THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY
HEARING COMMITTEE NUMBER SEVEN

In the Matters of	:	
JOHN T. SZYMKOWICZ, ESQUIRE (Admitted 3/6/78; Bar No. 946079),	:	Bar Docket No. 2005-D179
J.P. SZYMKOWICZ, ESQUIRE (Admitted 2/1/99; Bar No. 462146),	:	Bar Docket No. 2007-D050
LESLIE SILVERMAN, ESQUIRE (Admitted 10/2/95; Bar No. 448188),	:	Bar Docket No. 2007-D214
ROBERT KING, ESQUIRE (Admitted 11/4/69; Bar No. 922575),	:	Bar Docket No. 2008-D420
Respondents.	:	
Members of the Bar of the District of Columbia Court of Appeals	:	

HEARING COMMITTEE'S FINDINGS OF FACT, PROPOSED
CONCLUSIONS OF LAW AND RECOMMENDATION AS TO SANCTION

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

Table of Contents

I. INTRODUCTION

A. Procedural Background

1. These consolidated cases concern charges against four Respondents, John T. Szymkowicz (hereinafter referred to as "JTS"), John P. Szymkowicz (hereinafter referred to as "JPS"), Leslie Silverman (hereinafter referred to as "LS"), and Robert King (hereinafter referred to as "RK"). Bar Counsel served each Respondent in June 2009 with the Specification of Charges and Petition Instituting Formal Disciplinary Proceedings, alleging violations of D.C. Rules of Professional Conduct 1.5(b), 1.6(a)(1), 1.7(b)(2), 1.7(b)(3), 1.7(b)(4), 8.4(c), 8.4(d) and 1.16(a). BX 2, BX 3.[1] Respondents, through their respective counsel, submitted answers to the charges in June and August 2009, admitting some of the allegations, but denying that they violated the ethical rules charged. BX 4 (JTS/JPS); BX 5 (LS); BX 6 (RK).

2. Hearing Committee No. Seven for this proceeding consists of John H. Quinn, Jr., Esq., Chair; Beverly Lewis-Koch, Esq., Attorney Member; and Kawin Wilairat, Public Member.[2] Julia L. Porter, Esq., Senior Assistant Bar Counsel, represented Bar Counsel. Robert N. Levin, Esq. represented Respondents JTS and JPS. Melvin G. Bergman, Esq. represented Respondents RK and LS.

3. There were two pre-hearing conferences, the first on August 12, 2009, and the second on October 6, 2009. During the first pre-hearing conference, each of the

[1] "BX" refers to Bar Counsel's exhibits. "RX JTS/JPS" refers to JTS's and JPS's exhibits.

[2] The Hearing Committee has been ably assisted with research and other important support by Ross M. Sarraf, Law Clerk, a dual degree J.D./M.B.A. candidate at the University at Buffalo, Class of 2014.

Respondents acknowledged on the record that he or she had been informed of and counseled about the possible adverse consequences of joint representation in this proceeding, and each, in accord with Rule 1.7 of the Rules of Professional Conduct, expressly waived any conflict of interest arising from or in connection with their respective joint representations. Tr. at 19-20, 29 (JTS), 20-22, 29 (JPS), 31-32 (LS), 32-33 (RK) (Aug. 12, 2009).

4. The hearing was held on twelve days, beginning on October 13, 2009, and concluding on March 10, 2010. The hearing transcript comprises 3,626 pages. Bar Counsel called twelve witnesses: Mary Frances Ackerman Abbott ("Mrs. Abbott"), the daughter of Mrs. Genevieve Ackerman; Frank Abbott, Mrs. Abbott's husband ("Mr. Abbott"); Dr. Paulo Negro, the psychiatrist who evaluated Mrs. Ackerman in 2004 and 2006; Tas Coroneos, the lawyer who prepared the trusts and other estate planning documents for Mrs. Ackerman and her husband in 2002; Ashbenett Cannon, Fatmata Koker and Ayo Temple, Mrs. Ackerman's three regular caregivers until October 2008; Margi Helsel-Arnold, a geriatric specialist who has worked with Mrs. Ackerman since 1997; Susan Rodgers, the head of Capital City Nurses, the home care agency providing nurses and caregivers to Mrs. Ackerman and her husband since the late 1990s; Martha Gaston, a social worker; Deborah Ahern, the court-appointed visitor for Mrs. Ackerman in the second guardianship matter; and Shahidah Nicole Hamlett, an attorney who met with Mrs. Ackerman in connection with the initial guardianship matter.

