

Respondent deposited the $1,500 check into his personal banking account on May 7, 2007, (FF 8, 11), but kept no records related to the funds. FF 6. Respondent's account was neither a lawyer's trust account nor an IOLTA account. FF 8.

a. Purpose of payment

The purpose of the check is not entirely clear from the record. FF 9. The check contains the words "MAY-JULY 2007 MONTHLY LEGAL PYMTS PER AGRMENT" on its memo line. FF 6. Notwithstanding the notation on the check's memo line, Respondent repeatedly represented that the purpose of the check was to pay the medical expert he consulted with regarding Shepard's potential claims. FF 9; Tr. 98-99.

The Committee concluded, and the Board agrees, that the purpose of the check was either an advance payment for legal fees as reflected on the check's memo line or an advance payment for expenses. FF 10. In either case, the payment was not for past services rendered or past expenses incurred. *Id*.

Respondent's representation in a November 26, 2008 letter to Bar Counsel that Shepard's payment to him was a *reimbursement* for expenses that Respondent had incurred for the medical expert was found by the Committee to be incredible and inaccurate. FF 12, 13. That credibility finding is supported by substantial evidence in the record. In support of its conclusion, the Committee noted that Respondent contradicted that representation in the very same letter to Bar Counsel. FF 12. There and elsewhere, Respondent contradicted his "reimbursement" explanation by asserting that the medical expert had not charged for his services, before Respondent requested that Shepard send money to pay for the services. *Id*.

The Committee also found that Respondent's assertion that he used the $1,500 to pay the medical expert for his services, rather than to reimburse himself for expenses incurred, was not

credible. FF 13. That credibility finding, too, is supported by substantial evidence in the record. Respondent was unable to recall how much he paid the medical expert or when he paid the medical expert. FF 12. At one point, Respondent asserted that he compensated the medical expert by paying for several of the expert's lunches or dinners. *Id.* Yet at another point during the hearing, he testified that the meals were not truly compensation and that the medical expert was not charging for his services. Tr. 96 (Respondent testified that he paid for meals for the medical expert because it was "[t]he least I could do. I was asking him to do something for free . . . .").

b. Use of payment

Bar Counsel submitted the bank statements—covering April 14, 2007, to December 14, 2007—for the checking account into which Respondent deposited Shepard's $1,500 check. FF 11; BX 8. The Committee summarized the status of Respondent's bank account during the relevant time frame as follows:

> Respondent's bank records for the account into which he deposited the $1,500 check reflect a variety of small expenditures over the course of the next three weeks. Respondent's bank statements between April 17 and December 14, 2007, for that same account do not show any withdrawal of $1,500 or any check written for that amount. The bank records included in Bar Exhibit 8 – covering the period April 14-December 14, 2007 – show that, after Respondent deposited the $1,500 check on May 7, 2007, his account was overdrawn on the following dates: May 24-25, June 19-26, August 14-15, and August 23-30. These records also show that, between May 7 and December 14, 2007, the balance in Respondent's account fell below $1,500 on the following dates: May 24-25, May 30, June 5-July 30, August 6-September 5, October 4-11, October 24-30, November 19-26, and December 5-14.

FF 11 (citations omitted).

3. Shepard's Bar Complaint, the Termination of Respondent, and Respondent's Return of Shepard's Medical Records

On November 11, 2008, Shepard filed a complaint with Bar Counsel alleging, in relevant part, that he and Respondent had entered into an agreement for Respondent to represent him in a

medical malpractice case. FF 16. In the complaint, Shepard alleged that he was unaware of any restrictions on Respondent's ability to practice law and that, in July 2008, he confronted Respondent when he became aware that Respondent's license had been suspended. FF 17. Shepard's complaint further alleged that he terminated Respondent's representation of him on November 5, 2008, and requested that Respondent refund his money and deliver his medical records to an acquaintance, Joseph P. Thomas ("Thomas"), within ten days. FF 17, 20.

Shortly after receiving Shepard's complaint, Bar Counsel initiated its disciplinary investigation of Respondent. FF 18. By letter dated January 28, 2009, Bar Counsel requested, among other things, that Respondent provide an explanation of any actions taken by Respondent to return Shepard's records. *Id.* In a response letter to Bar Counsel dated February 11, 2009, Respondent indicated that he returned the records to Shepard on February 10, 2009. FF 19. Respondent did not return any of the money to Shepard. FF 17.

Respondent testified that he had received Shepard's November 2008 letter requesting that he return the records to Thomas. Tr. 111. Respondent further testified that he was unable to return Shepard's records to Thomas, and so he decided to send the records to Shepard at the address listed on Shepard's disciplinary complaint. FF 20. According to Respondent, he was unable to return the records to Shepard until February 10, 2009, because he needed assistance packing and sending the records, due to physical limitations resulting from a stroke he had suffered in 2005. *Id.*[5] The Committee found Respondent's explanation not credible given his unsettled recollection of the underlying events and the lack of corroborating evidence for his account. *Id.* In support of its finding, the Committee noted that Respondent's ability to promptly mail Shepard's records following Bar Counsel's inquiry undercut his explanation. *Id.*

[5] The Committee's Report mistakenly states that Respondent suffered his stroke in 1995; the record reflects that Respondent in fact suffered a stroke in 2005. Tr. 63.

C. Bar Counsel's Subpoena of Respondent's Laptop

In connection with its investigation of Shepard's complaint against Respondent, by letter dated May 19, 2009, Bar Counsel asked Respondent to voluntarily permit a third-party company to make a mirror image of his computer's hard drive. FF 21. After Respondent refused Bar Counsel's request, Bar Counsel served Respondent with a subpoena by letter dated June 24, 2009, for "[t]he hard drive of any computer [he had] used since January 2007." *Id.*

On or about July 17, 2009, Respondent moved to quash Bar Counsel's subpoena on several bases. FF 22. Bar Counsel opposed Respondent's motion. FF 23. On June 18, 2010, an Ad Hoc Hearing Committee (the "Motion Hearing Committee") denied Respondent's motion to quash and ordered Respondent to identify all hard drives he had used during the relevant time period. *Id.* The Motion Hearing Committee also set parameters for an outside contractor to create a mirror image of and search any such hard drive for relevant files, and for the parties to examine the relevant files. *Id.*

However, on February 9, 2010, while Respondent's motion to quash Bar Counsel's subpoena was still pending, Respondent provided his laptop computer to a repair company known as "Geeks on Call" to have the computer's hard drive repaired. FF 26. Respondent was aware that the laptop was under subpoena when he provided it to Geeks on Call. *Id.* According to Respondent, Geeks on Call informed him that it could not fix his laptop, so he purchased a new computer from the company in February 2010, without requesting the return of his old laptop. *Id.*

Respondent did not request that Geeks on Call return his laptop until after the Motion Hearing Committee had denied his motion to quash. FF 26.[6] At no point between turning his laptop over to Geeks on Call and the Hearing Committee's denial of his motion to quash did Respondent inform the Motion Hearing Committee that he had relinquished possession of the laptop. FF 26.

On or about July 2, 2010, Respondent moved the Motion Hearing Committee to reconsider its order denying his motion to quash in light of the laptop's destruction. FF 24. The Motion Hearing Committee granted Respondent's motion because, since Geeks on Call had destroyed the laptop, Respondent could no longer comply with the subpoena. FF 25.

