

I. PROCEDURAL HISTORY

Disciplinary Counsel filed the Specification of Charges on November 12, 2020.² Respondent filed her Answer on March 3, 2021 (DCX 3), and errata on March 24, 2021. DCX 4.³

An Ad Hoc Hearing Committee, composed of Theodore Hirt, Esq., Chair, Mr. David Bernstein, and Leonard Marsico, Esq., held an evidentiary hearing on June 1 and 2, 2021. Disciplinary Counsel was represented by Joseph C. Perry, Esq. Respondent appeared *pro se*. The following exhibits were received in evidence: DCX 1-10, 12-15, 17-22, 24-28, 30-32, 40, 43 and RX 20, 22, 23, and 33-35. Following the hearing, Respondent supplemented the record with RX 44, which was admitted by the Chair's Order dated August 24, 2021.

At the close of the hearing, the Hearing Committee made a preliminary nonbinding determination under Board Rule 11.11 that Disciplinary Counsel had not met its burden in proving that Respondent violated Rule 4.2. Tr. 363.

² On December 22, 2020, Disciplinary Counsel filed with the Court of Appeals a Motion for an Order Directing Service by Alternative Means, attaching its Specification of Charges in this matter. DCX 1 at 001, 012-020 (Specification). On January 12, 2021, prior to any action taken by the Court of Appeals, Respondent accepted service of the Specification via email. DCX 2 at 002.

³ The Committee notes that, after the closure of the proceedings, Respondent filed a number of motions and other documents, which Disciplinary Counsel opposed. *See* Appendix A. The Hearing Committee denies Respondent's above-referenced motions because they are untimely or, as explained herein, seek relief that would exceed the Hearing Committee's authority.

II. FINDINGS OF FACT

The following findings of fact are based on the testimony and documentary evidence admitted at the hearing, and these findings of fact are established by clear and convincing evidence. *See* Board Rule 11.6; *In re Cater*, 887 A.2d 1, 24 (D.C. 2005) (“clear and convincing evidence” is more than a preponderance of the evidence, it is “evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the fact sought to be established”).

Background

1. Respondent is a member of the Bar of the District of Columbia Court of Appeals, having been admitted by motion on June 4, 1979, and assigned Bar Number 267385. Tr. 210-11 (Testimony of Respondent (“Resp.”)); DCX 3 at 001, ¶ 1.

2. On August 31, 2015, a representative of Adult Protective Services (“APS”) petitioned the probate division of the Superior Court of the District of Columbia for the appointment of a general guardian and conservator for M.D., a man who was diagnosed with diabetes, hypertension, high cholesterol, and delusional disorder. DCX 6 at 001. The petition noted that M.D.’s “cognitive functioning is impaired due to mental health issues and as a result, he is not able to handle his finances, living arrangements, or medical care.” *Id.*; *see also* Tr. 30-31 (Testimony of Brett E. Cohen (“Cohen”)).

3. The petition stated that although M.D.’s brothers had assisted him in the past, M.D. was now suspicious of them and believed that they were trying to

exploit him. DCX 6 at 002. The petition attached a report of a psychological evaluation of M.D. *Id.* at 010. The report noted concerns that his “delusional thinking has distorted the intentions of his family’s attempts to assist him and has left him vulnerable to significant health issues and a further decline in his physical and mental functioning.” *Id.* at 013. The report further noted that M.D.’s “family would like to support him and assist him[,] but he no longer trusts them and will not permit them into his home.” *Id.* at 13-14; *see also* Tr. 31-32 (Cohen).

4. At the time the petition was filed, M.D. was the sole owner of real property at 720 Webster Street, N.W., and was residing there. DCX 6 at 002 (M.D. and his deceased mother listed on the deed), 008 (deed); 011 (his mother put his name on the deed).

5. On September 3, 2015, the probate court scheduled a hearing for September 30, 2015. DCX 7 (Order). The court appointed Brett E. Cohen, Esq. as counsel for M.D. Tr. 28-29 (Cohen); DCX 7 at 001 (order of appointment).⁴

6. On September 3, 2015, the court appointed Richard Tappan, Esq. as guardian ad litem, finding such appointment appropriate given M.D.’s physical and mental health issues. DCX 7 at 002.

7. On September 4, 2015, Mr. Cohen filed with the probate court his entry of appearance. Tr. 29 (Cohen); DCX 8.

⁴ The duration of that appointment is the primary issue in contention in this matter, as discussed below.

8. On September 29, 2015, Mr. Cohen visited with M.D. at his home. Tr. 132-34 (Cohen) (describing visit), 118 (date).

9. On September 30, 2015, the probate court held a hearing. DCX 9 (9/30/15 Transcript). Mr. Cohen, Mr. Tappan, a representative from APS, a court-appointed examiner, and two of M.D.'s brothers, A.D. and R.D., were in the courtroom. *Id.* at 003, 021. M.D. participated by telephone. *Id.* at 004. He was agreeable to having someone appointed to assist him with his finances, as well as someone to help him with his medications. *Id.* at 018-19. He also expressed his belief that his brothers had taken his mail from the house (*id.* at 017) and stated that "I do believe my brothers want the house." *Id.* at 018.

