DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matters of:	:	
	:	
DORRANCE D. DICKENS,	:	Board Docket No. 13-BD-094
	:	Bar Docket Nos. 2011-D271, 2012-
Respondent.	:	D010 & 2012-D011
	:	
A Suspended Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 450751)	:	
	:	
DEBORAH Y. LUXENBERG,	:	Board Docket No. 13-BD-094
	:	Bar Docket No. 2011-D272
Respondent.	:	
	:	
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 215657)	:	

REPORT AND RECOMMENDATION OF THE BOARD ON PROFESSIONAL RESPONSIBILITY

I. INTRODUCTION

This consolidated matter arises out of Respondent Dorrance D. Dickens's ("Dickens") alleged theft of at least $1,434,298.50 from estates related to three different clients, Vernon J. Harris, Jr. ("Harris"), William Garrity ("Garrity"), and Michelle S. Seltzer ("Seltzer"), and Respondent Deborah Y. Luxenberg's ("Luxenberg") activities related to the Seltzer matter.[1] The Hearing Committee, after weighing the evidence presented at the disciplinary hearing, making determinations of credibility, and considering

[1] The petition was filed by the Office of Bar Counsel. The District of Columbia Court of Appeals changed the title of Bar Counsel to Disciplinary Counsel, effective December 19, 2015. We use the current title in this Report and Recommendation.

the burden of proof, recommended in a comprehensive 186-page report that Dickens be disbarred, with restitution of $1,434,298.50 as a condition of reinstatement (including interest at the legal rate), based on findings that he violated D.C. Rules of Professional Conduct ("Rules") 1.1(a), 1.1(b), 1.3(b)(1), 1.3(b)(2), 1.4(a), 1.4(b), 1.7(b)(4), 1.15(a)(misappropriation), 1.15(c), 8.1(b), 8.4(b), 8.4(c), and 8.4(d). The Hearing Committee also recommended that Respondent Luxenberg, Dickens's former law partner, be suspended for 45 days, based on findings that she violated Rules 5.1(a) and 5.1(c)(2).

For the following reasons and those set forth by the Hearing Committee, the Board concurs with the Hearing Committee's findings of fact, conclusions of law, and recommended sanction with respect to Dickens. With respect to Luxenberg, the Board largely concurs with the Hearing Committee's findings of fact, but disagrees, in part, with the Committee's application of the facts to the disciplinary rules. The Board finds that, in addition to violating Rules 5.1(a) and 5.1(c)(2), Luxenberg violated Rule 1.3(a) (failure to represent a client zealously and diligently). We recommend that Luxenberg be suspended for a period of six months.

II. PROCEDURAL HISTORY

Disciplinary Counsel served its Specification of Charges and Petition against Luxenberg in the Seltzer matter (Bar Docket No. 2011-D272) on October 15, 2013. H.C. Rpt. at 6.[2] Disciplinary Counsel also attempted to serve Dickens with the Specification of

[2] References to the Hearing Committee's Report and Recommendation and its findings of fact are referenced, respectively, as "H.C. Rpt. at __" and "FF___." Citations to Disciplinary Counsel's exhibits and the hearing transcript are referenced, respectively, as "EX___" and "Tr. ____." Citations to Respondent Luxenberg's opening brief and reply brief are referenced, respectively, as "Lux. Br. ___" and "Lux. Rply. ___." Citations to Disciplinary Counsel's brief are referenced as "D.C. Br. __."

Charges in the Seltzer, Harris, and O'Brien matters by personal service and certified mail, but could not locate Dickens. *Id.* On November 6, 2013, pursuant to Disciplinary Counsel's motion for an order directing service on Dickens by alternate means, the D.C. Court of Appeals entered an order, pursuant to D.C. Bar R. XI § 19(e) and D.C. Code § 11-2503(b), directing Disciplinary Counsel to serve Dickens by regular and certified mail, email, and by publication. *Id.* at 6-7.

Luxenberg filed an answer on November 18, 2013. *Id.* at 7. Dickens did not file an answer. *Id.*

A. Pre-Hearing Consolidation of the Harris and O'Brien Matters with the Seltzer Matter

On November 7, 2013, Disciplinary Counsel moved to assign all matters against Dickens to the same hearing committee. Specifically, the motion sought to assign the Specifications of Charges against Respondent Dickens in Bar Docket Nos. 2012-D010 (the Harris matter) and 2012-D011 (the O'Brien matter) to Hearing Committee Number Twelve, which had already been assigned to hear the Specifications of Charges against Respondents Dickens and Luxenberg in Bar Docket Nos. 2012-D271 and 2012-D272 (the Seltzer matter). Disciplinary Counsel did not request that the Dickens matters be consolidated with the Luxenberg matter for a single, combined hearing. *See* Motion of [Disciplinary] Counsel to Assign All Matters Against Respondent Dorrance Dickens to the Same Hearing Committee, November 7, 2013, at 2-3 ("[Disciplinary] Counsel is not requesting that the matters be consolidated for a single hearing, which would require Respondent Luxenberg to be present for matters in which she is not charged with any ethical misconduct.").

Neither Respondent opposed the motion and, on November 27, 2013, the Board granted Disciplinary Counsel's motion and assigned the Specifications of Charges against Respondent Dickens in the Harris and O'Brien matters to Hearing Committee Number Twelve. H.C. Rpt. at 7.

B. Pre-Hearing Conference and Order

A pre-hearing conference was held before the Hearing Committee Chair on January 27, 2014. *Id*. At the conference, the parties discussed, among other things, the effect of the Board's consolidation of the O'Brien, Harris, and Seltzer matters on the presentation of evidence at the hearing and the Committee's consideration of the evidence against Respondents. *Id*. at 8. Counsel for Luxenberg moved the Hearing Committee to proceed in a way in which it would close the evidence against Luxenberg at the conclusion of the Seltzer-related portion of the proceeding (leaving the evidence open for Dickens as to the other two matters). *See* January 27, 2014 Prehearing Tr. 19-20. The concern was whether overlapping evidence in the Harris and O'Brien matters could be used against Luxenberg in the Seltzer matter.

The Hearing Committee reserved judgment on this issue and indicated it would examine precedent regarding how the Committee should proceed in circumstances involving a consolidated hearing. *Id*. at 21. The Hearing Committee indicated the issue would be resolved in the Prehearing Order. *Id*.

On February 14, 2014, the Hearing Committee issued its prehearing order. In it, the Chair advised Luxenberg that the Committee would consider overlapping evidence presented in the Harris and O'Brien matters in assessing the charges against her in the

Seltzer matter, so that the Committee could assess the "entire mosaic" of her conduct in accordance with the Court of Appeals' guidance in *In re Ukwu*, 926 A.2d 1106, 1116 (2007). Feb. 14, 2014, Prehearing Order at 3.

C. The Hearing

The hearing was held March 31 through April 4, 2014, before Hearing Committee Number Twelve. H.C. Rpt. at 8. Disciplinary Counsel called Jerri Seltzer Falk, the daughter of Michelle Seltzer; Kevin O'Connell, a forensic investigator of the Office of Disciplinary Counsel; Carolyn Hohlfeld, a work colleague of Michelle Seltzer; Nicholas Gleichman, a nonlawyer employee of the Luxenberg law firm; Respondent Luxenberg; Carole Gelfeld, a trusts and estates lawyer who represented Jerri Seltzer Falk, and who testified as an expert as to the allegations against Dickens; Eric Seltzer, the son of Michelle Seltzer; Azadeh Matinpour, an Investigative Attorney for the Office of Disciplinary Counsel; Gary Altman, a trusts and estates lawyer who acted as trustee for and represented Eric Seltzer, and who testified as an expert as to the allegations against Dickens; Peg Shaw, a lawyer who prepared accountings for the Seltzer Estate and trusts; Stephen Johnson, Luxenberg's husband and law partner; Joseph Ghanem, a friend of Dickens who worked for him on various matters; Karen Blank, a lawyer employed with the Virginia Tech Foundation; and Vernon Harris, the personal representative of the Gladys Harris Estate. Disciplinary Counsel also offered the testimony of Angela Thornton, a Disciplinary Counsel employee, by affidavit. *Id.* at 8-9. Respondent Luxenberg testified on her own

behalf, and called four character witnesses: Dwight D. Murray, Esq.; Joan H. Strand, Esq.; Hon. Diane M. Brenneman; and Hon. Bruce S. Mencher. *Id*. at 9.[3]

The Hearing Committee issued its Report and Recommendation on April 20, 2015. Luxenberg and Disciplinary Counsel took exception to various parts of the Hearing Committee's findings of fact, conclusions of law, and recommended sanction. The parties filed briefs on their exceptions, and the Board heard oral argument on December 4, 2015.

III. SUMMARY OF THE CASE

The Hearing Committee found that Dickens stole at least $1,434,298.50 from estates related to three different clients, Vernon J. Harris, Jr., William Garrity, and Michelle S. Seltzer, and determined that he should be disbarred. The Committee found that Luxenberg failed to make reasonable efforts to ensure that the firm had measures in effect giving reasonable assurance that all lawyers in the firm conformed to the Rules of Professional Conduct. The Committee further found that Luxenberg failed to take remedial action when she knew or reasonably should have known about Dickens's failure to keep Ms. Seltzer reasonably informed as to the status of her matter at a time when its consequences could have been avoided or mitigated. Finally, the Committee found that Luxenberg failed to take remedial action when she knew or reasonably should have known about Dickens engaging in the practice of law in Maryland without a license to do so.

[3] During the hearing, Luxenberg was reminded that the Hearing Committee would consider overlapping evidence presented in the Harris and O'Brien matters in considering the charges against Luxenberg in the Seltzer matter. Tr. 899-900. Counsel for Luxenberg represented that he understood the Hearing Committee's position "completely." Tr. 900.

A. Background

Deborah Luxenberg became a member of the District of Columbia Bar in 1975. FF 1. In 1994, Luxenberg began to practice law in the District of Columbia under the firm name "Law Offices of Deborah Luxenberg," with her husband Stephen Johnson. FF 2. Dickens began working for the Luxenberg firm as a law clerk in 1995, and was promoted to associate in 1996 after graduating from law school and becoming a member of the District of Columbia Bar. FF 3, 5. Dickens spent his entire legal career working for the Luxenberg firm. FF 10.

B. The Harris Matter

In May of 2000, while an associate of the firm, Dickens undertook to represent Vernon Harris in probating the estate of his sister, Gladys Eloise Harris. FF 13. Dickens filed a petition for probate that did not disclose most of the decedent's assets or list all her heirs; failed to marshal the assets of the estate; did not provide his client with information or an accounting of the estate assets; did not prepare or send any bills or statements explaining the services he was providing and the fees he was charging (and money he was taking from estate assets); took more than five years to sell the decedent's three real properties; and began misappropriating funds a month after opening an estate account on which he was the sole signatory – an account for which he and the firm failed to keep any records other than for a discrete six-month period. *See* FF 53-54, 61-63, 69, 76, 79, 93, and 95.

C. The O'Brien Matter

In April of 2008, Dickens agreed to represent William Patrick Garrity in probating the estate of Dr. JoAnne S. O'Brien in the District of Columbia. FF 97. Dickens did not provide Garrity with a retainer agreement or other writing setting forth the basis for the fee or the scope of the representation; used money from the estate to rent a storage unit and to pay a friend to move the contents of the decedent's house to the storage unit (and then personally used the storage unit but continued paying for it with estate funds); misappropriated over two-thirds of the estate's assets; used estate funds to pay third parties for his own personal and business expenses; and never prepared or provided Garrity with an accounting or information about the funds Dickens received on behalf of the O'Brien Estate and what he had done with them. *See* FF 102, 107-110, 113, 122, and 124.

D. The Seltzer Matter

(1) The Amended 1990 Trust

Luxenberg had a long-standing attorney-client relationship with Michelle Seltzer as a result of representing her in a family law matter in the 1990s. FF 133-136. In 2004, Seltzer contacted Luxenberg to update her estate plan. FF 139. Luxenberg advised Seltzer that she did not practice trusts and estates work, but that the firm could represent her and that Dickens would provide her with advice and assistance. FF 140. At that time, Luxenberg believed Dickens had worked on a number of trusts and estate matters at the firm, and could handle the work because he was "brilliant." Tr. 393-94. *See also* Tr. 351.

After approximately four months, Dickens made minor and inconsistent amendments to Seltzer's prior existing trust (the "1990 Trust") and prepared two form

documents for Seltzer – a general power of attorney and a healthcare proxy. FF 139 and 144. In November of 2004, Seltzer executed an amended 1990 Trust (the "Amended 1990 Trust") in her capacity as grantor and trustee. EX 16. Luxenberg was named co-trustee. EX 16.

(2) The 2009 Trust and Will

In May of 2009, Seltzer again retained the Luxenberg firm to help her with revisions to her estate plan. FF 156, 159. Seltzer told Luxenberg that she was undergoing cancer treatment, and provided contact information for Stuart Plotnick, Seltzer's son's trustee. FF 159. She asked Luxenberg to contact Plotnick so that the two of them could coordinate her trust with the trust that her ex-husband had established for her son's benefit. *Id.*; EX 26 at 1. In the days that followed, Seltzer communicated with Luxenberg about her medical condition and her desire to have a long-term plan in place that would provide for her son's care after she passed away. FF 160; EX 28 at 2-3.

Luxenberg delegated to Dickens the responsibility for drafting the estate planning documents, including a new trust, a will, and several powers of attorney. FF 156-162. At the time, Dickens was handling only a few cases and, though the record is not absolutely clear,[4] Dickens had, at the very least, taken a substantial pay cut and indicated he was going to finish up a few more matters and would then leave to pursue other ventures. Tr. 377-380. Additionally, Dickens was traveling regularly by 2009 and had become "hard to

[4] Luxenberg testified that the firm stopped paying Dickens in 2009; however, the firm's bank records show that the firm made seven direct deposits in Dickens' personal bank accounts in 2009 of $2,462.67 (net pay) each. FF 27.

reach," so much so that there were many occasions when no one connected with the firm knew where Dickens was or what he was doing. Tr. 384, 1061.