5. Of Bar Counsel's 182 exhibits, BX 1-170 appear not to have been formally offered or admitted in evidence during the hearing. However, all parties agreed to the admissibility of the exhibits at the second Prehearing Conference, and the Hearing Committee Chair stated that all the exhibits would be admitted to the extent that they

were not cumulative. Tr. at 53-55 (Oct. 6, 2009). He repeated this statement on the first day of the hearing. Tr. at 12-13 (Oct. 13, 2009). All parties and the Hearing Committee throughout these proceedings have treated these exhibits BX 1-170 as though they were "in evidence." (The court reporter states on Tr. at 1269 (Oct. 16, 2009), that "All Bar Counsel Exhibits received in evidence on page 1060," but there is nothing on that page or elsewhere to our knowledge confirming admission of these exhibits.) Under these circumstances, the inadvertent failure formally to introduce the exhibits is harmless, and the Committee now formally admits Bar Counsel's exhibits, BX 1-170, for the record. Bar Counsel exhibit BX 171 was tendered and used during the course of a witness's testimony. Tr. at 489-90, 513, 525 (Oct. 14, 2009); apparently it was not formally offered or admitted, but it is now also admitted for the record. Bar Counsel exhibits BX 172-76, 178 and 179 were admitted toward the end of the hearing. Tr. at 2833 (Jan. 14, 2010). Bar Counsel exhibit 177 was withdrawn and not admitted. Tr. at 2624-31 (Jan. 7, 2010); Tr. at 2829-30, 2833 (Jan. 14, 2010). At the close of the hearing, Bar Counsel offered additional exhibits, BX 180-83, reflecting discipline imposed on LS and RK for ethical misconduct in other matters. These exhibits were received in evidence without objection. Tr. at 3626 (Mar. 10, 2010).

6. All Respondents testified at the hearing. Respondents JTS and JPS called Dr. Richard Ratner as a witness. Although the court reporter states on Tr. at 1800 (Dec. 1, 2009) that "Respondents' JTS/JPS exhibits 1 through 37 were received in evidence on page 1670," there is nothing on that page or elsewhere to our knowledge confirming admission of these or other Respondents' exhibits. However, there are 46 JTS/JPS exhibits, and all of these exhibits have been used or available for use by the parties even though they appear never to have been offered in evidence. There has been no record objection to these exhibits. The failure to offer and receive these exhibits

during the course of the hearing is harmless error. Respondents' JTS/JPS exhibits 1-46 are now formally admitted in evidence. Respondents RK and LS offered no exhibits and called no additional witnesses.

7. Near the conclusion of the hearing, all parties waived the necessity of the Hearing Committee's going into executive session pursuant to Board Rule 11.10 to make a preliminary determination with respect to whether Bar Counsel had proven a violation of any disciplinary rule. Tr. at 3616-19 (Mar. 10, 2010).

B. Organization of the Hearing Committee Report

8. This Hearing Committee Report is organized in a somewhat atypical fashion. Because of the number of Respondents in this case, the long period of time over which the events in question occurred, the number of actions or decisions being examined for their legal consequences, the credibility of key witnesses, including Bar Counsel's complaining witness, and the general complexity of events described in the record before us, the Committee has intently and extensively reviewed a very substantial record and also considered almost 300 pages of briefs from the parties. The facts and conclusions set forth respectively in the sections entitled "Summary of the Principal Facts" and "Summary of the Principal Conclusions" serve as a summary of the basic events and people involved as well as the Hearing Committee's conclusions. Section III, titled "Findings of Fact and Conclusions of Law Regarding Mrs. Ackerman's Mental Capacity," is the beginning of the analysis and formal findings of the Committee.

