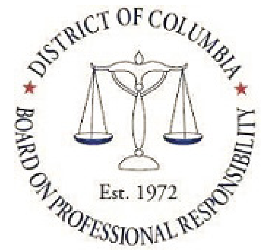
THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*



DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Issued
May 31, 2022

In the Matter of:	:	
	:	
AZUBUIKE OSEMENE,	:	
	:	
Respondent.	:	Board Docket No. 18-BD-105
	:	Disc. Docket No. 2017-D101
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 496245)	:	

REPORT AND RECOMMENDATION OF THE BOARD ON PROFESSIONAL RESPONSIBILITY

An Ad Hoc Hearing Committee concluded that Respondent, Azubuike Osemene, violated D.C. Rules of Professional Conduct 1.5(b), by failing to provide the client with a writing setting forth the basis or rate of his fee or the scope of the representation, and l.6(a), by knowingly revealing a client's secret. The Hearing Committee also found that Respondent gave false testimony during the disciplinary hearing, and recommended that Respondent be publicly censured.

Disciplinary Counsel takes no exception to the Hearing Committee Report. Respondent argues that the D.C. Court of Appeals lacks jurisdiction over the conduct at issue, that he did not violate any Rules and should not be sanctioned.

We agree with the Hearing Committee, and recommend that the Court conclude that Respondent violated Rules 1.5(b) and 1.6(a), and we further recommend that Respondent be publicly censured. We adopt the Hearing Committee Report, which is attached hereto and incorporated by reference herein.

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

We briefly summarize the relevant facts, and address Respondent's arguments to the Board.[1]

Factual Summary

Respondent practices immigration law in California. He is not a member of the California Bar, and is permitted to practice in the immigration courts by virtue of his D.C. Bar membership. Beginning in 2015, Respondent had an arrangement with the "Legal Clinic," a California-based law firm. The Legal Clinic would accept new clients and outsource the clients' immigration matters to Respondent. Respondent and the Legal Clinic evenly divided the fees.

In November 2015, the client at issue ("the Client"), met with a non-lawyer at the Legal Clinic, who told him that Respondent would handle his immigration removal case for $5,000. This was only the second client Respondent represented through the Legal Clinic. Respondent had previously agreed with the Legal Clinic that the fee for these types of cases would be $5,000. Respondent relied on the Legal Clinic to perform client intake functions, including providing an engagement agreement. Neither the Legal Clinic nor Respondent gave the Client an engagement agreement, although it was the Legal Clinic's standard practice to do so. The Client twice asked Respondent for a copy of the engagement letter, but Respondent did not provide it.

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[1] The Hearing Committee concluded that Disciplinary Counsel failed to prove certain charged Rule violations. Because Disciplinary Counsel has not filed exceptions regarding those Rule violations, we do not address them here.

In July 2016, the Client became dissatisfied with Respondent's representation, fired him, and demanded a refund of the $2,050 in fees paid during the course of the representation. Respondent agreed to refund $1,700. On or about August 23, 2016, Respondent filed a motion to withdraw. The motion disclosed derogatory information about the Client that is the basis for improperly disclosing client secrets: asserting that the Client was "rude, belligerent and absolutely uncooperative, . . . unruly, . . . failed to provide the information [Respondent] requested, . . . [and] failed to cooperate making it doubly, doubly difficult if not impossible to prepare his defense."

On November 1, 2016, the immigration court granted Respondent's motion to withdraw. Several months later, March 8, 2017, the Client, represented by new counsel, filed a disciplinary complaint against Respondent.

Respondent's Motion to Dismiss

Respondent moved to dismiss the charges against him, arguing that the Court of Appeals does not have disciplinary jurisdiction over the alleged misconduct, and that he did not engage in any misconduct. The Hearing Committee recommended that the motion be denied, and we agree.

As a D.C. Bar member, Respondent is subject to the disciplinary jurisdiction of the Court and the Board, regardless of where the alleged misconduct occurred. D.C. Bar R. XI, § 1(a) ("All members of the District of Columbia Bar, . . . are subject to the disciplinary jurisdiction of this Court and its Board on Professional Responsibility."); D.C. Rule 8.5(a) ("A lawyer admitted to practice in this

jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs."). We further agree with the Hearing Committee that Respondent violated two Rules, and thus, there is no merit to his second ground for dismissal.

Respondent's motion to dismiss is denied.

Choice of Law

Respondent also argues that pursuant to D.C. Rule 8.5(b), the Hearing Committee should have applied the Rules of the Executive Office for Immigration Review at the Department of Justice ("the EOIR") to the alleged misconduct because those rules apply to practitioners practicing before the immigration courts. The Hearing Committee agreed that the alleged failure to provide an engagement letter, and the alleged disclosure of client secrets in the motion to withdraw occurred in connection with an immigration court proceeding, and thus, the EOIR Rules should apply. However, as the Hearing Committee discussed, the EOIR Rules are not a comprehensive substitute for state disciplinary rules. They do not contain rules analogous to D.C. Rules 1.5(b) or 1.6(a), and the Board of Immigration Appeals (which has the authority to sanction practitioners in immigrations courts) expects that state rules will fill such "gaps" in the EOIR Rules. *See* Professional Conduct for Practitioners—Rules and Procedures, and Representation and Appearances, 73 Fed. Reg. 76914, 76915 (Dec. 18, 2008) ("Although EOIR does not seek to supplant the disciplinary functions of the various state bars, this rule aims to strengthen the existing rules in light of the apparent gaps in the current regulation."); *see also*

Gadda v. Ashcroft, 377 F.3d 934, 939 (9th Cir. 2004) (the federal immigration regulatory scheme did not preempt California's authority to regulate the conduct of immigration attorneys pursuant to California disciplinary rules). Thus, the Hearing Committee applied the D.C. Rules because it determined that the BIA intended for "state rules," here the D.C. Rules, to apply to the misconduct at issue. We agree with the Hearing Committee's choice of law analysis.

I. Disciplinary Counsel Proved by Clear and Convincing Evidence that Respondent Did Not Provide an Engagement Agreement to the Client.

Respondent's brief to the Board did not contest the Hearing Committee's conclusion that he violated Rule 1.5(b), which requires that a lawyer who has not regularly represented a client to provide a writing setting forth "the basis or rate of the fee, the scope of the lawyer's representation, and the expenses for which the client will be responsible." At oral argument before the Board, Respondent described the Legal Clinic's standard practice of providing an engagement agreement to clients. He then speculated that the Legal Clinic does not have a copy of that agreement because it gave the only copy to the Client, after he fired Respondent. The Hearing Committee, relying on the Client's testimony (and the lack of a copy of the agreement), found that the Client was not provided an engagement agreement, despite twice asking Respondent for it.

We agree with the Hearing Committee, that despite Respondent's relationship with the Legal Clinic and his reliance on the Legal Clinic to perform client "intake" functions, as the sole counsel for the Client, Respondent was responsible for making sure that the Client received the writing required by Rule 1.5(b). When the Client

twice asked for a copy of the letter, it was clear that he had not received it from the Legal Clinic. Respondent's failure to provide the writing following specific client requests violated Rule 1.5(b).

II. Disciplinary Counsel Proved by Clear and Convincing Evidence that Respondent Knowingly Disclosed Client Secrets.

Rule 1.6 prohibits a lawyer from knowingly disclosing a client "secret," which is defined as "information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client." *See* Rule 1.6(a)(1), 1.6(b). An otherwise prohibited disclosure is permitted with the client's informed consent, which means "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Rule 1.6(e)(1), 1.0(e) (defining "informed consent").

This charged Rule violation arises out of the following representations in Respondent's affidavit submitted in support of the motion to withdraw as the Client's counsel:

> [the Client] came to counsel's office in a rude, belligerent and absolutely uncooperative manner. He showed up with a woman he said was his girlfriend. Both were loud and unruly. [The Client] declared he did not require the services of counsel and counsel agreed and told him it was his right to choose who represents him. Counsel then admonished him that whether he retains other counsel or not, he must appear at all scheduled court [sic] until his case is concluded. He said he did not need any advise [sic] or counsel, collected his deposit and left and this counsel has not heard from or seen him since nor does counsel expect to. [The Client] has neither provided the information

> requested nor cooperated with counsel. [The Client] has failed to cooperate making it doubly, doubly difficult if not impossible to prepare his defense and according to [the Client], he does not need the services of this or other counsel.

HC Rpt. at ¶ 30.

Respondent argued that this disclosure did not violate Rule 1.6(a) because (1) nothing in the motion was embarrassing to the Client; (2) it did not disclose any case-related information; (3) the Client waived any prohibitions on disclosure because the conduct at issue occurred in a public area of the Legal Clinic, and thus was viewed by others; (4) the Client consented to the disclosure; and (5) Respondent was permitted to make this disclosure because the Client complained about Respondent's representation. We disagree with Respondent's arguments.

First, a lawyer's public assertions that his client was rude, belligerent and absolutely uncooperative and unruly, among other derogatory characterizations, would likely be embarrassing or detrimental to a client. Disclosures "tending to demean or belittle" a client are "contrary to the fundamental principle that the attorney owes a fiduciary duty to his client and must serve the client's interests with the utmost loyalty and devotion." *In re Gonzalez*, 773 A.2d 1026, 1031 (D.C. 2001).

Second, Rule 1.6 does not apply only to case-related information, but by its plain language it also applies to "information gained in the professional relationship." As the Court recognized in *Gonzalez*

> [i]f there had been no professional relationship, then the alleged facts of which Gonzalez complained—A.A.'s non-payment of her fees, her lack of cooperation, and her misrepresentations—would not have

> existed, and Gonzalez would neither have known them nor revealed them.

Id. at 1030. Like Gonzalez, had Respondent not been in a professional relationship with the Client, he would not have known the information that he disclosed in the withdrawal motion. As the information disclosed was gained in his professional relationship with the Client, Rule 1.6(a) applies.

Third, there is no merit to Respondent's argument that the protections of Rule 1.6 do not apply to conduct witnessed by others. He seems to argue that Rule 1.6 is co-extensive with the attorney-client privilege, but it is not, as addressed by Comment [8]: "This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of the information or the fact that others share the knowledge. It reflects not only the principles underlying the attorney-client privilege, but the lawyer's duty of loyalty to the client." *Accord, Gonzalez*, 773 A.2d at 1031.

Fourth, Respondent did not have his client's "informed consent" to make the disclosures, as required by Rule 1.6(e)(1). "Informed consent" means

> the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

Rule 1.0(e). Respondent argues that the Client did not object to the disclosures either when Respondent orally informed him that he would tell the immigration court about the Client's conduct, or after reviewing the copy of the withdrawal motion. The Hearing Committee did not make any findings regarding Respondent's assertion that

he orally informed the Client that he would disclose the Client's behavior to the immigration court. The Hearing Committee found that the Client did not receive the withdrawal motion because it had been sent to the wrong address.

However, even if Respondent orally informed the Client that he intended to make the disclosure, and even if the Client received the withdrawal motion before it was filed, Respondent did not have the Client's informed consent because Respondent does not even suggest that he explained to the Client the material risks of the disclosure, and reasonably available alternatives. These explanations are essential to obtaining informed consent. As there is no evidence that the Client was informed of material risks and reasonably available alternatives, Disciplinary Counsel has proven by clear and convincing evidence that Respondent did not have informed consent. *See In re Szymkowicz*, 195 A.3d 785, 789 (D.C. 2018) (per curiam) (where a respondent asserts that he received informed consent, Disciplinary Counsel must prove by clear and convincing evidence that it "was not obtained.")

Finally, Respondent's disclosures in the motion to withdraw were not done to defend against a complaint about his representation because the Client had not yet complained about his representation. Rule 1.6(e)(3) permits the disclosure of client secrets "to the extent reasonably necessary to respond to specific allegations by the client concerning the lawyer's representation of the client." Respondent filed the motion to withdraw in August 2016, but the disciplinary complaint was not filed until May 2017. Thus, the Rule 1.6(e)(3) exception does not apply here.

Sanction

The Hearing Committee found clear and convincing evidence that Respondent testified falsely that he had no role in determining the amount of the fee or the refund. The Hearing Committee concluded, "Respondent deliberately refused to acknowledge his role in determining the fee and the refund to support his erroneous claim that he merely 'worked the file' for the Legal Clinic and had no attorney/client relationship with" the Client. HC Rpt. at 67. Respondent argues that the Legal Clinic employees who testified that he determined the fee and the refund were lying. But he offers no proof of this, other than his own testimony.

"Whether [a] respondent gave sanctionable false testimony before the Hearing Committee is a question of ultimate legal fact that the Board and [the] court review *de novo*." *In re Bradley*, 70 A.3d 1189, 1194 (D.C. 2013). Unlike *Bradley*, there is no evidence here (other than Respondent's testimony) that detracts from the Hearing Committee's credibility determination. Our *de novo* review finds no reason to disturb the Hearing Committee's conclusion that Respondent testified falsely on these two points to bolster his argument that he was just "working the case" for the Legal Clinic.

We further agree with the Hearing Committee, that but for the false testimony, an Informal Admonition may have been consistent with the sanction imposed in cases involving comparable misconduct. *See* D.C. Rule XI, § 9(h)(1). However, false testimony to a Hearing Committee is a significant aggravating factor. *See In*

re Cleaver-Bascombe, 892 A.2d 396, 411-13 (D.C. 2006).[2] Thus, we agree with the Hearing Committee that Respondent should be publicly censured by this Court.

Conclusion

For the foregoing reasons, the Board recommends that the Court conclude that Respondent violated D.C. Rules 1.5(b) and 1.6(a), and that the Court publicly censure him.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: Sara K. Blumenthal
Sara K. Blumenthal, Public Member

All Board Members concur in this Report and Recommendation.

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[2] Although Disciplinary Counsel did not take exception to the Hearing Committee's recommended sanction, at oral argument it encouraged the Board to consider certain uncharged misconduct in aggravation of sanction. Specifically, that after his discharge, Respondent opposed the Client's motion to reopen his immigration proceedings, and disclosed information in that opposition that the Hearing Committee determined could be considered client confidences or secrets. We agree with the Hearing Committee that the uncharged misconduct should not be considered in aggravation of sanction because "an attorney can be sanctioned only for those disciplinary violations enumerated in formal charges." *See In re Slattery*, 767 A.2d 203, 209 (D.C. 2001) (quoting *In re Smith*, 403 A.2d 296, 300 (D.C. 1979). Disciplinary Counsel confirmed at oral argument that the Specification of Charges did not even allege the facts set forth above, much less that they constituted a Rule violation. Therefore, this additional alleged misconduct should not be considered in aggravation of sanction.

THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY
AD HOC HEARING COMMITTEE

FILED

Jan 28 2022 3:37pm

Board on Professional Responsibility

In the Matter of:	:	
	:	
AZUBUIKE OSEMENE,	:	
	:	
Respondent.	:	Board Docket No. 18-BD-105
	:	Disc. Docket No. 2017-D101
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 496245)	:	

REPORT AND RECOMMENDATION OF
THE AD HOC HEARING COMMITTEE

Respondent, Azubuike Osemene, is charged with violating multiple Disciplinary Rules including the California Rules of Professional Conduct (effective from September 14, 1992 to October 13, 2018) (the "California Rules"), California Business and Professions Code (the "BPC"), Rules applicable in immigration proceedings ("BIA Rules"), and the District of Columbia Rules of Professional Conduct (the "D.C. Rules"), arising from his alleged misconduct while representing a client in an immigration matter and during the subsequent disciplinary investigation.

Disciplinary Counsel contends that Respondent committed all of the charged violations, and should be suspended for six months as a sanction for his misconduct and required to prove his fitness to practice before reinstatement based on aggravating factors including his alleged false testimony during the hearing.

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

Respondent argues that this matter should be dismissed on the grounds that the District of Columbia Court of Appeals lacks jurisdiction in this matter because under D.C. Rule 8.5(b)(1) and (2)(ii), the Rules of the Executive Office of Immigration Review as set forth in 8 C.F.R. § 1003.102 apply to his representation of the client. Alternatively, Respondent contends that the Specification of Charges should be dismissed because he did not violate any of the Rules.

As set forth below, the Hearing Committee finds that Disciplinary Counsel has proven by clear and convincing evidence that Respondent violated D.C. Rule 1.5(b), in that Respondent failed to provide the client with a written document setting forth the basis or rate of his fee or the scope of the representation. The Hearing Committee also finds that Respondent violated D.C. Rule l.6(a), in that Respondent knowingly revealed a secret of his client. The Hearing Committee finds that the remaining charges have not been proven by clear and convincing evidence. The Hearing Committee recommends that Respondent receive a public censure. D.C. Bar Rule XI, § 3(a)(5).

I. PROCEDURAL HISTORY

On January 9, 2019, Disciplinary Counsel served Respondent with a Specification of Charges ("Specification").

The Specification alleges that related to the representation of Erwin Jimenez Montepeque in removal proceedings pending before the Immigration Court in Los Angeles, California, Respondent violated the following rules:

- California Rule 3-500 and/or 8 C.F.R. § 1003.102(r) and/or D.C. Rule 1.4(a), in that Respondent failed to keep his client

reasonably informed about the status of their matter and promptly comply with reasonable requests for information;

- California Rule 3-500 and/or D.C. Rule l.4(b), in that Respondent failed to explain a matter to the extent reasonably necessary to permit his client to make informed decisions regarding the representation;

- California Code, Business and Professions Code, BPC § 6148 and/or D.C. Rule 1.5(b), in that Respondent failed to provide the client with a written document setting forth the basis or rate of his fee or the scope of the representation;

- California Rule 3-100 and/or D.C. Rule l.6(a), in that Respondent knowingly revealed a secret of his client without authorization; "secret" refers to other information gained in the professional relationship, the disclosure of which would be embarrassing, or would likely be detrimental to the client;

- California Rule 3-700 and/or D.C. Rule 1.16(d), in that Respondent, in connection with the termination of representation, failed to take timely steps to the extent reasonably practicable to protect his client's interests, including surrendering papers and property to which his client was entitled; and

- California Code, Business and Professions Code, BPC § 6106 and/or D.C. Rule 8.4(c), in that Respondent engaged in conduct involving dishonesty, deceit, or misrepresentation.

DX 2, Specification ¶ 32(a)-(f).

Respondent filed an answer on January 29, 2019. Respondent included a motion to dismiss in his post-hearing brief, and we include a recommended disposition of Respondent's motion below.

A hearing was held on July 17-18, 2019, before this Ad Hoc Hearing Committee (the "Hearing Committee").[1] Disciplinary Counsel was represented at the hearing by Assistant Disciplinary Counsel Caroll Donayre Somoza, Esquire. Respondent was present during the hearing and represented himself *pro se*.

An additional hearing day was held on October 9, 2019, to address an unsworn letter submitted by Respondent's witness, Moshe Bibiyan, seeking to correct his hearing testimony.

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 facts 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 facts sought to be established") (internal quotations and citation omitted).

A. Background

1. Respondent is a member of the Bar of the District of Columbia Court of Appeals, having been admitted by motion on February 3, 2006, and assigned Bar

[1] The transcript for the July 18 hearing date was initially filed with incorrect pagination that was nonconsecutive with the July 17 transcript. On October 10, 2019, a corrected transcript was filed, revising the pagination such that the transcripts from all three hearing days are consecutively paginated. Because the corrected transcript was filed after the majority of the post-hearing briefing was complete, it was not cited in the parties' briefs. Nevertheless, for ease of review, we cite to the corrected July 18 transcript throughout and recognize such as the official transcript of record.

number 496245. DX 1; Tr. 191-92 (Respondent). He is also licensed in Maryland. Tr. 191 (Respondent).

2. Respondent is an immigration attorney who practices in California. Tr. 191 (Respondent). At one time he also had an immigration law practice in the District of Columbia, but he closed that office in 2013. Tr. 195-96 (Respondent). From 2015 to the present, Respondent has had an arrangement with the "Legal Clinic," a California based law firm, pursuant to which the firm would accept new clients and outsource the clients' immigration matters to Respondent, with the legal fees divided 50/50 between Respondent and the Legal Clinic. Tr. 199-202, 297, 353-57 (Respondent); Tr. 463-65 (Bibiyan). Respondent's arrangement with Legal Clinic was based on an oral understanding and was not memorialized in writing. Tr. 353-57 (Respondent). Respondent explained that he "worked the file" for Legal Clinic's clients, but he did not consider himself to be the client's attorney, even in cases where he entered his appearance and was listed as attorney-of-record. Tr. 237-39 (Respondent). Respondent also maintains a separate legal practice of his own, known as the East-West Law Center. Tr. 195 (Respondent).

B. Jimenez Montepeque Representation

3. Mr. Jimenez Montepeque is a native of Guatemala. RX 21; Tr. 27 (Montepeque). At the time of his July 2019 hearing testimony, he resided at 8810 Memorial Park Avenue, Apartment 112, Northridge, California 91343, where he had lived for the past two years. Tr. 27 (Montepeque). He previously resided at 19344 Wyandotte Street, Apartment 227, Northeast, Reseda, California. Tr. 27

(Montepeque). Immigration Court records, however, show him living at 8024 Zelzah Avenue, Reseda, California, 91335, until approximately March 8, 2017, even though he testified that he left that address in or before 2013 and moved to 8604 Corbin Avenue, Northridge, California. DX 14 at 33; Tr. 80-81 (Montepeque).

4. In May of 2013, Mr. Jimenez Montepeque was arrested in California for a violation of the California Penal Code and a violation of the California Vehicle Code for which he subsequently was convicted. RX 21. In response, the Office of Immigration and Customs Enforcement (ICE) initiated deportation proceedings against Mr. Jimenez Montepeque. *See* RX 21. Beginning in 2013, he had to remain under ICE supervision until his removal case could be resolved, which required that he regularly report to ICE. Tr. 34 (Montepeque); Tr. 358-59 (Respondent).

5. In late 2015, Mr. Jimenez Montepeque sought the assistance of an immigration attorney. He had a court date for his removal case, although it kept being rescheduled. Tr. 28 (Montepeque). An acquaintance referred Mr. Jimenez Montepeque to the Legal Clinic. Tr. 29 (Montepeque). On November 24, 2015, Mr. Jimenez Montepeque visited the Legal Clinic and met Blanca Ortega. Tr. 447 (Ortega). Ms. Ortega worked as a Spanish interpreter at the law firm. Tr. 444-45 (Ortega).

6. Mr. Jimenez Montepeque explained to Ms. Ortega that he needed legal representation for his immigration removal case. Tr. 30, 177 (Montepeque). Mr. Jimenez Montepeque does not speak English, but Ms. Ortega was able to translate for him. Tr. 27, 29 (Montepeque); *see* Tr. 423-24 (Ortega). She explained that this

case would be handled by Respondent, who was not in the office at that time. Tr. 29-30 (Montepeque). She also told Mr. Jimenez Montepeque that Respondent would represent him in his removal case in Immigration Court in California for a flat fee of $5,000, and that he could pay in $350 monthly installments. Tr. 30-31 (Montepeque); Tr. 447-48, 452 (Ortega); Tr. 465 (Bibiyan).

7. The agreement that Mr. Jimenez Montepeque would pay $5,000 for representation was between Mr. Jimenez Montepeque and the Legal Clinic. Tr. 35, 61-63 (Montepeque). Respondent was not present at the November 24, 2015 meeting, and Mr. Jimenez Montepeque and Respondent did not directly agree to any terms of the representation. Tr. 35-36 (Montepeque). However, Respondent had advised Legal Clinic of the amount of the legal fee that the Legal Clinic should charge for a representation of this nature. Tr. 452 (Ortega); Tr. 465 (Bibiyan).

8. At the meeting with Ms. Ortega on November 24, 2015, Mr. Jimenez Montepeque agreed to make an initial $1,000 payment and then pay additional monthly installments of $350 until the $5,000 was paid in full. DX 14 at 14; Tr. 31-32 (Montepeque). He paid $50 at the initial meeting and returned the next day to pay an additional $950, for a total of $1,000. DX 14 at 14; *see* Tr. 31-32 (Montepeque). These payments were made to Legal Clinic; Mr. Jimenez Montepeque did not make any payments directly to Respondent. Tr. 109 (Montepeque). Mr. Jimenez Montepeque understood that, in return for his payments to the Legal Clinic, "Attorney Osemene would represent me in court hearings,

inform me of what was happening with my immigration case and in the future, provide me with an immigration document such as a work permit." DX 5 at 3.

9. For the cases he receives through the Legal Clinic, Respondent relies on the Legal Clinic to perform the client intake functions. Tr. 355 (Respondent). The Legal Clinic maintains its own file for its client and provides a copy to Respondent when it assigns the case to him. Tr. 227 (Respondent). During the November 24, 2015 meeting, an unidentified person at the Legal Clinic completed an intake sheet that identified Mr. Jimenez Montepeque's current address as "19344 Wyandotte [Street,] Apt 27[, Northeast,] Reseda 91335." DX 4 at 8; *see* Tr. 64-65 (Montepeque); Tr. 448-49 (Ortega). In fact, this address was incorrect in a key detail: Mr. Jimenez Montepeque's actual apartment number was "227," not "27." Tr. 27, 64-65, 174 (Montepeque).

10. The Legal Clinic and Respondent failed to provide Mr. Jimenez Montepeque with a written retainer agreement at intake or any other time. Tr. 32 (Montepeque); Tr. 240-41 (Respondent). It is the normal practice of the Legal Clinic to provide its clients with a retainer agreement. Tr. 464, 472-74 (Bibiyan). Respondent relied on Legal Clinic to provide retainer agreements for the clients it referred to him, and he did not complete a separate retainer agreement with those persons. Tr. 228-29, 237, 239-241, 355-56 (Respondent). Respondent saw a version of the retainer agreement that Legal Clinic typically used in 2015, but he never saw a retainer agreement between Legal Clinic and Mr. Jimenez Montepeque. Tr. 355-57 (Respondent). Mr. Jimenez Montepeque testified that he requested a retainer

agreement from Respondent at least twice but Respondent did not provide him with one. Tr. 32-33 (Montepeque). During the hearing, the Hearing Committee Chair requested a copy of the retainer agreement pertaining to the representation of Mr. Jimenez Montepeque and asked Respondent to submit it, if it existed. Tr. 475 (HC Chair). Neither Respondent nor the Legal Clinic has been able to produce a copy of a retainer agreement that Legal Clinic actually provided to Mr. Jimenez Montepeque or produce witness testimony to confirm that any written agreement ever actually existed for his case. The Hearing Committee therefore credits Mr. Jimenez Montepeque's testimony that no such written agreement was provided, despite his requests.

11. Respondent only began collaborating with Legal Clinic approximately one month before Mr. Jimenez Montepeque's case, and Mr. Jimenez Montepeque was only the second client Respondent represented through the Legal Clinic. Tr. 278-79, 352-53 (Respondent). Following the evidentiary hearing in this matter, Respondent filed a supplemental exhibit purporting to be an example of the Attorney-Client Retainer Agreement that Legal Clinic was utilizing with its clients in November 2015. RX 22. That one-page document states that the "Firm" (defined as the Legal Clinic) will represent the client and that the Firm "retains the exclusive right to determine which of its attorneys will participate in the Client['s] representation," but makes no mention of the use of outside or associated counsel on its cases or to the division of responsibilities and fees with such counsel. *See* RX 22.

12. In January 2016, Mr. Jimenez Montepeque met Respondent for the first time on his third visit to the Legal Clinic office. Tr. 33 (Montepeque); DX 5 at 4. Respondent did not speak Spanish, so Ms. Ortega translated for Mr. Jimenez Montepeque. Tr. 29, 32-33 (Montepeque); Tr. 450-51 (Ortega). Following the first in-person meeting, Respondent called the Immigration Court and learned that Mr. Jimenez Montepeque's removal case had not yet been scheduled for a hearing. Tr. 271-73 (Respondent). Respondent told Mr. Jimenez Montepeque that he was "safe" for now but that he should write down his "story" explaining when and why he came to the United States so that Respondent could evaluate his case. Tr. 273-75, 359-361, 529 (Respondent). Respondent needed this information to determine whether Mr. Jimenez Montepeque could make a claim for asylum, taking into account his failure to raise such a claim within the mandatory one-year period following his entry into the United States. Tr. 360-63 (Respondent). Respondent testified that he and Ms. Ortega asked Mr. Jimenez Montepeque to provide additional documents several times, although he acknowledges that those requests were not put in writing. Tr. 274-79 (Respondent). Mr. Jimenez Montepeque, however, denied that either Respondent or Ms. Ortega asked him for any documents or a declaration. Tr. 156-57 (Montepeque). Thus, we have conflicting testimony from Respondent and Mr. Jimenez Montepeque. We have identified significant credibility issues with both individuals. *See* FOFs 24, 37, 48-49, 52, 54-59. Ms. Ortega, whose testimony we find credible, testified that Respondent's practice is to request relevant documents and a declaration from his clients, that this practice was

followed in Mr. Jimenez Montepeque's case, and that Mr. Jimenez Montepeque failed to provide the requested materials. Tr. 422-23 (Ortega). We therefore accept Respondent's testimony on this issue.

13. During their first in-person meeting Respondent requested a copy of Mr. Jimenez Montepeque's driver's license and birth certificate, which he provided. Tr. 35 (Montepeque); *see also* Tr. 65 (Montepeque); Tr. 203-04 (Respondent). Respondent made copies and returned the original documents to Mr. Jimenez Montepeque. Tr. 35, 66-67 (Montepeque). Mr. Jimenez Montepeque made another payment during this visit. Tr. 32-34 (Montepeque).