Though Luxenberg delegated the matter to Dickens, she maintained some involvement in the representation (by communicating with Seltzer and Dickens, following up with Dickens and Seltzer on various issues, receiving copies of emails between Dickens and Seltzer, determining how much to bill Seltzer, and sending invoices to Seltzer). FF 156-161, 164, 165, 167, 169, 172, 189, 195, 197.

Between May and September 2009, Seltzer and Luxenberg exchanged emails about Dickens's progress – or lack thereof – in preparing the estate documents. FF 167. On August 12, 2009, Luxenberg sent Dickens an email asking if he "realistically" could do the work. EX 36 at 1. Within minutes of Luxenberg's email, Dickens emailed Seltzer and assured her that he would complete the work. EX 37. The next day, Dickens assured Seltzer that her matter was a "priority." EX 38.

A few months later, Dickens amended Seltzer's will and created a new trust for her. Specifically, in November of 2009, Seltzer executed the new trust document that Dickens had prepared (the "2009 Trust"). EX 67 at 12. Dickens was named trustee of the 2009 Trust.[5] *Id*. Seltzer also executed a general power of attorney and a durable power of attorney for health care. Dickens then prepared a will for Seltzer, which Seltzer executed in December of 2009. EX 76.

[5] Disciplinary Counsel's expert witnesses testified that in creating the 2009 Trust and advising Seltzer about her estate plan, Dickens failed to provide competent advice, and the documents he prepared fell below the standard of care required of a reasonably competent lawyer. FF 182; H.C. Rpt. at 62 n.31.

(3) The Letter of Instruction

Seltzer's health declined and, in February of 2010, she was admitted to hospice care. FF 201-202. On February 23, 2010, both Luxenberg and Dickens went separately to the hospice to meet with Seltzer. FF 204. Luxenberg and Dickens met in the parking lot, walked in together,[6] and introduced themselves as Seltzer's lawyers and friends. *Id*.

When they arrived, Ms. Hohlfeld, a former co-worker of Seltzer's, was finishing her visit with Seltzer. *Id*. When Hohlfeld left the room, Dickens followed her into the hallway to discuss Seltzer's condition. FF 205. Dickens asked Hohlfeld how she knew Seltzer and, after learning that they worked together and had known each other for some time, asked Hohlfeld if she would witness Seltzer signing a document relating to her trust. *Id.* Hohlfeld agreed to do so, based on Dickens's representations that the document related to the trust that Seltzer had created to distribute funds to her son – something that Seltzer had previously discussed with Hohlfeld. *Id.*

When Hohlfeld went back into Seltzer's room, she was sufficiently concerned about Seltzer signing a document, given her condition, that she questioned Seltzer. FF 206. Seltzer said that Dickens had set up a trust, and the document was needed for the lawyer who would oversee the trust and distribute money to her son. *Id.* Because Seltzer's

[6] The record evidence suggests that Luxenberg's and Dickens' contemporaneous arrival at the hospice was coincidental. *See* Tr. 432 (Luxenberg: "I met Mr. Dickens in the parking lot, I didn't know he was coming"); Tr. 178 (Hohlfeld: "They came together."); Tr. 188 (Hohlfeld did not know if they arrived in the same vehicle, but "[t]hey just walked in the door together.").

explanation was consistent with what Dickens had told her in the hallway, Hohlfeld agreed to witness Seltzer's execution of the document. *Id.*

At some point, Luxenberg walked into the room with a portfolio in her hand and either Luxenberg handed Dickens the portfolio, from which he removed the document, or Luxenberg removed the document from the portfolio and handed it and the portfolio to Dickens. FF 207; Tr. 187-188, 193-194, 198-200, 203. The document did not have any attachments and was only one sentence long. FF 207, EX 90. Although Luxenberg and Dickens both represented Seltzer and knew that Seltzer had only days to live, neither of them explained to Seltzer what they were asking her to sign, why she was being asked to sign it, what Dickens intended to do with the document and her funds, or the consequences of signing the document. FF 209.[7] Further, although Luxenberg testified that she had a long-term attorney-client relationship with Seltzer, she did not read the document or notice that it was missing its two attachments, either before Seltzer signed it, or after Seltzer signed it when Luxenberg signed it as a witness. Tr. 436-437. At the time, Luxenberg believed the document was created to enable Dickens to transfer assets and funds to the 2009 Trust. FF 208. The document, however, actually transferred the assets to Dickens with no restrictions on his disposition of them. *Id.* This document ultimately facilitated Dickens's theft; it contained an inadequate description of Seltzer's testamentary intent and

[7] Disciplinary Counsel's expert witness testified that Dickens failed to provide competent advice regarding the tax consequences of the Letter of Instruction (EX 90), and that the document he prepared fell below the standard of care required of a reasonably competent lawyer. *Id.*

what Luxenberg assumed its purpose to be. Luxenberg did not read the document until after Seltzer's death. *Id.*

The Hearing Committee found that Luxenberg was there to visit Seltzer as her friend, and was not providing any substantive representation to Seltzer at the time. FF 140 and 161. In contrast, the Hearing Committee found that Dickens was apparently there to facilitate his theft of funds from Seltzer's trust. While there is no evidence indicating that Luxenberg intended to facilitate Dickens's theft of funds, she did bring the portfolio containing the document to Seltzer's room, and without reviewing the one-sentence instrument that provided for Seltzer's funds to be distributed to Dickens without restrictions, she signed it as a witness. She knew at the time that Seltzer trusted her and considered her to be her attorney, yet she plainly failed to ensure that Seltzer's interests were protected. On March 5, 2010, Seltzer died. FF 219. Between the moment that Dickens left Seltzer's bedside with the signed Letter of Instruction, and the time he fled the country in May of 2011 as his scheme unraveled, he had stolen $722,514.38 from her estate. FF 360. During that period Dickens repeatedly dodged Seltzer's children's increasingly desperate attempts to get in touch with him; lied and misrepresented the status of Seltzer's trusts and estate to her children, beneficiaries and, eventually, her children's attorneys; lied about the status of the trusts and estate in emails on which he copied Luxenberg; lied about the value and status of the estate in court filings (which were made in Maryland state court, despite Dickens's lacking a license to practice law in Maryland); and refused to talk to Luxenberg about the matter after Seltzer's children's attorneys began contacting the firm. FF 218, 221-222, 224-229, 233-238, 249-251.

(4) Luxenberg's Administration of the Amended 1990 Trust After Seltzer's Death

Following Seltzer's death, Luxenberg made two trips to PNC bank with Dickens to transfer funds or assets belonging to the Amended 1990 Trust to the 2009 Trust. FF 240, 246. Luxenberg believed that Seltzer had created the 2009 Trust to replace the Amended 1990 Trust and that it was Seltzer's testamentary intent that the assets in the Amended 1990 Trust be transferred to the 2009 Trust. FF 241; Tr. 448-450. However, there was nothing in the terms of the 1990 Trust that gave Luxenberg the authority to make a distribution to the 2009 Trust. FF 241; EX 16. Luxenberg did not dispute that provisions of the 1990 Trust did not authorize her to make distributions. FF 241; Tr. 448-450. She testified that she believed she was obligated to do so based on what Dickens told her about the effect of the 2009 Trust. *Id.*; Tr. 448-450, 452, 457-458. By agreeing to transfer the assets contained in the Amended 1990 Trust, of which Luxenberg was the trustee, to the 2009 Trust, of which Dickens was the trustee, Luxenberg inadvertently facilitated the theft of funds by Dickens. FF 243.

(5) Luxenberg's Involvement with Seltzer's Children and Their Attorneys After Seltzer's Death

In April 2010, Luxenberg became aware that Seltzer's children (including Plotnik, Ms. Seltzer's son's trustee) were asking Dickens for information about their mother's estate and the probate process. Tr. 450-452. This was not unexpected, nor cause for alarm. Luxenberg testified that Seltzer told her a "couple of times" that "all hell would break loose" after her death because she was not giving assets to her children outright. Tr. 459.

Seltzer further told Luxenberg that she expected the children would be "very upset" and that she "expected" that Luxenberg and Dickens would "get calls from lawyers." *Id.*

Luxenberg received copies of two emails reflecting the children's and Plotnick's requests. *See,* EX 101 (paralegal forwarding message from Plotnik requesting a copy of the will and/or trust), 104 (Plotnik inquiring via email about the schedule of assets for the 2009 Trust after receiving a copy of the trust). Luxenberg testified that, in response to these emails, she contacted Dickens and his administrative assistant and told them to get in touch with the children and/or Plotnik. Tr. 451. Luxenberg further received copies of Dickens's responses to Plotnik and the children. *See,* EX 105 (Dickens responding to Plotnik that the schedule of assets was not yet available because "most of the assets will be coming from the estate per the will"), 106 (Dickens providing Plotnik an update and forwarding a copy of Seltzer's will), Tr. 450-451. Luxenberg did not learn until later that Dickens's responses contained lies. Tr. 452.

On August 10, 2010, Luxenberg was copied on an email from Seltzer's daughter to Dickens, requesting a "full and accurate accounting" of the assets in the 2009 Trust. EX 130. Included in this email chain is a prior email in which Dickens advised Seltzer's daughter that he was working to combine the assets from the two trusts into the 2009 Trust. *Id.* Luxenberg testified that she called Dickens after reviewing this email because it did not reflect her understanding as to the current status of the trusts. Tr. 464-465. She told Dickens "he had to get on the stick," and he assured her that the only thing left in the Amended 1990 Trust was Seltzer's furniture, which the children would divvy up themselves, and that he would meet the relevant deadlines. Tr. 465-467.

On October 31, 2010, Dickens was hospitalized for an apparent heart attack. FF 275. Luxenberg did not contact the Seltzer children or Plotnik because Dickens had assured her that he could still handle the matter. *Id.*; Tr. 469.

On November 23, 2010, Carole Gelfeld, Seltzer's daughter's attorney, called the Luxenberg firm regarding the Seltzer matter and indicated it was urgent. FF 277. A receptionist took the message, and emailed it to Luxenberg and Johnson. EX 138. After a delay of a week during which Luxenberg was out of town (Tr. 468), on November 30, 2010, Johnson emailed Dickens and cc'd Luxenberg, forwarding Gelfeld's message and asked Dickens to call Gelfeld and Johnson. EX 140. That same day, Luxenberg asked an administrative assistant to call her or Johnson about Dickens. EX 141.

On December 3, 2010, Gelfeld again called the firm about the Seltzer matter, stating that the estate tax was due the following Monday, and requesting a meeting with Johnson. EX 142. A receptionist took a message and sent it to Johnson, copying Luxenberg. *Id*. Several minutes later, Luxenberg forwarded Johnson a copy of the August 10, 2010 email chain. EX 143.

Also on December 3, 2010, Gelfeld sent a letter to Dickens and Johnson, setting forth her "serious concerns" relating to the trust and its administration, including deficiencies in the trust documents, the absence of any accountings or information about Seltzer's assets, the trustee's inability to administer the trust on a reasonable and timely basis, and the estate tax that was due on December 6, 2010. EX 145. Gelfeld did not address her letter to Luxenberg or copy Luxenberg on it; however, Luxenberg received a copy of it. Tr. 470. Dickens responded to the letter that same day. Luxenberg also knew

about this response. EX 146, Tr. 470. She testified that she was under the impression that Dickens was handling it." Tr. 470.

Through the end of 2010 and early 2011, Gelfeld and Gary Altman, Seltzer's son's attorney, continued to correspond and confer with Dickens, but they did not send copies of their correspondence to Luxenberg or Johnson. FF 298. In early February 2011, Dickens agreed to prepare accountings for Seltzer's estate and trusts. FF 299.

(6) Luxenberg Receives the Accounting and Retains Counsel

The accounting was finalized on March 25, 2011, (EX 205), and was sent to Gelfeld and Altman on March 28, 2011. FF 328. In the accounting, Dickens attempted to account for his thefts by claiming that Seltzer purportedly agreed to pay him $685,000 for a 1% interest in two then unformed LLCs. FF 327.

Gelfeld and Altman called the Luxenberg firm on the morning of March 29, 2011, but could not reach Dickens, Johnson, or Luxenberg. FF 330.[8] Altman left a message for Luxenberg that there was an "absolute emergency" and that returning their call was "the most important call [Luxenberg] might ever make." EX 209, Tr. 573, 601-602. A paralegal called Altman back and Altman told the paralegal that the firm had better call its malpractice carrier and the state bar because money was stolen from Ms. Seltzer's trust. EX 211. Luxenberg immediately emailed Dickens (by way of an administrative assistant) requesting he call her. *Id*.

[8] There is evidence in the record indicating that Luxenberg was in court when Gelfeld and Altman called. *See* EX 211 (email from Luxenberg to Dickens regarding calls: "I was in court and didn't take the call").

On March 30, 2011, Altman and Gelfeld sent letters to Dickens, Luxenberg, and Johnson, detailing their concerns and allegations that Dickens had stolen money from the Seltzer Estate. EX 212; 214. When Luxenberg received the letters, and received and reviewed Dickens's response, she first learned of the purported $685,000 demand note, and that Dickens was claiming the Letter of Instruction was to facilitate an initial payment on that note. FF 334, 337-338; Tr. 442. The letters left Luxenberg very confused. Tr. 482 (the letters left her "dizzy"; none of it was "making any sense to her"; it "look[ed] crazy"). She immediately called a "prominent estate and trust attorney," and explained what she knew and what Gelfeld and Altman were alleging. Tr. 482-483. She further met with the trust and estate attorney over the weekend to "figure out what was going on." *Id.* Luxenberg then immediately contacted her malpractice carrier and sought representation. Tr. 483; see *also* Tr. 442-443 (after reviewing the letters Luxenberg "went to an estate and trust attorney, "frantically" got in touch with her malpractice carrier, and "pleaded with an attorney to help" them).

Luxenberg continued to attempt to contact Dickens, but he refused to speak with her. *See, e.g.,* EX 219 (letter from Dickens to Luxenberg, dated March 31, 2011 enclosing a draft of Dickens's response to Altman and Gelfeld, and stating, among other things, "[i]f you are represented by counsel. I cannot speak directly to you. You are the trustee of one trust and I of another. One of the allegations is that of conspiracy between us.").

There is no evidence in the record to indicate that Luxenberg or Johnson had any control over any of the missing funds at the end of March or beginning of April of 2011. FF 334. Rather, the Hearing Committee found that those funds were in the sole control of

Dickens (if they were still available at all). *Id*. The Hearing Committees' finding is supported by substantial evidence in the record.