III. PRELIMINARY MOTIONS AND MATTERS

Over the course of this disciplinary proceeding, Respondent filed five motions to dismiss which raise a number of arguments in support of the dismissal of Bar Counsel's Specification of Charges and the subsequent amended versions of that charging document. Pursuant to Board Rule 7.16(a), the Committee deferred ruling on the motions until filing its Report and Recommendation, in which it ultimately recommended an appropriate disposition for each of the motions. Additionally, in Respondent's exception to the Committee's Report, he moved to strike

[6] Respondent's representations as to when he requested that Geeks on Call return his laptop are inconsistent. At several points during the evidentiary hearing, Respondent testified that he did not request the laptop's return until the Motion Hearing Committee denied his motion to quash. Tr. 137, 141-42. This appears to have been Respondent's position as early as his motion to reconsider the Motion Hearing Committee's ruling. *See* BX 18. During the evidentiary hearing, however, Respondent testified that he had asked Geeks on Call for his old laptop when the company delivered his new laptop in or around February 2010, but was informed that it had been destroyed. Tr. 146. He also testified that Geeks on Call never informed him that it was the company's policy to destroy the old computer and that he did not give the company permission to do so. Tr. 147, 152-53. The Committee did not explicitly make a credibility finding with respect to these inconsistencies. It found that Respondent's testimony that he had asked for his old laptop back in February 2010 lacked credibility. We read that finding as concluding that Respondent did not request the return of his laptop until after his motion to quash was denied. FF 26. This conclusion is supported by substantial evidence in the record.

the Committee's Report. Respondent's motions to dismiss and motion to strike are addressed in turn.

A. First Motion to Dismiss

On December 30, 2010, Respondent moved to dismiss Bar Counsel's Specification of Charges on the following grounds: (1) the Specification of Charges failed to provide Respondent notice of the alleged misconduct; (2) Bar Counsel violated his due process right to a speedy trial; and (3) the charges were barred by *laches*. *See* Resp't's Exculpatory Statement and Mot. to Dismiss at 3-6, 7-8, Dec. 30, 2010. The Committee recommended that Respondent's motion be denied in its entirety. HC Rpt. at 33. The Board adopts that recommendation.

First, Respondent argues that the Specification of Charges failed to put him on notice of the charges against him, because the petition's allegations where insufficiently specific. As the Committee's Report notes, the Committee initially treated Respondent's motion as one for a bill of particulars and denied the motion because the Specification of Charges sufficiently set forth the allegations of misconduct. HC Rpt. at 32 n.11. Upon reconsideration, the Committee ordered Bar Counsel to file an amended Specification of Charges, specifying the level of intent ascribed to the alleged misappropriation, and Bar Counsel complied. *Id.* The Amended Specification of Charges plainly puts Respondent on notice of "the alleged misconduct and the disciplinary rule or rules alleged to have been violated" as required by Board Rule 7.1. Respondent's arguments to the contrary (*e.g.* the allegation that "on or about April 8, 2007" is "vague") are meritless.

Second, Respondent argues that Bar Counsel violated his constitutional right to a speedy trial. Respondent had no such right in these proceedings. *See In re Sibley*, 990 A.2d 483, 491 n.6 (D.C. 2010) ("'[T]he Speedy Trial Clause of the Sixth Amendment to the Constitution

simply does not apply' to attorney-discipline cases.") (quoting in part *In re Sibley*, 564 F.3d 1335, 1340 (D.C. Cir. 2009)); *In re Williams*, 513 A.2d 793, 795-98 (D.C. 1986) (per curiam).

The Board likewise rejects Respondent's third grounds for dismissal, based on *laches*. Respondent argues that Bar Counsel's undue delay in initiating this action warrants its dismissal under the doctrine of *laches*. "[A]n undue delay in prosecution [of disciplinary charges] is not in itself a proper ground for dismissal of charges of attorney misconduct." *Williams*, 513 A.2d at 796. While "delay coupled with actual prejudice could result in a due process violation[,]" *id.* at 797, Respondent has not shown actual prejudice. For these reasons, Respondent's first motion to dismiss is denied.

B. Second Motion to Dismiss

On March 14, 2011, Respondent filed a second motion to dismiss in which he argues dismissal is warranted because: (1) Bar Counsel failed to file a timely response to his first motion to dismiss; and (2) the Motion Hearing Committee that resolved the issues concerning Bar Counsel's subpoena of the laptop "tainted" the proceedings by suggesting that Bar Counsel should allege additional violations of the disciplinary rules based on Respondent's conduct. Resp't's Resp. to Bar Counsel's Opp'n and Mot. for Default and/or Dismissal at 2-4, Mar. 14, 2011.

The Board adopts the Committee's recommendation and denies Respondent's second motion to dismiss. First, the Hearing Committee Chair granted a motion by Bar Counsel to file an out of time response to Respondent's first motion to dismiss, (*see* Prehearing Tr. 9, Mar. 7, 2011), and Bar Counsel then filed a timely opposition to the motion. Second, the Motion Hearing Committee's suggestion that Bar Counsel consider charging additional violations of the Rules does not warrant dismissal. As the Committee asserted in its Report, Bar Counsel has the authority, indeed the duty "[t]o investigate all matters involving alleged misconduct by an

attorney subject to the disciplinary jurisdiction of this Court which may come to the attention of Bar Counsel . . . from any source whatsoever, where the apparent facts, if true, may warrant discipline." D.C. Bar R. XI, § 6(a)(2). In other words, Bar Counsel plainly had the obligation to charge violations of the Rules based on Respondent's alleged misconduct during the proceedings. The alleged violations, like any other alleged violation, had to be proved by clear and convincing evidence.

C. Third Motion to Dismiss

In his third motion to dismiss, Respondent argues that the charges initiated by Bar Counsel in this action were mooted by the Court's order suspending Respondent from practice in *Mayers I*, 943 A.2d at 1172. Resp't's Answer to Specification and Third Mot. to Dismiss at 2-5, Apr. 7, 2011. Respondent also argues that the Committee lacked jurisdiction over the proceedings because they constituted criminal proceedings. *Id*. The Board again adopts the Committee's recommendation and denies Respondent's third motion to dismiss.

Respondent's mootness argument is difficult to discern. Respondent appears to argue that his suspension from practice on March 20, 2008, precluded Bar Counsel from bringing charges in this matter. However, Bar Counsel's charges are based on conduct wholly unrelated to the facts forming the basis for Respondent's prior disciplinary sanction. Moreover, suspended attorneys are equally subject to the Court's disciplinary jurisdiction. *See* D.C. Bar R. XI, § 1(a). The Board finds no basis on which the Court's prior suspension of Respondent moots the charges in this matter.

Further, the Board rejects Respondent's jurisdictional argument. Respondent argues that these proceedings amount to a criminal prosecution over which the Committee lacks jurisdiction. Respondent's view is mistaken. Bar Counsel charged Respondent with a violation of Rule

8.4(b), which prohibits criminal acts that reflect adversely on a lawyer's honesty, trustworthiness, or fitness. A violation can be found, even in the absence of a conviction. *See In re Slattery*, 767 A.2d 203, 207 (D.C. 2001) ("[A]n attorney may be disciplined for having engaged in conduct that constitutes a criminal act that reflects adversely on his or her fitness as a lawyer . . . despite not having been prosecuted for such actions."). D.C. Bar R. XI, § 1(a) vests the Court and the Board with disciplinary jurisdiction over "[a]ll members of the District of Columbia Bar." The disciplinary system clearly has jurisdiction to sanction Respondent under Rule 8.4(b) for his criminal conduct.

Further, as the Committee pointed out, "Respondent was free to—and did—assert his Fifth Amendment privilege in response to specific charges . . . or specific questions posed at the hearing . . . [b]ut Respondent has no right to a blanket assertion of privilege against self-incrimination . . . ." HC Rpt. at 35-36. The Board finds Respondent's jurisdictional argument meritless and denies Respondent's third motion to dismiss.