14. The driver's license that Mr. Jimenez Montepeque provided to Respondent was issued on May 19, 2015. DX 4 at 9; Tr. 65-68 (Montepeque). The address on the driver's license is "8510 Columbus Ave, Apt 212, North Hills, California 91343." DX 4 at 9; *see* Tr. 66-68 (Montepeque). In fact, Mr. Jimenez Montepeque was no longer living at the address shown on his license when the license was issued; he left that address in 2014. Tr. 69-70 (Montepeque). He told Respondent that he was not living at the address shown on the license and to send all correspondence to him at the 19344 Wyandotte Street address. Tr. 70 (Montepeque).

15. Mr. Jimenez Montepeque gave the outdated address on his driver's license to the State of California in 2015 so that the license could be mailed to that address. His friend was still living there, and he was confident his friend would give him the license when it arrived, which the friend in fact did. Tr. 69-70, 176

(Montepeque). The friend still lived at that address in 2016, and the friend would have notified Mr. Jimenez Montepeque of any mail he received that was addressed to Mr. Jimenez Montepeque. Tr. 71-72, 176-77, 180 (Montepeque).

16. During his initial visit to the Legal Clinic, Mr. Jimenez Montepeque was told that an appointment was necessary to meet with Respondent. Tr. 104 (Montepeque). In February 2016, Mr. Jimenez Montepeque went to the Legal Clinic's office to make a payment. Tr. 208-211 (Respondent); DX 5 at 4. He had not made an appointment, but he waited several hours to talk to Respondent. DX 5 at 4; *see* Tr. 37, 107 (Montepeque). When Respondent arrived, he assured Mr. Jimenez Montepeque that his case was going well and that it would take time. *See* Tr. 36-37, 79 (Montepeque); DX 5 at 4. Ms. Ortega translated for Mr. Jimenez Montepeque. DX 5 at 4; *see* Tr. 79 (Montepeque); Tr. 450-51 (Ortega).

17. On or about February 22, 2016, approximately three months after being retained on November 24, 2015, Respondent entered his appearance in the removal case, as Mr. Jimenez Montepeque's "attorney or representative." Tr. 285 (Respondent); DX 14 at 30.

18. In total, Mr. Jimenez Montepeque paid about $2,050 to the Legal Clinic for representation. Tr. 36 (Montepeque).

19. Apart from the two face-to-face meetings described in FOFs 12 and 16, *supra*, Respondent did not personally provide Mr. Jimenez Montepeque with any updates about his case during the pendency of his representation. *See* Tr. 37-39 (Montepeque). Respondent himself never initiated a call, wrote a letter, or sent a

text to Mr. Jimenez Montepeque until Respondent sent Mr. Jimenez Montepeque a copy of his motion to withdraw. Tr. 37-39, 47-49 (Montepeque); Tr. 230-31, 235-36 (Respondent); *see* FOF 26. Instead, Respondent relied on the office interpreter for the Legal Clinic, Ms. Ortega, to communicate with Mr. Jimenez Montepeque. Tr. 230-36, 276-79, 291-92 (Respondent). Ms. Ortega communicated with Mr. Jimenez Montepeque by text message. Tr. 38 (Montepeque).

20. Prior to the termination of the representation, apart from the two face-to-face meetings referenced above, Respondent's actions on behalf of Mr. Jimenez Montepeque consisted of just two things: calling the Immigration Court to ascertain the status of Mr. Jimenez Montepeque's case and filing a notice of appearance in that case. Tr. 201-211, 215, 272-74 (Respondent). Respondent generally takes notes when he meets with a client or reviews a client's documents, but in Mr. Jimenez Montepeque's case he either took no notes or very few notes because the client provided no documents for him to review. Tr. 205-07, 210, 224-26 (Respondent).

21. In addition to wanting the Legal Clinic's help with his immigration case, Mr. Jimenez Montepeque also wanted help in obtaining a work permit and anticipated that would be part of the representation as well. Tr. 178 (Montepeque). At some point, Ms. Ortega told him there would be an additional $1,000 fee for that service, but Mr. Jimenez Montepeque decided not to go forward with that service because by that time he did not trust the Legal Clinic. Tr. 178 (Montepeque).

C. Termination of the Representation

22. Toward the end of July 2016, probably on July 24 or 25, Mr. Jimenez Montepeque went to meet with Respondent with a female friend, Ms. Cepeda, who Mr. Jimenez Montepeque was paying to translate for him. Tr. 42-43, 105, 128-29, 171 (Montepeque); Tr. 292-94 (Respondent); Tr. 413-15 (Bibiyan). Mr. Jimenez Montepeque wanted to know what exactly Respondent was doing on his case. Tr. 37, 42-43 (Montepeque); Tr. 292-94 (Respondent). In addition to Respondent, Moishe Bibiyan, the office manager for Legal Clinic, was also present. Tr. 413, 460-61, 466 (Bibiyan). Ms. Cepeda translated for Mr. Jimenez Montepeque and also asked questions of Respondent. Tr. 43 (Montepeque); Tr. 292-94 (Respondent). She asked Respondent what he had done. Respondent showed her a piece of paper, to which she responded that she could have done that herself. Tr. 42-45 (Montepeque). There is no evidence as to what was on the piece of paper.

23. Mr. Jimenez Montepeque told Respondent that if he was not going to work on the case, he wanted a full refund of the $2,050 he had paid. Tr. 37, 44-45 (Montepeque); Tr. 296 (Respondent); Tr. 414 (Bibiyan). During the meeting, Mr. Jimenez Montepeque expressed his displeasure with Respondent's handling of the case. Tr. 43-44 (Montepeque). Mr. Jimenez Montepeque decided to terminate the representation at this time. He and Respondent discussed a refund of the fee. Tr. 42-45, 185-86 (Montepeque). Mr. Jimenez Montepeque ceased making any further payments for Respondent's services after the meeting. Tr. 47, 121-22 (Montepeque).

24. Respondent agreed to refund $1,700 to Mr. Jimenez Montepeque. Tr. 46 (Montepeque); Tr. 467 (Bibiyan). Although Respondent suggested through his testimony and questioning of witnesses that he played no role in negotiating the refund, Mr. Bibiyan, the Legal Clinic's office manager called as a witness by Respondent, credibly testified that Respondent agreed that the Legal Clinic should refund $1,700 to Mr. Jimenez Montepeque. Tr. 108, 186 (Montepeque); Tr. 294-97, 312-13 (Respondent); Tr. 464-65, 467 (Bibiyan). We therefore find credible Mr. Jimenez Montepeque's testimony that Respondent was present for at least part of the negotiations over the refund. Tr. 44, 185-86 (Montepeque). Moreover, we cannot ascribe the conflicts in the testimony on this issue to a mere difference of recollection between Respondent and Mr. Jimenez Montepeque. Given the testimony of Mr. Bibiyan, we find that Respondent testified falsely when he refused to acknowledge his role in determining the refund to support his claim in these disciplinary proceedings that he merely "worked the file" for the Legal Clinic and had no attorney/client relationship with Mr. Jimenez Montepeque. *See* FOF 2.

25. On July 27, 2016, the Legal Clinic issued a check to Mr. Jimenez Montepeque in the amount of $1,700. DX 5 at 15. These funds were returned from the Legal Clinic's coffers, as Respondent had not yet received his share of Mr. Jimenez Montepeque's payment. *See* Tr. 598-604 (Bibiyan's testimony from October 9, 2019, correcting his testimony from July 18, 2019 (Tr. 842-849) that Respondent had in fact been paid his share and contributed half of the refund). Mr. Bibiyan provided inconsistent testimony on this point, but his testimony, as

corrected, stands without contradiction. On July 27, 2016, Mr. Jimenez Montepeque's friend, Ms. Cepeda, visited the Legal Clinic office to pick up the check. Tr. 46, 171 (Montepeque). During that visit, Ms. Cepeda signed a document that was intended to be signed by Mr. Jimenez Montepeque acknowledging receipt of the $1,700 refund and receipt of "all the documents from my file from the Law Offices of Marc a [sic] Biederman[2] and The Legal Clinic." DX 4 at 6. The record does not reflect to what extent the Legal Clinic provided Ms. Cepeda with originals versus copies of documents in its file, but the Legal Clinic retained at least a copy of its file, as Ms. Ortega subsequently offered to provide a copy of that file to Mr. Jimenez Montepeque's successor counsel. *See* FOF 38. Respondent has his own file that he did not provide to Ms. Cepeda or Mr. Jimenez Montepeque, but it contained substantially the same documents as the file maintained by the Legal Clinic. Tr. 300-01 (Respondent); *see* FOF 9. Mr. Jimenez Montepeque cashed the refund check that Ms. Cepeda picked up from the Legal Clinic and provided to him. Tr. 46 (Montepeque). He testified that he did not receive any of the accompanying documents from his file. Tr. 173 (Montepeque). We believe it more likely, however, that Ms. Cepeda would also have given him the documents she received from the Legal Clinic at the same time she gave him the check. No reason has been suggested to the Committee why she would not have done so.

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[2] Mr. Biederman apparently owned The Legal Clinic at the time of the events at issue. Tr. 212 (Respondent).

D. The Motion to Withdraw

26. On or about August 23, 2016, Respondent filed with the Immigration Court a motion to withdraw and be relieved as counsel for Mr. Jimenez Montepeque ("Motion to Withdraw"). DX 6 at 13-15. Respondent testified that he did not file the Motion to Withdraw immediately after the July meeting because in his experience sometimes the client changes his mind. Tr. 305 (Respondent). Instead, Respondent mailed a copy of the as yet unfiled Motion to Mr. Jimenez Montepeque on or about August 15, 2016. Tr. 305-07 (Respondent). Respondent only sent an English language version of the Motion, even though Respondent knew Mr. Jimenez Montepeque did not speak English. Tr. 344-45 (Respondent). When he did not hear anything further from Mr. Jimenez Montepeque, and after receiving notice that the Immigration Court had scheduled a hearing for November 1, 2016 in Mr. Jimenez Montepeque's case, Respondent filed the Motion to Withdraw with the court on or about August 23, 2016. Tr. 289, 302-07 (Respondent).

27. The Motion to Withdraw, signed by Respondent, states that it was served on Mr. Jimenez Montepeque at "his last known address of record" which it identifies as both "19344 Wyandotte Street, Apt 27, Reseda, CA 91335," listing the wrong apartment number for Mr. Jimenez Montepeque, and "8510 Columbus Ave, Apt 212, North Hills, CA 91343," listing the address from Mr. Jimenez Montepeque's driver's license. DX 6 at 15; *see* FOFs 9, 14. Mr. Jimenez Montepeque denied ever receiving a copy of Respondent's Motion to Withdraw from Respondent or the Legal Clinic. Tr. 47-48 (Montepeque).

28. The Immigration Court did not grant the Motion to Withdraw until the November 1, 2016, hearing. DX 6 at 9; DX 11 at 10; Tr. 289, 336 (Respondent). Therefore, Respondent continued to be counsel of record for Mr. Jimenez Montepeque until that date and would have received any notices the Immigration Court sent in Mr. Jimenez Montepeque's case. Tr. 289, 336 (Respondent).

29. In the Motion to Withdraw, Respondent stated that Mr. Jimenez Montepeque "has failed to cooperate with counsel and has failed to comply with requests making it difficult for counsel to continue representing [him]." DX 6 at 14. Respondent also stated that Mr. Jimenez Montepeque "showed up at counsel's office in a rude and abusive manner creating disruption in counsel's office and demanded that he did not want to be represented anymore." DX 6 at 14; Tr. 340-42 (Respondent).

30. In a Declaration accompanying the Motion to Withdraw, Respondent stated that Mr. Jimenez Montepeque

> came to counsel's office in a rude, belligerent and absolutely uncooperative manner. He showed up with a woman he said was his girlfriend. Both were loud and unruly. [Mr. Jimenez Montepeque] declared he did not require the services of counsel and counsel agreed and told him it was his right to choose who represents him. Counsel then admonished him that whether he retains other counsel or not, he must appear at all scheduled court [sic] until his case is concluded. He said he did not need any advise [sic] or counsel, collected his deposit and left and this counsel has not heard from or seen him since nor does counsel expect to. [Mr. Jimenez Montepeque] has neither provided the information requested nor cooperated with counsel. [Mr. Jimenez Montepeque] has failed to cooperate making it doubly, doubly difficult

> if not impossible to prepare his defense and according to [Mr. Jimenez Montepeque], he does not need the services of this or other counsel.

DX 6 at 17; Tr. 343-44 (Respondent).

31. Respondent asserts that nothing in his Motion to Withdraw or supporting Declaration constituted a client "secret" or was otherwise improper to disclose because "[i]t was the truth" and Respondent "stated it as diplomatically as possible." Tr. 341, 399, 483 (Respondent). Respondent also asserts that Mr. Jimenez Montepeque "found nothing objectionable or embarrassing" in those filings because Mr. Jimenez Montepeque did not alert Respondent to any objections between the August 15, 2016 date on which Respondent mailed the proposed motion to Mr. Jimenez Montepeque and the August 23, 2016 date on which Respondent filed it. Respondent's Post-Hearing Brief ("Resp. Br.") at 11. However, as noted above, Respondent's proposed Motion to Withdraw was not sent to Mr. Jimenez Montepeque's correct address, and Mr. Jimenez Montepeque testified that he did not receive a copy of it until several months later, when it was provided by his new attorney. DX 6 at 15; Tr. 46-48 (Montepeque); FOF 45. Respondent also never spoke with Mr. Jimenez Montepeque in any detail about the content of Respondent's Motion to Withdraw. Tr. 50 (Montepeque); Tr. 341-42 (Respondent).

E. <u>The November 1, 2016 Hearing Notice</u>

32. On or about August 15, 2016, Respondent received notice that a hearing had been scheduled in Mr. Jimenez Montepeque's case for November 1, 2016. Tr. 289, 303 (Respondent); DX 5 at 19.

33. The November 1, 2016 hearing was a master calendar hearing at which a foreign national must appear to be informed of the charges against him and answer questions from the Immigration Court related to the government's request for removal. Tr. 365-66 (Respondent). If the foreign national appears for the first master calendar hearing, he will not be deported at that time and a second master calendar hearing will be scheduled to address any defenses. Tr. 365-66, 368-70 (Respondent). But if he does not appear, an order of removal will be entered against him in absentia if the Department of Homeland Security establishes by clear, unequivocal and convincing evidence that he or his attorney has been provided the notice of hearing and he is removable. DX 5 at 19.