Through the end of April, 2011, Altman, Gelfeld, and Dickens continued to correspond about resolving the matter. FF 341-346. No resolution was reached and, in May of 2011, Dickens fled the country to St. Kitts. FF 349. Litigation between the Luxenberg firm and the Seltzer children ensued. FF 350-351, 355-356, 359.

E. The Firm's Administrative Practices

Regarding Luxenberg's managerial authority at her firm – an issue of central importance to the Hearing Committee's findings against Luxenberg – the firm did not have a partnership agreement or any writing that set forth the rights and responsibilities of its partners. FF 8. Luxenberg was a founding partner of the firm, was a named partner in the firm, had a controlling interest in the firm, and was responsible for originating most of the firm's business. FF 2, 6, 8. Luxenberg determined which clients the firm would represent and which firm lawyer would handle their matters. FF 12.[9]

The primary method the Luxenberg firm used to monitor its practice were staff meetings at which the lawyers reviewed the firm's list of open cases. FF 21. The case list was generated based on the firm's retainer agreements and billing records. FF 25. Accordingly, if retainer letters were not obtained and billing records were not kept regularly for certain client matters, the case list would not include those matters. Although the Luxenberg firm required that its attorneys prepare retainer or fee agreements for all

[9] Additionally, Dickens was never a signatory on the Firm's IOLTA account, even when he was a partner, and he had no managerial authority at the firm. FF 15.

clients, there is no evidence that Dickens consistently did so. FF 25, 28-30, 32, 102. There is also no evidence that the firm took steps to enforce its policy or to try to achieve future compliance. Further, Dickens did not regularly attend staff meetings. After the firm moved its offices from Washington, D.C. to Maryland in 2007 (and Dickens opened a satellite office for the Luxenberg firm in Sterling, Virginia), Dickens's participation "tailed off." FF 16, 22; Tr. 1039. Dickens would "fall off the record for as much as a month at a time," and by 2009, "[i]t became hard to reach [Dickens]." FF 23-24; Tr. 266, 1061.

Lawyers at the firm were also required to keep contemporaneous records of their time, but Dickens "failed to record time for some of his clients, including Vernon Harris, William Garrity, Samuel Ghanem, Courtney Stadd, and, for the most part, Michelle Seltzer." FF 26. Again, there is no evidence that the firm took steps to enforce its time-recording policy or to try to achieve compliance.

Firm attorneys were required to keep complete client files including emails. FF 33. To that end, Dickens was supposed to save electronic documents in the firm's computer server, but failed to do so. *Id.* As a result, other firm personnel could not find documents relating to the client matters on which Dickens worked. *Id*. The firm apparently took no steps to require Dickens to comply with this policy.

The Luxenberg firm lacked financial controls, and received funds without any idea what the funds were for or whether the amount was appropriate. For example, the firm negotiated checks drawn on the O'Brien Estate account and the Seltzer trust account totaling more than $24,000, without receiving or requiring Dickens to provide any supporting documents, such as a retainer, invoice, bill, or any other records indicating that

the firm was entitled to the monies. FF 31 and 222. Additionally, rent for the firm's Virginia office was paid (by Dickens) from client funds, including those from the O'Brien and Seltzer Estates. FF 20.[10] Finally, there is no evidence that the firm had any policies or procedures in place to ensure that firm lawyers kept records of amounts transferred into and out of accounts containing entrusted funds.

The firm also apparently had no policies or procedures whatsoever as to professional licensure. For instance, the Luxenberg firm did not take any steps to determine whether, by practicing in an office located in Virginia, and by working on an estate for a client in Maryland, without being admitted to the Virginia or Maryland Bars, Dickens would be violating those jurisdictions' rules on the unauthorized practice of law. FF 163, 228.

F. Irregularities Involving Dickens

Throughout Dickens's employment at the Luxenberg firm, he made a number of questionable claims about his background. For instance, sometime after becoming a

[10] Additional examples of the firm's inadequate financial controls include that in 2007, the firm paid off and attempted to close a joint credit card account used by Dickens, Johnson, and Luxenberg, because it had accumulated a balance of $27,000. FF 44; Tr. 367-368. Luxenberg testified that she did not know (1) what percentage of the charges was attributable to Dickens, or (2) whether the charges were for business or personal matters. *Id.* The firm paid the balance and thought they had closed the card, but in January 2011, Luxenberg learned that an additional $20,000 to $25,000 had been charged to the card. Tr. 369-370. Luxenberg asked Dickens to pay it off, and at that time, did not know whether the charges were for business or personal matters. Tr. 370. Luxenberg did not learn until roughly a year later, after her firm received copies of the statements, that the charges were for Dickens's personal expenses. Tr. 474-476. Further, although the record is not entirely clear, it appears that the firm received at least $25,000 for the Stadd case, without knowing the billing arrangement for that matter. FF 32.

partner in 2003, Dickens told Luxenberg, Johnson, and others that he had trained as a canon lawyer, and was working for the Vatican. FF 40. It is unclear when Dickens allegedly received this training while a full-time employee of the Luxenberg firm. *Id.* [11] Additionally, on some occasions, Dickens dressed as a priest and claimed to have an official affiliation with the Roman Catholic Church. FF 41. Luxenberg was present on a number of these occasions, including at the funeral of their client, Seltzer. *Id.* Dickens also took Luxenberg and Johnson on two trips to Rome, but did not disclose to Luxenberg and Johnson his source of funds for those trips. FF 41.

Dickens also claimed to have received specialized training or degrees in other vocations. Specifically, Dickens claimed he managed a catering business, had completed medical school, had worked for NASA, was a software designer, a baker, a nutritionist, and created ice sculptures. Tr. 291-292; Tr. 227. There is no evidence that Dickens had any specialized expertise or training in the fields or vocations he claimed to have mastered. FF 42.

IV. FINDINGS OF FACT

The Hearing Committee's Report contains three hundred and eighty-three (383) paragraphs of comprehensive and detailed factual findings. The Board is obligated to accept those findings if they are supported by "substantial evidence on the record as a

[11] There is evidence in the record tending to substantiate Dickens' claim as to his ties to the Vatican. Luxenberg testified that while on a trip to the Vatican with Dickens, Dickens showed them the residence where he was staying, and the guards at St. Peter's and the Vatican museum knew him. Tr. 294. Luxenberg further testified that she heard from another attorney that Dickens had showed him his temporary office in the Vatican. Tr. 295.

whole." Board Rule 13.7; *In re Micheel*, 610 A.2d 231, 234 (D.C. 1992). The Board is also authorized to "modify, or expand the findings" based on clear and convincing evidence. Board Rule 13.7.

Neither Dickens nor Disciplinary Counsel took exception to the Hearing Committee's findings of fact related to Dickens. The Board has reviewed those findings of fact, and adopts those facts as supported by substantial evidence.

Disciplinary Counsel, however, took exception to the Hearing Committee's omission of certain facts related to Luxenberg's purported knowledge of Dickens's thefts and her failure to take reasonable action to protect her clients' interests and assets. Luxenberg lodged thirty-seven exceptions to the Hearing Committee's findings of fact, many of them to the Hearing Committee's reliance on evidence relating to the Harris and O'Brien matters, as Disciplinary Counsel did not include any reference to those matters in its Specification of Charges. *See* Lux. Br. at 6-18 (noting exceptions to Findings of Fact Nos. 18, 29-32, 45-96, 97-131, and 359 on the grounds that those facts relate only to the Harris and O'Brien matters, and are outside the Specification of Charges against her). The remainder of Luxenberg's exceptions to the findings of fact relate to her role at her firm and her authority over Dickens, the administrative practices of the firm, and her involvement in the Seltzer Matter. *Id.*

The Board has carefully reviewed the record, and Disciplinary Counsel's and Luxenberg's exceptions to facts relevant to the charges against Luxenberg and, with a few exceptions noted below, accepts and adopts the Hearing Committee's findings of fact as "supported by substantial evidence in the record, viewed in its entirety." *In re Shariati*, 31

A.3d 81, 86 (D.C. 2011) (per curiam) (quoting *In re White*, 11 A.3d 1226, 1228 (D.C. 2011)); *see* D.C. Bar R. XI § 9(h). The discussion that follows addresses Disciplinary Counsel's and Luxenberg's specific objections.

A. Disciplinary Counsel's Exceptions to the Findings of Fact

Disciplinary Counsel takes exception to the Hearing Committee's failure to make certain factual findings related to Luxenberg's knowledge of Dickens's thefts and her failure to take reasonable action to protect her clients' interests and assets. D.C. Br. at 4-7. Disciplinary Counsel contends that the Hearing Committee should have included a finding of fact that by no later than March 31, 2011, Luxenberg knew that Dickens had taken $685,000 from the Seltzer estate and trusts, and thereafter took no steps to protect her client's interests or assets before Dickens fled the country in May of 2011. *Id*. at 6-7. Disciplinary Counsel cites the following evidence in support of its contention: (1) between February and March 2011, Dickens, with the assistance of Peg Shaw, prepared accountings for the 1990 Trust and the 2009 Trust and forwarded copies of those accountings to Carol Gelfeld and Altman , the attorneys for Seltzer's children (*Id.* at 4-5); (2) Dickens indicated in the accountings that he had received payment from the 2009 Trust's assets on a $685,000 demand note purportedly owed by Seltzer (*Id*. at 5); (3) Gelfeld and Altman, upon receiving the accountings from Dickens, called Luxenberg and sent her letters dated March 30, 2011, in which they outlined their respective clients' allegations that Dickens had engaged in misconduct relating to Seltzer's estate and trusts (*Id*.); and (4) in response to Gelfeld's and Altman's claims, Luxenberg contacted Dickens and her malpractice insurance company and sought defense counsel to assist her in responding to those claims (*Id.* at 6-7).

These facts do not establish by clear and convincing evidence that Luxenberg knew, by March 31, 2011, that Dickens had taken $685,000 from the Seltzer estate and trusts, and thereafter took no steps to protect her client's interests or assets before Dickens fled the country. There is no allegation or finding that Luxenberg participated in creating the accountings, or that copies of the accountings were provided to her. Rather, the evidence shows that Luxenberg first heard Gelfeld's and Altman's allegations about the accountings and the possibility of wrongdoing from their letters dated March 30, 2011. Tr. 466-467.

These letters contained only allegations of wrongdoing. Neither the letters nor the emails between Luxenberg and Dickens cited by Disciplinary Counsel establish that Luxenberg had knowledge of Dickens's theft. In fact, the emails establish just the opposite: that Luxenberg was highly concerned by Gelfeld and Altman's letters, and was actively investigating the allegations, despite Dickens's efforts to avoid her. *See e.g.*, EX 217 (email dated March 31, 2011, from Luxenberg, desperately trying to get in touch with Dickens and stating: "[w]e need to notify the carriers but we don't know what to say"); EX 218 (email dated March 31, 2011, from Luxenberg, telling an administrative assistant that she needs to set up a time for Luxenberg to talk to Dickens "so we know what to say to the malpractice carriers"); EX 219 (letter from Dickens to Luxenberg, dated March 31, 2011, stating, among other things, "If you are represented by counsel. I cannot speak directly to you. You are the trustee of one trust and I of another. One of the allegations is that of conspiracy between us."). In fact, the record shows that Luxenberg did not have any direct evidence to substantiate Gelfeld's and Altman's allegations until after Dickens fled the country in May of 2011. *See* FF 351 (after Dickens fled, Luxenberg files a motion with

the Orphan's Court to remove her as registered agent for Dickens, because she learned he forged her signature on the filing). Accordingly, the Hearing Committee properly concluded, based on substantial evidence in the record, that no findings should be made that Luxenberg knew of Dickens's misconduct on or prior to March 31, 2011.

B. Luxenberg's Exceptions to the Findings of Fact[12]

(1) The Firm's Administrative Practices

Luxenberg takes exception to Finding of Fact 12, which states that "[s]ometime after 2007, Luxenberg declined to assign any new client matters to Dickens and referred them outside the firm." (Lux. Br. at 6). This Factual Finding is supported by substantial evidence in the record as a whole. *See* Tr. 276-279. Gleichman, a nonlawyer employee with the Luxenberg firm, testified that sometime after 2007 it became apparent that referring cases to Dickens was not an option, and that the firm stopped giving cases to Dickens. *Id.*

Luxenberg takes exception to Finding of Fact 15, which states that "Luxenberg and her firm had no policies or procedures to ensure that Dickens kept complete records of the entrusted funds he handled, or that he handled them in accordance with the requirements of the ethical rules." Lux. Br. at 6. Luxenberg does not dispute that this finding of fact is

[12] To the extent Luxenberg takes exceptions to various findings of fact on the grounds that the Hearing Committee improperly relied on evidence relating to the Harris and O'Brien matter, s*ee* Lux. Br. at 6-18 (noting exceptions to Findings of Fact Nos. 18, 29-32, 45-96, 97-131, and 359 on the grounds that those facts relate only to the Harris and O'Brien matters, and are outside the Specification of Charges against her), those objections are intertwined with Luxenberg's due process/procedural objection and are addressed in the Board's Conclusions of Law, *infra*.

supported by substantial evidence; rather, she objects to its relevancy, arguing that the firm was not obligated to have such policies or procedures in place because under D.C. law, Dickens had the personal obligation as trustee to take reasonable steps to take control of and protect the trust property. *Id*. The Board does not accept the remarkable contention that because Dickens was named personal representative for the Seltzer estate, the law firm was thereafter absolved of its Rule 5.1(a) responsibilities. Rule 5.1(a) obligates lawyers with managerial authority to make reasonable efforts to ensure that their firm has measures in effect giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct, including the requirement to maintain complete records of entrusted funds. *See* Rule 1.15(a). Seltzer hired the Luxenberg firm to handle her trust and estate matters and the firm collected fees from-Seltzer. Luxenberg herself set the hourly fee, with the expectation that Seltzer would pay the firm, not Dickens personally. FF 165. The lack of policies or procedures to ensure that Dickens kept complete records of the entrusted funds he handled is therefore directly relevant to the charges against Luxenberg.