D. Fourth Motion to Dismiss

Respondent filed a fourth motion to dismiss on August 23, 2011, in which he alleges that prosecutorial misconduct by Bar Counsel warrants dismissal of the disciplinary action against him. Resp't's Emergency Mot. to Reopen Evidence and Mot. to Dismiss, Aug. 23, 2011. Specifically, Respondent alleges that Bar Counsel failed to disclose during the hearing that Shepard previously had been indicted and arrested. The Board adopts the Committee's recommendation and denies Respondent's motion.

Assuming arguendo that Bar Counsel had an obligation to disclose information concerning Shepard's indictment and arrest, there is no evidence to support the argument that

Bar Counsel was aware of Shepard's indictment and arrest prior to the hearing. Respondent offers naked speculation.

Further, in an order dated November 17, 2011, the Committee instructed Respondent that the proper procedure for lodging a complaint against Bar Counsel was to "file a request for administrative review by the Board." Order, *In re Mayers*, Bar Docket No. 515-08 at 4 (HC Nov. 17, 2011).[7]

E. Fifth Motion to Dismiss

In his fifth motion to dismiss, Respondent argues that this disciplinary action must be dismissed in light of Shepard's death in January 2012. Resp't's Pet. of Suggestion of Death of Complainant, Feb. 24, 2012. In support of his argument, Respondent cites *Howell v. United States*, 455 A.2d 1371 (D.C. 1983) and *Dove v. United States*, 423 U.S. 325 (1976).[8] However, those cases involve the death of a criminal defendant during the defendant's own appeal and are inapposite. The purpose of these disciplinary proceedings is to address Respondent's alleged misconduct under the Rules, and Shepard's death does not alter that purpose. As the Committee

[7] In its November 17 Order, the Committee admitted a certified copy of Shepard's conviction, but concluded that evidence of the conviction was an insufficient basis upon which to alter the findings in this matter. Order, *Mayers*, Bar Docket No. 515-08 at 1-3. We agree with this conclusion. Respondent argued that the circumstances forming the basis for Shepard's conviction established that Shepard could not have been engaging in the charged criminal conduct while also interacting with Respondent. Shepard was charged with federal tax related crimes. The charged conduct in no way precluded him from interacting with Respondent during the relevant time frame. *Id.* at 2. Respondent further argued that Shepard's indictment called into question the authenticity of the $1,500 check from Shepard to Respondent. However, as the Committee pointed out, substantial corroborating evidence established the authenticity of the check; namely, the testimony of an official from Respondent's bank and Respondent's own admission that he received a check for $1,500 from Shepard. *Id.* at 2-3.

[8] Respondent's brief mistakenly cites *Howell v. United States* at 435 A.2d 1371 rather than at 455 A.2d 1371.

noted, a complainant is not required to participate in disciplinary proceedings. *See Sibley*, 990 A.2d at 492 (citations omitted).

Respondent's fifth motion to dismiss also appears to state an argument similar to the "mootness" argument advanced in his third motion to dismiss. Resp't's Pet. of Suggestion of Death of Complainant at 2-3. Specifically, Respondent argues that claims based on any conduct occurring during the disciplinary proceedings in the unrelated matter are barred by the doctrine of *res judicata*. *Id.* The Board rejects that argument for the same reason that it rejected the argument in Respondent's third motion to dismiss. The Board denies Respondent's fifth motion to dismiss.

F. Respondent's Exception to the Hearing Committee Report

In his exception to the Committee's Report, Respondent moves the Board to strike the Report because: (1) the Report was based on inadmissible evidence in the form of the copy of the $1,500 check from Shepard to Respondent, and (2) the Report was not timely filed. Resp't's Br. on Exceptions and Objections to HC Rpt., Sept. 30, 2013. Respondent further argues that he was prejudiced by the Motion Hearing Committee's delay in ruling on his motion to quash Bar Counsel's subpoena. *Id*. at 4. For the reasons stated below, the Board denies Respondent's motion to strike and rejects his argument of prejudice.

Respondent argues that the Report and the conclusions therein are based on inadmissible hearsay. Specifically, Respondent challenges the admissibility of the copy of the $1,500 check from Shepard to Respondent. The Board first addresses Respondent's argument that he was never given an opportunity to argue his motion *in limine* challenging the check's admissibility. *Id*. at 5. The record in this matter contradicts Respondent's assertion. During the evidentiary hearing, it was proposed that Respondent's motion *in limine* be addressed after a bank representative testified concerning the check's authenticity. Tr. 21-22. Respondent agreed to

that method of proceeding. *Id.* At the conclusion of the hearing, the Committee determined that it would make a recommendation as to the authenticity and admissibility of the check in its Report, and invited the parties to further argue the issue in their post-hearing briefs. Tr. 163. Respondent did not object to this method of proceeding and presented arguments on the topic in his post-hearing brief. *See* Resp't's Br. Findings of Facts at 2-3, Dec. 6, 2011. In other words, the record reflects that Respondent was provided ample opportunity to challenge the admissibility of the evidence.

Next, the Committee properly admitted Respondent's bank records, including the copy of the $1,500 check to Respondent from Shepard. HC Rpt. at 5. Respondent argues that the records were inadmissible hearsay. The Board Rule governing the admissibility of evidence in disciplinary proceedings provides that:

> Evidence that is relevant, not privileged, and not merely cumulative shall be received, and the Hearing Committee shall determine the weight and significance to be accorded all items of evidence upon which it relies. The Hearing Committee may be guided by, but shall not be bound by the provisions or rules of court practice, procedure, pleading, or evidence, except as outlined in these rules or the Rules Governing the Bar.

Board Rule 11.3. Bar Counsel presented testimony from a representative of Respondent's own bank who testified that the records were kept in the bank's archives in accordance with the bank's ordinary course of business and were accurate. Tr. 30. The Committee properly admitted the records. *See In re Mitrano*, 952 A.2d 901, 918 (D.C. 2008) (admitting bank records based on bank representative's testimony).

Respondent's second argument in support of his motion to strike the Committee's Report is that the Report was filed out of time. The Committee conducted its evidentiary hearing in this matter on April 28, 2011, and issued its Report on June 18, 2013. D.C. Bar R. XI, § 9(a) and Board Rule 12.2 direct the Committee to file its Report within 120 days of the conclusion of the

hearing. While the Committee issued its Report substantially after the 120 days expired, the delay is not the basis for dismissing this disciplinary proceeding. *See In re Morrell*, 684 A.2d 361, 370 (D.C. 1996) (D.C. Bar R. XI, § 9(a)'s time frame for filing the hearing committee report is "directory rather than mandatory[,]" and the failure to adhere to the deadline is not the basis for dismissal).

Further, the delay was due in part to extended post-hearing briefings, and Respondent has not shown that he was prejudiced as a result of the delay. On August 23, 2011, instead of filing his proposed findings of fact and conclusions of law in accordance with the Committee's post-hearing briefing schedule, Respondent filed his fourth motion to dismiss and a motion to reopen the record. HC Rpt. at 5. The Committee ruled on Respondent's motion to reopen the record and granted him additional time to file his proposed findings of fact and conclusions of law. *Id.* Respondent filed these on December 6, 2011, and Bar Counsel filed a response on December 9, 2011. On February 24, 2012, Respondent filed his "Petition of Suggestion of Death of Complainant."