10. A.D. and R.D. informed the probate court that they would be willing to serve as co-guardians. They acknowledged, however, that their brother believed they were trying to take advantage of him (*id.* at 023-24) and that he had recently called the police to have them removed from the home. *Id.* at 027.

11. During the course of the hearing, the court determined that it was appropriate to appoint a guardian and conservator for M.D. DCX 9 at 024-30. The court scheduled another hearing in order to evaluate whether M.D. might regain trust in his brothers and they could assume responsibility for his care, or if a more permanent arrangement using a court-appointed guardian and conservator would be appropriate. *Id.*; *see also* Tr. 39 (Cohen) ("There were questions about what role [M.D.'s] brothers would take"), 50-51,75-76. According to Mr. Cohen, at some

point during the hearing, the probate court advised him that he would be staying on as counsel for M.D. Tr. 40-41, 155 (Cohen).

12. The transcript does not memorialize the probate court (the Honorable Gerald I. Fisher) specifically advising Mr. Cohen that he would remain as M.D.'s counsel, but his continuation as counsel appears to have been understood by those participating in the hearing, as the court discussed with Mr. Cohen his availability for the next hearing. Tr. at 40 (Cohen) (there was no reason to agree to appear at next hearing if he were not counsel); DCX 9 at 032 (court discussing Mr. Cohen's availability for next hearing), 035 (Cohen discussing "unique posture," "our hearing," and "by the time we come back"); *see also* Tr. 173 (Testimony of Richard Tappan ("Tappan")) (Cohen continued to serve as M.D.'s attorney for "quite some time").

13. The next hearing was scheduled for April 11, 2016. DCX 9 at 037.

14. On September 30, 2015, the probate court filed its Findings of Fact, Conclusions of Law and Order. DCX 10. The order appointed Richard Tappan, Esq., as general guardian and conservator for M.D. Tr. 171 (Tappan); DCX 10 at 004-06.

15. The order memorialized that Mr. Cohen was present at the hearing as M.D.'s attorney, and identified him as M.D.'s attorney on the attached distribution list. DCX 10 at 001, 007. The order did not otherwise address Mr. Cohen's status as attorney for M.D. It did not state whether his appointment was continued or terminated. DCX 10.

16. The court docket for the M.D. matter contained multiple entries, sequentially, about the September 30, 2015, hearing. *See* DCX 5. One entry, which appeared at the top of the entries for September 30, 2015, stated that Mr. Cohen had been dismissed as attorney for M.D.:

Attorney Dismissed
Attorney COHEN, Mr. BRETT E
dismissed/withdrawn for subject
[M.D.] on 09/30/2015

See DCX 5 at 046, entry 329 (emphasis added).

17. Another, more detailed entry, which appeared below the entry quoted above, described the proceedings and indicated that Mr. Cohen would remain in place as M.D.'s attorney until the continued status hearing date:

Event Resulted:

The following event: Hearing on
Petition for Guardian and Conservator
scheduled for 09/30/2015 at 10:30 am
has been resulted [*sic*] as follows:

Result: Hearing Held. The Court found the subject incapacitated and granted the petition for guardian and conservator with no opposition. A member of the fiduciary panel will be appointed as guardian and conservator to help the subject with his financial and personal matters. A status hearing has been set for 4/11/16 at 10:00am to determine the progress of the fiduciary appointments. *Mr. Cohen is*

*to remain in place as counsel until
the continued status hearing date.*

Judge: FISHER, GERALD I Location:

Courtroom A-49

Courtroom Clerk: Bradley Edge

Court Reporter: Donna Hawkins

Parties Appearing: Gregory Benton (APS

s. worker); M.D. (via

telephone) (Subject); EDWIN POWELL MD

(Examiner); RICHARD TAPPAN Esq

(Guardian ad Litem); ; Mr BRETT E

COHEN (Attorney) on behalf of M.D.

(Subject); Mrs MC

STEINER-SMITH (Attorney) on behalf of

OFFICIAL OF ADULT PROTECTIVE SERVICES

(Applicant)

See DCX 5 at 047, entry 334 (emphasis added).

18. On September 30, 2015, the court specifically ordered that M.D. not be moved to a location outside of the District of Columbia “without prior court approval.” DCX 10 at 5, ¶ 6(c).

19. From September 30, 2015, until the April 11, 2016, hearing, Mr. Tappan served Mr. Cohen with at least four pleadings. Tr. 173-77 (Tappan); DCX 12 (guardianship plan); DCX 13 (conservatorship plan); DCX 14 (motion to late file with fee petition); DCX 15 (report of guardian).

20. In or around March of 2016, Mr. Tappan moved M.D. to an assisted living facility in Maryland called Raphael House. *See DCX 15.*

21. On March 31, 2016, Mr. Cohen visited M.D. at Raphael House. Tr. 45, 117 (Cohen).

22. Before the April 11, 2016 Status Hearing, all of M.D.'s belongings were removed from his home. DCX 27 at 1, ¶ 13; Tr. 137.

23. Mr. Tappan never filed an itemized inventory or appraisal of any of M.D.'s personalty. DCX 5 (Docket); DCX 27 at 1, ¶ 12.