34. At the first master calendar hearing, the foreign national identifies the charges he admits and those he contests. Tr. 365-66, 368-69 (Respondent). At the second master calendar hearing, the foreign national must produce the documents he intends to rely on at the trial on the merits, including a declaration from the foreign national if he is seeking asylum. Tr. 369 (Respondent). The Immigration Court will not accept a statement from the lawyer; the court expects a declaration from the person seeking asylum. Tr. 369-70 (Respondent).

35. Respondent did not send the hearing notice to Mr. Jimenez Montepeque until September 20, 2016, approximately one month after he received it. DX 4 at 10; Tr. 307-08 (Respondent). According to Respondent, he did not send the notice earlier because it was not an emergency, since the November 1, 2016 hearing was several months away. Tr. 307 (Respondent). As with Respondent's prior

correspondence, Respondent mailed his September 20, 2016 cover letter with the hearing notice to "Erwin Montepeque Jimenez" (rather than Erwin Jimenez Montepeque) at two addresses, with the wrong apartment number listed for Mr. Jimenez Montepeque's Wyandotte Street address and the second copy sent to the Columbus Avenue address from Mr. Jimenez Montepeque's driver's license. DX 4 at 10; *see also* DX 6 at 16.

36. Respondent also reports, based on information he received from an unknown source, that on an unspecified date sometime after "early September 2016," Mr. Jimenez Montepeque came to the Legal Clinic office when Respondent was not present and picked up an envelope that contained a copy of the hearing notice. Tr. 396-98 (Respondent); RX 9. According to Respondent, Mr. Jimenez Montepeque refused to sign an acknowledgment of receipt that had been drafted by Respondent and included certain additional acknowledgements. *Id.* Nonetheless, an unidentified Legal Clinic employee gave Mr. Jimenez Montepeque the envelope containing the hearing notice, notwithstanding Respondent's written instructions that "Montepeque must sign note inside here before you hand him the other envelope." Tr. 396-98; RX 9. The Hearing Committee does not find this reported incident to be credible, both because it rests on untested and unverifiable hearsay and because it conflicts with Mr. Jimenez Montepeque's testimony that the only notice he received of the November 1, 2016 hearing date was through text messages from Ms. Ortega. *See* FOF 37.

37. Mr. Jimenez Montepeque testified that he never received written notice from Respondent or the Legal Clinic of the November 1, 2016 hearing date. Tr. 48, 160-61 (Montepeque). He admitted, however, that prior to the November 1, 2016 master calendar hearing, Ms. Ortega sent him a text message about a probable or possible court date, but he did not take it seriously "because they themselves did not take their word seriously." Tr. 117-18 (Montepeque). Despite receiving this information from Ms. Ortega, Mr. Jimenez Montepeque did not call the court to determine whether in fact a hearing date had been scheduled in his case. Tr. 118 (Montepeque). Instead, he wrote back to Ms. Ortega saying, "I don't believe it." Tr. 121 (Montepeque). Although he may not have received written notice of the November 1, 2016 hearing date, under the circumstances, Mr. Jimenez Montepeque's claim that he did not receive *any* notice of the hearing is not credible.

38. Ms. Ortega also credibly testified that, at Respondent's request, she contacted Mr. Jimenez Montepeque by phone a few days before the November 1, 2016 hearing to remind him of the court date. Tr. 430-32 (Ortega). Mr. Jimenez Montepeque responded that he now had a different attorney and his court date was not until the following year (*i.e.*, 2017). Tr. 431-32 (Ortega). When Ms. Ortega asked for the phone number of the new attorney so that she could forward copies of the documents in the Legal Clinic file, Mr. Jimenez Montepeque stated that she had no need for the phone number because the Legal Clinic had nothing further to do with his case. Tr. 430-32 (Ortega).

F. The November 1, 2016 Hearing

39. Mr. Jimenez Montepeque was notified by Ms. Ortega that his hearing was scheduled for November 1, 2016, but he did not appear in court on that date. Tr. 48 (Montepeque). As a result, the Immigration Court ordered that he be removed from the United States. DX 6 at 6-7.

40. Although he admits receiving a text message from Ms. Ortega about the hearing, Mr. Jimenez Montepeque denied receiving the September 20, 2016 letter from Respondent that enclosed the notice of the November 1, 2016 hearing. Tr. 117-18, 181 (Montepeque). As noted above, the letter was mailed to "Erwin Montepeque Jimenez" (rather than Erwin Jimenez Montepeque) at two addresses: "19344 Wyandotte Street, #27, Reseda, CA 91335" (rather than Apartment 227), and "8510 Columbus Ave, #212, North Hills, CA 91343" (the address from Mr. Jimenez Montepeque's driver's license). DX 4 at 10; *see* FOF 9. With respect to the first address, the incorrect apartment number was the result of a clerical error made by an unidentified employee of the Legal Clinic during the client intake process. FOF 9. No letters from Respondent to Mr. Jimenez Montepeque were returned as undeliverable by the United States Postal Service. Tr. 388-89 (Respondent). Thus, Respondent was not alerted to the error with respect to the apartment number. With respect to the second address, Mr. Jimenez Montepeque does not know whether his friend who lived at the Columbus Avenue address received the September 20, 2016 letter. Tr. 181 (Montepeque). But he is confident that if his friend received the letter he would have given it to him. Tr. 176, 180

(Montepeque). Because Mr. Jimenez Montepeque's friend still resided at the Columbus Avenue address in 2016 and would have given him any mail he received, it is likely that Mr. Jimenez Montepeque's friend notified him that he received Respondent's September 20, 2016 letter. There is no evidence in the record contradicting Respondent's claim that he mailed the September 20, 2016 letter to the Columbus Avenue address.

41. Although Respondent remained Mr. Jimenez Montepeque's attorney of record until the November 1, 2016 hearing, Respondent did not appear for the hearing or contact the court about his absence. DX 11 at 10. Nonetheless, at the hearing, the Immigration Court granted Respondent's Motion to Withdraw as counsel for Mr. Jimenez Montepeque, subject to the requirement that he "will remain the Attorney of Record for the limited purpose of service of any in absentia order an Immigration Judge might issue." DX 14 at 29.

G. The Motion to Rescind the Immigration Court's Removal Order

42. In November 2016, Mr. Jimenez Montepeque received a text message from Ms. Ortega with a screenshot of a court notice reflecting or referring to the order of deportation in his case. Tr. 48, 160-61 (Montepeque); Tr. 336-38 (Respondent).

43. On or about November 4, 2016, Respondent sent a letter to Mr. Jimenez Montepeque enclosing the removal order issued by the Immigration Court. DX 7 at 16-17; Tr. 336-38 (Respondent). The letter was sent only in English, not Spanish. Tr. 338 (Respondent). As with prior correspondence, the letter was mailed to "Erwin

Montepeque Jimenez" (transposing his names) at "19344 Wyandotte Street, #27, Reseda, California 91335" (listing the wrong apartment number) and "8510 Columbus Ave, #212, North Hills, CA 91343" (the address of Mr. Jimenez Montepeque's friend). DX 7 at 16. As with other correspondence from Respondent, Mr. Jimenez Montepeque denied receiving the November 4, 2016 letter from Respondent that enclosed the copy of the removal order. Tr. 48-49 (Montepeque).

44. In December 2016, Mr. Jimenez Montepeque hired successor counsel for his immigration case. Tr. 47, 161 (Montepeque).

45. After successor counsel obtained information from the Immigration Court, she advised Mr. Jimenez Montepeque of the events that had happened after his last meeting with Respondent in July 2016, including that Respondent had filed a Motion to Withdraw. Tr. 47, 50-51 (Montepeque).

46. On or about March 8, 2017, with the assistance of his successor counsel, Mr. Jimenez Montepeque filed a complaint against Respondent with the District of Columbia Office of Disciplinary Counsel. DX 5.

47. On March 10, 2017, Mr. Jimenez Montepeque's successor counsel filed with the Immigration Court a Motion to Rescind *In Absentia* Removal Order and Reopen Proceedings ("Motion to Rescind"). DX 14; Tr. 161-62 (Montepeque). Mr. Jimenez Montepeque's successor counsel did not serve a copy of the Motion to Rescind on Respondent, which Respondent contends was required. DX 14 at 34; Resp. Br. at 6.

48. In support of the Motion to Rescind, Mr. Jimenez Montepeque signed a sworn Declaration stating that he had not received notice of the November 1, 2016 hearing and that Respondent had failed to inform him of the hearing date. DX 14 at 20-21, 23. In his Declaration, Mr. Jimenez Montepeque failed to mention the text message and telephone call he received from Ms. Ortega informing him of the hearing date, or that he disregarded the information she provided. *Id.*; *see* FOFs 37-38. Instead, he claimed that Ms. Ortega "told me that they had no obligation to inform me of the court date since they had returned some of my money and I did not want them to continue with my case." DX 14 at 20.

49. In the same Declaration, Mr. Jimenez Montepeque also stated that he had not resided at the Columbus Avenue address "in years," and that he was "not even sure how Attorney Osemene got this prior address of mine since I never gave it to him." DX 14 at 19. In fact, according to his hearing testimony, Mr. Jimenez Montepeque himself provided the driver's license with the outdated address to Respondent and, even though Mr. Jimenez Montepeque no longer lived there, his friend lived at that address in 2016 and would have forwarded any mail he received for Mr. Jimenez Montepeque. FOFs 13-15.

50. On March 22, 2017, the Immigration Court granted Mr. Jimenez Montepeque's Motion to Rescind. DX 16; Tr. 162 (Montepeque). On April 10, 2017, Respondent filed an Opposition or Motion to Reconsider that decision of the Immigration Court. DX 15; Tr. 346-47. In his filing, Respondent advocated for the rescission of the relief the Immigration Court had already granted to Mr. Jimenez

Montepeque, claiming that Mr. Jimenez Montepeque "knowingly and intentionally misled and deceived" the Immigration Court and that "a fraud is being perpetrated against the court and the legal system." DX 15 at 3.

51. Respondent also prepared a sworn Declaration dated April 4, 2017, which he submitted to the Office of Disciplinary Counsel and also appears to have been included as part of his April 10, 2017 filing with the Immigration Court. DX 6 at 2-4; DX 15 at 5-7. In his Declaration, Respondent stated that he had timely notified Mr. Jimenez Montepeque of the November 1, 2016 hearing by letter and via phone calls from Ms. Ortega. DX 15 at 6-7, 17. At the end of the Declaration, Respondent asserted that Mr. Jimenez Montepeque had "[made] up false tales" and "perpetrate[d] a fraud on the court" and that he "must be denied any and all immigration relief." DX 15 at 7.

52. In this same Declaration, Respondent claimed to have attended the November 1, 2016 hearing, even though the Immigration Judge stated on the record at the hearing that Respondent was not present and had not contacted the court regarding his absence. DX 11 at 10; DX 15 at 6. Respondent's Declaration included specific details about his purported attendance at the hearing, including that he "arrived [at] the court at about 8:14 a.m., signed in and took a seat"; that he contacted Ms. Ortega while he waited in court and asked her to contact Mr. Jimenez Montepeque to remind him about the hearing; that the court called the case around 10:30 a.m., granted Respondent's Motion to Withdraw, and ordered Mr. Jimenez Montepeque's removal in absentia; and that "[t]he court asked counsel to

do one final thing – serve the removal order on Erwin Montepeque." DX 15 at 6; Tr. 321-31 (Respondent).

53. On April 13, 2017, the Immigration Court denied Respondent's Opposition or Motion to Reconsider, noting that the letters Respondent had sent to Mr. Jimenez Montepeque had listed the incorrect apartment number. RX 12 at 25; Tr. 349-50 (Respondent); Tr. 162-63 (Montepeque).

H. Respondent's Representations to the Office of Disciplinary Counsel

54. After the Office of Disciplinary Counsel received Mr. Jimenez Montepeque's disciplinary complaint and Respondent's April 4, 2017 Declaration in response, the Office of Disciplinary Counsel requested and obtained a copy of the transcript from the Immigration Court's November 1, 2016 hearing. DX 11. The transcript confirmed that Respondent had not been present at the hearing. DX 11 at 10.

55. The Office of Disciplinary Counsel subsequently sent Respondent a copy of its draft charges, which referenced Respondent's failure to appear at the November 1, 2016 hearing. Respondent replied in an October 26, 2018 letter, denying that he had failed to appear for the hearing and insisting the "court record" would support his denial. RX 19.

56. At Respondent's request, on November 30, 2018, the Office of Disciplinary Counsel emailed and mailed Respondent a copy of the transcript from the November 1, 2016 hearing. DX 12; DX 13. That same day, Respondent sent a letter to the Immigration Court requesting permission to review the Immigration

Court's file for Mr. Jimenez Montepeque's case. RX 18; Tr. 318-19, 331-32, 376-77 (Respondent).

57. Respondent testified that his recollection was that he had been present at the November 1, 2016 hearing, and the Immigration Court's file did not indicate otherwise. Tr. 319, 331-32, 376-77 (Respondent). However, when Respondent reviewed the hearing transcript, he recognized that he had not in fact been present. Tr. 319, 331-32, 376-77 (Respondent). Respondent does not dispute the accuracy of the transcript with respect to whether he appeared, even though his own recollection differed. Tr. 319, 327-28, 332, 482 (Respondent).

58. Prior to the evidentiary hearing in this matter, Respondent did not expressly correct his previous statement to Disciplinary Counsel that he had been present at the November 1, 2016 hearing. Tr. 332-34 (Respondent). Instead, in response to the allegation in the Specification that he failed to appear, DX 2 at 4, Respondent stated that "[e]ven assuming Respondent did not appear in keeping with your complainant's wishes, there was no prejudice to him by the alleged non-appearance by Respondent." DX 4 at 3. Respondent also responded "Deny" to the allegations that "[a]fter Mr. Montepeque filed a complaint with Disciplinary Counsel, Respondent falsely stated that he appeared at the November 1, 2016 [hearing] in immigration court, signed in with the clerk, and waited for the case to be called" and that "Respondent falsely claimed that while he was in court he asked his secretary to contact Mr. Montepeque to remind him to appear, but that Mr. Montepeque dismissed the secretary's reminder." DX 2 at 5-6; DX 4 at 4.

59. At the evidentiary hearing, Respondent, relying on the Immigration Court transcript, expressly acknowledged that he was not in fact present at the November 1, 2016 hearing and that his statements to the contrary were not accurate. Tr. 319-28, 335-36 (Respondent). He explained that he may have confused another case he had around the same time that also had a motion to withdraw and that he had relied upon entries on his 2016 calendar, which he can no longer locate, for his initial responses to Disciplinary Counsel's inquiries. Tr. 320-26, 377 (Respondent). He testified that his erroneous representations were due to his "negligen[ce]" in not waiting for and consulting the hearing transcript, but he maintained that he had not deliberately misled or lied to Disciplinary Counsel. Tr. 331-32, 479 (Respondent).