Thus, post-hearing briefing continued for approximately ten months after the conclusion of the evidentiary hearing. At the end of the post-hearing briefing, the Committee was confronted with the task of resolving a series of dispositive motions and deliberating numerous, serious accusations of professional misconduct.

Accordingly, the Board rejects Respondent's motion to strike based on the Committee's untimely filing of its Report. *See Morrell*, 684 A.2d at 370 ("It would hardly serve the integrity of the bar . . . to allow Respondent to avoid the imposition of discipline for his serious ethical violations merely because the Hearing Committee took a long time carefully evaluating the

substantial, complex evidence in his case."); *In re Thyden*, 877 A.2d 129, 139-140 (D.C. 2005); *In re Bernstein*, 774 A.2d 309, 316 n.14 (D.C. 2001).

Respondent also argues that the Motion Hearing Committee's delay in ruling on his motion to quash caused him prejudice, because had it acted more promptly, his laptop would have been in good working order, and he would not have had to turn it over to Geeks on Call. Regardless of the fact that the laptop required repair, it was Respondent's obligation to preserve it while the subpoena remained outstanding and, at a minimum, to advise Bar Counsel of the need to repair it, so that an arrangement could be made to preserve its contents. Because Respondent and Respondent alone is responsible for the destruction of his laptop, any prejudice that may have resulted from the Hearing Committee's delay in ruling on the motion is solely attributable to Respondent.

With that, the Board turns to the substance of Bar Counsel's allegations.

IV. CONCLUSIONS OF LAW

The Committee found that Respondent violated Rules 1.15(a) and (d); 1.16(d); 3.3(a); 3.4(a) and (c); 5.5(a); 8.1(a); and 8.4(b), (c) and (d). The Committee also concluded that Bar Counsel had proven the charged violation of D.C. Bar R. XI, § 2(b)(3), but not Rule 5.5(a), when he represented Shepard without advance notice to the Board, in violation of its March 2006 Order, but that Bar Counsel did not prove a violation of § 2(b)(3) with respect to Respondent's handling of the subpoena. For the reasons that follow, the Board agrees with the Committee's conclusions of law, except for its findings that Respondent violated Rule 3.3(a) by submitting a false affidavit to the Board, and Rule 8.4(b) with respect to the destruction of his laptop, while under subpoena.

A. Alleged Violations Relating to Respondent's Representation of Shepard (Count I)

Count I of the Second Amended Specification of Charges alleges that Respondent violated Rules 1.1(a) and (b); 1.3(a); 1.4(a) and (b); 1.15(a) and (d); 1.16(d); 3.3(a); 3.4(c); 5.5(a); 8.1(a); 8.4(c) and (d); and D.C. Bar R. XI, § 2(b)(3) during his representation of Shepard. In its Report, the Committee concluded that Bar Counsel proved violations of Rules 1.15(a) and (d); 1.16(d); 3.3(a); 3.4(c);[9] 5.5(a); 8.1(a); 8.4(c) and (d); and D.C. Bar R. XI, § 2(b)(3) by clear and convincing evidence.[10] The Board agrees with the Committee's conclusions of law with respect to Count I, except for its finding that Respondent violated Rule 3.3(a) by submitting a false affidavit to the Board.

1. An attorney-client relationship existed between Respondent and Shepard.

Respondent's primary defense to many of the disciplinary charges against him is that he only "consulted" with Shepard for the purpose of referring him to another attorney; thus, an attorney-client relationship was never formed between the two. We disagree. The Board concurs with the Committee's conclusion that an attorney-client relationship existed between Respondent and Shepard. *See* HC Rpt. at 17-18.

"Whether an attorney-client relationship existed is to be determined by the fact finder based on the circumstances of each case." *In re Bernstein*, 707 A.2d 371, 375 (D.C. 1998) (citing *In re Lieber*, 442 A.2d 153, 156 (D.C. 1982)). "It is well established that neither a written

[9] The Hearing Committee found a Rule 3.4(c) violation but did not include a further discussion of that violation in its Report. HC Rpt. at 3.

[10] Bar Counsel conceded that it did not prove violations of Rules 1.1(a) and (b) (competence, skill and care); 1.3(a) (diligence and zeal); and 1.4(a) and (b) (keeping a client reasonably informed and explaining matters as reasonably necessary). HC Rpt. at 3 n.2. Because the record generally lacks evidence of the substantive nature/quality of the legal services Respondent provided Shepard, outside of the general tasks he undertook, the Board agrees that Bar Counsel has not proved violations of those rules by clear and convincing evidence.

agreement nor the payment of fees is necessary to create an attorney-client relationship." *Lieber*, 442 A.2d at 156. The provision of legal advice is clearly a feature of an attorney-client relationship. *See In re Sofaer*, 728 A.2d 625, 628 (D.C. 1999). Further, "a client's perception of an attorney as his counsel is a consideration in determining whether a relationship exists." *Lieber*, 442 A.2d at 156.

The circumstances here reflect an attorney-client relationship between Respondent and Shepard. Respondent repeatedly acknowledged during the course of his testimony that the purpose of his consultations with Shepard was to provide legal advice to him, including but not limited to, the applicable statutes of limitations and the general viability of Shepard's potential claims. FF 4-5; Tr. 73-74, 128-31. Moreover, Shepard provided Respondent with over 1,500 pages of his medical records, which Respondent reviewed, (FF 14), and engaged a medical expert to examine. FF 15. Thus, Respondent was clearly providing legal advice and legal services to Shepard. Additionally, the record is clear that Shepard considered Respondent to be his attorney. HC Rpt. at 17 (noting Shepard's belief that he had retained Respondent and Shepard's letter terminating Respondent's representation of Shepard). For these reasons, the Board concludes that Bar Counsel established by clear and convincing evidence that Respondent and Shepard had an attorney-client relationship.

2. Respondent violated Rules 1.15(a) and (d) and 1.16(d).

The Second Amended Specification of Charges alleges that Respondent violated Rules 1.15(a) and (d) and 1.16(d). Rule 1.15(d) requires lawyers to treat "advances of unearned fees and unincurred costs . . . as property of the client . . . until earned or incurred unless the client gives informed consent to a different arrangement." Under Rule 1.15(a), a lawyer must "hold

property of clients or third persons . . . separate from the lawyers own property."[11] Rule 1.15(a) further requires a lawyer to keep "[c]omplete records of such account funds and other property" and to maintain such records "for a period of five years after termination of the representation."

Although the word "misappropriation" is not used in the rule, "Rule 1.15, among other things, proscribes the conduct that constitutes misappropriation." *In re Midlen*, 885 A.2d 1280, 1286 (D.C. 2005). Misappropriation is defined as "any unauthorized use of client's funds entrusted to [the lawyer], including not only stealing but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom." *In re Anderson*, 778 A.2d 330, 335 (D.C. 2001) (quotations and citation omitted) (alteration in original). "[M]isappropriation occurs whenever the balance in the attorney's escrow account falls below the amount due to the client, regardless of whether the attorney acted with an improper intent. It is essentially a *per se* offense." *In re Edwards*, 990 A.2d 501, 518 (D.C. 2010) (citing *In re Smith*, 817 A.2d 196, 202 (D.C. 2003); *In re Carlson*, 802 A.2d 341, 348 (D.C. 2002); *Anderson*, 778 A.2d at 335; *In re Berryman*, 764 A.2d 760, 768 (D.C. 2000)).

a. Respondent violated Rules 1.15(a) and (d) and 1.16(d) in connection with his receipt of the $1,500 payment from Shepard.