24. When M.D.'s brothers learned that Mr. Tappan was disposing of the contents of M.D.'s home, they tried to telephone Mr. Tappan, without success. DCX 26 at 1; DCX 31 at 6.

25. Respondent was M.D.'s next door neighbor. She lived in the adjoining rowhouse. Tr. 340. She checked on him and assisted him from time to time. Tr. 243-45.

26. M.D. knew that Respondent was an attorney, as did his brothers. DCX 9 at 10 ("She's an attorney."); Tr. 245; DCX 26 at 1.

27. On April 5, 2016, the brothers called Respondent and asked her to assist. DCX 26 at 1.

28. On April 5, 2016, Respondent reached Mr. Tappan, by telephone and made inquiries. Among other things, she asked how the brothers could reach M.D. Respondent memorialized the conversation in a contemporaneous email to Mr. Tappan. DCX 26 at 2, 19 (Respondent Email to Tappan, 4/5/2016).

29. During the April 5, 2016, telephone call with Respondent, Mr. Tappan said he would have to check with M.D. to see if he was willing to speak with his

brothers. DCX 31 at 10-11. Mr. Tappan declined to disclose the location of M.D.'s new living arrangements without first soliciting M.D.'s consent. DCX 26 at 2, 19 (Respondent Email to Tappan, 4/5/2016).

30. While Respondent waited to hear back from Mr. Tappan, the brothers located their brother, M.D.; and, asked Respondent to visit M.D. to determine how he was doing and whether he knew the house was being cleared out. DCX 26 at 2.

31. On or about April 5, 2016, R.D., A.D., and another one of M.D.'s brothers (F.D.) retained Respondent to file petitions for them to participate in the proceedings and also to file a petition to remove Mr. Tappan as conservator and guardian. Tr. 197-98 (Resp.) (Respondent informs the court at the April 11 hearing that she was appearing on behalf of the brothers); DCX 43 (fee petition), at 001 (identifying herself as attorney of record for the brothers), at 018 (4/5/2016 billing entry memorializing initial conversation with R.D. and A.D.), (4/9/2016 billing entry regarding agreeing to draft documents).

32. On Friday, April 8, 2016, Respondent visited M.D. at Raphael House and discussed with him removing Mr. Tappan as conservator and guardian. DCX 3 at 004 (¶ 14); DCX 31 at 006; DCX 26 (opposition to motion to strike) at 002; DCX 43 at 18 (billing entries).

33. Respondent did not seek or obtain consent from Mr. Cohen for this visit. Tr. 67 (Cohen). Respondent contends that at that time, she was not aware that Mr. Cohen, or anyone else, was acting as M.D.'s attorney. Tr. 207 (Resp.). It had been Respondent's experience and understanding that, in guardianship proceedings,

the status of counsel for a ward typically terminated after the completion of the intervention hearing. Accordingly, she did not expect that M.D. would have counsel as of April 2016. DCX 31 at 006-07.

34. On Sunday, April 10, 2016, Respondent visited M.D. at Raphael House and discussed with him removing Mr. Tappan as conservator and guardian. DCX 3 at 004 (¶ 14); DCX 31 at 006; DCX 26 at 002; DCX 43 at 19 (billing entries).

35. M.D. informed Respondent that he wanted to remain in his home with assistance; and, upon learning that his conservator (Tappan) had disposed of his personal belongings, he wanted the return of his property or he wanted damages. DCX 21 at 2-4; DCX 27 (damages); DCX 31 at 29, 24 (remain in his home); RX 22 at 308-11 (damages); RX 23; Tr. 250-51, 300-01 (damages).

36. Respondent did not seek or obtain consent from Mr. Cohen for this visit. Tr. 67 (Cohen).

37. The brothers believed that M.D.'s desire to remain in his home and live independently was a viable option which the conservator/guardian had failed to explore fully. DCX 31 at 46.

38. M.D., and his brothers, also wanted Mr. Tappan's appointment as M.D.'s court-appointed fiduciary terminated. DCX 21 (Petition to Terminate).

39. At some point prior to the Monday, April 11, 2016, hearing, Mr. Tappan learned that Respondent had been visiting M.D. and he testified that he told her to stop visiting him. Tr. 180-81 (Tappan).

40. A Petition to Terminate Mr. Tappan's fiduciary appointments was prepared by the Respondent, after speaking with M.D. DCX 21. A proposed Order for the court's appointment of an attorney was appended to the Petition to Terminate. *See* DCX 21 at 15. The Petition to Terminate Mr. Tappan's appointments was drafted prior to the scheduled hearing that occurred on the morning of April 11, 2016, but it was not filed until April 13, 2016. Tr. 234-35.

41. Before the case was called before the court on April 11, 2016, Respondent located Mr. Tappan in the courtroom and introduced herself. Tr. 207. She handed him a courtesy copy of the Petition to Terminate. Tr. 234-35 (Resp.); DCX 26 at 2.