9. Because of the relative complexity of the analysis of an elderly person's mental capacity, the rules regarding legal mental capacity have been separated, at least in part, from the sections analyzing the individual Respondent's charges. The purpose of this organization is to make clearer the analysis of this issue before applying the findings

about Mrs. Ackerman's mental capacity to the various analyses of the Rules violations alleged against each Respondent. The Report then addresses the charges against each Respondent individually.

10. There are four Appendices, A, B, C and D, respectively containing extensive quotation from the record. These Appendices are integral parts of the Report and should be read along with the text in the main body of the Report.

11. Overall, the reader should note that the findings of fact, instead of being stated entirely at the beginning of the Report as might traditionally be expected, are throughout the various sections. Only the most basic facts are given in the Summary of Principal Facts.

C. Statement of the Issues

12. Society at large and virtually all members of the Bar who work with elderly clients regularly confront the issues raised in this proceeding. All participants in this proceeding, including the Hearing Committee, have invested substantial effort wrestling with these issues:

- Are elderly, mentally impaired persons entitled to legal representation of their choosing?
- Are there gradations of mental impairment that are relevant to the various actions and undertakings of elderly persons?
- Who is qualified to determine whether the client's mental impairment is so severe as to disqualify the client from:
  - Selecting counsel?
  - Determining or approving a course of action consistent with her fundamental interests?
  - Determining whether the chosen attorney has a conflict of interest?

- In particular, do attorneys have a duty to evaluate the mental state of clients, and if so, what qualification is required for the fulfillment of such a duty?

- Should attorneys decline to represent elderly, mentally impaired persons because of the risk to reputation and even the license to practice law associated with such representation?

13. This case pointedly illustrates the perils encountered by elderly clients, their family members, mental health professionals and members of the Bar as each of them seeks, in good faith, "to do the right thing," particularly the "right thing" for the elderly client or family member.

14. Our judicial system assumes that everyone is entitled to consult with counsel.[3] Some people assume that there is a bright line between mental "competence" and a lack of mental "competence."[4] What is the difference between "competence" and "capacity"? A critical question is whether current "law" makes or should make that assumption. Is there mental capacity for some purposes but not for others? Regardless of

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[3] Cf. D.C. Code § 21-2033 (2001). Mr. Justice Sutherland's statement in Powell v. Alabama, 287 U.S. 45, 68-69 (1932), puts the matter well: "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law." Then-Judge, later Justice Stevens, in his 1975 confirmation hearing, testified: "Yes; I don't hesitate in saying that I think one of the most important aspects of procedural fairness is availability of counsel to the litigant on either side. I could not overemphasize the importance of the lawyer's role in the adversary process and it is unquestionably a matter of major importance in all litigation." Hearings on Nomination of John Paul Stevens to be a Justice of the Supreme Court before the Senate Comm. on the Judiciary, 94th Cong., 78 (1975).

[4] See Dexter v. Hall, 82 U.S. (15 Wall.) 9, 20 (1872). The Court there said, "But a lunatic, or a person *non compos mentis*, has nothing which the law recognizes as a mind, and it would seem, therefore, upon principle, that he cannot make a contract which may have any efficacy as such." Id.; see also Sullivan v. Flynn, 20 D.C. (9 Mackey) 396 (1892), 1892 WL 11492, at *4 (D.C. Feb. 23, 1892), where the Supreme Court of the District of Columbia held, "the deed of an insane person is void, and therefore cannot be ratified by acts *in pais*." Id. Further, the Court said, "[w]hatever may be the effect of a finding by a jury to inquire *de lunatico* that a person was insane from and after a certain day, such a finding does not even purport to determine the status of such person before that date." Id. at *5.

whether there is or is not a bright line, or perhaps a fuzzy, wavering line, separating mental capacity from incapacity, who should make the determination, and what qualifications are required for making that determination?