The Board agrees with the Committee's finding that Respondent violated Rules 1.15(a) and (d) and 1.16(d) by: (1) treating his client's property as his own; (2) failing to keep adequate records of such property; (3) misappropriating that property when his personal bank account balance fell below the amount held in trust for his client; and (4) failing to return client funds. HC Rpt. at 22. As detailed by the Committee, Respondent received a payment of $1,500 from Shepard. FF 6. That payment was intended as either an advance for legal fees or an advance for

[11] The D.C. Court of Appeals revised Rule 1.15(a) in August 2010; the revision does not affect the charged violation here.

costs to be incurred. FF 9, 10. Under either scenario, the payment was not rendered for fees earned or costs already incurred. FF 10. Thus, under Rule 1.15(d), Respondent had an obligation to treat the $1,500 as client property and hold it separate from his own property until earned or incurred. Respondent failed to keep the $1,500 payment separate from his own property. Instead, Respondent deposited Shepard's check into his personal checking account and treated the funds as his own, in violation of Rule 1.15(d). FF 8. Further, the record established that Respondent did not use Shepard's funds for incurred costs or his own legal fees, and that the balance of the account holding Shepard's funds regularly dropped below $1,500. FF 11-13.

Respondent's only explanation as to how the $1,500 was used was to "reimburse" himself for costs he had incurred for the medical expert and/or to directly pay the medical expert for costs incurred. FF 12.[12] The Committee did not credit Respondent's explanation. FF 13. The Committee's findings of fact highlight several instances in which Respondent made contradictory representations, or was otherwise unable to explain the circumstances surrounding the disposition of Shepard's payment.

First, Respondent testified that he did not recall receiving a check from Shepard or, if he did receive one, he did not recall the amount of the check. FF 7; Tr. 65, 125-26. Respondent also testified, however, that he did in fact receive a check from Shepard for $1,500. FF 7; Tr. 90; BX 5, 7.

Second, in a letter to Bar Counsel responding to Shepard's complaint, Respondent asserted that the purpose of the payment was to reimburse Respondent for costs incurred for the medical expert's services. FF 12. Respondent contradicted his "reimbursement" theory on

[12] A review of the record reveals that at no point did Respondent contend that any of the $1,500 constituted earned legal fees. Indeed, in a letter to Bar Counsel, Respondent represented that he had not charged a fee for his time. BX 5; *see also* FF 9.

multiple occasions. For instance, in the same letter, Respondent stated that Shepard "tendered a check for $1,500 which [he] forwarded on to the medical expert." BX 5; FF 12. Further, Respondent consistently asserted that Shepard provided the check because the medical expert would not continue to provide his services for free. FF 12 (listing occasions). Based on these contradictions, the Committee did not credit Respondent's "reimbursement" theory and concluded that, to the extent that the $1,500 check was provided for the costs of the medical expert's services, the payment was an advance on services to be rendered, rather than a payment for services rendered. FF 10, 13.

Third, at one point Respondent represented that he "forwarded" Shepard's check to the medical expert. BX 5. Respondent later testified that he simply did not recall *how* or *how much* he paid the medical expert, but that he "gave [the medical expert] something for his time." FF 12. Respondent suggested that he may have compensated the medical expert by taking him out to lunches and dinners, (*id.*), but could not say whether that compensation accrued to $1,500. Tr. 95-97. On the other hand, Respondent testified that the reason he paid for the medical expert's lunches and dinners on occasion was because the expert was providing his services for free. Tr. 96.

The record shows that Respondent deposited Shepard's check for $1,500 into his personal banking account on May 7, 2007. FF 8. Bar Counsel submitted bank statements—for a period ranging from April 17 to December 14, 2007—for the account into which Respondent deposited Shepard's check (BX 8). The Board's Findings of Fact adopt the Committee's detailed analysis of the records for that account. Further, the record clearly indicates that Respondent failed to keep complete records, or any records for that matter, related to the funds received from Shepard, as required by Rule 1.15(a). FF 6. By way of summary, Respondent's

bank records reflect a series of small expenditures from May 7 through May 24, resulting in Respondent's account being overdrawn by May 24, 2007. FF 11. The statements also show that from May 7 through December 14, 2007, Respondent's account balance regularly fell below the $1,500 he was obligated to hold in trust for Shepard, and that the account was overdrawn on several other occasions after the deposit. *Id.* At no point during that period was a withdrawal for $1,500 made or a check for $1,500 paid. *Id.* Respondent's misappropriation of client funds in violation of Rule 1.15(a) is supported by clear and convincing evidence.

Misappropriation may be the result of negligent, reckless, or intentional conduct by a lawyer. *See Carlson*, 802 A.2d at 348. The Committee concluded that Respondent's misappropriation was the result of at least reckless conduct and not simple negligence. HC Rpt. at 20. The Board agrees.

Case law has established that:

> [T]he central issue in determining whether a misappropriation is reckless is *how* the attorney handles entrusted funds, whether in a way that suggests the unauthorized use was inadvertent or the result of simple negligence, or in a way that reveals either an intent to treat the funds as the attorney's own or a conscious indifference to the consequences of his [or her] behavior for the security of the funds.

Anderson, 778 A.2d at 340 (emphasis in original) (citing *In re Micheel*, 610 A.2d 231, 236 (D.C. 1992)) (other citations omitted). The *Anderson* Court identified a number of "hallmarks" of the reckless treatment of client and third party funds, among them: (1) "the indiscriminate commingling of entrusted and personal funds"; (2) "total disregard of the status of accounts into which entrusted funds were placed, resulting in a repeated overdraft condition"; and (3) "the disregard of inquiries concerning the status of funds." *Id.* at 338.

The record is replete with evidence evincing Respondent's conscious disregard for the safekeeping of Shepard's funds. First, Respondent knowingly and intentionally commingled

client funds with his personal funds in a personal account. Further, he repeatedly allowed the account balance to fall below the amount that he was obligated to hold in trust, often permitting the account to become overdrawn. *See Micheel*, 610 A.2d at 235-36 (reckless misappropriation where the respondent made no attempt to keep track of client funds, and indiscriminately wrote checks at a time he knew or should have known the account was overdrawn, resulting in repeated overdraft conditions); *In re Pels*, 653 A.2d 388, 393 (D.C. 1995) (same).

Finally, Respondent's refusal to honor Shepard's request that the unused funds be returned; his complete failure to keep records relating to the funds; and his inability to account for the alleged disposition of the funds betray a conscious and gross disregard for the possibility that Shepard's funds would be used for unauthorized purposes. *See Carlson*, 802 A.2d at 349 (observing that attorney's evasion of client request for an accounting of funds showed that she "willfully blinded herself" to improper use of funds); *In re Smith*, 70 A.3d 1213, 1217 (D.C. 2013) (per curiam) (failure to maintain records of client funds contributed to finding that misappropriation was reckless); *Anderson*, 778 A.2d at 336-37 ("[T]he Board may weigh, together with all of the other evidence, an attorney's explanation for—or conversely inability to explain satisfactorily—the use of a client's funds in deciding whether Bar Counsel has met its burden of proving dishonest misappropriation by clear and convincing evidence") (citation omitted). For these reasons, the Board agrees with the Committee's conclusion that Bar Counsel established that Respondent's misappropriation of client funds was at least reckless.

Upon termination of a representation, Rule 1.16(d) obligates a lawyer to "take timely steps to the extent reasonably practicable to protect a client's interests, such as . . . 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." Because Respondent did not use the funds to pay

his own legal fees, costs for the medical expert, or anything else related to his representation of Respondent, Respondent was obligated under Rule 1.16(d) to return the funds to Shepard upon the termination of his representation. His failure to do so constitutes a violation of the rule.

b. Respondent violated Rule 1.16(d) in connection with his return of Shepard's medical records.