42. The documents shared with Mr. Tappan on April 11, 2016, did not include Mr. Cohen's name. Tr. 226, 234-35 (Resp.).

43. While Respondent was speaking with Mr. Tappan, Mr. Cohen introduced himself and said he was the court-appointed attorney for M.D. Tr. 207-08 (Resp.). Respondent challenged whether M.D. had counsel, and she asked Mr. Cohen to provide her with a copy of the order appointing him, which he said he would do. Tr. 207-08 (Resp.). Mr. Cohen did not provide such an order. Tr. 225.⁵

44. On April 11, 2016, the court held a hearing. DCX 17 (April 11, 2016 Transcript). Respondent was present and attentive at this hearing. Tr. 203 (Resp.). Mr. Cohen identified himself as court-appointed attorney for M.D. Tr. 52 (Cohen); DCX 17 at 002. The Court addressed him as counsel for M.D. *Id.* at 003-08. During

⁵ DCX 7 is the September 3, 2015 order appointing Mr. Cohen prior to the September 30 hearing.

the hearing, Respondent credited Mr. Cohen's representation that he was M.D.'s attorney, subject to verification. Tr. 232-33 (Resp.).

45. During the hearing, Respondent informed the court that she was appearing for M.D.'s brothers. DCX 17 at 002. She advised the court that she would be e-filing petitions to participate in the proceeding on behalf of the brothers and a petition to terminate Mr. Tappan's appointment. *Id.*

46. During the April 11 hearing, Mr. Cohen sought to waive M.D.'s presence and Respondent objected; her objection was overruled insofar as the court had not granted her permission to participate in the proceedings. Tr. 203 (Resp.); DCX 17 at 004.

47. During the hearing, Mr. Tappan advised the court that M.D. did not want his brothers visiting him because he was frightened that they might steal from him or otherwise harm him. DCX 17 at 011. Mr. Tappan further discussed his desire to obtain input from mental health professionals before M.D. made a decision to "include the brothers in his life more." *Id.* He went on to state "[t]he mental health professionals I'm working with have expressed to me it's not the best thing to have people visiting him that he's frightened of or that he feels have ill-will towards him." *Id.* While making these statements, Mr. Tappan asserted that "how much of [M.D.'s] feelings about his brothers are based on delusions and how much is based on fact, I don't know." *Id.*

48. During the hearing, the court discussed with Mr. Cohen and Mr. Tappan how to arrange for another hearing with M.D.'s participation, at which the court

could address the Petitions to Participate and the Petition to Terminate Mr. Tappan's appointment. DCX 17 at 005-13. Ultimately, it was determined that the hearing would be held at Raphael House. *See id.*

49. The court set a new hearing date of May 19, 2016, and asked Mr. Cohen if he would be available. DCX 17 at 013.

50. After the hearing, Respondent and M.D.'s brothers went to the Clerk's office and reviewed the docket for the case and printed out the entries. Tr. 308 (Resp.). Based on that review, Respondent concluded that Mr. Cohen had been dismissed as counsel for M.D. and there was no order designating Mr. Cohen as such counsel. Tr. 308-09 (Resp.).

51. On April 11, 2016, Mr. Tappan filed a complaint with the Office of Disciplinary Counsel against Respondent for her having made two visits to M.D. at Raphael House without obtaining the consent of counsel. RX 20 at 298-99. Mr. Tappan filed the complaint because of his view that Respondent "was continuing to put my ward at risk." Tr. 181 (Tappan). On May 16, 2016, Disciplinary Counsel mailed a copy of the complaint to Respondent. *See* RX 20.

52. On April 13, 2016, Respondent e-filed with the probate court the Petitions for Permission to Participate on behalf of each of the three brothers individually. Tr. 226-227 (Resp.); DCX 18, DCX 19, DCX 20 (respective petitions for R.D., A.D., and F.D.). The petitions were served on M.D., Mr. Tappan, and Mr. Cohen. Tr. 226-227 (Resp.); DCX 18 at 002; DCX 19 at 002; DCX 20 at 002. The certificates of service identified Mr. Cohen as a lawyer (as it included "Esq." after

his name), but did not identify him as M.D.'s counsel. DCX 18 at 002; DCX 19 at 002; DCX 20 at 002.

53. Before e-filing the petitions on April 13, 2016, Respondent had added Mr. Cohen's name to the three copies of both petitions, as a courtesy, believing that he either would produce an Order of appointment, which Respondent did not see in the court file, or he would eventually get an Order. Tr. 226-33 (Resp.).

54. On April 13, 2016, Respondent also filed with the probate court a Petition Post Appointment to Terminate Appointment of Conservator and Guardian, Richard Tappan. Tr. 228-229 (Resp.); DCX 21. The petition alleged, *inter alia*, that Mr. Tappan had improperly disposed of personal property of both M.D. and his brothers, and that Mr. Tappan was "actively and secretively removing personalty from the home of [M.D.] with the intent to sell [M.D.'s] home out from under him." DCX 21 at 004. The petition advocated that M.D. continue living in the family home. *Id.* at 003-04.

55. On April 13, 2016, Respondent served M.D., Mr. Tappan, and Mr. Cohen with the Petition to Terminate. DCX 21 at 007 (Certificate of Service). In the certificate of service, Respondent identified Mr. Cohen as "Attorney of Record for the Ward." *Id.* Respondent included a proposed Order for the court's appointment of an attorney for M.D. *See* DCX 21 at 15.