III. CONCLUSIONS OF LAW

A. Motion to Dismiss

Respondent argues that this matter should be dismissed, contending that:

(1) the District of Columbia lacks jurisdiction in this matter because under D.C. Rule 8.5(b)(1) and Rule (2)(ii) the Rules of the Executive Office of Immigration Review as set forth in 8 C.F.R. § 1003.102 apply to his representation of the client; or

(2) the Specification should be dismissed because he did not violate any of the Rules.

Resp. Br. at 1, 14-16

The Hearing Committee has no authority to dismiss the charges, but only to make recommendations to the Board about the finding of a violation and appropriate

sanction. *In re Ontell*, 593 A.2d 1038, 1040 (D.C. 1991) (hearing committees are required "to defer rulings on substantive motions and to include recommendations on such motions in their reports to the Board"); Board Rule 7.16.

The Hearing Committee recommends that the Motion be denied. As explained below in Section III.B, the Committee does not agree with Respondent's choice of law argument. Moreover, as a member of the District of Columbia Bar, Respondent "is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs." D.C. Rule 8.5(a).

As to Respondent's argument that the charges should be dismissed because he did not violate any of the Rules, we have found clear and convincing evidence that Respondent violated D.C. Rules 1.5(b) and l.6(a). *See infra* Sections III.C.2 and III.C.3.

B. Choice of Law

D.C. Rule 8.5(b) provides:

> (b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the Rules of Professional Conduct to be applied shall be as follows:
>
> (1) For conduct in connection with a matter pending before a tribunal, the rules to be applied shall be the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise, and
>
> (2) For any other conduct,
>
> (i) If the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and

> (ii) If the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

Disciplinary Counsel maintains that the D.C. Rules apply to the alleged misconduct of failing to provide a retainer agreement and submitting false information to Disciplinary Counsel (Specification ¶¶ 32.c, 32.f). Pre-Hearing Statement of Disciplinary Counsel on Choice of Law at 3. Disciplinary Counsel maintains, however, that the California Rules apply to all other alleged violations (Specification ¶¶ 32.a, 32.b, 32.d, and 32.e). Pre-Hearing Statement of Disciplinary Counsel on Choice of Law at 2-3. According to Respondent, the alleged misconduct had its predominant effect "in no other jurisdiction but the immigration court," and therefore, under D.C. Rule 8.5(b)(1)(ii), the rules of the Immigration Court must apply. Resp. Br. at 15.

Respondent is licensed in the District of Columbia and in Maryland. FOF 1. Most of his alleged misconduct in the Jimenez Montepeque matter, however, involved conduct before a tribunal in California, the Immigration Court in Los Angeles. The Los Angeles Immigration Court falls under the jurisdiction of the Office of the Chief Immigration Judge, which is a component of the Department of Justice's Executive Office of Immigration Review ("EOIR"). *See* DCX 11. The Immigration Court is a "tribunal" within the meaning of D.C. Rule 8.5(b)(1). D.C. Rule 1.0(n)*; see In re Koeck*, Board Docket No. 14-BD-061 at 21 n.11 (BPR Aug.

30, 2017), *recommendation adopted on other grounds*, 178 A.3d 463 (D.C. 2018) (per curiam). The EOIR has its own Rules of Professional Conduct, 8 C.F.R. § 1003.102, governing attorney conduct before the Immigration Courts. Ultimately sanctions are issued by the Board of Immigration Appeals ("BIA").

The BIA's rules address an attorney's duty to maintain communication with a client, including the duty to consult with the client about the means by which the client's objectives are to be accomplished, to keep the client reasonably informed about the status of the matter, and to promptly comply with reasonable requests for information. 8 C.F.R. § 1003.102(r)(2)-(4). Therefore, under D.C. Rule 8.5(b)(1), Respondent is subject to Section 1003.102(r)(3) and (4) for the alleged failures to keep his client reasonably informed about the status of the Immigration Court proceeding and to promptly comply with reasonable requests for information. Specification ¶ 32.a. We also conclude that 8 C.F.R. § 1003.102(r)(2) applies to the charge that Respondent violated the duty to explain a matter to the extent reasonably necessary to permit the client to make informed decisions. Specification ¶ 32.b.

Respondent is also charged with dishonesty, deceit, and misrepresentation in connection with responses he provided to D.C. Disciplinary Counsel. Specification ¶ 32.f. That alleged misconduct did not occur before a tribunal, and therefore D.C. Rule 8.5(b)(1) does not apply. D.C. Rule 8.5(b)(2)(i) also does not apply because Respondent is licensed in both D.C. and Maryland. FOF 1. Under the first part of D.C. Rule 8.5(b)(2)(ii), "the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices." However, Respondent does

not principally practice in either D.C. or Maryland at the present time, having closed his D.C. office in 2013. FOF 2. But he has practiced immigration law in D.C., *id.*, while we have no evidence to suggest that he has ever done so in Maryland. And the principal effect of the alleged dishonesty, deceit, and misrepresentation was in the District of Columbia. We therefore agree with Disciplinary Counsel that the D.C. Rules of Professional Conduct (specifically D.C. Rule 8.4(c)) apply to the allegations of dishonesty, deceit, and misrepresentation.

The Disciplinary Counsel's remaining three allegations concern Respondent's duty to provide a retainer agreement, to protect the client's confidential information, and to avoid prejudice to the client's interests upon the termination of representation. Specification ¶¶ 32.c, 32.d, and 32.e. Those alleged violations occurred in connection with the Los Angeles Immigration Court proceeding. The BIA's rules do not address those specific violations. According to the BIA, however, its rules are not comprehensive and are not intended to replace state disciplinary rules. In *Matter of Rivera-Claros*, 21 I&N Dec. 599, 604 (BIA 1996), the BIA said:

> Regulations do exist for the disciplining of attorneys appearing before Immigration Judges. See 8 C.F.R. § 292.3 (1996). But those regulations, in their current form, are not intended to be a comprehensive set of rules governing the practice of law in the immigration field and, indeed, are not as broad as the American Bar Association's Model Rules of Professional Conduct (1995), for example. Moreover, there is no expeditious way for this Board to deal with the more routine attorney-related problems that periodically arise. Instead, for attorneys who may practice before us simply by virtue of their admission into a state bar or the bar of another recognized jurisdiction, we rely on the disciplinary process of the relevant jurisdiction's bar as the first, and ordinarily the fastest, means of identifying and correcting possible misconduct.

Although the BIA rules have been amended since 1996, the BIA's position regarding applicability of state disciplinary law has not changed. *See* Professional Conduct for Practitioners—Rules and Procedures, and Representation and Appearances, 73 Fed. Reg. 76914, 76915 (Dec. 18, 2008) ("Although EOIR does not seek to supplant the disciplinary functions of the various state bars, this rule aims to strengthen the existing rules in light of the apparent gaps in the current regulation."). Thus, federal law does not preempt state laws regulating immigration attorneys practicing before the EOIR, United States Citizenship and Immigration Services, or BIA. *Gadda v. Ashcroft*, 377 F.3d 934, 939 (9th Cir. 2004) (finding that the federal immigration regulatory scheme did not preempt California's authority to regulate the conduct of immigration attorneys pursuant to California disciplinary rules).

Therefore, although the violations alleged in Specification ¶¶ 32.c, 32.d, and 32.e occurred in connection with the Los Angeles Immigration Court proceeding, the BIA intends that state disciplinary rules apply to such violations because they are not covered by the BIA's own disciplinary rules. Moreover, when an attorney is authorized to practice in the Immigration Court by virtue of his membership in a state bar, the intent of the BIA's rules is that "the disciplinary process of the relevant jurisdiction's bar" should apply to the alleged violations.[3] In this case, the "relevant

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[3] *Matter of Rivera-Claros*, 21 I&N Dec. at 604.

jurisdiction's bar" is D.C., since Respondent was admitted to practice before the Immigration Court on the basis of his membership in the D.C. Court of Appeals' Bar.[4] By contrast, Respondent is not licensed in California. *See* FOF 1.

Pursuant to D.C. Rule 8.5(b)(1), then, "the rules of the tribunal provide otherwise" and direct us to look to the rules of D.C., as Respondent's licensing jurisdiction, rather than the rules of California even though the tribunal (Immigration Court) was sitting in California.

We therefore conclude that, under D.C. Rule 8.5(b)(1), the D.C. Rules of Professional Conduct apply to the violations alleged in Specification ¶¶ 32.c, 32.d, and 32.e.

C. Violations Charged

1. FAILURE TO COMMUNICATE WITH A CLIENT (8 C.F.R. § 1003.102(r))

Under 8 C.F.R. § 1003.102(r), a practitioner before the Immigration Court "shall be subject to disciplinary sanctions in the public interest" if he or she

> Fails to maintain communication with the client throughout the duration of the client-practitioner relationship. It is the obligation of the practitioner to take reasonable steps to communicate with the client in a language that the client understands. A practitioner is only under the obligation to attempt to communicate with his or her client using addresses or phone numbers known to the practitioner. In order to properly maintain communication, the practitioner should:

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[4] *See In re Johnson*, 158 A.3d 913, 915 n.1 (D.C. 2017) ("A lawyer admitted to our bar may be disciplined here for conduct occurring in another jurisdiction, and in appropriate cases, as here, subject to discipline here based on the ethics rules of the other jurisdiction. District of Columbia Rules of Professional Conduct 8.5 (a), (b).").

> (1) Promptly inform and consult with the client concerning any decision or circumstance with respect to which the client's informed consent is reasonably required;
>
> (2) Reasonably consult with the client about the means by which the client's objectives are to be accomplished. Reasonable consultation with the client includes the duty to meet with the client sufficiently in advance of a hearing or other matter to ensure adequate preparation of the client's case and compliance with applicable deadlines;
>
> (3) Keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation; and
>
> (4) Promptly comply with reasonable requests for information, except that when a prompt response is not feasible, the practitioner, or a member of the practitioner's staff, should acknowledge receipt of the request and advise the client when a response may be expected;

According to Disciplinary Counsel, Respondent "repeatedly and consistently failed to communicate adequately with Mr. Jimenez Montepeque about the status of his case." Disciplinary Counsel Post-Hearing Brief ("DC Br.") at 17-18. Disciplinary Counsel alleges, "Respondent failed to discuss strategies for achieving Mr. Jimenez Montepeque's goals, to seek out information and documents Respondent needed (to the extent Mr. Jimenez Montepeque had not already provided them), and most importantly, to inform his client of the scheduling of the merits hearing." *Id.* at 18.

We agree with Disciplinary Counsel that the most important allegation is that Respondent failed to inform Mr. Jimenez Montepeque of the November 1, 2016 Master Calendar hearing. "Master calendar hearings are held for pleadings, scheduling, and other similar matters." Immigration Court Practice Manual, Chapter

4.15(a) (Aug. 2, 2018).[5] Although this was not a "merits hearing," Mr. Jimenez Montepeque could be subject to an order of deportation if he failed to appear. *See* FOF 33. But we do not find by clear and convincing evidence that Respondent failed to notify Mr. Jimenez Montepeque of the hearing. On the contrary, we conclude that Mr. Jimenez Montepeque's claim that he did not receive notice of the hearing is not credible because it is inconsistent with his own testimony. FOFs 37-38. At a minimum, he received notice from Ms. Ortega that he chose to ignore. *Id.*

Respondent also sent a letter on or about September 20, 2016 to Mr. Jimenez Montepeque enclosing the notice of the November 1, 2016 hearing. One copy of the letter the was sent to "Erwin Montepeque Jimenez" with the correct street address but the wrong apartment number. FOF 35. The incorrect apartment number was the result of a clerical error made by an unidentified employee of the Legal Clinic during the client intake process. FOF 9. Because the September 20, 2016 letter was not returned to Respondent by the Postal Service, Respondent was not alerted to the error with respect to the apartment number. FOF 40.

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[5] DX 17 includes pages 1-3 and 17-36 of the August 2, 2018 Immigration Court Practice Manual. It does not include Chapter 4.15, but the Committee may take judicial notice of the quoted text from the Manual. *See* Fed. R. Evid. 201(b)(2). The August 2, 2018 Immigration Court Practice Manual is available at https://www.justice.gov/eoir/page/file/1084851/download. Although this version of the Immigration Court Practice Manual was issued after the facts underlying this disciplinary proceeding, the quoted portion is identical to prior versions of the Manual. *See, e.g.*, Immigration Court Practice Manual, Chapter 4.15(a) (June 10, 2013), https://www.justice.gov/eoir/pages/attachments/2015/02/02/practice_manual_review.pdf. Additionally, Respondent did not object to DX 17, and cited it in his brief. *See* Tr. 315-18, 382; Resp. Br. at 20.

The second copy of the September 20, 2016 letter was sent to the Columbus Avenue address on Mr. Jimenez Montepeque's driver's license. FOF 35. He no longer resided at that address, and he had so informed Respondent. FOF 14. Nevertheless, he had used the Columbus Avenue address as his mailing address for the driver's license even though he no longer lived there when he applied for the license. FOF 15. Because Mr. Jimenez Montepeque's friend still resided at the Columbus Avenue address in 2016 and would have given him notice of any mail he received, *id.*, it is likely that Mr. Jimenez Montepeque's friend would have notified him of receipt of the September 20, 2016 letter.

As Respondent's attempts to communicate with his client about the scheduling of the November 1, 2016 hearing were directed at the "addresses [and] phone numbers known to the practitioner," 8 C.F.R. § 1003.102(r), we do not find that Respondent failed to maintain communication in this regard. Although 8 C.F.R. § 1003.102(r) also requires a practitioner to communicate with the client in a language the client understands, and the Respondent sent communications to Mr. Jimenez Montepeque in English rather than Spanish, we do not find clear and convincing evidence of a communications violation on this ground alone, as there is no evidence Mr. Jimenez Montepeque received but could not understand the communications sent to him; the record also reflects that Mr. Jimenez Montepeque had access to people who could assist him with translation if needed. *See* FOF 22. Disciplinary Counsel also alleges generally that Respondent failed to communicate adequately with Mr. Jimenez Montepeque about the status of his case. Disciplinary

Counsel has identified two significant developments in the Immigration Court proceeding in the eight-month period during which Respondent represented Mr. Jimenez Montepeque. Those include Respondent's receipt of the hearing notice, which we have just discussed, and Respondent's filing of his Motion to Withdraw which, as discussed below in Section III.C.4, we conclude was sufficiently timely and appropriately addressed. Other than those matters, Disciplinary Counsel has not identified any specific significant development in the Immigration Court proceeding about which Mr. Jimenez Montepeque was not informed. *See* DC Br. at 18-20. The Immigration Court case was essentially in limbo, awaiting the scheduling of the master calendar hearing, until August of 2016 when the Immigration Court issued the notice of the November 1, 2016 hearing.

Thus, Disciplinary Counsel has not established by clear and convincing evidence that Respondent failed to inform Mr. Jimenez Montepeque of significant developments in the case.