15. Assuming a qualified person determines that an elderly, mentally impaired client has mental capacity to make appropriate decisions in her interest, is wisdom the standard for determining what is "appropriate" or "in her interest?" Are mentally impaired clients held to a higher standard of wisdom than are those who do not present evidence of mental impairment? Are there degrees of wisdom that lawyers representing elderly, mentally impaired clients with mental capacity for the task at hand must be sensitive to that lawyers representing other clients need not be sensitive to? If so, how are these degrees of wisdom calibrated? Does the final result of litigation necessarily determine the wisdom of pursuing the litigation?

16. This case involves a dispute between siblings over how best to care for their elderly mother. See BX 118 at 4; Tr. at 767 (Oct. 15, 2009). Are lawyers professionally equipped to be effective in representing the respective factions in a family dispute? Are lawyers required by the Rules of Professional Conduct to refuse to participate in situations in which the law and lawyers can be used, or even abused, as weapons in a family dispute? Are lawyers professionally equipped to participate in situations in which the law and lawyers can be used, or even abused, as weapons in a family dispute?

17. As stated in these paragraphs, these questions appear to be rhetorical questions. However, this Hearing Committee, the Board on Professional Responsibility and perhaps the District of Columbia Court of Appeals grapple with them in "real time"

in this proceeding. The outcome of our deliberations may have significant, long-lasting consequences for members of the Bar who represent elderly clients and for elderly persons generally, as well as for those who must deal with families and elderly persons in the "legal" realm.

D. Summary of the Principal Facts

18. At the heart of this case is the Ackerman family. Tr. at 70-71, 75 (Oct. 13, 2009). The parents are Mr. Steven Ackerman, Sr. (hereinafter "Mr. Ackerman"), who died on October 10, 2005 and played no significant role in this matter, and his wife, Genevieve Ackerman (hereinafter "Mrs. Ackerman"), who plays a central role. Tr. at 71 (Oct. 13, 2009), Tr. at 830 (Oct. 15, 2009). Mr. and Mrs. Ackerman had two children, Steven Ackerman, Jr. (hereinafter "Dr. Ackerman") and Mary Frances Ackerman Abbott (hereinafter "Mrs. Abbott"), who is married to Frank Abbott (hereinafter "Mr. Abbott"). Tr. at 69-71, 75 (Oct. 13, 2009). Because of their age, deteriorating health, and the need for care, Mr. and Mrs. Ackerman established two revocable trusts on May 21, 2002, primarily for their own benefit; however, Dr. Ackerman was also named as a current beneficiary of Mrs. Ackerman's trust. BX 9 at 4-6. Dr. Ackerman is also a contingent beneficiary of Mr. Ackerman's trust. BX 10 at 4-7. Mrs. Abbott took the lead in establishing the trusts for her parents by engaging the services of Tas Coreonos, an attorney who drafted the documents and supervised their execution. Tr. at 121 (Oct. 13, 2009). The trust documents are dated as of the date Mrs. Abbott signed them on behalf of both of her parents as their attorney-in-fact pursuant to Powers of Attorney in favor of Mrs. Abbott. BX 7; BX 9; BX 10. Dr. Ackerman and Mrs. Abbott are equal residual beneficiaries of the trusts; however, payments to Dr. Ackerman during his parents'

lifetimes are treated as advances of his share of the residual estate. Tr. at 2698-99 (Jan. 7, 2010); BX 9 at 5-6, BX 10 at 5-6. Mr. Abbott is the trustee with Mrs. Abbott as successor trustee of both trusts. BX 9 at 1, 13; BX 10 at 1, 13. The trust assets included personal property and real estate owned by Mrs. Ackerman, including properties at Plymouth Street, N.W. in Washington, D.C. (hereinafter "Plymouth Street"), Sea Colony, Delaware (hereinafter "Sea Colony"), and eventually, all of the North Carolina Avenue, S.E. property in Washington, D.C. (hereinafter "North Carolina Avenue"). BX 9 at 19; BX 97.