56. On Saturday, April 16, 2016, Respondent visited M.D. at Raphael House. Tr. 239. She described the purpose of her visit as a social one; she wanted to bring M.D. some toiletries. Tr. 239, 250, 308. Respondent brought with her the

Petitions to Participate and the Petition to Terminate Mr. Tappan's status as guardian; she told him "that his brothers were setting before the court his wishes and desires for the court's consideration," and she recited the contents of the petitions, "line by line" to M.D., to make sure that what she had filed "was truly representative of what he wanted to say." Tr. 239-41. She also served M.D. with copies of the petitions to participate and the petition to terminate guardianship. Tr. 239; DCX 30.

57. When Respondent arrived at Raphael House, she identified herself to the staff as one of M.D.'s neighbors, not as an attorney, which she explained, would be her accustomed practice. RX 23 at 312 (email from Respondent to brothers describing her practice of identifying herself as a neighbor); DCX 25 (Cohen motion to strike) at 002, ¶ 10 ("When Ms. Wagner approached the Ward and others at the nursing facility, she identified herself as a neighbor of the Ward.") (footnote omitted).

58. During the meeting, Respondent took notes, recording details about M.D.'s medical history and experiences at Raphael House; and created a partial inventory of personal property that was inside the home, including M.D.'s estimations as to the value of some of the items. Tr. 297-301 (Resp.); RX 22. During the meeting, it became clear to Respondent that M.D. "was actually serious about" itemizing his losses and seeking damages. Tr. 300. Respondent used the information provided during this meeting to amend the Petition to Terminate Mr. Tappan, to add a request for damages. Tr. 301.

59. Respondent did not seek or obtain consent from Mr. Cohen for this visit. Tr. 67 (Cohen).

60. On May 4, 2016, Respondent visited M.D. again at Raphael House, in order to deliver various health care items to him. RX 23 at 312 (Respondent email to M.D.'s brothers describing the visit). Unprompted, M.D. informed Respondent about an upcoming May 19, 2016 hearing in his case and he expressed dissatisfaction with the removal of items from his home and concerns about his returning to his house to live. *Id.*

61. Respondent did not seek or obtain consent from Mr. Cohen for this visit. Tr. 67 (Cohen).

62. At some point after the April 11 hearing, Mr. Cohen received a call from Mr. Tappan and learned that Respondent had visited M.D. Tr. 53 (Cohen).

63. On May 13, 2016, Mr. Cohen went to Raphael House to visit with M.D. and to confirm that Respondent had visited M.D. without his consent. Tr. 53-54, 117 (Cohen).

64. On May 13, 2016, Mr. Cohen sent Respondent a letter via email, with Mr. Tappan copied, stating that he had learned that Respondent had met with M.D. on at least one occasion after the April 11 hearing, and that “[y]ou never asked, and I never granted, you permission to speak to my client.” DCX 22 at 002. Mr. Cohen also demanded that Respondent stop speaking with M.D. and that she provide to him any work product from her visits with M.D. Tr. 54 (Cohen); DCX 22 at 003.

65. On May 17, 2016, Respondent emailed Mr. Cohen, stating that “the record in the case clearly indicates that you are no longer [M.D.’s] attorney. It is not necessary that I solicit your consent to speak with [M.D.]” Tr. 57-58 (Cohen); DCX 24.

66. On May 18, 2016, Mr. Cohen filed a motion to strike Respondent’s appearance. DCX 25. According to Mr. Cohen, he wanted Respondent removed from the case because he believed that she appeared to be representing an interest that diverged from M.D.’s interests. Tr. 60 (Cohen). Specifically, M.D. had issues with his brothers “[s]ince the onset of the case.” Tr. 63-64 (Cohen).

67. On May 20, 2016, the court rescheduled the May 19, 2016 hearing for June 1, 2016. DCX 5 at 040, entry 278.

68. On May 26, 2016, Respondent filed her opposition to the motion to strike her appearance. DCX 26. Respondent argued that Mr. Cohen did not “currently have an order of appointment” and that there was no such court order on the docket. *Id.* at 005. She cited D.C. SCR PD Rule 305(4)(c)⁶ (*id.* at 003) and argued that “[t]here was no legally defined role for an attorney to play between September 30, 2015, and the filing of the April 2016 petition to terminate the conservator/guardian.” *Id.* at 006.

⁶ Respondent’s citation to SCR PD Rule 305(4)(c) is erroneous. The intended reference appears to be Probate Division Rule 305(c), providing that “[t]he appearance of counsel for the subject of an intervention proceeding shall terminate upon the disposition of the petition for which counsel’s appearance was entered, unless otherwise ordered by the Court.”

69. On May 26, 2016, Respondent also filed an amendment to the petition for termination of Mr. Tappan's appointment as guardian and conservator. DCX 27. The petition incorporated information that Respondent obtained from her interview with M.D. on April 16. Tr. 300-01 (Resp.); *compare* RX 22 at 310 (noting, *e.g.*, Panasonic camera for \$4,700, JVC video camera for \$300), 310-311 (models such as PFI Mustang, helicopter and accessories, and Budweiser boat for \$300), *with* DCX 27 at 001, ¶ 15 (Panasonic camera, JVC video camera), 002 n.3 (PFI Mustang, helicopter and accessories, Budweiser boat).