The Board also concurs with the Committee's conclusion that Respondent violated Rule 1.16(d) by failing to take timely steps to return approximately 1,500 pages of Shepard's medical records. HC Rpt. at 22. Respondent admitted receiving Shepard's request for the return of his files some three months before he actually complied with the request. FF 17, 20; Tr. 111. The Committee did not credit Respondent's assertion that his substantial delay in returning the records was attributable to physical limitations he suffered as a result of a stroke. FF 20. The Hearing Committee's finding is supported by substantial evidence in the record. Specifically, it is supported by Respondent's inconsistent recollection of the events surrounding his return of the records, (*id.*; Tr. 111-14), and his apparent ability to promptly return the records just over a week after receiving an inquiry from Bar Counsel. FF 20. Thus, Respondent's delay was inexcusable. *See In re Thai*, 987 A.2d 428, 430 (D.C. 2009) (per curiam) ("[T]he client is owed an immediate return of his file no matter how meager.") (quotations and citation omitted).

3. Respondent violated Rules 3.3(a) and 8.1(a).

Bar Counsel also charged Respondent with violations of Rules 3.3(a)(1) and 8.1(a) in connection with an affidavit he filed pursuant to D.C. Bar R. XI, § 14(g) on March 31, 2008, in which he asserted that he had no clients or client property. We agree with the Committee's finding that Bar Counsel established that Respondent violated those rules by clear and convincing evidence.

It is a violation of Rule 3.3(a)(1) for a lawyer to "knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal . . . ." A statement is made "knowingly" if the individual asserting it has "actual knowledge of the fact in question." Rule 1.0(f). "A person's knowledge may be inferred from circumstances." *Id.* The Rules define a "tribunal" as a "court . . . or other body acting in an adjudicative capacity." Rule 1.0(n). "A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter." *Id.*

Respondent violated Rule 3.3(a)(1) when he stated in the § 14(g) affidavit that he "currently [had] no clients, no client papers or property, [and] no active matters . . . ." HC Rpt. at 23-24. These representations were false. As discussed above, Respondent began representing Shepard in or about April of 2007 and continued to do so until Shepard terminated the representation in November 2008. FF 27. Furthermore, Respondent was in possession of Shepard's records from 2007 through February 2009. *Id.* Finally, Respondent's knowledge of the falsity of his statements may be inferred from the circumstances. The Committee did not believe Respondent's representation that he merely consulted with Shepard in order to refer Shepard's case to another attorney. FF 4; HC Rpt. at 24. The evidence in the record supports this conclusion and indicates, through Respondent's own testimony, that over an extended period of time, Respondent researched applicable law, reviewed Shepard's medical records, consulted with a medical expert and, ultimately, rendered legal advice to Shepard. Thus, clear and convincing evidence in the record supports the conclusion that Respondent violated Rule 3.3(a)(1) when he submitted a false affidavit to the Court. *See In re Lebowitz*, 944 A.2d 444, 446

(D.C. 2008) (finding substantial reason to believe that Respondent violated Rule 3.3(a) by making false statement in § 14(g) affidavit). Respondent's conduct in this regard also violated Rule 8.1(a), which provides that in connection with a disciplinary matter, a lawyer shall not "knowingly make a false statement of fact."[13]

4. Respondent violated D.C. Bar R. XI, § 2(b)(3), and Rules 3.4(c) and 5.5(a).

Respondent violated D.C. Bar R. XI, § 2(b)(3) and Rules 3.4(c) and 5.5(a). It is a violation of § 2(b)(3) to fail "to comply with any order of the Court or the Board issued pursuant to" D.C. Bar R. XI. It is a violation of Rule 3.4(c) to "[k]nowingly disobey an obligation under the rules of a tribunal . . . ."

In a disciplinary matter unrelated to the present case, the Board, in a March 15, 2006 Order, directed Respondent to: (1) give Bar Counsel 90-days' notice of his intention to resume the practice of law (at the time he was not practicing); and (2) submit a medical report to Bar Counsel demonstrating his fitness to resume practice. FF 2; Order, *Mayers*, Bar Docket No. 443-03 at 7 ("March 2006 Board Order"); BX 10. The Board's order remained in effect until the Court suspended Respondent through an order dated March 20, 2008. FF 3; *Mayers I*, 943 A.2d at 1172.

[13] Bar Counsel originally charged Respondent with violating Rule 3.3(a) by filing a false D.C. Bar R. XI, § 14(g) affidavit with the Court of Appeals. *See* Second Amended Specification of Charges ("Specification") at 2, 4, ¶¶ 7, 13(h). In its brief to the Hearing Committee, however, Bar Counsel argued for the first time that Respondent also violated the Rule by filing the affidavit with the Board, without mentioning the charging document. Bar Counsel's Br. at 24-26. The Hearing Committee accepted the argument, concluding that the Board fit the definition of a "tribunal" because it "act[ed] in an adjudicative capacity" in determining compliance with the affidavit. HC Rpt. at 23. We need not address whether Respondent also violated Rule 3.3(a) by filing the affidavit with the Board, and specifically do not decide today whether the Board is a "tribunal" under Rule 3.3(a), since Respondent violated Rule 3.3(a) in any event by filing the affidavit with the Court as Bar Counsel originally charged. We also decline to review this issue since Bar Counsel did not include it in its Specification, and it is unnecessary for us to decide the issue in order to render a fair and considered decision concerning Respondent's actions.

The Committee found that Respondent's assertion that he merely consulted with Shepard in an effort to refer him to another attorney was not credible. HC Rpt. at 24. Rather, clear and convincing evidence established that Respondent began an attorney-client relationship with Shepard in or about April 2007 and that relationship lasted through November 2008. Respondent did not give the Board any prior notice of his intent to resume practice, nor did Respondent provide the Board a medical report demonstrating his fitness to do so. FF 4. In other words, Respondent plainly failed to comply with the March 2006 Board Order, in violation of D.C. Bar R. XI, § 2(b)(3).

The Board also finds that clear and convincing evidence establishes that Respondent knowingly disobeyed an order of the Court, when he continued to represent Shepard following the Court's March 20, 2008 order of suspension. Thus, Respondent's conduct also constitutes a violation of Rule. 3.4(c). *See In re Klein*, 747 A.2d 1179, 1182 (D.C. 2000) (holding respondent violated Rule 3.4(c) by disregarding court order).

Bar Counsel's Second Amended Specification of Charges also alleges a violation of Rule 5.5(a). Rule 5.5(a) prohibits the "[p]ractice [of] law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction[.]" *See, e.g.*, *In re Schoeneman*, 891 A.2d 279, 280-82 (D.C. 2006) (per curiam) (counseling clients during a period of suspension violates Rule 5.5(a)). Respondent's representation of Shepard following the Court's order of suspension constituted a violation of Rule 5.5(a).

The Board agrees, however, with the Committee's finding that the record lacks clear and convincing evidence to show that Respondent's practice of law while the March 2006 Board Order was in effect also violated Rule 5.5(a). At the time of the Board's March 2006 Order, Respondent had voluntarily elected to stop practicing law. *See* March 2006 Board Order at 6.

Respondent was not suspended from the practice of law by the March 2006 Order; rather, the order directed that Respondent, among other things, advise the Board before he elected to resume practice. While Respondent's failure to comply with the order plainly constituted a violation of D.C. Bar R. XI, § 2(b)(3), the Board cannot conclude, under the circumstances, that his failure to comply with the Board's order constituted unauthorized practice in violation of Rule 5.5(a). *See* HC Rpt. at 26 n.9.