19. The extended Ackerman family included Mrs. Ackerman's sister, Margaret Mary Sullivan (hereinafter Ms. Sullivan), who lived throughout her life, unmarried, in the family home on North Carolina Avenue.[5]

20. Dr. Ackerman contacted JTS and JPS in the Summer of 2002 in order to address concerns he had about his mother's recently executed trust. Tr. at 2245 (Dec. 11,

[5] The record contains substantial information about Dr. Ackerman's seemingly indifferent care of his aunt and alleged mismanagement of her financial affairs to his personal benefit. This information is primarily from Mrs. Abbott's testimony. (Dr. Ackerman's deposition in Ackerman II, BX 55, is largely silent on this subject.) The Hearing Committee is not in a position to make findings with respect to this information for the following reasons: (1) Dr. Ackerman is not a party to these proceedings. Accordingly, he lacked any opportunity to defend himself against his sister's serious charges. Further, Bar Counsel introduced evidence that Mrs. Ackerman disputed Mrs. Abbott's allegations about her brother's treatment of Ms. Sullivan. BX 54 at 8-10, 18. (2) Although Bar Counsel and Mrs. Abbott attribute knowledge of Dr. Ackerman's alleged maltreatment of his aunt and mismanagement of her financial affairs to Respondents, primarily JTS and JPS, there is no evidence that Respondents authoritatively had sufficient information to evaluate the charges. (3) We find Mrs. Abbott's testimony with respect to Respondents to be severely biased. Respondents, particularly JTS and JPS, did have the opportunity to cross examine Mrs. Abbott with respect to her accusations against them. Tr. at 364-436 (Oct. 14, 2009); Tr. at 657-750, 757-59, and 771-72 (Oct. 15, 2009); see also Appendix B. Her testimony with respect to accusations of Dr. Ackerman's malfeasance and neglect of Ms. Sullivan cannot be relied upon. See infra pp. 18-21. We therefore are not in a position to rely upon it with respect to Dr. Ackerman, especially where there was no occasion and effective opportunity for cross examination. (4) Evidence of Dr. Ackerman's treatment of Ms. Sullivan is not relevant to the charges against Respondents.

2009). Dr. Ackerman's primary assertion was that the Sea Colony property should have been given to him instead of being transferred to the trust and that Mrs. Ackerman actually desired that outcome, notwithstanding the terms of the trust. Tr. at 127 (Oct. 13, 2009); Tr. at 2249 (Dec. 11, 2009). Eventually, a complaint was filed in D.C. Superior Court on behalf of Dr. Ackerman by JTS and JPS on August 6, 2003 against the Trustee to produce an accounting, to remove the Trustee and to have a disinterested person appointed instead, and to reform the trust to the settlor's intent by transferring Sea Colony to Dr. Ackerman (hereinafter "Ackerman I"). BX 34. The Court eventually found against Dr. Ackerman, and he appealed that decision. BX 43; BX 44. The trial court's judgment was affirmed on appeal. BX 46; BX 47. As the result of this litigation, Dr. Ackerman was disinherited from his parents' estates in accord with the *in terrorem* clause of Mrs. Ackerman's trust agreement. BX 47; Tr. at 226 (Oct. 13, 2009).

21. Throughout the time period with which we are concerned, it is clear that Mrs. Ackerman was experiencing periodic memory loss, which appears to have become progressively worse during the time period in question.[6] It is also clear that she continued to manifest her life-long social graces and convinced various persons that she possessed the mental capacity to recognize and act in accord with her long-standing values. Tr. at 833-35 (Oct. 15, 2009); see infra Part III.