70. On May 29, 2016, Mr. Cohen filed his reply to Respondent's opposition to the motion to strike. Tr. 60-61 (Cohen); DCX 28.

71. On June 1, 2016, the probate court held a hearing. DCX 31 (June 1, 2016 Tr.). The court first heard argument about Mr. Cohen's motion to strike Respondent's appearance, and the court questioned Respondent. *Id.* at 002-11.

72. Judge Fisher stated that he had read all the pleadings that had been filed in connection with the motion to strike. DCX 31 at 004.

73. In discussing Respondent's first two visits to M.D. prior to the April 11 hearing, the court asked Respondent why she did not look into whether M.D. was represented. DCX 31 at 006. Respondent responded, in part, that "it was not [her] expectation" that there was counsel because "the law is that, at the end of the initial hearing, the – that counsel is terminated and reappointed on the filing of a new petition." *Id.* The court responded:

Well, that's not a – not something that happens every time. That's kind of a general rule that somebody is removed. They're not – sometimes

they're extended for reasons, for subsequent hearings, for things like that, which is actually what occurred in this case.

Id. at 007.

74. The court had earlier stated:

[T]he question of whether there's impropriety to me essentially boils down to what happened after the last hearing that we had, which was I think on April the 11th, at which time I believe Ms. Wagner, [M.D.'s] brothers, were present. I don't think [M.D.] was there, but Mr. Tappan and Mr. Cohen was *[sic]* there.

DCX 31 at 004.

75. Ultimately, the court stated:

Well, here's where I am on this particular issue. I think there's all sorts – I think there's all sorts of ethical questions here, Ms. Wagner, and maybe at the end of this hearing I will make a referral to [Disciplinary] Counsel for them to determine whether you have acted ethically.

I don't think it's for me to strike your appearance, even if I think you've acted unethically, because ultimately I have to make a determination what's in [M.D.'s] best interest. But I think a referral to [Disciplinary] Counsel is appropriate. They may decide there's nothing inappropriate at all. That's not for me to determine. And I'll do that at the end of these proceedings today.

DCX 31 at 011.

76. As to Respondent's Petition to Terminate Mr. Tappan's appointments, the court stated: "I don't really think there's anything that I've heard today that makes me believe that Mr. Tappan should be removed as the guardian or as the conservator." DCX 31 at 048-49. The court also noted that it was not sure that M.D. returning home would "in the end" be "the most viable option." *Id.* at 049.

77. During the hearing, M.D. stated that the last time he had contact with his brothers was when he “had to have the police come in and escort my brothers out of the house, because I didn’t feel good with them in the house.” DCX 31 at 017. He described attempts to remove his brothers’ names from his checks and to “get them off my – out of the business of my house.” *Id.*

78. During the hearing, M.D. twice stated he did not trust his brothers. *Id.* at 014, 028. He stated he would call the police and have them removed if he returned home and they tried to visit him again. *Id.* at 028. When questioned by the court, he stated he objected to them even receiving information about his well-being or whereabouts. *Id.* at 015-16.

79. Near the conclusion of the June 1, 2016 hearing, the probate court stated that if the parties wanted another status hearing, “I’d make it clear that Mr. Cohen remains [M.D.’s] attorney, if you want to do that, but I don’t know that we necessarily need another hearing.” DCX 31 at 051. No written order was issued.

80. Ultimately, the probate court continued Mr. Cohen’s appointment, and directed him to respond to the amendment to the Petition to Terminate. *See* DCX 31 at 054-57; *see also* Tr. 66 (Cohen) (“I was continued as counsel.”).

81. Respondent regarded the probate court’s oral statements at the June 1, 2016 hearing at Raphael House as a “court order” that Mr. Cohen was M.D.’s attorney. Tr. 317-18 (Resp.).

82. On June 2, 2016, the court issued a written order denying Mr. Cohen's motion to strike Respondent's appearance for the reasons stated at the June 1 hearing and referred the matter to Disciplinary Counsel. DCX 32.

83. Mr. Cohen visited M.D. on June 23, 2016, and on January 20, 2017. Tr. 119 (Cohen).

84. On January 24, 2017, the probate court held a hearing, which was attended by Mr. Cohen and Mr. Tappan. DCX 40 (Jan. 24, 2017 Transcript). During the hearing, the court decided to end Mr. Cohen's appointment as counsel, subject to his potential reappointment should Mr. Tappan file a petition to sell M.D.'s home. Tr. 66-67 (Cohen); DCX 40 at 011-13; *see also* DCX 5 at 036, entry 239.

85. Mr. Cohen understood that he served as M.D.'s counsel continuously from the September 30, 2015 hearing through the termination of his appointment. Tr. 163 (Cohen).

III. CONCLUSIONS OF LAW

Disciplinary Counsel Did Not Prove by Clear and Convincing Evidence that Respondent Violated Rule 4.2.