5. Respondent violated Rules 8.4(c) and (d).

The Second Amended Specification of Charges further alleges that Respondent violated Rules 8.4(c) and (d). Rule 8.4(c) provides that "[i]t is professional misconduct for a lawyer to . . . [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation[.]" The Board concurs with the Committee's finding that Bar Counsel established a violation of Rule 8.4(c) by clear and convincing evidence. As noted above, Respondent knowingly made a false statement of fact to the Court when he filed his false affidavit pursuant to D.C. Bar R. XI, § 14(g). This conduct also constitutes an act of "dishonesty, fraud, deceit, or misrepresentation" in violation of Rule 8.4(c). *See In re Uchendu*, 812 A.2d 933, 938-39 (D.C. 2002) (holding false representations in document submitted to tribunal violated Rule 8.4(c)). *Lebowitz*, 944 A.2d at 446 (finding false representation in § 14(g) affidavit "provide[d] substantial reason to believe" the respondent violated Rule 8.4(c)).

The Board further agrees that Respondent also violated Rule 8.4(d) by filing the false § 14(g) affidavit. Under Rule 8.4(d), it is "professional misconduct for a lawyer to . . . engage in conduct that seriously interferes with the administration of justice." In order to prove a violation of Rule 8.4(d) there must be clear and convincing evidence that:

> 1. Respondent's conduct was improper, *i.e.*, that Respondent either acted or failed to act when he should have;

> 2. Respondent's conduct bore directly upon the judicial process with respect to an identifiable case or tribunal; and
>
> 3. Respondent's conduct tainted the judicial process in more than a *de minimis* way, *i.e.*, it must have potentially had an impact upon the process to a serious and adverse degree.

In re Evans, 902 A.2d 56, 67 (D.C. 2006) (appended Board Report) (per curiam) (quoting *In re Hopkins*, 677 A.2d 55, 61 (D.C. 1996)). Here, Respondent improperly filed a false affidavit with the Court, the Board and Bar Counsel in connection with disciplinary proceedings. The Court, Board and Bar Counsel relied on the representations in that affidavit to ensure Respondent's compliance with a Court order of suspension. Thus, Respondent's misrepresentations critically undermined the process put in place to govern members of this Bar and protect the integrity of the profession.

B. Respondent's Alleged Rule Violations in Connection with these Disciplinary Proceedings (Count II)

Count II of the Second Amended Specification of Charges alleges that Respondent violated Rules 3.4(a) and (c); 8.4(b) and (d); and D.C. Bar R. XI, § 2(b)(3) through his conduct in connection with Bar Counsel's subpoena of his computer hard drive. The Committee concluded that Bar Counsel proved, by clear and convincing evidence, violations of Rules 3.4(a) and (c) and 8.4(b) and (d), but did not establish a violation of D.C. Bar R. XI, § 2(b)(3). While the Board agrees that Respondent violated Rules 3.4(a) and (c), and 8.4(d), we conclude that Respondent did not violate Rule 8.4(b).

1. Respondent violated Rules 3.4(a) and (c).

The Board agrees with the Committee that Respondent violated Rules 3.4(a) and (c). HC Rpt. at 26-28. It is a violation of Rule 3.4(a) to "[o]bstruct another party's access to evidence or alter, destroy, or conceal evidence . . . 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."

Comment [3] to Rule 3.4 defines "evidence" as "any document or physical object that the lawyer reasonably should know may be the subject of discovery or subpoena in any pending or imminent litigation." Comment [4] to Rule 3.4 (citation omitted). By failing to preserve his laptop in the face of Bar Counsel's subpoena, Respondent violated Rule 3.4(a).

According to Respondent's own testimony, he was aware that his laptop was under subpoena when he gave control of it to Geeks on Call. FF 26. Upon being informed that his laptop could not be repaired, Respondent purchased a new laptop, but did not request the return of his old laptop. *Id.* Indeed, Respondent did not request that Geeks on Call return his old laptop until the Motion Hearing Committee denied his motion to quash the subpoena for the laptop—more than four months after Respondent had relinquished control of the computer to the company. *Id*. Clear and convincing evidence on the record supports the conclusion that, with knowledge that it was under subpoena, Respondent relinquished control of his laptop to a third party, and failed to take steps to protect it, thereby impeding Bar Counsel's access to potentially relevant evidence in this disciplinary action.

The Board also agrees with the Committee's conclusion that Respondent's conduct constituted a violation of Rule 3.4(c). That Rule provides, in pertinent part, that "[a] lawyer shall not knowingly disobey an obligation under the rules of a tribunal . . . ." The Committee found that Respondent violated the rule of a tribunal, because "Bar Counsel's subpoena put Respondent on clear and unequivocal notice that 'failure of any person without adequate excuse to obey this subpoena as served may be deemed contempt of the District of Columbia Court of Appeals' rules governing the Bar.'" HC Rpt. at 27-28. In essence, the Committee found that Respondent had an obligation to preserve his laptop and violated the Rule when he failed to do so. *Id.* at 28.

Bar Counsel's subpoena was issued pursuant to the authority of D.C. Bar R. XI, § 18(a) (authorizing "any member of the Board, any member of a Hearing Committee . . . , the Executive Attorney, or Bar Counsel" to issue subpoenas). The subpoenas are enforceable by the Court under D.C. Bar R. XI, § 18(d). Bar Counsel's subpoena may be challenged in accordance with Board Rule 3.15. Respondent was not obligated to produce evidence while his motion to quash was pending; however, he had an implicit obligation under D.C. Bar R. XI, § 18(d) to preserve evidence under subpoena regardless of any objection to the subpoena. *Cf. Myers v. United States*, 15 A.3d 688, 690 (D.C. 2011) (holding that the duty to preserve evidence under subpoena is implicit under Superior Court Criminal Rules imposing a duty to disclose such evidence); *Allen v. United States*, 649 A.2d 548, 553 (D.C. 1994) ("The duty to produce discoverable evidence entails the antecedent duty to preserve that evidence.") (citing *Brown v. United States*, 372 A.2d 557, 560 (D.C. 1977)).

Myers and *Allen* hold that D.C. Super. Ct. Crim. R. 16, which requires the government to turn over certain documents to the defense, also implicitly requires the government to preserve the documents prior to production to ensure that the purpose of the Rule is not frustrated. Super. Ct. Civ. R. 45, which requires production of documents under subpoena, would also be unenforceable without an implicit obligation to preserve documents before production is required. Thus, by failing to preserve evidence subject to Bar Counsel's subpoena, Respondent failed to fulfill his obligations under D.C. Bar R. XI, § 18(d) and Super. Ct. Civ. R. 45, and violated Rule 3.4(c).

2. Respondent violated Rule 8.4(d), but not Rule 8.4(b).

The Board agrees with the Committee's conclusion that Respondent violated Rule 8.4(d) by failing to take steps to prevent Geeks on Call from harming his laptop. HC Rpt. at 30-31. We find, however, that Bar Counsel did not establish a violation of Rule 8.4(b).

As has been indicated, Rule 8.4(d) prohibits "conduct that seriously interferes with the administration of justice[.]" The level of intent necessary to prove a violation of Rule 8.4(d) is negligence. *See Hopkins*, 677 A.2d at 60-61 (stating that a lawyer may violate Rule 8.4(d) "simply because, considering all the circumstances in a given situation, the attorney should know that he or she would reasonably be expected to act in such a way as to avert any serious interference with the administration of justice."). Respondent plainly acted improperly by failing to take steps to protect his laptop while it was under subpoena. Further, Respondent's conduct deprived Bar Counsel and the Committee of potentially relevant evidence and undermined the procedural framework that underpins the fact-finding component of all disciplinary proceedings.