Disciplinary Counsel emphasizes that Respondent had only several brief discussions with Mr. Jimenez Montepeque during the eight-month representation, and otherwise communicated with him through Ms. Ortega. DC Br. at 18. Disciplinary Counsel also alleges that "Respondent failed to discuss strategies for achieving Mr. Jimenez Montepeque's goals." *Id.* It is true that Respondent had only limited communication with Mr. Jimenez Montepeque during the eight-month representation. FOFs 12, 16, 19. The reasons for this, however, are in dispute. Respondent testified that he needed, and asked for, information and documents from

Mr. Jimenez Montepeque in order to evaluate his case. In particular, Respondent needed more information from Mr. Jimenez Montepeque to determine whether he could make a claim for asylum, given his failure to raise such a claim within the mandatory one-year period following his entry into the United States. FOFs 12, 20. Respondent could not have obtained the necessary information without the cooperation of Mr. Jimenez Montepeque. According to Respondent, Mr. Jimenez Montepeque's failure to comply with the requests for information made it difficult for Respondent to evaluate his case properly. Resp. Br. at 17. Mr. Jimenez Montepeque, however, testified that neither Respondent nor Ms. Ortega asked him for any documents or a declaration. FOF 12. Based on Ms. Ortega's credible testimony, we have accepted Respondent's testimony on this issue. *Id.* We therefore find that the charge of failing to discuss strategies for achieving Mr. Jimenez Montepeque's goals has not been established by clear and convincing evidence.

Disciplinary Counsel further charges that Respondent failed "to seek out information and documents Respondent needed (to the extent Mr. Jimenez Montepeque had not already provided them)." DC Br. at 18. Such misconduct, however, would constitute a failure to provide competent representation to a client, not a failure to communicate.[6] No violation of Respondent's duty to provide

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[6] An Immigration Court practitioner is subject to discipline if he or she

> (o) Fails to provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. Competent handling of a particular matter includes

competent representation was alleged in the Specification, so we may not consider such a claim. *See In re Slattery*, 767 A.2d 203, 209 (D.C. 2001).

In any event, even if Section 1003.102(r) applies, Disciplinary Counsel has not identified specific documents or information that Respondent allegedly should have obtained to support Mr. Jimenez Montepeque's claim for asylum. Disciplinary Counsel did not provide expert testimony or any other competent evidence to explain the actions that Respondent should have taken to fulfill his duty to obtain such documents or other information. Disciplinary Counsel has therefore not provided clear and convincing evidence of a violation of Section 1003.102(r).

2. CONFIDENTIAL INFORMATION OF A CLIENT (D.C. RULE 1.6(a))

Disciplinary Counsel alleges Respondent violated California Rule 3-100 in that Respondent disclosed secrets of his client and violated his duty of loyalty to the client. DC Br. at 15. Although we have concluded that the D.C. Rule applies to this charge, the D.C. Rule imposes sufficiently similar requirements as California law

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> inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.

8 C.F.R. § 1003.102(o).

regarding disclosure of secrets. *Compare* D.C. Rule 1.6, *with* California Rule 3-100, *and* BPC § 6068(e). D.C. Rule 1.6(a) provides:

> Except when permitted under paragraph (c), (d), or (e), a lawyer shall not knowingly:
>
> (1) reveal a confidence or secret of the lawyer's client;
> (2) use a confidence or secret of the lawyer's client to the disadvantage of the client;
> (3) use a confidence or secret of the lawyer's client for the advantage of the lawyer or of a third person.

D.C. Rule 1.6(b) defines a "secret" as "other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental to the client."

Respondent disclosed detrimental or embarrassing information about Mr. Jimenez Montepeque in the Motion to Withdraw and the attached Declaration he filed with the Immigration Court. FOFs 29-30. Respondent claimed that Mr. Jimenez Montepeque had failed to cooperate with him or comply with his requests. He also characterized Mr. Jimenez Montepeque's behavior as rude, abusive, and disruptive to his office. *Id.* When Respondent moved to withdraw from the case and included detailed, derogatory information about the client, the attorney was disclosing "secrets" of the client in violation of Rule 1.6(a). *See In re Gonzalez*, 773 A.2d 1026, 1030 (D.C. 2001).

Respondent argues that his disclosures were not a violation of D.C. Rule 1.6 because the disclosed information "was the truth" and "stated . . . as diplomatically as possible," and because Mr. Jimenez Montepeque did not immediately object when

sent a copy of Respondent's draft filing. FOF 31. As to the first point, Rule 1.6 does not, without more, permit disclosures of client secrets merely because those disclosures are truthful or diplomatic. As to the second point, Respondent had neither informed consent nor a reasonable belief of implied authorization to make the disclosures. *See* D.C. Rule 1.6(e)(1) and (4).

Respondent also did not have a valid ground to reveal client secrets under D.C. Rule 1.6(e)(3), which permits the use and disclosure of client secrets "to the extent reasonably necessary to establish a defense to a criminal charge, disciplinary charge, or civil claim, formally instituted against the lawyer, based upon conduct in which the client was involved, or to the extent reasonably necessary to respond to specific allegations by the client concerning the lawyer's representation of the client." At the time of Respondent's disclosures, there were no pending formal disciplinary charges or civil claims based on Respondent's conduct regarding Mr. Jimenez Montepeque. Mr. Jimenez Montepeque also had not yet made specific allegations concerning Respondent's representation of him to which Respondent needed to respond. Thus, Respondent's disclosures of client secrets in his Motion to Withdraw and attached Declaration were not reasonably necessary and were not justified under D.C. Rule 1.6(e)(3).

Subsequent to Respondent's filing of his Motion to Withdraw and attached Declaration, Mr. Jimenez Montepeque did include specific allegations concerning Respondent's representation of him in his Motion to Rescind the removal order, which he filed with the assistance of his successor counsel. FOFs 47-49. Despite

no longer having any role in the case, Respondent filed an Opposition or Motion to Reconsider and supporting Declaration which disclosed further information that could be construed as client confidences or secrets, including as to Mr. Jimenez Montepeque's knowledge and intent and what information Respondent had conveyed to him. FOFs 50-52. The Hearing Committee finds it unnecessary to decide, however, whether these disclosures by Respondent were reasonably necessary to rebut the allegations against him, as the Specification only alleges improper disclosures with respect to Respondent's Motion to Withdraw and attached Declaration. *See* DX 2 at 4-7.

In addition to the disclosures addressed above, Disciplinary Counsel further charges that, after the Immigration Court reopened Mr. Jimenez Montepeque's case, Respondent took affirmative steps to harm his former client. DC Br. at 16-17. Specifically, Respondent's Opposition or Motion to Reconsider and attached Declaration alleged that Mr. Jimenez Montepeque had committed immigration fraud and argued that he "must be denied any and all immigration relief." FOFs 50-51. If Respondent's Opposition had prevailed, Disciplinary Counsel maintains that Mr. Jimenez Montepeque would have been deported. DC Br. at 17.

Subsections (2) and (3) of D.C. Rule 1.6(a) prohibit the use of client confidences or secrets to the disadvantage of the client or for the advantage of the lawyer or a third person. In addition, although not expressly provided by the Rule, an attorney licensed in D.C. owes a "fiduciary duty of loyalty, full disclosure and trustworthiness" to a client. *In re Bernstein*, 774 A.2d 309, 315 (D.C. 2001); *see*

also Herbin v. Hoeffel, 806 A.2d 186, 197 (D.C. 2002) ("'[T]he attorney owes a fiduciary duty to [her] client and must serve the client's interest with the utmost loyalty and devotion.'") (quoting *In re Gonzalez*, 773 A.2d at 1031). D.C. Rule 1.3(b) also provides that "[a] lawyer shall not intentionally . . . (2) Prejudice or damage a client during the course of the professional relationship."

Nevertheless, "an attorney can be sanctioned only for those disciplinary violations enumerated in formal charges." *In re Slattery*, 767 A.2d at 209 (quoting *In re Smith*, 403 A.2d 296, 300 (D.C. 1979)). Disciplinary Counsel charged only that Respondent violated "California Rule 3-100 and/or D.C. Rule l.6(a), in that Respondent knowingly revealed a secret of his client without authorization," paralleling the language of subsection (1) of Rule 1.6(a). The Specification did not allege a violation of D.C. Rule 1.6(a) (2) or (3), nor does the Specification otherwise provide Respondent with sufficient notice of the alleged violation of his duty of loyalty to his client.

We therefore conclude that Disciplinary Counsel has proven by clear and convincing evidence that Respondent violated D.C. Rule 1.6(a)(1), but we also conclude that the Specification did not allege a violation of Rule 1.6(a)(2), Rule 1.6(a)(3), or Respondent's general duty of loyalty to his client.

3. FAILURE TO PROVIDE A RETAINER AGREEMENT (D.C. RULE 1.5(b))

Disciplinary Counsel charges Respondent with violating D.C. Rule 1.5(b), which provides:

> When the lawyer has not regularly represented the client, the basis or rate of the fee, the scope of the lawyer's representation, and the expenses for which the client will be responsible shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation.

Respondent had never represented Mr. Jimenez Montepeque in a matter before the events at issue in this case. At the outset of the representation, the Legal Clinic reached an oral agreement with Mr. Jimenez Montepeque that Respondent would represent him in the immigration matter for $5,000. FOF 6. However, neither the Legal Clinic nor Respondent provided Mr. Jimenez Montepeque with a written retainer agreement. FOF 10.

Respondent has never produced a copy of the retainer agreement that he contends the Legal Clinic provided Mr. Jimenez Montepeque. Respondent has offered only a sample retainer that the Legal Clinic may have used during the same period of time when Mr. Jimenez Montepeque engaged Respondent. RX 22. Mr. Jimenez Montepeque testified credibly that he requested an agreement more than once, but Respondent did not provide it. FOF 10. We therefore conclude that a violation of D.C. Rule 1.5(b) has been established by clear and convincing evidence.

In his hearing testimony, Respondent explained that he relied on the Legal Clinic to provide the retainer agreement for clients as part of the Legal Clinic's intake function. FOF 9. But his reliance was not reasonable. Even though

Respondent determined the cost of the representation, and was the only lawyer to meet with Mr. Jimenez Montepeque and the only lawyer affiliated with the Legal Clinic to appear as Mr. Jimenez Montepeque's counsel, Respondent did not confirm that the Legal Clinic prepared a retainer agreement for Mr. Jimenez Montepeque. FOFs 9-10. Respondent also did not confirm that his file contained a copy of such retainer agreement, even though he apparently received at least one other intake document from the Legal Clinic for Mr. Jimenez Montepeque's case. *See* FOFs 9, 40. Respondent did not have a written agreement with the Legal Clinic defining their respective responsibilities, nor a course of dealing with the Legal Clinic concerning intake documents upon which he could reasonably rely, as this was only the second client he had received from the Legal Clinic in their then-month-old collaboration. FOFs 2, 11. Respondent also did not ensure that whatever retainer agreement being prepared by the Legal Clinic was sufficient under the D.C. Rules (which apply to Respondent); for example, the purportedly representative sample agreement that Respondent provided to the Hearing Committee—for a different client referred to him by the Legal Clinic around the same time period—was between the Legal Clinic and that client, not between Respondent and the client. FOF 11; RX 22. That sample agreement also stated that the Legal Clinic and "its attorneys" would participate in the representation, but did not disclose that any lawyers outside of the firm (such as Respondent) would be participating in the representation, nor how the responsibilities would be divided between the lawyers, as would have been required by D.C. Rule 1.5(e). *See* FOF 11; RX 22. The Hearing Committee thus

concludes that Respondent did not take reasonable steps to ensure that, whether on his own or when utilizing the Legal Clinic's assistance for the intake function of his practice, Respondent complied with his obligations under D.C. Rule 1.5.[7]

Respondent also argues that Mr. Jimenez Montepeque did not retain him but instead retained the Legal Clinic as his attorney. Resp. Br. at 21. We must therefore determine whether an attorney-client relationship existed between Respondent and Mr. Jimenez Montepeque. The existence of an attorney-client relationship is not solely dependent on a written agreement, payment of fees, or the rendering of legal advice. *In re Lieber*, 442 A.2d 153, 156 (D.C. 1982). The D.C. Court of Appeals "consider[s] the totality of the circumstances to determine whether an attorney-client relationship exists." *In re Fay*, 111 A.3d 1025, 1030 (D.C. 2015) (citing *In re Lieber*, 442 A.2d at 156).

Here, the totality of the circumstances confirms that Respondent was the attorney for Mr. Jimenez Montepeque. Although Mr. Jimenez Montepeque's oral agreement was with the Legal Clinic, Ms. Ortega told him that Respondent would represent him in his immigration case, and the client made monthly payments based on that agreement. FOFs 7-8. It had been the Legal Clinic's practice since earlier in 2015, per an oral agreement with Respondent, to refer incoming immigration

[7] D.C. Rule 5.1 and 5.3 recognize that lawyers may delegate certain tasks to other lawyers or to non-lawyer employees or contractors. However, these Rules recognizes that lawyers relying on others must make reasonable efforts to ensure that subordinates comply with applicable Rules. Here, there is no evidence that Respondent made any efforts to ensure that Mr. Jimenez Montepeque received a written retainer. To be clear, we are not finding a violation of either D.C. Rule 5.1 or 5.3, neither of which were charged. We refer to these Rules to show only that Respondent's defense of reliance on the Legal Clinic's usual practice was not reasonable.

matters to Respondent. FOF 2. No evidence was presented to show that any attorney associated with the Legal Clinic other than Respondent met, spoke with, or played any role in representing Mr. Jimenez Montepeque. Mr. Jimenez Montepeque's meetings to discuss his case, although limited, were with Respondent. FOFs 12, 16. Respondent filed his entry of appearance in the case as the attorney for Mr. Jimenez Montepeque, making no mention of the Legal Clinic. FOF 17. Similarly, Respondent's Motion to Withdraw as counsel for Mr. Jimenez Montepeque was filed entirely on his own behalf; it does not mention the Legal Clinic or any other attorney. *See* DX 7 at 8-9. As in *In re Fay*, 111 A.3d at 1031, Respondent "cannot now deny his professional relationship with [Mr. Jimenez Montepeque], which he earlier represented to the court as existing."

During the hearing, Respondent frequently focused on whether he had participated in negotiating the refund to Mr. Jimenez Montepeque or had actually received any money from the Legal Clinic in connection with this representation, in an apparent attempt to minimize his relationship with Mr. Jimenez Montepeque. While Respondent may be correct that the Legal Clinic had not yet disbursed to him his share of Mr. Jimenez Montepeque's payments, the Hearing Committee concluded that Respondent did, in fact, participate in negotiating the refund to Mr. Jimenez Montepeque. FOFs 23-25. This strengthens the conclusion that he was counsel. In any event, neither of the factors cited by Respondent, individually or together, outweigh the other factors described above, which convincingly

demonstrate that an attorney-client relationship existed between Respondent and Mr. Jimenez Montepeque.