Respondent is charged with one Rule violation – Rule 4.2(a), which provides that, while representing a client,

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

The term “known” denotes “actual knowledge of the fact in question,” *see* Rule 1.0(f), which “may be inferred from circumstances.” *Id.*

1. Respondent was representing a client during the relevant period of time.

Respondent does not appear to contest that she was representing M.D.’s brothers in this matter. *See, e.g.*, Tr. 197-99 (Respondent). The record demonstrates she was serving as their attorney by the time she visited M.D. on April 16, 2016. *See* FF 27-31.

2. Respondent communicated with M.D. about the subject of the representation.

Respondent does not appear to contest that, on April 16, 2016, she communicated with M.D. about the guardianship and conservatorship proceedings. She acknowledges discussing with him his position on legal filings that would directly affect his care (FF 60) and also took notes about his personal property, which she later used in a filing on behalf of his brothers. FF 69.

3. Disciplinary Counsel did not prove by clear and convincing evidence that Respondent knew that M.D. was represented by another lawyer.

On April 11, 2016, Respondent attended the hearing at which Mr. Cohen identified himself as counsel, the court dealt with him as counsel, and the court confirmed Mr. Cohen’s availability for the next hearing. FF 41-49. Although Respondent initially credited Mr. Cohen’s representation at the hearing that he was M.D.’s counsel, her review of the docket immediately after the hearing, *i.e.*, docket entry 329 that stated that Mr. Cohen was dismissed as M.D.’s counsel, prompted her to question that initial assumption. *See* Tr. 94-96.

Two days later, Respondent served Mr. Cohen with a pleading that identified him as the attorney of record for M.D. FF 53-55. In discussing her filing of the April 13, 2016 Petition to Terminate Mr. Tappan's appointment, and her visit to M.D. three days later, Respondent testified:

Q [Disciplinary Counsel]: So as of April 13th, you were accepting his representation he was counsel for the –

A [Respondent]: Yes. I was – yes. I was accepting and trusting that he was going to appear and produce documentation he was counsel, because he said so, and he said so in open court, which made me believe it even more that it had credibility.

Q: Then within three days you had changed your mind? Is that your testimony?

A: No, at this point I'm not sure whether I was still waiting. I think I was probably – this is three days I think I was still waiting. Now by the time I filed the next pleading or visited with [M.D.] again I think I had a different attitude...

Tr. 305-06 (Resp.).

Respondent has argued that M.D. did not have an attorney at the time that Respondent contacted him. Resp. Br.⁷ at 63; Tr. 94-96. Respondent contends that Mr. Cohen's prior court-appointed attorney status had lapsed, by operation of law, and by the court's September 30, 2015 docket entry, and that there was no court

⁷ "Resp. Br." Refers to Respondent's Brief and Proposed Findings of Fact and Conclusions of Law.

order continuing the appointment. Resp. Br. at 63. Respondent specifically quotes from that docket entry, which states:

Attorney Dismissed
Attorney COHEN, Mr. BRETT E
dismissed/withdrawn for subject
[M.D.] on 09/30/2015

Id. at 41-44 (quoting DCX 5 at 046, entry 329).

At the June 1, 2016, hearing, the court addressed Mr. Cohen's motion to strike and stated that it had continued Mr. Cohen's appointment after September 30, 2015. FF 74. The court also stated that while it understood that attorneys in Mr. Cohen's position were often terminated as counsel for the ward following initial hearings, M.D.'s case, like some other cases, was different. *Id.* Probate Rule 305 ("Counsel for the subject of an intervention proceeding"), section (c) ("Termination of Appearance"), reflects the court's understanding. It provides:

The appearance of counsel for the subject of an intervention proceeding shall terminate upon the disposition of the petition for which counsel's appearance was entered, unless otherwise ordered by the Court.

When Respondent was retained as counsel for M.D.'s brothers, her initial assumption was that M.D. was not represented by counsel. This was based on her understanding of guardianship proceedings and Probate Rule 305(c). And, although Mr. Cohen participated at the April 11, 2016 hearing as M.D.'s counsel, Respondent's review of the docket entries for the case caused her to question his asserted status. The September 30, 2015 docket entries on this question were internally inconsistent.

Nor did Mr. Cohen produce an order of appointment after Respondent's request. It was not unreasonable for a Respondent to conclude that, because Mr. Cohen did not produce the promised order, he was not M.D.'s attorney as of April 16, 2016. Finally, at the June 1, 2016 hearing, Judge Fisher did not explicitly determine that Respondent had acted unreasonably. Instead, the court recognized that, pursuant to Probate Rule 305(c), the status of counsel for a ward would generally terminate upon the disposition of the petition for which the counsel's appearance had been entered. *See* FF 74.

Respondent, therefore, argues that, whatever she may have believed at the April 11, 2016 hearing, the court failed to take the necessary steps to continue Mr. Cohen's appointment as M.D.'s attorney after that hearing, and, therefore, Mr. Cohen was not in fact M.D.'s attorney. Respondent's argument essentially is that the court was not sufficiently explicit in continuing or reinstating Mr. Cohen's appointment, and therefore no attorney-client relationship existed between M.D. and Mr. Cohen. FF 69. Respondent concluded that the docket entry that recited the termination of Mr. Cohen's status as M.D.'s attorney indicated as such. Accordingly, in Respondent's mind, she did not violate Rule 4.2.