22. On May 8, 2005, JTS and JPS began to represent Mrs. Ackerman while continuing to represent Dr. Ackerman. On May 9, 2005, they filed a complaint in the D.C. Superior Court on her behalf against the trust (hereinafter "Ackerman II"). BX 49.

[6] However, Dr. Negro, a psychiatrist who examined Mrs. Ackerman in 2004 and again in 2006, testified that there was no noticeable deterioration between those two examinations. Tr. at 515, 518 (Oct. 14, 2009).

Ackerman I was still ongoing at this time. BX 45. Ackerman II was filed against Mr. Abbott as trustee of Mrs. Ackerman's trust for the purpose of revoking the trust and returning control of the trust assets to Mrs. Ackerman. BX 49 at 4. On March 7, 2007, JTS withdrew as attorney for Mrs. Ackerman in Ackerman II because of the conflict posed by his potentially being called as a witness in that trial by Mr. Abbott's attorney. BX 61; Tr. at 1654 (Dec. 1, 2009).

23. JTS recommended that attorney LS replace him in representing Mrs. Ackerman in Ackerman II. Tr. at 1654 (Dec. 1, 2009); Tr. at 2339-40 (Dec. 11, 2009). She began representing Mrs. Ackerman and entered an appearance in that litigation on March 7, 2007. See BX 62. LS then asked RK to assist her as co-counsel in the trial of Ackerman II. Tr. at 2948-2949 (Jan. 14, 2010); Tr. at 3063, 3212 (Jan. 15, 2010). The Court eventually ruled against Mrs. Ackerman in this action, however. BX 71.

24. On September 11, 2007, Mr. Abbott as trustee of Mrs. Ackerman's trust filed a complaint for a declaratory judgment in D.C. Superior Court. BX 85. The purpose was to have the real property on North Carolina Avenue transferred to Mrs. Ackerman and placed into the trust once title was in Mrs. Ackerman's name. Id. LS represented Mrs. Ackerman in this litigation and answered on her behalf; JTS and JPS represented Dr. Ackerman, who was allowed to intervene. BX 86; BX 87; BX 96. The court ruled for Mr. Abbott on his motion for summary judgment. BX 97; BX 98. On February 29 and March 7, 2008 respectively, JTS and LS appealed on behalf of their respective clients. BX 99; BX 100. LS eventually abandoned the appeal without further action. BX 101 at 3; BX 108. Dr. Ackerman's appeal was denied, and the declaratory judgment order was affirmed by the District of Columbia Court of Appeals. BX 109.

25. On November 28, 2007, Dr. Ackerman filed a *pro se* petition with the Probate Court to be named guardian and conservator for Mrs. Ackerman on the ground that she was then incompetent. BX 111; Tr. at 1767 (Dec. 1, 2009). Eventually, Dr. Ackerman withdrew the petition, however. See Tr. at 281-82 (Oct. 13, 2009); Tr. at 2807 (Jan. 14, 2010) (JTS advised Dr. Ackerman to withdraw); BX 179 at 2 (JTS time record); see also Tr. at 1233-34 (Oct. 16, 2009); BX 169 at 35.

26. On March 17, 2008, Mrs. Abbott filed a petition with the Probate Court requesting that she be appointed guardian and conservator for Mrs. Ackerman. BX 117. In April, 2008, Dr. Ackerman, acting with his mother's Power of Attorney, retained RK to represent her in this matter. Tr. at 3223 (Jan. 15, 2010). RK never entered an appearance, (Id. at 3223-24), however, the Probate Court found, on June 24, 2008, that Mrs. Ackerman "was not competent" after the February 11, 1999 Power of Attorney executed by her in favor of Mrs. Abbott.[7] See BX 122. Accordingly, the Court declared subsequent Powers of Attorney in favor of Dr. Ackerman invalid, reinstating the February 11, 1999 Power of Attorney in Mrs. Abbott's favor. BX 122. As a result, the Court found no need for a guardianship because Mrs. Abbott had sufficient authority to control Mrs. Ackerman's financial and personal affairs. Id.