Luxenberg takes exception to the relevancy of Finding of Fact 18, which states that "Luxenberg did not take any steps to determine whether, by practicing in an office located in Virginia, where he was not licensed, Dickens would be violating the rules of Virginia concerning the unauthorized practice of law. …" Lux. Br. at 7. Luxenberg similarly takes exception to the relevancy of Finding of Fact 163 that she did not do anything to determine whether Dickens, who was not licensed in Maryland, could draft Seltzer's estate plan. Lux. Br. at 12. These findings are relevant to the adequacy of the firm's policies and procedures for assuring that its attorneys complied with the ethical rules, including the rules against

the unauthorized practice of law. Moreover, the existence or non-existence of such policies does not require a finding that Dickens actually violated a rule regarding the unauthorized practice of law.

Luxenberg takes exception to Finding of Fact 30, which states that "Luxenberg and her firm … had no policies and procedures in place to provide any assurance that Dickens was conforming to the ethical rules." Lux. Br. at 7. This fact is arguably a conclusion of law for which the Board does not owe the Hearing Committee any deference. However, as discussed below, the Board affirmatively finds that the Luxenberg firm had inadequate policies and procedures in place to provide assurances that its attorneys were practicing in conformance with the rules. Further, as discussed below, to the extent that the Luxenberg firm did have policies in place, those policies were plainly not adequately enforced against Dickens.[13]

Luxenberg takes exception to Finding of Fact 33, which states that "Dickens was supposed to save electronic documents in the firm's computer server, but failed to do so." Lux. Br. at 9. Luxenberg further takes exception to Finding of Fact 171 that Dickens did not comply with the firm's file maintenance policy during his representation of Seltzer, and that Luxenberg did not follow up with him once his non-compliance came to her attention. Lux. Br. at 12-13. These findings of fact are supported by substantial evidence

[13] To the extent Luxenberg takes exception to the relevancy of the findings that Luxenberg admitted she did not know how Garrity became a client of the firm and that Johnson, Luxenberg's partner, admitted that he did not know if Dickens' representation of Garrity made it onto the firm's case list (FF 30), these facts are relevant to the Rule 5.1(a) charge. For example, these facts speak to the Luxenberg firm's policies and diligence (or lack thereof) in checking for conflicts of interest.

in the record as a whole. *See* Tr. 235-237. Regarding Finding of Fact 33, while Gleichman may have testified that sometimes Dickens saved documents in the firm's computer server, his testimony established that most of the time Dickens did not. *Id*. The Board does not read Finding of Fact 33 as stating an absolute – i.e., that files were *never* saved on the firm's computer server – but rather as a finding that Dickens's file maintenance did not conform to the firm policy since he saved very few files on that computer server. Regarding Finding of Fact 171, Luxenberg testified that as early as September 2009 she asked Dickens for Seltzer's files for the firm's central file, and that as of March 31, 2011, she still did not have them. Tr. 423.

Luxenberg takes exception to Finding of Fact 35, which states that "[b]y 2009, Dickens was traveling frequently and when he did, Luxenberg and the rest of her firm did not know where he was or how long he would be gone." Lux. Br. at 10. That finding of fact is supported by substantial evidence in the record as a whole. Tr. 384. Clearly, as pointed out by Luxenberg, on the occasions that Luxenberg traveled with Dickens, she knew where he was. But Luxenberg's testimony establishes that on other occasions, she did not. *Id*. How often Luxenberg and the rest of her firm did not know where Dickens was traveling is immaterial; there is substantial evidence in the record that more often than not, they were unaware of Dickens's whereabouts. *Id*.

Luxenberg takes exception to the relevancy of Finding of Fact 38, which states that "Dickens did not disclose to [the] firm the nature of his purported ventures and the parties involved – information that would be necessary for the firm to identify conflicts of interest for current and future clients." Lux. Br. at 10. This fact is clearly relevant to the adequacy

of the firm's policies and procedures for ensuring that its attorneys complied with the rules of professional conduct. Information concerning an attorney's other business ventures is necessary to ensure no conflicts of interest exist. *See* Rule 5.1, cmt [2]. Further, the fact that these ventures were shams is immaterial. As far as Luxenberg's firm knew, Dickens was pursuing these ventures, and thus should have required information about the ventures for conflicts purposes.

(2) Luxenberg's Role in the Seltzer Matter

Luxenberg takes exception to Findings of Fact 162 and 165, which state that she "delegated" the drafting of Seltzer's estate planning documents to Dickens in 2009. Lux. Br. at 12. This fact is supported by substantial evidence in the record as a whole. Seltzer was Luxenberg's client. It was Luxenberg, not Dickens, who had a long-standing attorney-client relationship with Seltzer. FF 133-136. When Seltzer wanted the estate planning documents drafted in 2009, she reached out to Luxenberg, not to Dickens. FF 156. In response, Luxenberg advised Seltzer that Dickens would be providing the substantive representation in connection with her estate matter. FF 159. In sum, Seltzer retained the Luxenberg firm, and Luxenberg entrusted Dickens with the work on the estate. *Id*.

Luxenberg further takes exception to Findings of Fact 182, 183, 198, and 241, all of which relate to the legal effect of the 2009 Trust on the Amended 1990 Trust, and whether Seltzer, as co-trustee of the 1990 Trust, transferred title of the assets listed in Schedule A of the 2009 Trust to the 2009 Trust prior to her death. The findings are based in part on Luxenberg's own testimony and, in any event, the Board concludes that the

Hearing Committee's determination on these facts is based on substantial evidence in the record as a whole.

Luxenberg takes exception to Finding of Fact 254, which states that "[t]here is no evidence that Luxenberg discussed with Dickens their respective roles as trustees and how that work would be accomplished after he left the firm." Lux. Br. at 16. There is evidence that Luxenberg discussed with Dickens their roles as trustees. Tr. 464-468. There is no evidence that Luxenberg discussed with Dickens who would do the work after he left the firm. There is substantial evidence in the record, however, that Luxenberg thought that Dickens would be able to continue serving as trustee for the 2009 Trust after he left the firm. Tr. 428-429.

Luxenberg takes exception to Finding of Fact 325 that she "apparently had little or no knowledge where Dickens was and what he was doing between January and March 2011," and that "[k]nowing Dickens's plans to move to St. Kitts, Luxenberg did not take any steps to ensure that Ms. Seltzer's trusts – including the 1990 Trust for which Luxenberg was still the trustee – were and would continue to be administered in the manner that Seltzer had requested." Lux. Br. at 17. There is substantial evidence that Luxenberg had little to no knowledge as to where Dickens was and what he was doing between January and March 2011. *See* EX 201, 202, and 204. There is also substantial evidence that Luxenberg did not

take any steps to ensure that Seltzer's trusts would continue to be administered in the manner that Seltzer had requested.[14]

V. CONCLUSIONS OF LAW

A. Conclusions of Law with Respect to Dickens

The Hearing Committee found that Disciplinary Counsel proved by clear and convincing evidence that Dickens violated Rules 1.1(a), 1.1(b), 1.3(b)(1), 1.3(b)(2), 1.4(a), 1.4(b), 1.7(b)(4), 1.15(a), 1.15(c), 8.1(b), 8.4(b), and 8.4(d). Neither Dickens nor Disciplinary Counsel filed any exceptions to the Hearing Committee's Conclusions of Law with respect to Dickens. Nonetheless, the Board owes no

[14] Additionally, the Board sustains the following exceptions: Luxenberg's exception to Finding of Fact 44 (ambiguity regarding when Luxenberg found out about Dickens' charges on a firm issued credit card). The record shows that she learned of the credit card charges in January 2011. Tr. 370; Luxenberg's exceptions to Findings of Fact 141, 145, and 147 (all concerning whether Luxenberg served as "trustee" of Seltzer's Amended 1990 Trust). The record shows that Luxenberg agreed to serve as "co-trustee," not "trustee." EX 16 at 4; Luxenberg's exceptions to Findings of Fact 179 and 193 (both asserting that the documents Dickens prepared designated him as trustee). The record shows that Seltzer, as the person executing the Trust and the Will, was the individual who designated Dickens as Trustee/Personal Representative, and Johnson as Successor Trustee/Successor Personal Representative. EX 67 and 76; Luxenberg's exception to Finding of Fact 228 (that Luxenberg knew Dickens was acting as personal representative for Seltzer's estate before the Maryland Orphans' Court) is sustained in part. There is no evidence in the record that Luxenberg knew of the Appointment of Resident Agent form signed by Dickens until she was sued by Seltzer. However, there is evidence that she knew the court system would be involved and that Dickens was acting as personal representative and was not licensed to practice in Maryland where Seltzer's Estate was probated. Tr. 453-54, EX 121; Luxenberg's exception to Finding of Fact 239 (that Luxenberg knew that the Amended 1990 Trust held substantial assets upon Seltzer's death). There is a lack of substantial evidence establishing that Luxenberg knew that the 1990 Trust held substantial assets upon Seltzer's death. Tr. 514-515; Luxenberg's exception to Finding of Fact 278 (that Luxenberg sent Johnson the email identified as EX 140). Luxenberg's partner, Johnson, sent the email depicted in EX 140.

deference to the Hearing Committee's proposed conclusions of law, and we review them *de novo*. *In re Bradley*, 70 A.3d 1189, 1194 (D.C. 2013) (per curiam); *In re Anderson*, 778 A.2d 330, 339 n.5 (D.C. 2001). For the following reasons, we agree with the Hearing Committee and find that Dickens violated Rules 1.1(a), 1.1(b), 1.3(b)(1), 1.3(b)(2), 1.4(a), 1.4(b), 1.7(b)(4), 1.15(a), 1.15(c), 8.1(b), 8.4(b), and 8.4(d).

(1) Failure to Provide Competent Representation and Serve Seltzer with the Skill and Care Commensurate with that Generally Afforded to Clients by Other Lawyers in Similar Matters (Rules 1.1(a) and (b))

Disciplinary Counsel charged Dickens with violations of Rules 1.1(a) and 1.1(b) in the Seltzer matter. These rules require professional competence in the representation of clients. *In re Yelverton*, 105 A.3d 413, 416 (D.C. 2014).

The evidence in the record establishes that Dickens did not act with the required level of professional competence in his representation of Seltzer. Disciplinary Counsel's expert witnesses testified that Dickens's work in amending the 1990 Trust, drafting the Letter of Instruction, advising Seltzer before she executed her estate plan, and filing Seltzer's estate tax returns, fell below the standard of care. FF 143, 182, 209, 285; Tr. 544, 779-80, 833. We agree and, accordingly, conclude that Dickens violated Rules 1.1(a) and 1.1(b) in the Seltzer matter.

(2) Intentionally Failing to Seek the Client's Lawful Objectives Through Reasonably Available Means and Prejudicing and Damaging his Client During the Court of the Professional Relationship (Rules 1.3(b)(1) and 1.3(b)(2))

Disciplinary Counsel charged Dickens with violations of Rules 1.3(b)(1) and 1.3(b)(2) in the Seltzer matter. Under Rule 1.3(b)(1), "[a] lawyer shall not intentionally. . . [f]ail to seek the lawful objectives of a client through reasonably available means permitted by law and the disciplinary rules[.]" Under Rule 1.3(b)(2) "[a] lawyer shall not intentionally . . . prejudice or damage a client during the course of the professional relationship."

By stealing Seltzer's estate assets, Dickens intentionally failed to seek Seltzer's objectives and intentionally prejudiced her and her beneficiaries. The record is replete with clear and convincing evidence establishing the thefts and misappropriations. *See* FF 217-218, 221-222, 226, 245, 248, 250. Accordingly, we conclude that Dickens violated Rules 1.3(b)(1) and 1.3(b)(2) in the Seltzer matter.

(3) Failure to Keep His Clients Reasonably Informed about the Status of their Matter, and to Explain Matters Sufficiently to Permit the Client to Make Informed Decisions Regarding the Representation (Rules 1.4(a) and 1.4(b))

Disciplinary Counsel charged Dickens with violations of Rules 1.4(a) and (b) in the Harris, O'Brien, and Seltzer matters. Rule 1.4(a) provides: "[a] lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." Rule 1.4(b) provides: "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Dickens's violations of Rules 1.4(a) and (b) in the Harris matter are well-established in the record. Dickens failed to keep Harris informed as to his actions with respect to the Harris Estate, and in the few communications he had with Harris, he concealed information that he was obligated to disclose, lied, or both. *See* FF 53-54, 58, 60- 63, 68-69, 78, 79, 88-93.

Similarly, in the O'Brien matter, Dickens failed to keep Garrity, the executor of Dr. O'Brien's Estate, informed as to his actions on behalf of the Estate, and the true amount to which the Estate was entitled. *See* FF 113-115, 124. It goes without saying that Dickens told neither Garrity nor Dr. O'Brien's beneficiaries that he was stealing estate funds for himself. FF 125.

Finally, Dickens's Rule 1.4 violations in the Seltzer matter were pervasive. Dickens did not timely communicate with Seltzer about her trust and estate plan and did not provide her with the information she needed to make informed decisions about the plan. *See* FF 159, 162-168, 189, 195. Thus, we conclude that Dickens violated Rules 1.4(a) and (b) in the Harris, O'Brien, and Seltzer matters.

(4) Failure to Provide Client with a Writing Communicating the Basis or Rate of Fee and Scope of Representation (Rule 1.5(b))

Disciplinary Counsel charged Dickens with a violation of Rule 1.5(b) in the O'Brien matter. Rule 1.5(b) provides: "[w]hen 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."

The fact that Dickens did not provide Garrity with a retainer agreement or other writing setting forth the basis for the fee or the scope of the representation is well supported by record evidence. FF 97, 101-102. Further, during the representation, Dickens did not generate any bills or statements reflecting the services he was providing to Garrity, or otherwise communicate the basis for the fees the firm was charging. FF 102. For these reasons, we conclude that Dickens violated Rule 1.5(b) in the O'Brien matter.

(5) Representing a Client in a Matter in Which His Professional Judgment on the Client's Behalf Would Be or Reasonably Could Be Affected by his own Financial, Business, Property or Personal Interests, Without Obtaining the Client's Informed Consent (Rule 1.7(b)(4))

Disciplinary Counsel charged Dickens with a violation of Rule 1.7(b)(4) in the Seltzer matter. Rule 1.7(b)(4) provides: "a lawyer shall not represent a client with respect to a matter if . . . [t]he lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by . . . the lawyer's own financial, business, property, or personal interests."