As noted above, Disciplinary Counsel must prove by clear and convincing evidence that Respondent "actually knew" that Mr. Cohen was M.D.'s lawyer when she met with him. The Hearing Committee recognizes that there is evidence that could support the conclusion that Respondent knew that M.D. was represented. But there is also significant contrary evidence. In light of the specific circumstances of

this case, the lack of a post-September 2015 order identifying Mr. Cohen as M.D.’s counsel, Mr. Cohen’s failure to produce an order of appointment, despite his promise to do so, the language of Probate Rule 305(c), and the inconsistent docket entries, the Hearing Committee cannot conclude, by virtue of clear and convincing evidence, that Respondent had “actual knowledge” that Mr. Cohen continued to represent M.D. in April-May 2016 when she met with M.D. In other words, because Disciplinary Counsel did not prove, by clear and convincing evidence, that Respondent knew that Mr. Cohen was M.D.’s attorney when Respondent communicated with him, the Committee finds that Disciplinary Counsel failed to meet its burden of proof that Respondent “communicate[d] about the subject of the representation with a party known to be represented by another lawyer in the matter” as required for a Rule 4.2(a) violation.⁸

⁸ In her brief, Respondent states that “more than five (5) years after the events, the Respondent is before the Board [on] Professional Responsibility with little evidence to support the allegation of an ethics violation.” The import of Respondent’s statement is unclear. To the extent that she raises an issue with an alleged delay in prosecution, she seeks no specific relief and has not identified any manner in which her defense was prejudiced by a delay in prosecution. And the Court of Appeals has never dismissed a disciplinary case solely on the basis of delay. *See In re Ponds*, 888 A.2d 234, 243 (D.C. 2005).

Additionally, Respondent raises broader claims that the Office of Disciplinary Counsel is biased in its prosecution of respondents. These claims are not properly addressed by the Hearing Committee, whose authority is limited to consideration of the formal charges of misconduct identified in the Specification of Charges before it. *See* Rule XI, § 5(c). Respondent’s complaints against Disciplinary Counsel must be raised directly with the Board on Professional Responsibility through its administrative review process.

IV. RECOMMENDED SANCTION

Because the Hearing Committee finds that the charge has not been proven, the Hearing Committee recommends that no sanction be imposed.

V. CONCLUSION

For the foregoing reasons, the Committee finds that Disciplinary Counsel has not demonstrated, by clear and convincing evidence, that Respondent has violated Rule 4.2 and the Committee recommends that this matter be dismissed.

AD HOC HEARING COMMITTEE

Theodore Hirt

Theodore C. Hirt, Chair

David Bernstein

David Bernstein, Public Member

Leonard J. Marsico

Leonard J. Marsico, Attorney Member

APPENDIX A
Post-Hearing Filings

- 1) On September 29, 2021, Respondent filed her Errata to Respondent's Brief and Proposed Findings of Fact and Conclusions of Law, purportedly "setting forth corrections to" her post-hearing brief.
- 2) On October 4, 2021, Disciplinary Counsel filed a Motion to Strike Respondent's filing on grounds that the filing proposed substantive additions to the original brief and that the briefing deadline had passed.
- 3) On October 14, 2021, Respondent filed a Reply and Appendix, responding to Disciplinary Counsel's post-hearing Reply brief.
- 4) On October 15, 2021, Respondent filed an amended Reply brief. On October 19, 2021, Respondent filed her Opposition to Office of Disciplinary Counsel's Motion to Strike the Respondent's Errata and the Respondent's (3rd) Motion to Supplement the Record and the Respondent's Motion to, Further, Amend the Respondent's Argument for Revamping the Disciplinary Process.
- 5) On October 19, 2021, Disciplinary Counsel filed a Motion to Strike "Respondent's Reply (Corrected)", contending that this filing also proposed substantive additions to the record.
- 6) On October 19, 2021, Respondent filed the following proposed exhibits - RX 41, RX 42, RX 44, and RX 45.
- 7) On October 21, 2021, Respondent filed an Opposition to Disciplinary Counsel's Motion to Strike the Respondent's Reply and Appendix.
- 8) On October 21, 2021, Disciplinary Counsel filed a Response to Respondent's Opposition to Office of Disciplinary Counsel's Motion to Strike the Errata and the Respondent's (3rd) Motion to Supplement the

Record and the Respondent's Motion to, Further, Amend the Respondent's Argument for Revamping the Disciplinary Process.

- 9) On October 22, 2021, Disciplinary Counsel filed a Statement Regarding Respondent's Opposition to Disciplinary Counsel's Motion to Strike the Respondent's Reply and Appendix.
- 10) On October 25, 2021, Respondent filed her Final Motion to Allow the Respondent to Supplement and Amend her Argument for Revamping the Disciplinary Process. That next day, Disciplinary Counsel filed a Motion to Strike that pleading on grounds that her requests to supplement were past the briefing deadlines and that Respondent's arguments are outside the scope of these proceedings.
- 11) On October 28, 2021, Respondent filed an Opposition to Motion to Strike Final Motion to Amend Arguments for Revamping the Disciplinary Process.