It was therefore Respondent's responsibility to create a retainer agreement or cause one to be created and provided to Mr. Jimenez Montepeque. He admittedly never did, and he is therefore responsible for the ethical violation.

4. TERMINATION OF REPRESENTATION (D.C. RULE 1.16(d))

Disciplinary Counsel charges Respondent with a number of violations related to the termination of his representation of Mr. Jimenez Montepeque. DC Br. at 18-20. Although Disciplinary Counsel alleges these violations occurred under California Rule 3-700, we have concluded that D.C. Rule 1.16(d) applies. It provides:

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

Disciplinary Counsel charges Respondent with failing to return the client's file after he was discharged by Mr. Jimenez Montepeque. However, on July 27, 2016, Mr. Jimenez Montepeque's friend, Ms. Cepeda, visited the Legal Clinic on his behalf to pick up the refund check and signed a document acknowledging receipt of both the $1,700 refund and "all the documents from my file from the Law Offices of Marc a [sic] Biederman and The Legal Clinic." FOF 25. It is undisputed that Mr.

Jimenez Montepeque cashed the refund check, which he must have received from Ms. Cepeda, and there is not clear and convincing evidence that Ms. Cepeda gave Mr. Jimenez Montepeque the check but not the documents she received from the Legal Clinic. *Id.* In any event, Disciplinary Counsel has failed to prove by clear and convincing evidence that the Legal Clinic did not provide a copy of the documents in its file to Ms. Cepeda, and Respondent could not be found to have violated D.C. Rule 1.16(d) as to the file maintained by the Legal Clinic even if Ms. Cepeda failed to deliver these documents to Mr. Jimenez Montepeque.

Respondent admitted he did not return his personal file to Mr. Jimenez Montepeque. FOF 25. Respondent testified that he keeps a working file with a copy of documents from the Legal Clinic file, but Disciplinary Counsel did not establish that Respondent's file included documents materially different from those in the Legal Clinic's file. FOFs 9, 25. Other than entering his appearance and calling the Immigration Court, Respondent did not do any additional work on Mr. Jimenez Montepeque's case or generate any notes or work product. FOF 20. When Mr. Jimenez Montepeque and Ms. Cepeda visited Respondent on the day he was terminated, Respondent could only show them a single piece of paper, the subject and contents of which is not reflected in the record, to document his efforts. FOF 22. We therefore conclude that Respondent's duty to return the client's file was satisfied when the Legal Clinic provided a copy of the file it maintained to Ms. Cepeda. By its plain language, D.C. Rule 1.16(d) is directed at a lawyer's duty to protect a client's interests when a representation is terminated, which includes "surrendering

papers and property to which the client is entitled." "The Rules of Professional Conduct . . . are rules of reason." D.C. Rules, Scope [1]. We see no reason to find a D.C. Rule 1.16(d) violation solely because Respondent did not provide his copy of the file that the Legal Clinic had already provided to Mr. Jimenez Montepeque.

Moreover, Mr. Jimenez Montepeque expressly refused Ms. Ortega's offer, made shortly before the November 1, 2016 hearing date, to forward copies of the documents in the Legal Clinic file to his new attorney. FOF 38. Thus, although Mr. Jimenez Montepeque denied receiving any documents from his file, we do not find his testimony credible on this issue. He either received the documents from Ms. Cepeda or could have obtained them from Ms. Ortega.

Disciplinary Counsel also alleges that Respondent failed to take reasonable steps to withdraw from the representation promptly and notify his client of the withdrawal. DC Br. at 19. Approximately three weeks elapsed between the July meeting at which Mr. Jimenez Montepeque terminated Respondent's services and the date on which respondent mailed a copy of the unfiled Motion to Withdraw to Mr. Jimenez Montepeque. FOFs 22, 26. Respondent waited another week to file the Motion to Withdraw because in his experience sometimes the client changes his mind. FOF 26. We do not find this conduct inconsistent with Respondent's duty to provide reasonable notice to his client of his intent to withdraw.

Although the unfiled Motion to Withdraw was served on Mr. Jimenez Montepeque at "19344 Wyandotte Street, Apt 27, Reseda, CA 91335," listing the wrong apartment, it was also sent to "8510 Columbus Ave, Apt 212, North Hills,

CA 91343," listing the address from Mr. Jimenez Montepeque's driver's license at which his friend resided. FOF 27; DX 6 at 15. Because Mr. Jimenez Montepeque's friend still resided at the Columbus Avenue address in 2016 and would have given him notice of any mail he received, FOF 15, it is likely that Mr. Jimenez Montepeque's friend would have notified him of receipt of the unfiled Motion to Withdraw.

Disciplinary Counsel has not shown by clear and convincing evidence that the delay in filing the Motion to Withdraw violated Respondent's duty to protect his client's interests. Mr. Jimenez Montepeque was undoubtedly aware after the July 2016 meeting that he needed to obtain new counsel for his Immigration Court proceeding, given that he had terminated Respondent's services, ceased paying him, and demanded a refund. FOF 23. Although it is true that Respondent continued to receive court notices, including the notice of the November 1, 2016 hearing, that was because the Immigration Court did not rule on the Motion to Withdraw until the November 1, 2016 hearing. FOF 28. Even if Respondent had filed the Motion to Withdraw immediately after the end of July meeting, rather than on August 23, it is at best uncertain whether the Immigration Court would have granted the Motion before the November 1, 2016 hearing.

Also, even if the Immigration Court had granted the Motion to Withdraw at an earlier date, this would not have been helpful to Mr. Jimenez Montepeque. Because he failed to notify the Immigration Court of his various changes of address, the Immigration Court's records show him living at 8024 Zelzah Avenue, Reseda,

California, 91335, until March 8, 2017, even though he actually left that address in or before 2013. FOF 3. As a result, if Respondent's Motion to Withdraw had been granted before the November 1, 2016 hearing, court documents would have been sent to the Zelzah Avenue address where Jimenez Montepeque had not lived for several years.

Respondent received the notice of the November 1, 2016 master calendar hearing on or about August 15, 2016, but he did not send Mr. Jimenez Montepeque the notice until September 20 despite its significance. FOF 32, 35. Respondent justified this delay because the hearing was several months away. FOF 35. As noted, "[m]aster calendar hearings are held for pleadings, scheduling, and other similar matters." Immigration Court Practice Manual, Chapter 4.15(a) (Aug. 2, 2018). Approximately six weeks remained between the date Respondent mailed the notice and the hearing date. *See* FOF 15, 35, 40. Disciplinary Counsel failed to prove that this did not provide Mr. Jimenez Montepeque and his new counsel adequate time to prepare for a procedural hearing. Therefore, although more prompt notice of the hearing date would have been preferable, we cannot say that Respondent's delay amounts to a failure to protect his client's interests.

Disciplinary Counsel alleges that Respondent "did nothing to verify that Mr. Jimenez Montepeque was aware of the merits hearing or to remind him when the hearing date drew closer, such as by calling him a few days before the hearing to ensure he would show up." DC Br. at 20. In fact, at Respondent's request, Ms. Ortega called and texted Mr. Jimenez Montepeque shortly before the Master

Calendar hearing and he disregarded the information she provided. FOFs 37-38. To the extent Mr. Jimenez Montepeque no longer trusted information coming from Ms. Ortega or Respondent, as he so testified, the Hearing Committee does not find that Respondent owed a further duty to remind Mr. Jimenez Montepeque about the hearing, including because Mr. Jimenez Montepeque indicated he was being advised by new counsel whose contact information he declined to provide, and Mr. Jimenez Montepeque also could have contacted the Immigration Court himself to verify whether the hearing had been scheduled for November 1, 2016, as Ms. Ortega had told him. FOFs 37-38.

Disciplinary Counsel further charges that "while Respondent remained counsel of record for Mr. Jimenez Montepeque, he did nothing to ensure that Mr. Jimenez Montepeque was prepared for the merits hearing. . . . He also did not ask for a continuance so that Mr. Jimenez Montepeque could obtain new counsel." DC Br. at 20. Respondent replies that he "could not take any further action in the case once [Mr. Jimenez Montepeque] asked him to cease further activity." Resp. Br. at 23. We agree with Respondent that any substantive action in the case taken by Respondent after July 24, 2016, other than filing the Motion to Withdraw, could have been construed as a violation of EOIR Rules for failure to abide by the decisions and instructions of the client, subjecting Respondent to discipline under 8 C.F.R. § 1003.102(p).

Even if Respondent could have taken some action on behalf of Mr. Jimenez Montepeque, we conclude that the actions demanded by Disciplinary Counsel were

not "reasonably practical," as required by D.C. Rule 1.16(d). Prior to the November 1, 2016 hearing, Mr. Jimenez Montepeque informed Ms. Ortega that he had retained new counsel and that he believed the Master Calendar hearing was scheduled for 2017. FOF 38. He had also made it clear that he no longer wanted to have anything further to do with Respondent or the Legal Clinic. FOFs 22-23, 38. Therefore, Mr. Jimenez Montepeque would almost certainly have rejected any attempt by Respondent to prepare him for the November 1, 2016 Master Calendar hearing or to seek a continuance on his behalf. Respondent also could not have sought a continuance from the Immigration Court on the grounds that Mr. Jimenez Montepeque needed more time to obtain new counsel, given that Mr. Jimenez Montepeque had informed Ms. Ortega that he already had new counsel.[8]

The Committee therefore finds that Disciplinary Counsel has not established by clear and convincing evidence that Respondent violated D.C. Rule 1.16(d).

5. DISHONESTY, DECEIT, OR MISREPRESENTATION (D.C. RULE 8.4(c))

Disciplinary Counsel charges Respondent with a violation of D.C. Rule 8.4(c). DX 2 at 7. Under that Rule, it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

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[8] *See* 8 C.F.R. § 1003.102(c) (A practitioner is subject to discipline if he "[k]nowingly or with reckless disregard makes a false statement of material fact or law, or willfully misleads, misinforms, threatens, or deceives any person (including a party to a case or an officer or employee of the Department of Justice), concerning any material and relevant matter relating to a case, including knowingly or with reckless disregard offering false evidence.").

Misrepresentations to Disciplinary Counsel made during an investigation constitute a violation of D.C. Rule 8.4(c). *In re Boykins*, 999 A.2d 166, 172, 174, 176 (D.C. 2010); *see In re Chapman*, 962 A.2d 922, 925 (D.C. 2009).

The D.C. Court of Appeals has held that each of these terms encompassed within Rule 8.4(c) "should be understood as separate categories, denoting differences in meaning or degree." *In re Shorter*, 570 A.2d 760, 767 (D.C. 1990) (per curiam). Each category requires proof of different elements. *See In re Romansky*, 825 A.2d 311, 315 (D.C. 2003).

Disciplinary Counsel's Specification alleged that Respondent engaged in conduct involving "dishonesty, deceit, or misrepresentation" during the investigation of the disciplinary complaint. DX 2 at 7. Specifically, he is charged with falsely stating that "he appeared at the November 1, 2016 [hearing] in immigration court, signed in with the clerk, and waited for the case to be called." *Id.* at 5. In its post-hearing brief, Disciplinary Counsel charged that Respondent made these "misrepresentations" in his response to the complaint filed by Mr. Jimenez Montepeque, and that he "made similar false statements in a declaration he filed with the Immigration Court." DC Br. at 22-23. Disciplinary Counsel again referred to Respondent's "misrepresentations" and "false statements" in its Reply. DC Reply Br. at 10-11.

We will therefore analyze the charges under the "misrepresentation" prong of Rule 8.4(c). Misrepresentation is a "statement . . . that a thing is in fact a particular way, when it is not so." *In re Shorter*, 570 A.2d at 767 n.12 (internal quotations and

citation omitted); *see also In re Schneider*, 553 A.2d 206, 209 n.8 (D.C. 1989) (misrepresentation is element of deceit). Misrepresentation requires active deception or a positive falsehood. *See In re Shorter*, 570 A.2d at 767. The failure to disclose a material fact also constitutes a misrepresentation. *See In re Outlaw*, 917 A.2d 684, 688 (D.C. 2007) (per curiam) ("Concealment or suppression of a material fact is as fraudulent as a positive direct misrepresentation." (internal quotations and citations omitted)); *In re Scanio*, 919 A.2d 1137, 1139-1144 (D.C. 2007) (respondent violated Rule 8.4(c) by failing to disclose that he was salaried employee when he made a claim for lost income to insurance company measured by lost hours multiplied by billing rate); *In re Reback*, 513 A.2d 226, 228-29 (D.C. 1986) (en banc) (finding deceit and misrepresentation where respondents neglected claim, failed to inform client of dismissal of case, forged client's signature onto second complaint, and had complaint falsely notarized).

Disciplinary Counsel need not establish that a respondent acted with "deliberateness" in making a misrepresentation in order to prove a violation of Rule 8.4(c). *In re Rosen*, 570 A.2d 728, 728-30 (D.C. 1989) (per curiam). Rather, proof that the respondent "acted in reckless disregard of the truth" is sufficient to establish a violation of Rule 8.4(c) based on a misrepresentation. *Id.*

The evidence before the Committee clearly and convincingly shows that Respondent did not attend the November 1, 2016 hearing. FOFs 57, 59. At the Committee hearing, Respondent accepted that the immigration hearing transcript shows that he was not present. *Id*. The more difficult question, however, is whether

Respondent's statements to Disciplinary Counsel and the Immigration Court were made deliberately or with reckless disregard of the truth, or whether his misrepresentations were negligent, as Respondent claims. *See* FOF 59.

Having reviewed the documentary evidence and considered the testimony of Respondent at the Committee hearing, we conclude that his actions were the product of negligence rather than of deliberate or reckless disregard of the truth. *See* FOFs 54-59. Although Respondent did initially claim that he attended the November 1, 2016 hearing, he took appropriate steps to verify his recollection by requesting a copy of the hearing transcript from Disciplinary Counsel and asking the Immigration Court for permission to review its file. FOF 56. Respondent found nothing in the Immigration Court file to contradict his recollection, but when Respondent reviewed the hearing transcript he recognized that he had not in fact been present. FOF 57. He so testified before the Hearing Committee. FOF 59.