As the Hearing Committee noted, "at some point Dickens's interest in the Seltzer matter became nothing more than looting the Estate for his personal benefit. . . . there is no doubt that the interest of an attorney engaging in such reprehensible conduct is antithetical to the interest of his client." H.C. Rpt. at 131. We agree. Dickens's personal interest in stealing the money in the estate created an inherent and obvious conflict of interest in his representation of Seltzer. Accordingly, we conclude that Dickens violated Rule 1.7(b)(4) in the Seltzer matter.

(6) Commingling Trust and Estate Funds with his Own Funds (Rule 1.15(a))

Disciplinary Counsel charged Dickens with a violation of Rule 1.15(a) by commingling in the Harris, O'Brien, and Seltzer matters. Rule 1.15(a) requires attorneys to preserve the separate identity of client funds. It provides, in relevant part: "[a] lawyer shall hold the property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property." Rule 1.15(a). The Hearing Committee found that Disciplinary Counsel failed to prove commingling by clear and convincing evidence, a finding with which we agree.

In order to prove commingling, Disciplinary Counsel had to prove that entrusted and non-entrusted funds were on deposit in the same account at the same time. *In re Smith*, 817 A.2d 196, 201 (D.C. 2003); *In re Haar*, 698 A.2d 412, 416 (D.C. 1997) (citing *In re Ingram*, 584 A.2d 602, 603-04 (D.C. 1991)). While the bank statements offered by Disciplinary Counsel show multiple deposits of entrusted funds into Dickens's personal bank account, *see* FF 62, 89, 91-92, 119, 120, 226, 250, 258, neither the bank statements nor any other evidence established that there were non-entrusted funds in Dickens's personal account at the time of the deposits. Thus, we do not find that Dickens committed commingling in violation of Rule 1.15(a).

(7) Intentionally Misappropriating Trust and Estate Funds (Rule 1.15(a))

Disciplinary Counsel charged Dickens with intentionally misappropriating entrusted client funds in violation of Rule 1.15(a). Misappropriation is defined as "any unauthorized use of client[] [or third-party] funds entrusted to [the lawyer], including not

only stealing but also unauthorized temporary use for the lawyers own purpose, whether or not he derives any personal gain or benefit therefrom." *In re Harrison*, 461 A.2d 1034, 1036 (D.C. 1983) (citation and quotation marks omitted).

The record clearly establishes that Dickens misappropriated client funds from the Harris, O'Brien, and Seltzer Estates and that his misappropriations were intentional. *See* FF 61, 62, 71, 78-79, 83-86, 90-92, 107, 109-110, 113, 120-123, 217-218, 221-222, 226, 245, 248, 250. As summarized by the Hearing Committee, "absent a confession by a respondent, it is difficult to conceive of a more compelling case for intentional misappropriation." H.C. Rpt. at 136. Dickens intentionally misappropriated entrusted client funds in violation of Rule 1.15(a).

(8) Failure to Promptly Notify his Clients of Receipt of Estate Funds, Promptly Deliver the Funds to the Client, and Provide a Full Accounting of Said Funds (Rule 1.15(c))

Disciplinary Counsel charged Dickens with a violation of Rule 1.15(c) in the Harris, O'Brien, and Seltzer matters. Rule 1.15(c) provides:

> Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property, subject to Rule 1.6.

Once again, the record is clear that Dickens breached this obligation in the Harris, O'Brien, and Seltzer matters. *See* FF 79, 257, 264, 299, 302, 307. Indeed, each time Dickens misappropriated funds from the estates in violation of Rule 1.15(a), he failed to deliver funds that a client or third party was entitled to receive in violation of Rule 1.15(c).

See discussion of Rule 1.15(a), *supra*. Accordingly, we conclude that Dickens violated Rule 1.15(c) in the Harris, O'Brien, and Seltzer matters.

(9) Engaging in the Practice of Law in Maryland Without a License, in Violation of the Regulation of the Legal Profession in that Jurisdiction (Rule 5.5(a))

Disciplinary Counsel charged Dickens with violating Rule 5.5(a) in the Seltzer matter by engaging in the unauthorized practice of law in Maryland. Rule 5.5(a) prohibits a lawyer from "practic[ing] law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction." The Maryland Code defines the practice of law as:

> (i) giving legal advice;
>
> (ii) representing another person before a unit of the State government or of a political subdivision;
>
> (iii) performing any other service that the Court of Appeals defines as practicing law.

Maryland Code, Business Occupations and Professions, § 10-101(h)(1)(i)-(iii). The practice of law specifically includes:

> (i) advising in the administration of probate of estates of decedents in an orphans' court of the State;
>
> (ii) preparing an instrument that affects title to real estate;
>
> (iii) preparing or helping in the preparation of any form or document that is filed in a court or affects a case that is or may be filed in a court; or
>
> (iv) giving advice about a case that is or may be filed in a court.

Id. at § 10-101(h)(2)(i)-(iv).

The application of the Maryland Code to the undisputed, well-supported facts in the record make clear that Dickens practiced law "in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction," in violation of Rule 5.5(a). Dickens was never a member of the Maryland Bar. FF 7. Dickens nonetheless practiced law in Maryland by preparing legal documents for Seltzer (who was located in Maryland), holding all of his meetings with Seltzer at the firm's office in Maryland, giving legal advice about the documents and the probate of Seltzer's estate, and preparing forms or documents that were filed in the Maryland Orphans' Court. FF 10, 18, 33, 163, 172, 177, 188, 192, 227-228, 251, 284, 305.[15] Accordingly, we conclude that Dickens violated Rule 5.5(a) in the Seltzer matter.

(10) Failure to Respond to Disciplinary Counsel's Lawful Demand for Information Regarding a Matter (Rule 8.1(b))

Disciplinary Counsel charged Dickens with violating Rule 8.1(b) in the Harris, O'Brien, and Seltzer matters. Rule 8.1(b) provides that, in connection with a disciplinary matter, a lawyer shall not "knowingly fail to respond reasonably to a lawful demand for information from an admissions or disciplinary authority." "[A] person's knowledge may be inferred from the circumstances." Rule 1.0(f) (Terminology).

Dickens failed to respond to Disciplinary Counsel in all three matters that are the subject of this proceeding. FF 362-369. Further, we agree with the Hearing Committee that his failures to respond were knowing. Disciplinary Counsel made extensive efforts to

[15] Luxenberg was a member of the Maryland Bar, but she did not supervise Dickens' preparation of documents, the legal advice he provided, or his filings with the Orphans' Court, in the Seltzer matter. FF 10, 18, 33, 163, 228.

reach Dickens, including by U.S. Mail, email, voicemail messages, publication, talking to his spouse and neighbors, and contacting a medical school in St. Kitts. FF 370. Indeed "the record strongly suggests that Dickens had fled the jurisdiction to avoid facing the consequences of his misconduct." H.C. Rpt. at 144. These suggestions are buttressed by the statement that Dickens made to Seltzer's children's attorneys, that he would not "run from the bar" in the face of their accusations. FF 336. It appears that is exactly what he did. *See* H.C. Rpt. at 144. Accordingly, we conclude that Dickens violated Rule 8.1(b) in the Harris, O'Brien, and Seltzer matters.

(11) Commission of Criminal Acts Reflecting Adversely on Honesty, Trustworthiness, and/or Fitness as a Lawyer (Rule 8.4(b))

Disciplinary Counsel charged Dickens with violating Rule 8.4(b) by intentionally misappropriating entrusted funds in the Harris, O'Brien, and Seltzer matters. Rule 8.4(b) provides: "[i]t is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. . . ." To violate this rule, a lawyer does not have to be convicted, or even charged, with criminal conduct. *In re Slaughter*, 929 A.2d 433, 445 (D.C. 2007).[16]

Disciplinary Counsel identified the following statutes that Dickens violated: D.C. Code § 22-3211 (theft); D.C. Code § 22-3221 (fraud); Va. Code § 18.2-95 (grand larceny); Va. Code § 18.2-178 (false pretenses); Md. Crim. Law Code § 7-105 (general theft). The

[16] For the purposes of Rule 8.4(b), Disciplinary Counsel must only prove the criminal act by clear and convincing evidence (as opposed to the beyond a reasonable doubt standard in the criminal context). *See In re Slattery*, 767 A.2d 203, 207 (D.C. 2001).

crux of each of the aforementioned statutes is that a person, without right, has deprived another of his or her property.

Dickens's misappropriations of funds in the Harris, O'Brien, and Seltzer matters are well-established throughout the record. *See* Section IV(A)(7), *supra*. Further, we agree with the Hearing Committee that there can be no reasonable doubt that Dickens's thefts were intentional. This is especially true given that the thefts involved numerous separate acts and often complex activities designed to obfuscate Respondent's crimes. FF 83, 106, 120, 217, 221, 245, 248, 250. We therefore conclude that Dickens engaged in criminal fraud and theft and violated Rule 8.4(b) in the Harris, O'Brien, and Seltzer matters.

(12) Engaging in Conduct Involving Dishonesty, Fraud, Deceit, or Misrepresentation (Rule 8.4(c))

Disciplinary Counsel charged Dickens with violating Rule 8.4(c) in the Harris, O'Brien, and Seltzer matters. Rule 8.4(c) provides that it is professional misconduct for a lawyer to: "[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

As should be clear from our discussion, there can be no doubt that Dickens engaged repeatedly in acts of "dishonesty, fraud, deceit, [and] misrepresentation" in violation of Rule 8.4(c). Over the course of almost a decade, he stole from the Harris, O'Brien, and Seltzer estates, lied about his thefts to his clients and third-party beneficiaries, concealed material facts from clients, and attempted to cover his tracks. In reaching this conclusion, we rely on the facts discussed in reference to Dickens's violations of Rules 1.4(a) and (b), 1.15(c), 5.5(a), 8.1(b), and 8.4(b), *supra*. *See also* FF 64, 79, 227, 269, 283, 293.

(13) Engaging in Conduct that Seriously Interferes with the Administration of Justice (Rule 8.4(d))

Disciplinary Counsel charged Dickens with violating Rule 8.4(d) in the Harris, O'Brien, and Seltzer matters. Rule 8.4(d) provides: "[i]t is professional misconduct for a lawyer to . . . (d) engage in conduct that seriously interferes with the administration of justice [.]"

The record clearly establishes that Dickens violated Rule 8.4(d). In reaching this conclusion, we rely on the facts discussed in relation to Dickens's Rule 8.1(b) violation, *supra*. Dickens's failure to respond to Disciplinary Counsel's inquiries not only undermined the disciplinary system and required the expenditure of substantial time and resources by Disciplinary Counsel, but his misconduct in the underlying estate matters also adversely affected the courts involved. For instance, in the Harris, O'Brien, and Seltzer matters, the estate beneficiaries had to file motions to reopen or otherwise correct the various Probate Court rulings to salvage what they could from the looted estates. FF 96, 130, 350-351, 356-357. Accordingly, we conclude that Dickens also violated Rule 8.4(d) in the Harris, O'Brien, and Seltzer matters.

(14) Failing to Comply with a Board Order (D.C. Bar R. XI, § 2(b)(3))

Disciplinary Counsel charged Dickens with violating D.C. Bar Rule XI, § 2(b)(3) in the Seltzer matter when he failed to comply with an order from the Board directing him to respond to Disciplinary Counsel's inquiries. D.C. Bar Rule XI, § 2(b)(3) provides that "[f]ailure to comply with any order of the Court or the Board issued pursuant to this rule" shall be grounds for discipline.

The record establishes that Dickens failed to comply with the January 9, 2012 order issued by the Board in the Seltzer matter, FF 364, 371, and thus we conclude Dickens violated D.C. Bar Rule XI, § 2(b)(3).

B. Conclusions of Law with Respect to Luxenberg

The Hearing Committee found that Disciplinary Counsel proved by clear and convincing evidence that Luxenberg violated Rules 5.1(a) and 5.1(c)(2), but did not prove by clear and convincing evidence that she violated Rules 1.3(a), 1.3(b)1, 1.3(b)(2), 1.7(b)(4) and 8.4(a). We disagree with the Hearing Committee's conclusion that Luxenberg did not violate Rule 1.3(a), but otherwise agree with its conclusions of law.

(1) Due Process/Procedural Objection to the Prehearing Consolidation of the Harris and O'Brien Matters with the Seltzer Matter

As a threshold matter, Luxenberg takes exception to the Hearing Committee's reliance on overlapping evidence introduced by Disciplinary Counsel related to the Harris and O'Brien Matters (Bar Docket Nos. 2012-D010 and 2012-D011) in connection with the Hearing Committee's findings of fact and conclusions of law against her in the Seltzer matter. Lux. Br. at 18-23. Specifically, Luxenberg alleges a due process violation and a violation of D.C. Bar R. XI, § 8(c).

The Hearing Committee overruled Luxenberg's objections, asserting that it considered against Luxenberg only the charges against her in the Seltzer matter that are set forth in the Specification of Charges in which she is named, and that to the extent that certain of those charges address Luxenberg's responsibility for Dickens's misconduct, the

Committee considered only whether Luxenberg was responsible for Dickens's violations in the Seltzer matter. H.C. Rpt. at 155-156.[17]

(a) D.C. Bar R. XI, § 8(c)

D.C. Bar R. XI, § 8(c) requires, among other things, that a petition "be sufficiently clear and specific to inform the attorney of the alleged misconduct." Luxenberg asserts that no petition was ever filed against her alleging misconduct in the Harris or O'Brien matters. Lux. Br. at 20-21.