Rule 8.4(b) provides that a lawyer engages in professional misconduct when he "[c]ommit[s] a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects[.]" Bar Counsel bears the burden of establishing that a lawyer committed a criminal act by clear and convincing evidence. *See Slattery*, 767 A.2d at 207. Bar Counsel has not met its burden.

Bar Counsel alleges that Respondent's conduct amounted to a violation of D.C. Code § 22-723(a). HC Rpt. at 28. Section 22-723(a) makes it a criminal offense to:

> tamp[er] with physical evidence if, knowing or having reason to believe an official proceeding has begun or knowing that an official proceeding is likely to be instituted, that person alters, destroys, mutilates, conceals, or removes a record, document, or other object, with intent to impair its integrity or its availability for use in the official proceeding.

D.C. Code § 22-723(a). A violation of the statute thus requires proof that the defendant intended to impair the integrity or availability of physical evidence for use in an "official proceeding," which is defined as "any trial, hearing, investigation, or other proceeding in a court of the District of Columbia or conducted by the Council of the District of Columbia or an agency or department of the District of Columbia government . . . ." D.C. Code § 22-271(4). The Board

agrees with the Committee's conclusion that disciplinary investigations and proceedings before the Board, which acts as an arm of the District of Columbia Court of Appeals, qualify as "official proceedings." HC Rpt. at 29. Nevertheless, there is insufficient evidence that Respondent intended to impair the integrity or availability of the computer. Bar Counsel established a violation of 8.4(d) by proof that Respondent negligently failed to take steps to preserve the computer, thus seriously interfering with the administration of justice. Proof of a violation of Rule 8.4(b), however, requires more.[14] Bar Counsel submitted no documentary or testimonial evidence showing that Respondent intended that the computer be destroyed. Nor is there any circumstantial evidence to establish that Respondent's conduct was intentional. Without evidence that Respondent formed the *mens rea* that § 22-723(a) requires, Bar Counsel has not proven that Respondent violated Rule 8.4(b).

3. Respondent did not violate D.C. Bar R. XI, § 2(b)(3).

Finally, the Board concurs with the Committee's conclusion that Respondent did not violate D.C. Bar R. XI, § 2(b)(3), as the alleged violation relates to Bar Counsel's subpoena. As the Committee aptly put it:

> [section] 2(b)(3) provides that discipline may be imposed for the violation of a Board order (Bar Counsel cites no authority to support the argument that discipline may be imposed for the violation of a Hearing Committee order) and 2, Respondent could not comply with the initial order on the motion to quash because the computer had been destroyed by the time the Motion Hearing Committee issued its ruling.

HC Rpt. at 32.

[14] A Rule 8.4(b) violation based on D.C. Code § 22-723(a) also requires proof of a higher level of intent than Rule 3.4(a), which is governed by a negligence standard. *See* Rule 3.4(a) (making it a violation "if the lawyer reasonably should know that the evidence is or may be the subject of discovery or subpoena. . . ."); *see also* Comment [4] to Rule 3.4 ("These prohibitions [of Rule 3.4(a)] may overlap with criminal obstruction provisions and civil discovery rules, but they apply whether or not the prohibited conduct violates the criminal provisions or court rules. Thus, the alteration of evidence by a lawyer, whether or not such conduct violates criminal law or court rules, constitutes a violation of paragraph (a).").

V. SUMMARY OF RULE VIOLATIONS

In summary, the Board agrees with the Committee that Bar Counsel proved violations of the following Rules by clear and convincing evidence: Rules 1.15(a) and (d); 1.16(d); 3.3(a); 3.4(a) and (c); 5.5(a); 8.1(a); 8.4(c) and (d); and D.C. Bar R. XI, § 2(b)(3).

VI. SANCTION

The Committee recommended disbarment as the appropriate sanction for Respondent's misconduct. The Board accepts the Committee's recommended sanction of disbarment and recommends restitution in the amount of $1,500, with interest at the legal rate.

Because the Board has found that Respondent was at least reckless in his misappropriation of Shepard's $1,500, the recommended sanction is practically prescribed. The Court has held that "in virtually all cases of misappropriation, disbarment will be the only appropriate sanction unless it appears that the misconduct resulted from nothing more than simple negligence." *In re Addams*, 579 A.2d 190, 191 (D.C. 1990) (en banc). Although not a *per se* rule, there is a presumption in favor of disbarment in a case of reckless or intentional misappropriation, absent "extraordinary circumstances." *Id*. Any mitigating factors must be "especially strong" to overcome the presumption. *Id.*

The Board concurs with the Committee's observation that "the record reflects a wholesale lack of evidence" that the presumptive sanction of disbarment is not warranted here. HC Rpt. at 39. Respondent's post-hearing briefing to the Committee and to this Board is devoid of any argument that there exist extraordinary circumstances warranting departure from the presumption. The only argument raised by Respondent in support of mitigation was made during the evidentiary hearing. There, Respondent argued that mitigation was justified because he was relatively inexperienced in civil cases. Tr. 194-95. Even if true, relative inexperience does not amount to the kind of extraordinary circumstances necessary to deviate from the

presumptive sanction of disbarment in cases involving reckless misappropriation. *See In re Robinson*, 583 A.2d 691, 692 (D.C. 1990) (per curiam). In any event, Respondent's appeal to inexperience is unavailing. Respondent has been a member of this Bar since 1987 and for many years represented the United States as an Assistant United States Attorney in this District.

Respondent's complete disregard for, and indeed disinterest in, the safeguarding of client funds represents the kind of misconduct that the Court has noted "demonstrates [an] absence of the basic qualities for membership in an honorable profession." *Addams*, 579 A.2d at 193. The sanction of disbarment is mandated by case law here.

While we do not find that Respondent engaged in flagrant dishonesty, *see, e.g., In re Kanu*, 5 A.3d. 1, at 17 (D.C. 2010), he has been dishonest, both in his dealings with his client and before the institutions charged with administering the disciplinary framework fundamental to the protection of the integrity of our profession. Further, Respondent's actions in failing to ensure the availability of his laptop and his complete lack of remorse compound the seriousness of his violations. Respondent's violations are numerous and when taken together show that he "lacks the moral fitness to remain a member of the legal profession." *In re Cleaver-Bascombe II*, 986 A.2d 1191, 1200-01 (D.C. 2010) (per curiam).

The Board also affirms the Committee's decision that Respondent should be required to pay restitution in the amount of $1,500, plus interest at the legal rate from the date Respondent deposited Shepard's check (May 7, 2007), to the Estate of Alexander Shepard and/or the Client's Security Fund (to the extent that the Fund pays out any amounts on account of Respondent's misconduct).

VII. CONCLUSION

Having found that Bar Counsel has proven by clear and convincing evidence that Respondent committed reckless misappropriation and additional violations of the Rules of Professional Conduct, the Board recommends that the Court find the foregoing violations and disbar Respondent, with restitution in the amount of $1,500, plus interest at the legal rate, as a condition of reinstatement. For reinstatement purposes, the disbarment should be deemed to run from the date Respondent files an affidavit in compliance with D.C. Bar R. XI, § 14(g). *See* D.C. Bar R. XI, § 16(c); *In re Slosberg*, 650 A.2d 1329, 1331 (D.C. 1994).

By: /ELF/
Eric L. Yaffe
Vice Chair

Date: May 27, 2014

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