Disciplinary Counsel argues that the level of detail Respondent provided in his response to the complaint and in the April 4, 2017 Declaration he filed with the Immigration Court shows that his misstatements were more than merely negligent. DC Br. at 22-23; FOF 52; DX 6 at 3; DX 15 at 6. Such highly detailed information may support a finding that Respondent's misstatements were deliberate rather than accidental. *See In re Bradley*, 70 A.3d 1189, 1194 (D.C. 2013) (per curiam). Respondent explained, however, that he may have confused another case he had around the same time that also had a motion to withdraw, and that he relied upon entries in his 2016 calendar for the details he provided to the Immigration Court and

subsequently to Disciplinary Counsel. FOF 59.[9] Moreover, the fact remains that while Respondent did initially provide incorrect information to the Immigration Court and Disciplinary Counsel, he did not stop there but attempted to verify that the information he provided was correct, and subsequently acknowledged his error. This is consistent with his claim that the erroneous details he provided to the Immigration Court and Disciplinary Counsel were the result of mistake or confusion rather than reckless or intentional misconduct.

Disciplinary Counsel also emphasizes that, in his answer to the charges, Respondent did not unequivocally correct his prior incorrect statements, instead referring to his "alleged non-appearance" at the hearing. DC Br. at 23; DX 4 at 3. The most we can conclude from this statement is that, when he answered the charges, Respondent had not unequivocally accepted the evidence from the hearing transcript that he did not attend the November 1, 2016 hearing. At the hearing, however, Respondent repeatedly accepted the hearing transcript as correct. *E.g.*, Tr. 319, 322, 326-27, 331-32, 335-36. Viewed in the context of Respondent's overall conduct, his reference to his "alleged non-appearance" prior to the hearing does not convince us that he acted recklessly or intentionally in providing false information to the Immigration Court and Disciplinary Counsel.

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[9] In *In re Bradley*, on the other hand, the respondent was unable to point to any related activities that she might have confused with the matter about which she made detailed misstatements of fact. *See* 70 A.3d at 1194.

Finally, Disciplinary Counsel cites Respondent's testimony that, even though he stated he would rely on the hearing transcript, in his own mind he still believed he attended the hearing. DC Br. at 23; Tr. 335-36, 482 (Respondent) ("I still think that, yes, what I wrote was correct."). Viewed in the context of all his testimony, including his multiple statements that he does not dispute the transcript, Respondent was not suggesting that the Hearing Committee should ignore the transcript and find that he attended the November 1, 2016 hearing. Rather, Respondent was merely stating his own recollection that he was present, while at the same time accepting the transcript as correct. We could only find Respondent's testimony to be dishonest if we were to find clear and convincing evidence that he misrepresented his own recollection, a finding not supported by the record. *See In re Klayman*, 228 A.3d 713, 719 (D.C. 2020) (per curiam) ("We agree with the Board that there was not proof by clear and convincing evidence that Mr. Klayman testified dishonestly as to his belief and recollection.").

In sum, we do not find clear and convincing evidence that Respondent recklessly or intentionally provided false information to Disciplinary Counsel or the Immigration Court. Thus, Disciplinary Counsel did not prove a violation of D.C. Rule 8.4(c).

IV. RECOMMENDED SANCTION

Disciplinary Counsel has asked the Hearing Committee to recommend suspension of Respondent's license for six months with a fitness requirement.

Respondent has not addressed the question of the appropriate sanction. For the reasons described below, we recommend the sanction of public censure.

A. Standard of Review

The sanction imposed in an attorney disciplinary matter is one that is necessary to protect the public and the courts, maintain the integrity of the legal profession, and deter the respondent and other attorneys from engaging in similar misconduct. *See, e.g.*, *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc); *In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013); *In re Cater*, 887 A.2d 1, 17 (D.C. 2005). "In all cases, [the] purpose in imposing discipline is to serve the public and professional interests . . . rather than to visit punishment upon an attorney." *In re Reback*, 513 A.2d at 231 (citations omitted); *see also In re Goffe*, 641 A.2d 458, 464 (D.C. 1994) (per curiam).

The sanction also must not "foster a tendency toward inconsistent dispositions for comparable conduct or . . . otherwise be unwarranted." D.C. Bar R. XI, § 9(h)(1); *see, e.g.*, *In re Hutchinson*, 534 A.2d at 923-24; *In re Berryman*, 764 A.2d 760, 766 (D.C. 2000). In determining the appropriate sanction, the Court of Appeals considers a number of factors, including: (1) the seriousness of the conduct at issue; (2) the prejudice, if any, to the client which resulted from the conduct; (3) whether the conduct involved dishonesty; (4) the presence or absence of violations of other provisions of the disciplinary rules; (5) whether the attorney has a previous disciplinary history; (6) whether the attorney has acknowledged his wrongful conduct; and (7) circumstances in mitigation or aggravation. *See, e.g.*, *In re Martin*,

67 A.3d at 1053 (citing *In re Elgin*, 918 A.2d 362, 376 (D.C. 2007)). The Court also considers "'the moral fitness of the attorney' and 'the need to protect the public, the courts, and the legal profession . . . .'" *In re Rodriguez-Quesada*, 122 A.3d 913, 921 (D.C. 2015) (per curiam) (quoting *In re Howes*, 52 A.3d 1, 15 (D.C. 2012)).

B. Application of the Sanction Factors

1. SERIOUSNESS OF THE MISCONDUCT

Respondent's misconduct was serious. Respondent disclosed detrimental or embarrassing information about Mr. Jimenez Montepeque in the Motion to Withdraw and the attached Declaration he filed with the Immigration Court. FOFs 29-30. In addition, Respondent's failure to provide a retainer agreement meant that his client lacked a written document explaining "the basis or rate of the fee, the scope of the lawyer's representation, and the expenses for which the client will be responsible." D.C. Rule 1.5(b). Respondent failed to provide the required document even after his client specifically asked him for one. FOF 10.

2. PREJUDICE TO THE CLIENT

Although Respondent's violation of D.C. Rule 1.6(a) was serious, the evidence fails to show that it resulted in any significant prejudice to Mr. Jimenez Montepeque. As to the lack of a retainer agreement, it necessarily caused some degree of prejudice to Mr. Jimenez Montepeque, who does not speak English and has only limited familiarity with the American legal system. For example, a written retainer agreement would have clarified that Mr. Jimenez Montepeque would have to pay an additional one thousand dollars if he wanted Respondent to help him obtain

a work permit, a requirement that Mr. Jimenez Montepeque only became aware of after he had retained the Legal Clinic. FOF 21. A written retainer agreement also should have explained to Mr. Jimenez Montepeque that he would be represented by outside or associated counsel (Respondent). Nevertheless, although Mr. Jimenez Montepeque's payment obligations were not put in writing, Ms. Ortega explained the payment schedule to him, and his conduct shows that he understood the payments he was required to make to the Legal Clinic for representation in the Immigration Court proceeding. *See* FOFs 6, 8, 16, 18. Although Mr. Jimenez Montepeque eventually decided to terminate the representation, this was not because of a misunderstanding about the terms of the oral agreement for legal services, but rather because Mr. Jimenez Montepeque believed Respondent was not diligently performing his obligations. *See* FOF 23.

3. DISHONESTY

The Committee has concluded that Respondent's statements to Disciplinary Counsel and the Immigration Court concerning his attendance at the Immigration Court hearing did not violate D.C. Rule 8.4(c). *See supra* Section III.C.5. False testimony before the Hearing Committee, however, also may be relevant in determining the appropriate sanction for Respondent's violations of other disciplinary rules. *In re Bradley*, 70 A.3d at 1195.

Disciplinary Counsel alleges several instances of such false testimony. Disciplinary Counsel claims that "Respondent falsely testified that Mr. Jimenez Montepeque was not his client." DC Br. at 26. Disciplinary Counsel bases this

claim on Respondent's testimony that "Legal Clinic is the attorney. I am the contractor, working on the case." *Id.* (citing Tr. 237-42 (Respondent)). We regard this statement as a legal argument based on Respondent's interpretation of the evidence rather than dishonest testimony. Respondent's argument was a vigorous, although erroneous, attempt to defend his law license, not false testimony. *See In re Yelverton*, 105 A.3d 413, 430 (D.C. 2014) ("We recognize that an attorney has a right to defend himself and we expect that most lawyers will do so vigorously, to protect their reputation and license to practice law.").

Disciplinary Counsel also alleges that "Respondent testified inconsistently" when asked whether he took any notes during his meetings with Mr. Jimenez Montepeque. DC Br. at 26. Respondent testified that as a general matter he takes notes when he meets with a client or reviews a client's documents, but in Mr. Jimenez Montepeque's case he either took no notes or very few notes because the client provided no documents for him to review. FOF 20. We do not find any significant inconsistency in this testimony, much less evidence that Respondent provided false testimony.

Disciplinary Counsel further alleges that Respondent falsely testified that he played no role in determining the fee the Legal Clinic charged Mr. Jimenez Montepeque. DC Br. at 25. In fact, although Mr. Jimenez Montepeque and Respondent did not directly agree to the fee, Respondent's own witnesses, Ms. Ortega and Mr. Bibiyan, testified that he determined the amount of the fee. FOF 7. Disciplinary Counsel also maintains that Respondent testified falsely when he

claimed that he played no role in negotiating the refund to Mr. Jimenez Montepeque. DC Br. at 27. Here also, Respondent's own witness, Mr. Bibiyan, testified that Respondent negotiated the amount of the refund. FOF 24. We cannot ascribe the conflicts in the testimony on these issues to mere differences of recollection. Rather, Respondent deliberately refused to acknowledge his role in determining the fee and the refund to support his erroneous claim that he merely "worked the file" for the Legal Clinic and had no attorney/client relationship with Mr. Jimenez Montepeque. *See* FOF 2. Thus, on these two specific issues, we agree with Disciplinary Counsel that Respondent intentionally testified falsely.

4. VIOLATIONS OF OTHER DISCIPLINARY RULES

The Committee is not aware of any other violations of disciplinary rules by Respondent other than those identified in this Report.

5. PREVIOUS DISCIPLINARY HISTORY

Respondent has no previous disciplinary history.

6. ACKNOWLEDGEMENT OF WRONGFUL CONDUCT

Respondent has not acknowledged either of the disciplinary rule violations identified in this report. He has continued to maintain that the Legal Clinic provided Mr. Jimenez Montepeque with a retainer agreement, although neither he nor the Legal Clinic has been able to provide the Hearing Committee with a copy of such a document. Resp. Br. at 24-25. And, regarding his disclosure of confidential information of his client, Respondent continues to maintain that his actions were

consistent with comment [25] to D.C. Rule 1.6 and D.C. Rule 1.6(e)(3). Resp. Br. at 36.

7. OTHER CIRCUMSTANCES IN AGGRAVATION AND MITIGATION

Respondent has not identified any circumstances in mitigation of his violations. We have considered in Section IV.B.3 above the aggravating factors alleged by Disciplinary Counsel (intentionally false testimony) that pertain to the two violations of the Disciplinary Rules the Committee has identified. DC Br. at 24-29.

C. Sanctions Imposed for Comparable Misconduct

The D.C. Court of Appeals has previously approved an informal admonition where a respondent failed to provide a retainer agreement. *In re Szymkowicz*, 124 A.3d 1078, 1088 (2015) (per curiam); *In re Williams*, 693 A.2d 327, 327 (D.C. 1997). Sanctions for a single violation of Rule 1.6 have included informal admonition and public censure. *See, e.g.*, *In re Ponds*, 876 A.2d 636, 636-37 (D.C. 2005) (per curiam) (public censure for disclosure of confidential information in a motion to withdraw); *In re Gonzalez*, 773 A.2d at 1030-32 (informal admonition for disclosure of client secrets in motion to withdraw). In *In re Koeck*, 178 A.3d 463 (D.C. 2018) (per curiam), the Court of Appeals ordered a sixty-day suspension with a fitness requirement, where an attorney improperly disclosed former employer's confidences and secrets to a newspaper reporter and disclosed separate confidences to various governmental agencies. That case, however, involved four separate violations of D.C. Rule 1.6(a), as the respondent made improper disclosures of her

client's confidences and secrets to the U.S. Attorney's Office for the Northern District of Illinois, to the press, to Brazilian authorities, and to the Securities and Exchange Commission. *See In re Koeck*, 178 A.3d at 463-64. The disclosures made by Respondent in this case were far less extensive and potentially damaging.

D. Hearing Committee Sanction Recommendation

If this case involved only a single violation of either D.C. Rule 1.6 or Rule 1.5(b), and did not involve false testimony, the Committee would recommend an informal admonition. Respondent has no prior disciplinary history and his violations of the Disciplinary Rules did not cause significant prejudice to Mr. Jimenez Montepeque. Because this case involves a violation of both Rules, however, it is appropriate for the sanction to be more severe than it would be for any single violation. In addition, we must consider the aggravating factor of Respondent's dishonesty before the Hearing Committee regarding his role in negotiating the fee and the refund. Weighing all these factors, the Committee concludes that the appropriate sanction for Respondent's misconduct is public censure.[10]

We do not base this decision on the fact that Respondent has not acknowledged either of his disciplinary rule violations. As explained above, Respondent has the right to defend himself vigorously to protect his reputation and

[10] We recognize that Respondent's false testimony is a significant aggravating factor in the sanction analysis. *See In re Cleaver-Bascombe*, 892 A.2d 396, 411-13 (D.C. 2006). However, our finding that Respondent gave intentionally false testimony does not dictate that we recommend that he be suspended. *See In re Wilson*, 241 A.3d 309, 313 (D.C. 2020) (rejecting the respondent's argument that the Board had adopted a categorical rule requiring the suspension of any respondent who testified falsely at a disciplinary hearing).

license to practice law. *See In re Yelverton*, 105 A.3d at 430. As the Board stated in *In re Shannon*, Board Docket No. 09-BD-094, at 34 (BPR Nov. 27, 2012), *recommendation approved on other grounds*, 70 A.3d 1212 (D,C, 2013) (per curiam), "there would be a chilling effect, if we were to find a reason to increase a sanction either because a respondent presents a good faith defense or based on the degree, vigor or duration of the defense that the respondent presents." Although we have rejected Respondent's claim that the Legal Clinic provided Mr. Jimenez Montepeque with a retainer agreement, Respondent's argument is consistent with the testimony of the Legal Clinic's office manager, Mr. Bibiyan, who stated that the Legal Clinic typically provides its clients with a retainer. FOF 10. Similarly, although we have rejected Respondent's argument that he was justified in disclosing confidential information regarding his client, he was entitled to argue that his actions were consistent with comment [25] to D.C. Rule 1.6 and D.C. Rule 1.6(e)(3).

Because the Committee does not recommend a suspension of Respondent's license, we have not considered whether a fitness requirement should be imposed. *See* D.C. Bar R. XI, § 3(a)(2) (a fitness requirement may only be imposed following a suspensory sanction).

V. CONCLUSION

For the foregoing reasons, the Committee finds that Respondent violated D.C. Rules 1.5(b) and 1.6(a) and recommends that he should receive the sanction of a public censure.

AD HOC HEARING COMMITTEE

Ronald M. Spritzer

Ronald M. Spritzer, Chair

Dr. William V. Hindle, Public Member

Michael B. Roberts

Michael Roberts, Attorney Member