The Specification of Charges against Luxenberg charged that, among other things, Luxenberg violated "Rule 5.1(a) in that [Luxenberg] as a partner in the law firm, failed to make reasonable efforts to ensure that the firm had in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct[.]" Specification of Charges ¶ 93(e). The Specification of Charges further charged that Luxenberg violated "Rule 5.1(c)(2) in that [Luxenberg] as a partner in the law firm knew or reasonably should have known of Respondent Dickens's conduct at the time when its consequences could have been avoided or mitigated, but failed to take reasonable remedial action[.]" Id. at ¶ 93(f). These charges required an examination of (and a consideration of

[17] Disciplinary Counsel also asserted, and the Hearing Committee also stated, that waiver is an alternative basis for overruling the objection, because Luxenberg failed to oppose Disciplinary Counsel's November 7, 2013 motion to assign all matters against Dickens's to the same Hearing Committee. D.C. Br. at 11, n.4; H.C. Rpt. at 156, n.59. The Board disagrees. The Motion specifically *did not* request "that the matters be consolidated for a single hearing, which would require Respondent Luxenberg to be present for matters in which she is not charged with any ethical misconduct." Motion at 2-3. Nevertheless, since the Board finds that Luxenberg's due process rights were not violated, the Hearing Committee's dictum on waiver is harmless.

evidence relating to) the administration of the Luxenberg firm, Luxenberg's relationship with Dickens, their respective roles at the firm, the nature of Dickens's practice, and Luxenberg's knowledge thereof.

In making its findings of fact and conclusions of law regarding the Rule 5.1(a) and 5.1(c)(2) violations, the Hearing Committee considered evidence presented in connection with the Harris and O'Brien matters, which overlapped with the issue in the Seltzer matter regarding the administration of the Luxenberg firm. *See*, *e.g.*, FF 13, 20, 26, 29-32, 82, 102, 123, and 127; H.C. Rpt. at 164-180. The evidence was not improperly used in the Seltzer matter; rather, it is evidence directly related to the charges in the Seltzer matter, depicting the entire "mosaic" of Luxenberg's conduct. *See*, *e.g.*, *Ukwu*, 926 A.2d at 1115-1118 (holding that the Board should have considered evidence of neglect in respondent's prior representations as bearing on the issue of whether, in a subsequent representation, respondent intentionally neglected client's matter); *In re Godette*, 919 A.2d 1157, 1165-1166 (D.C. 2007) (overturning Board's decision and holding that the Board should have considered the respondent's repeated uncharged earlier failures to answer or acknowledge mail sent to him by Disciplinary Counsel as bearing on the issue of whether, thereafter, he deliberately evaded personal service); *In re Shillaire*, 549 A.2d 336, 343 (D.C. 1988) (overturning Board's findings, and holding that uncharged statements made to third parties should have been included in the Board's calculus because the statements established that respondent's conduct was "but one especially reprehensible part of a sordid mosaic of misconduct.").

The Specification of Charges was sufficiently specific to inform Luxenberg that the administration of the Luxenberg firm, Luxenberg's relationship with Dickens, their respective roles at the firm, the nature of Dickens's practice, and Luxenberg's knowledge thereof would be at issue. Luxenberg points to no authority requiring greater specificity.

(b) Due Process

"An attorney is entitled to procedural due process in a disciplinary hearing, which includes fair notice of the charges against h[er]." *In re Bielec*, 755 A.2d 1018, 1024 (D.C. 2000) (citing *In re Ruffalo*, 390 U.S. 544, 550-51 (1968)). "Such notice is necessary to afford the attorney an opportunity to explain or defend against allegations of misconduct." *Id.* Luxenberg asserts that she was not aware that the Hearing Committee would permit evidence from the Harris and O'Brien matters to be used against her. Lux. Br. at 21. She further asserts she was never afforded an opportunity to investigate or even review Disciplinary Counsel's file in connection with those matters. *Id*.

There is undisputed record evidence that Luxenberg had notice that any of the evidence admitted at the hearing could be used in consideration of the charges against Luxenberg in the Seltzer matter. This issue was specifically raised during the January 27, 2014, pre-hearing conference, and was addressed in the Hearing Committee's pre-hearing Order. *See* January 27, 2014 Hearing Tr. 19-21 (Counsel for Luxenberg proposed to first "proceed in the joint proceeding against Luxenberg and Dickens with regard to [the] Seltzer matter, close the evidence and make arguments . . . against Luxenberg and then move on with the rest of it"; Chairman Salerno advised that "on this particular point, I'm going to take it under advisement and we'll indicate in the prehearing order that comes out, exactly

how we'll handle this."); February 14, 2014 Prehearing Order ¶ d ("[I]n order to enable the Hearing Committee to consider the entire mosaic of Respondents' conduct, the Hearing Committee will not close the evidence relating to any one Specification of Charges until the close of the entire consolidated hearing. . . . Respondent Luxenberg is on notice that when considering the charges against her, the Hearing Committee may consider evidence presented in connection with [the Harris and O'Brien matters]."). The hearing did not start until March 31, 2014 – six weeks after the Committee issued its pre-hearing Order. Accordingly, Luxenberg had fair notice of the charges against her, and had a sufficient opportunity to explain or defend against the allegations.[18] Her due process rights were not violated.[19]

(2) Failing to Represent a Client Zealously and Diligently Within the Bounds of the Law (Rule 1.3(a))

The Hearing Committee declined to find a violation of Rule 1.3(a), because it found that Luxenberg's failings did not amount to the level of indifference and consistent failure

[18] Additionally, at the beginning of the hearing, the Committee reminded Luxenberg that any of the evidence admitted at the hearing could be used in consideration of the charges against Luxenberg in the Seltzer matter. Tr. at 3-4. The Hearing Committee reminded Luxenberg of this again, during the hearing, when it appeared that Luxenberg was waiving her right to cross- examine one of Disciplinary Counsel's witnesses. Tr. 899-900.

[19] Disciplinary Counsel also asserts that, in any event, Luxenberg cannot show any prejudice from the consolidation or the Committee's consideration of evidence relating to client matters other than the Seltzer matter, because Disciplinary Counsel would have offered the same evidence in the other client matters to establish Luxenberg's misconduct, particularly her violations of Rule 5.1, even if the matters were not consolidated. D.C. Br. at 11 n.4. The Board agrees.

to carry out her obligations to her client, which is necessary to prove neglect. H.C. Rpt. at 158. We disagree, and find that Luxenberg violated Rule 1.3(a).

Rule 1.3(a) requires a lawyer to "represent a client zealously and diligently within the bounds of law." Rule 1.3(a). Neglect of a client matter is a violation of the obligation of diligence. *See* Rule 1.3(a), Comment [8] ("[U]nreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. Neglect of client matters is a serious violation of the obligation of diligence."). In *In re Reback*, the Court defined neglect as:

> [I]ndifference and a consistent failure to carry out the obligations which the lawyer has assumed to his client or a conscious disregard for the responsibility owed to the client. The concept of ordinary negligence is different. Neglect usually involves more than a single act or omission. Neglect cannot be found if the acts or omissions complained of were inadvertent or the result of an error of judgment made in good faith.

487 A.2d 235, 238 (D.C. 1985) (per curiam) (citation omitted). The Court held in *Reback* that attorneys violated the predecessor to Rule 1.3(a) by failing to prosecute a divorce case, resulting in its dismissal, and failing to supervise an associate who failed to prosecute the same divorce after the case was refiled. *Id*. *See also In re Douglass*, 859 A.2d 1069, 1081 (D.C. 2004) (per curiam) (attorney violated Rule 1.3(a) when he took no action on a case for almost two years; court held "almost two years of sustained inattention crosses the line to incompetence and neglect."); *In re Lewis*, 689 A.2d 561, 564 (D.C. 1997) (per curiam) (attorney violated Rule 1.3(a) when he failed to appear at hearings, communicate with his client and/or the court, failed to file any motions on his client's behalf, and generally abandoned the representation of his client).

Here, Luxenberg's actions with respect to Seltzer's matters reflect a clear indifference and consistent failure to carry out her obligations to Seltzer over a sustained period of time, and thus establish neglect under Rule 1.3(a). First, Luxenberg delegated Seltzer's 2009 matter to Dickens while knowing that he was not licensed in Maryland, was rarely around, and already had made plans to leave the firm and the practice of law. D.C. Br. at 29. Additionally, at that time, Dickens had recently taken a large pay cut (Tr. 377-380), was difficult to reach, had stopped attending staff meetings, and disappeared for months at a time pursuing his own business ventures. FF 22; Tr. 384, 1061. Further, at the time she delegated the 2009 matter to Dickens, Luxenberg was privy to Dickens's occasional bizarre behavior, including dressing as a priest, and claiming to have received training in a number of other vocations. FF 41-42. Luxenberg was also aware of Dickens's performance on Seltzer's previous trust matter. She presumably knew that Dickens took four months to amend Seltzer's 1990 Trust, though it is not clear if that was at the forefront of her mind five years later. FF 139 and 143. Given the numerous potential problems with Dickens taking the lead in the representation of Seltzer, however, Luxenberg had an obligation to stay involved in the representation in more than a casual way to ensure that Seltzer's needs would be adequately addressed. She failed to do so.

Second, Luxenberg neglected Seltzer's matter because she knew Dickens was not working on the Seltzer matter for four months, but took no actions to ensure that Seltzer was receiving proper representation. D.C. Br. at 29. As pointed out by the Hearing Committee, Luxenberg did take action when Dickens failed to perform work during four months in 2009. In mid-August 2009 she sent Dickens an email asking if he could do the

work, and he immediately assured her and Seltzer that he could. FF 167. Dickens did meet with Seltzer in September 2009 and again in November 2009 to discuss trust documents and the powers of attorney that he had drafted. FF 172, 176-179, 183, 187-188. However, and as discussed further below, we agree with Disciplinary Counsel that, in the circumstances of this case, Luxenberg's occasional (but rare) communications with Dickens concerning the work he was doing for Seltzer were plainly insufficient to ensure that her matters were being handled adequately and constitute neglect on the part of Luxenberg.

Third, Luxenberg violated Rule 1.3(a) in connection with Seltzer's signing of the Letter of Instruction in February 2010. D.C. Br. at 30-31. Indeed, the circumstances surrounding the signing of the Letter of Instruction by Seltzer are extremely troubling.

Luxenberg argues, and the Hearing Committee agreed, that she was at the Casey House on the date the Letter of Instruction was signed as Seltzer's friend, not her lawyer, and that Luxenberg did not provide any substantive representation to Seltzer at the time. FF 140, 161. However, it is well-established that the client's perspective of the relationship is the overarching consideration in assessing whether an individual is acting as an attorney. *See In re Bernstein*, 707 A.2d 371, 375 (D.C. 1998) (client's perceptions are important consideration in determining whether attorney-client relationship existed) (citing *Matter of In re Lieber*, 442 A.2d 153, 156 (D.C. 1982)). To that end, the record establishes by clear and convincing evidence that Seltzer perceived Luxenberg as her attorney protecting her interests. Seltzer was Luxenberg's client, and Seltzer repeatedly turned to Luxenberg when she needed legal advice and counsel. *See* FF 133 (in June 1994, Seltzer retained Luxenberg

to represent her in a divorce and negotiated property settlement); FF 136 (Seltzer felt comfortable with Luxenberg, stayed in touch after 1997, and the two formed a close bond); FF 139 (in June 2004, Seltzer contacted Luxenberg about updating her estate plan; Seltzer provided Luxenberg with copies of relevant documents); FF 141 (at the express request of Seltzer, Luxenberg agreed to serve as trustee of Seltzer's amended 1990 Trust; Seltzer's reliance on Luxenberg and Luxenberg's agreement to represent Seltzer in the trust matter was largely motivated by their prior professional relationship and the friendship resulting therefrom); FF 142 (Luxenberg set the fee for Seltzer's representation, and charged her a "discounted rate . . . as a courtesy for [her] being an old, and very good client"); FF 148 (on December 8, 2007, several days before undergoing surgery, Seltzer provided written instructions to Luxenberg in the event she did not survive); FF 156 (by no later than April 20, 2009, Seltzer had contacted Luxenberg about helping her with further revisions to her estate plan and Luxenberg responded that "[w]e are happy to help you . . . "). Seltzer plainly viewed Luxenberg as her counsel, and by bringing the portfolio into the room and ultimately signing the Letter of Instruction as a witness, Luxenberg would appear to have been acting -- at least in part -- in a legal capacity for Seltzer, and had an obligation to represent Seltzer's interests diligently which, again, she failed to do. *See* FF 207, 211.

The Letter of Instruction was only one sentence long. At the very least, Luxenberg should have read the letter, and insisted that Dickens explain the purpose and consequences of the letter to Seltzer. The letter allowed Dickens to abscond with Seltzer's funds, since it permitted the transfer of her assets to him personally without restriction. Had she read the letter at the time she signed it as a witness, Luxenberg would have been able to step in

and protect Seltzer's interests -- which Seltzer expected Luxenberg to do as her attorney. *See* FF 208.

Fourth, Luxenberg violated Rule 1.3(a) in connection with her duties as trustee of Seltzer's Amended 1990 Trust. Specifically, Luxenberg's transfer of the assets to the 2009 Trust, even though she was not authorized to do so under the terms of the Amended 1990 Trust, was an instance of neglect.

Luxenberg testified she believed she was obligated to transfer the assets based on what Dickens told her about the effect of the 2009 Trust. Tr. 448-450, 452, 457-458. The Hearing Committee concluded that Luxenberg's belief, based on representations by Dickens, was that once the 2009 Trust was in place, it effectively transferred assets from the 1990 Trust, for which Luxenberg was trustee, to the 2009 Trust, for which Dickens was the trustee. H.C. Rpt. at 157. The Hearing Committee further concluded that Disciplinary Counsel failed to prove by clear and convincing evidence that Luxenberg's alleged failure to act was anything more than a good-faith misunderstanding (based on Dickens's incorrect advice and counsel) of her obligations. *Id*. To that end, the Hearing Committee did not reach a definitive answer to the question of whether Seltzer's execution of the 2009 Trust effectively revoked and transferred the assets from the Amended 1990 Trust into the 2009 Trust by operation of law. H.C. Rpt. at 161.

Nevertheless, it is clear that Luxenberg further facilitated Dickens's theft of funds by accompanying Dickens to the bank to authorize the transfer of funds from the 1990 Trust, which she controlled, to the 2009 Trust, which Dickens controlled. Absent Luxenberg's actions, Dickens would not have been able to carry out his scheme.

Luxenberg, as trustee of the 1990 Trust, was obligated to understand the instrument and the limits of her authority regarding the transfer of the funds. She failed to appreciate those limitations, and thus neglected to act in the best interests of Seltzer.

As is evident from the above discussion, Luxenberg neglected Seltzer's matter in a number of ways over a sustained period of time. Even if a particular example of Luxenberg's actions does not rise to the level of neglect, in combination they certainly do. In our view, the Hearing Committee analyzed each of Luxenberg's actions in isolation, and failed to take into account the history of Dickens's actions and behavior, of which Luxenberg had considerable knowledge. Our finding of neglect is based, in part, on Luxenberg's failure to protect Seltzer's interests in light of her knowledge of Dickens's history and his then-present intention of resigning from the firm. Further, knowing Dickens's various problems, Luxenberg failed to ensure that the matter was handled in a timely manner; failed to step in when Dickens was not making progress; failed to read the Letter of Instruction, and thus failed to notice that it was missing two attachments and that it called for the transfer of Seltzer's assets to Dickens without restriction; and failed to appreciate the Seltzer trust instrument over which she had control, which led to her further facilitating Dickens's crime by her signing off on the transfer of the assets to the 2009 Trust over which Dickens had control. She well-knew, based on, among other things, the issue with the firm's credit card in 2007 and Dickens's failure to maintain billing records, that there were potential problems with Dickens's handling of financial matters. In essence, Luxenberg was willfully blind and indifferent to Seltzer's ongoing needs. Seltzer trusted

Luxenberg, but Luxenberg neglected to diligently protect Seltzer's interests, and thus violated Rule 1.3(a).

(3) Intentionally Failing to Seek the Client's Lawful Objectives Through Reasonably Available Means and Prejudicing and Damaging a Client During the Course of the Professional Representation (Rule 1.3(b)(1) and (2))

The Hearing Committee declined to find that Luxenberg violated Rules 1.3(b)(1) and (2) because she did not act with the intent necessary to violate these rules. H.C. Rpt. at 162. The Board agrees.

Rule 1.3(b)(1) provides that "[a] lawyer shall not intentionally . . . [f]ail to seek the lawful objectives of a client through reasonably available means permitted by law and the disciplinary rules[.]" "Intent must ordinarily be established by circumstantial evidence, and in assessing intent, the court must consider the entire context." *Ukwu*, 926 A.2d at 1116.

Rule 1.3(b)(2) provides that "[a] lawyer shall not intentionally . . . prejudice or damage a client during the course of the professional relationship." To establish a violation of Rule 1.3(b)(2), Disciplinary Counsel must demonstrate "actual prejudice or damage to the client." *In re Cohen*, 847 A.2d 1162, 1165, n.1 (D.C. 2004). "It is sufficient to establish a violation of [the predecessor to Rule 1.3(b)(2) by showing] that the lawyer was 'demonstrably aware' that prejudice or damage to the client would result from his conduct, and that such prejudice or damage did, in fact, result." *In re Robertson*, 612 A.2d 1236, 1250-51 (D.C. 1992).

Disciplinary Counsel does not articulate a basis for its Rule 1.3(b) exceptions, separate from those articulated with respect to its Rule 1.3(a) exception. In any event,

while Luxenberg neglected Seltzer's matter, there is insufficient record evidence to establish that she intentionally failed to seek Seltzer's objectives or intentionally sought to prejudice or damage Seltzer. Thus, Disciplinary Counsel has failed to prove that Luxenberg violated Rules 1.3(b)(1) or 1.3(b)(2).

(4) Representing a Client in a Matter in which the Attorney's Professional Judgment Would be or Reasonably Could be Affected by his or her own Financial, Business, Property or Personal Interests Without Obtaining the Client's Informed Consent (Rule 1.7(b)(4))

The Hearing Committee declined to find a violation of Rule 1.7(b)(4) because it found that there were simply no conflicts of interest involved in the Seltzer matter. H.C. Rpt. at 163-164.

Rule 1.7(b)(4) provides: "[a] lawyer shall not represent a client with respect to a matter if . . . [t]he lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by . . . the lawyer's own financial, business, property, or personal interests."

Disciplinary Counsel did not articulate a separate argument regarding Rule 1.7(b)(4). *See* D.C. Br. at 28-35. The Committee did not err in finding no violation. While Disciplinary Counsel identifies what it believes to be shortcomings in Luxenberg's conduct, it does not identify any particular conflict of interest on which to rest a finding that Luxenberg violated Rule 1.7(b)(4).

(5) Failing to Make Reasonable Efforts to Ensure that the Firm had in Effect Measures Giving Reasonable Assurance that all Lawyers in the Firm Conformed to the Rules of Professional Conduct (Rule 5.1(a))

The Hearing Committee found Luxenberg violated Rule 5.1(a). Rule 5.1(a) provides as follows:

> A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm . . . shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm . . . conform to the Rules of Professional Conduct.

Luxenberg asserts that there are insufficient facts to establish that she is an attorney with sufficient managerial authority such that Rule 5.1(a) applies to her. Lux. Br. at 27-31. Luxenberg further asserts that even if Rule 5.1(a) applies to her, the facts are insufficient to establish that the firm did not have appropriate policies and procedures in place to supervise Dickens. Lux. Br. at 31-37. We disagree, and find that Luxenberg violated Rule 5.1(a).

(a) Rule 5.1(a) Applies to Luxenberg

The Hearing Committee relied on the following facts to find that Luxenberg is an attorney with sufficient managerial authority such that Rule 5.1(a) applies to her and her conduct: Luxenberg was a founding partner of the firm (FF 2, 6); she was a named partner in the firm (FF 2,6); she had a controlling interest in the firm (FF 6); she was responsible for originating most of the firm's business (FF 8); by late 2007, Luxenberg's other partner (Johnson) no longer had an active practice and apparently had few clients of his own (FF 16); she determined which clients the firm would represent and which firm lawyer would handle their matters (FF 12); Dickens was never a signatory on the Firm's IOLTA account,

even when he was a partner (FF 15); and Dickens had no managerial authority (FF 15). H.C. Rpt. at 169.

Luxenberg asserts that these facts have no bearing on her authority and responsibility to establish policies and procedures within her firm. Lux. Br. at 28. The Board disagrees. These facts have a direct bearing on Luxenberg's authority and responsibility to establish policies and procedures within her firm. Indeed, the Rule does not speak in terms of formalities of firm titles or formal designations, but rather incorporates a case-by-case factual inquiry. Moreover, the above facts, many of which are not challenged by Luxenberg, are supported by substantial evidence in the record as a whole.

Luxenberg further asserts that there are no cases in the District of Columbia in which the Court of Appeals has sanctioned a partner under Rule 5.1(a) for the acts and/or omissions of another partner (as opposed to an associate) in a law firm. Lux. Br. at 28-30. Luxenberg asserts that given this lack of case law, Rule 5.1(a) violations are reserved for circumstances in which it is established that a respondent attorney had clear managerial authority over the other lawyers in the firm. *Id.*

The Board does not view the lack of case law as establishing a quasi-judicial rule that a partner cannot be sanctioned under Rule 5.1(a) for the acts and/or omissions of another partner. The plain language of the rule dictates that the firm have in effect measures giving reasonable assurance that "*all lawyers in the firm*," not just associates, conform to the Rules of Professional Conduct. Luxenberg's attempt to create a distinction

between associates and partners under Rule 5.1(a) is unavailing.[20] The Board agrees with the Hearing Committee that Luxenberg is an attorney with sufficient managerial authority such that Rule 5.1(a) applies to her.

(b) The Firm's Policies and Procedures Were Inadequate

The Hearing Committee found that the firm's policies and procedures were "plainly and repeatedly proven to be inadequate to ensure Dickens complied with the Rules of Professional Conduct." H.C. Rpt. at 169-170. Luxenberg asserts that the firm had policies and procedures in place, and largely relies on her factual objections to contest the Hearing Committee's findings. Lux. Br. at 31-36. Disciplinary Counsel contends in response that "'[c]lear record evidence' demonstrated that Luxenberg and her firm made insufficient efforts, across the board, to assure that the firm's lawyers conformed to the rules[.]" D.C. Br. at 10.

The Board agrees with the Hearing Committee's analysis. As explained in detail by the Hearing Committee, the firm's policies and procedures were inadequate to ensure that Dickens complied with the Rules of Professional Conduct. The Hearing Committee's findings of fact relative to the firm's inadequate policies and procedures are supported by substantial evidence in the record as a whole.

Additionally, Luxenberg argues that the firm had policies and procedures in place, and was entitled to rely on and entrust Dickens to comply with these policies because he

[20] Further, the Hearing Committee cited three disciplinary cases out of New York in which partners were sanctioned for another partner's conduct under the comparable New York Rule of Processional Conduct 5.1(a) (H.C. Rpt. at 167-68). Luxenberg's attempt to distinguish them (Lux. Br. at 30, n.7) is unpersuasive.

was a partner in the firm. The logical extension of such an argument is that firms are not required to enforce their policies and procedures against partners. Such a conclusion is plainly inconsistent with the dictates of Rule 5.1(a).

Moreover, to the extent that Luxenberg argues that Dickens, as trustee of the 2009 Trust and as Personal Representative of Seltzer's Estate, had the sole legal responsibility, rather than the firm, to protect and safeguard the assets of the 2009 Trust and the Estate, the Board disagrees. Seltzer hired the firm to represent her. Part of that representation involved Dickens acting as her personal representative and trustee. There is no evidence that Dickens was retained to act in these capacities outside of his role as a lawyer with the Luxenberg firm. Rather, his role as personal representative and trustee is clearly part and parcel of the firm's representation of Seltzer on trust and estate matters.

Luxenberg further argues that the alleged shortcomings in the firm's policies and procedures did not cause Dickens's unethical conduct, and that without a finding of causation, Luxenberg cannot be found to have violated Rule 5.1. *Id*. at 36-37. As discussed by the Hearing Committee, causation is not mentioned in Rule 5.1. H.C. Rpt. at 173. The Rule is violated when reasonable measures are not in place, not when harm is proximately caused. Accordingly, the Board agrees with the Hearing Committee's conclusion that Disciplinary Counsel proved a violation of Rule 5.1(a).

(6) Failing to Take Remedial Action when the Attorney Knew or Reasonably Should Have Known About Another Attorney's Conduct in Violation of the Disciplinary Rules at the Time When its Consequences Could Have Been Avoided or Mitigated (Rule 5.1(c)(2))

Rule 5.1(c)(2) provides: "A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if: . . . (2) The lawyer has direct supervisory authority over the other lawyer or is a partner or has comparable managerial authority in the law firm . . . in which the other lawyer practices, and knows or reasonably should know of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action." The Hearing Committee found that this rule applied to Luxenberg because she had both sufficient managerial authority and direct supervisory authority over Dickens with respect to the Seltzer matter, and found her responsible for Dickens's unauthorized practice and failure to communicate. For the following reasons, the Board agrees.

(a) Sufficient Managerial Authority

Luxenberg asserts that for the same reasons that she is not an attorney with sufficient managerial authority such that Rule 5.1(a) does not apply to her, she did not have "comparable managerial authority" over Dickens for the purposes of 5.1(c)(2). Lux. Br. at 37. The Hearing Committee found that for the same reasons discussed in regard to the Rule 5.1(a) violation, Luxenberg was an attorney with sufficient managerial authority. H.C. Rpt. at 177. The Board, already having concluded that Luxenberg had sufficient managerial authority such that Rule 5.1(a) applies to her, agrees with the Hearing

Committee that for the same reasons set forth above, Luxenberg had "comparable managerial authority" over Dickens for the purposes of Rule 5.1(c)(2).

(b) Direct Supervisory Authority

In addition to finding that Luxenberg had sufficient managerial authority, the Hearing Committee found that Luxenberg had at least some specific supervisory authority over Dickens with respect to the Seltzer matter. The Hearing Committee relied on the following facts: it was Luxenberg, not Dickens, who had a long-standing attorney-client relationship with Seltzer (FF 133-136); when Seltzer wanted to update her estate plan in 2004, she reached out to Luxenberg, not Dickens (FF 139); although Luxenberg delegated the matter to Dickens, she maintained some involvement in the representation (by communicating with Seltzer and Dickens, following up with Dickens and Seltzer on various issues, receiving copies of emails between Dickens and Seltzer, determining how much to bill Seltzer, and sending Seltzer the bills). FF 140, 164, 165, 167, 169, 172, 189, 195, 197. The Hearing Committee held that the totality of the foregoing facts demonstrated that Luxenberg had at least some supervisory authority over Dickens's role in the representation of Seltzer. H.C. Rpt. at 178. The Board concurs.

Luxenberg asserts that she did not have "direct supervisory authority" over Dickens, because Dickens was handling the matter. Lux. Br. at 37-39. She asserts she did not, and had no obligation to, supervise Dickens. *Id.* at 38. Luxenberg's attempt to downplay her role in supervising the Seltzer matter is unpersuasive. Seltzer was not just one of Luxenberg's clients, but was one of her "top ten all-time favorite clients." FF 169. Indeed, the record shows that Seltzer went to Luxenberg for legal assistance in 2004 and

2009, relied on her involvement throughout the representation, and acceded to her recommendation to involve Dickens. FF 139-40. The record further shows that Seltzer communicated regularly with Luxenberg, even when Dickens was handling her trust and estate work. Luxenberg's decision to recommend involving Dickens, and Seltzer's acquiescence thereto, did not relieve Luxenberg of her obligations to her client.

Luxenberg also asserts that there is no support under D.C. law for the proposition that she can be liable for the conduct of Dickens, since he is a partner. Lux. Br. at 37-39. Her attempt once again to distinguish partners from associates, however, is unpersuasive. Like Rule 5.1(a), Rule 5.1(c)(2) speaks in terms of all "lawyers," and does not distinguish between partners and associates. Absent any case law to the contrary, the Board enforces the rule as written. Accordingly, the Board agrees with the Hearing Committee that Luxenberg had at least some specific supervisory authority over Dickens with respect to the Seltzer matter such that Rule 5.1(c)(2) applies to her.

(c) Violations for Which Luxenberg Is Responsible

Comment 5 to Rule 5.1(c)(2) explains that "the nature of the misconduct at issue" is one of the factors to be considered when determining whether a lawyer "should have known" about the misconduct. The Hearing Committee concluded that Luxenberg knew or should have known of Dickens's failure to communicate with sufficient promptness and completeness with Seltzer, and Dickens's engagement in the practice of law in Maryland without a license to do so, and thus she is responsible pursuant to Rule 5.1(c)(2) for Dickens's failure to communicate (Rule 1.4(a) and (b)), and Dickens's unauthorized practice violation (Rule 5.5(a)). H.C. Rpt. at 179. The Board agrees.

Disciplinary Counsel contends that the Hearing Committee's findings and the record evidence establish that Luxenberg knew or should have known not only of Dickens's failure to communicate and his unauthorized practice, but his other misconduct including his thievery at a time when she could have taken remedial action but did not. D.C. Br. at 22-28. However, as discussed above with respect to Disciplinary Counsel's exception to the Hearing Committee's findings of fact, the Hearing Committee properly concluded that no findings should be made that Luxenberg knew of this misconduct prior to Dickens's departure in May of 2011. The Board agrees with the Hearing Committee and does not believe that Luxenberg was aware or should have been aware of Dickens's thievery. Moreover, even if Luxenberg should have known of Dickens's misconduct on April 1 or 2, 2011, when she reviewed Gelfeld's and Altman's letters, Dickens's response, and the accounting, she was not in a position at that time to prevent further thefts. She immediately consulted a trusts and estates expert, notified her malpractice carrier, and retained counsel. Tr. 442-443, 482-483. There is no evidence in the record to indicate that Luxenberg or Johnson had any control over any of the missing funds at that point. FF 334. Rather, the record strongly indicates that those funds were in the sole control of Dickens (if they were still available at all), and the Board so concludes. *Id*. Accordingly, Luxenberg is not responsible pursuant to Rule 5.1(c)(2) for Dickens's violations that relate to his theft of client funds (i.e., Rules 1.3(b)(1), 1.3(b)(2), 1.15(a), 1.15(c), 8.4(b), and 8.4(c)).

Additionally, the Board agrees with the Hearing Committee that Luxenberg was not aware of Dickens's lack of competence, skill, and care in trust and estate matters, and

for his resulting violations of Rules 1.1(a) and (b). H.C. Rpt. at 178-179. The record is well-established that Luxenberg is not a trusts and estates attorney. Dickens's violations of Rules 1.1(a) and (b) required expert testimony from witnesses who, unlike Luxenberg, had experience with trust and estates law. These were not the kind of errors that were so obvious that a non-expert in the field would appreciate that Dickens had failed to represent Seltzer with competence, skill, and care. *See* H.C. Rpt. at 118-22.

Further, the Board agrees with the Hearing Committee that Luxenberg could not have known that after Dickens was no longer a member of the firm, he would not respond to Disciplinary Counsel's inquiries or to an order of the Board. H.C. Rpt. at 179. Thus, Luxenberg is not responsible pursuant to Rule 5.1(c)(2) for Dickens's violations of Rules 8.1(b) and 8.4(d).

Luxenberg takes exception to the Hearing Committee's conclusion that she is responsible under Rule 5.1(c)(2) for Dickens's violation of Rule 1.4. Lux. Br. at 40-41. Luxenberg asserts that when she learned that Dickens was not communicating promptly with Seltzer, she followed up with Dickens to ensure he could do the work and sought periodic updates. Lux. Br. at 40. While this is partially true (Luxenberg initially followed up with Dickens when he failed to communicate with Seltzer), Luxenberg should have taken further steps to ensure that Dickens was communicating with Seltzer. Indeed, despite acknowledging Seltzer's matter as a "priority," Dickens still did not act promptly, which Luxenberg knew. FF 169-171.

Luxenberg further disputes that she is responsible under Rule 5.1(c)(2) for Dickens's violation of Rule 5.5. Lux. Br. at 40-41. Luxenberg argues that the Hearing

Committee offered no legal support for its conclusion that it would have been reasonable for Luxenberg to assume that the Seltzer matter, a trust and estates matter, would involve a Maryland court. *Id.* While Luxenberg is not a trusts and estates attorney, specialized knowledge is not required to know that eventually a court proceeding will be necessary to probate an estate.

The Board thus agrees with the Hearing Committee that Luxenberg is responsible pursuant to Rule 5.1(c)(2) for Dickens's violation of Rule 5.1(a).

(7) Knowingly Assisting Another Attorney in Violating Disciplinary Rules (Rule 8.4(a))

Rule 8.4(a) provides: "It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." The Hearing Committee found that Luxenberg did not act knowingly to assist Dickens in violating the rules, just as it found that Luxenberg did not act intentionally with respect to any of the charges against her. H.C. Rpt. at 180. The Board agrees with the Hearing Committee. Just as we found that Luxenberg did not act intentionally with respect to any of the Rule 1.3(b) charges against her, we similarly find that she did not knowingly assist Dickens in violating Rule 8.4(a).

Disciplinary Counsel asserts that Luxenberg did, in fact, have the requisite knowledge to violate Rule 8.4. Disciplinary Counsel's argument relies heavily on the fact that Dickens was not licensed in Maryland, yet Luxenberg referred Seltzer to Dickens and thereafter accommodated the representation (which involved a Maryland citizen wishing to create a will under Maryland law). The analysis, however, is not that simple. Luxenberg's testimony makes clear that she did not intentionally allow Dickens to practice

law in Maryland. Rather, the record shows that Luxenberg was relying on Dickens to advise when he needed local counsel in the trust and estate matter. Tr. 453-54.

Disciplinary Counsel also relies heavily on the fact that Luxenberg was a trustee of one of Seltzer's trusts, and that as a trustee, she must have known that something was amiss with the trust. D.C. Br. at 35-37. The Board, however, credits Luxenberg's testimony regarding her belief that once the 2009 Trust was in place, it effectively transferred assets from the 1990 Trust, for which Luxenberg was trustee, to the 2009 Trust, for which Dickens was the trustee. FF 208.

VI. RECOMMENDED SANCTION

The discipline imposed in a matter, although not intended to punish the lawyer, should serve to maintain the integrity of the legal profession, protect the public and courts, and deter future or similar misconduct by the respondent-lawyer and other lawyers. *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc). Further, the sanction imposed must not "foster a tendency toward inconsistent dispositions for comparable conduct or . . . otherwise be unwarranted." D.C. Bar R. XI, §9 (h)(1). Specific factors to be considered when determining an appropriate sanction include, but are not limited to: (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 and/or misrepresentation; (4) the presence or absence of violations of other provisions of the disciplinary rules; (5) whether the attorney had a previous disciplinary history; (6) whether or not the attorney acknowledged his or her wrongful conduct; and (7) circumstances in mitigation of the misconduct. *In re Pelkey*, 962 A.2d 268, 281 (D.C. 2008).

A. Recommended Sanction as to Dickens.

The Hearing Committee recommended that Dickens be disbarred, with restitution of $1,434,298.50 as a condition of reinstatement (including interest at the legal rate). H.C. Rpt. at 153-154. In the District of Columbia, disbarment is the presumptive sanction for reckless or intentional misappropriation. *In re Addams*, 579 A.2d 190, 191 (D.C. 1990) (en banc). A lesser sanction may be appropriate only in "extraordinary circumstances." *See In re Kersey*, 520 A.2d 321 (D.C. 1987) (finding "extraordinary circumstances" where an attorney's alcoholism was taken to mitigate an intentional misappropriation committed during the period of alcoholism). Disbarment is also the sanction imposed for dishonesty "of the flagrant kind." *Pelkey*, 962 A.2d 281.

Here, we find that Dickens's misappropriation was intentional, and there is no evidence of any extraordinary mitigating circumstances. Accordingly, pursuant to *Addams*, the Board recommends that Dickens be disbarred. Additionally, we conclude that Dickens's conduct in this case constitutes flagrant dishonesty, which provides an alternative basis to support our recommended sanction of disbarment. The Board further recommends that, as a condition of reinstatement, Dickens should be required to pay restitution to the beneficiaries of the Harris, O'Brien and Seltzer Estates.

B. Recommended Sanction as to Luxenberg.

The Hearing Committee recommended that Luxenberg be suspended for 45 days. H.C. Rpt. at 186. Luxenberg asserts that even if the Board finds that she violated the Rules of Professional Conduct, as we have found, a reprimand is the maximum sanction that should be considered based on the District of Columbia's seven factor analysis and prior

decisions of the Court of Appeals. Lux. Br. at 43-44. Luxenberg largely agrees with the Hearing Committee's seven factor analysis, but disagrees with the Committee with respect to their findings that her sanction, given her conduct, was consistent with prior decisions from the Court of Appeals. *Id.* at 43-45. In light of the circumstances present here, we find that a reprimand would be inappropriate and recommend that a six-month suspension be imposed.

In addition to finding, as did the Hearing Committee, that Luxenberg violated Rules 5.1(a) and 5.1(c)(2), we also have found that she violated Rule 1.3(a). When balancing the present circumstances against the prior disciplinary decisions from the Court of Appeals and our own prior recommendations, the seriousness of the violations resulting from Luxenberg's Rule 5.1 violations, the length of time over which the violations occurred, the special rigor with which the disciplinary system treats the protection of client funds, and the need to deter future violations of this nature, we believe that a suspension of six months is appropriate. This matter involved serious misconduct. Similar cases support the imposition of a six-month suspension as the appropriate sanction here. *See In re Robinson*, 74 A.3d 688 (D.C. 2013) (seven-month suspension for violations of 5.1(a) and 1.15(a), where the "respondent should have been aware that the accounting practices in place at his firm had failed and that more needed to be done in the supervision of [an associate attorney] to ensure compliance with the Rules"); *see also In re Herbst*, 931 A.2d 1016 (D.C. 2007) (per curiam) (nine-month suspension, with three months stayed in favor of probation with conditions, where the respondent admitted that his failure to adequately supervise his nonlawyer employee resulted in the negligent misappropriation of a client's

settlement funds); *In re Cater*, 887 A.2d 1, 18-19 (D.C. 2005) (180-day suspension where respondent's misconduct was analogized "to a negligent misappropriation of entrusted funds, in that through her negligence, two estates were looted by her [nonlawyer] employee"; fitness was imposed based on the respondent's "egregious disregard for the disciplinary process" and months of delay in checking other conservatorship accounts after the employee absconded with estate funds).

Indeed, Luxenberg was involved in the representation of Seltzer from the outset, including determining how much she and the firm would charge for the work, EX 29 at 1, sending her estate papers at Seltzer's request, EX 30 at 1, and communicating with Seltzer periodically concerning the work being done, EX 50. Although she delegated the work to Dickens, and although she knew that Seltzer nevertheless relied on her, Luxenberg failed to pay sufficient attention to the matter and diligently pursue Seltzer's interest. This was a major reason why Dickens was able to steal money from Seltzer.

Moreover, the fact that the firm wholly lacked financial controls and negotiated checks drawn on the O'Brien Estate account and the Seltzer trust account totaling more than $24,000, without understanding the basis for the receipt of the funds, is also troubling. *In re Robinson* is instructive on this point. There, the respondent's failure to address a misappropriation by a firm associate resulted in a second misappropriation. That second misappropriation was considered to be a violation of both Rules 1.15(a) and 5.1. 74 A.3d at 694-696. The Court of Appeals imposed a seven-month suspension. *Id.* at 698. On the one hand, given that a six-month suspension is one usual sanction for negligent misappropriation, a seven-month suspension can be seen as adding one month for the Rule

5.1 violation. On the other hand, given that the same set of facts constituted both negligent misappropriation and a violation of Rule 5.1, the seven-month suspension can be seen as reflecting the seriousness with which violations involving client funds are viewed in our jurisdiction.

Disciplinary Counsel asserts that Luxenberg should be suspended for a year, with a fitness requirement. D.C. Br. at 37. Disciplinary Counsel bases this assertion on Luxenberg's misconduct, the harm that it caused, the lack of remedial steps, and her failure to take responsibility for her conduct. D.C. Br. at 37-39. In making its argument, Disciplinary Counsel incorporates and relies on its factual assertions regarding Luxenberg's purported knowledge of Dickens's thefts. We believe that Disciplinary Counsel is overstating its case and Luxenberg's level of knowledge. We have reviewed and dispensed with these assertions in ruling on Disciplinary Counsel's exceptions to the Hearing Committee's findings of fact.

Taking into account all of the factors relevant to our consideration of the appropriate sanction, *see In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013), and in light of the mitigation evidence offered by Luxenberg, including her commitment to public service, "very high reputation" in the legal community, service to the Bar Association, cooperation with Disciplinary Counsel's investigation, and her lack of a prior disciplinary offenses (FF 372-383), we find that Disciplinary Counsel's proposed sanction of one year plus a fitness requirement is not warranted. Luxenberg is a well-respected and accomplished member of the Bar who has contributed significantly to the community during the course of her career. We recognize these contributions and have taken them into account in our sanction

recommendation. Taking into account all of the circumstances, the Board believes a six-month suspension is necessary, especially given the seriousness of the misconduct, the substantial prejudice to Seltzer, and the case law concerning comparable misconduct.

We do not find that a fitness requirement should be imposed. "[T]o justify requiring a suspended attorney to prove fitness as a condition of reinstatement, the record in the disciplinary proceeding must contain clear and convincing evidence that casts a serious doubt upon the attorney's continuing fitness to practice law." *Cater*, 887 A.2d at 6. While we have found that Luxenberg violated certain ethical rules relating to her firm's practices, and her oversight of an attorney, based on the record as a whole we cannot say that she is not currently fit to practice law. She is an experienced practitioner who, with time to reflect upon her mistakes in this matter, should be able to make positive contributions to the District of Columbia Bar and to the profession upon her return to the practice of law in this jurisdiction.

VII. CONCLUSION

The Board finds that Disciplinary Counsel has proven by clear and convincing evidence that Dickens violated Rules 1.1(a), 1.1(b), 1.3(b)(1), 1.3(b)(2), 1.4(a), 1.4(b), 1.7(b)(4), 1.15(a), 1.15(c), 8.1(b), 8.4(b), 8.4(c), and 8.4(d) in the Harris, O'Brien, and Seltzer matters, and therefore should be disbarred. The Board further recommends restitution of $1,434,298.50 as a condition of reinstatement, with interest at the legal rate.

The Board further finds that Disciplinary Counsel proved by clear and convincing evidence that Respondent Luxenberg violated Rules 1.3(a), 5.1(a) and 5.1(c)(2) in the Seltzer matter, and recommends that she be suspended for a period of six months.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: /ELY/
Eric L. Yaffe
Chair

Dated: July 28, 2016

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