E. Summary of the Principal Conclusions

27. Bar Counsel charges that, during their representation of Mrs. Ackerman, Respondents engaged in conflicts of interest, dishonesty, fraud, and other ethical

[7] This ruling is not binding on the parties to this case or on the Hearing Committee. See infra, note 42 (discussing collateral estoppel).

violations, all in violation of Rules of Professional Conduct 1.7(b)(2), 1.7(b)(3),[8] 1.16(a), 8.4(c), 8.4(d), 1.6(a)(1), 1.7(b)(4) and 1.5(b). BX 2. Bar Counsel's prosecution rests on the contention that Mrs. Ackerman is "incompetent" because she suffers from dementia, "cognitive impairment" and "memory problems," and therefore was mentally incapable of hiring or directing a lawyer, and was unable to understand or process anything of a complex nature. Bar Counsel's Br. 25, 89-90, 92, 95-97; see, e.g., Tr. at 36 (Oct. 13, 2009); Tr. at 253 (Oct. 13, 2009); Tr. at 1081 (Oct. 16, 2009). Bar Counsel asserts that Mrs. Ackerman was an unknowing party to litigation that was brought in her name, because it was not in her interest. Bar Counsel's Br. 89; Tr. at 36 (Oct. 13, 2009). Instead, Bar Counsel argues that the litigation was intended only or primarily to benefit her son, Dr. Ackerman, to Mrs. Ackerman's financial detriment. These contentions were initiated and are primarily supported by the testimony of Bar Counsel's complaining witness, Mrs. Abbott. Tr. at 69-286 (Oct. 13, 2009); Tr. at 329-436 (Oct. 14, 2009); Tr. at 657-776 (Oct. 15, 2009).

28. After considering the voluminous evidence in this record and the applicable law, we conclude that Bar Counsel has not proven any of the charges against any of the Respondents by clear and convincing evidence, other than the Rule 1.5

[8] Bar Counsel notes that the Specification of Charges includes allegations that JTS and JPS violated Rule 1.7(b)(3). See BX 2 at 31-32. However, Bar Counsel acknowledges that evidence produced at the hearing does not support these allegations. See Bar Counsel's Br. 88 n. 29. Although there is an issue as to whether Bar Counsel has the authority unilaterally to elect not to pursue charges that have been approved by a Contact Member, there is no issue with respect to Bar Counsel's acknowledgement that there is no clear and convincing evidence supporting a particular allegation. We agree that Bar Counsel failed to prove the alleged 1.7(b)(3) violation by clear and convincing evidence. We therefore recommend dismissal of the charges of Rule 1.7(b)(3) violation against JTS and JPS in accord with In re Reilly, Bar Docket No. 102-94 (BPR July 17, 2003). See also In re Drew, 693 A.2d 1127, 1132-33 (D.C. 1997) (*per curiam*).

violation alleged against and admitted by Respondent RK. The Hearing Committee reaches this conclusion because we find that, contrary to Bar Counsel's argument, this record plainly shows that Mrs. Ackerman was *not* incapable of hiring or directing a lawyer or adequately understanding the matters at issue in this case, regardless of how complex they may have been or seemed to be to Mrs. Abbott and Bar Counsel. Bar Counsel has proven only that Mrs. Ackerman would be considered "incapacitated" under the D.C. guardianship statute. See D.C. Code § 21-2011(11) (2001). Importantly, this does *not* mean that she lacked the capacity to hire and direct lawyers.

29. Instead, to determine that Mrs. Ackerman lacked the capacity to hire and direct lawyers, as Bar Counsel argues, the Hearing Committee would have to determine that Mrs. Ackerman lacked the capacity to contract: the question, "whether [she] possess[ed] a sufficient mind to understand, in a reasonable manner, the nature, extent, character, and effect of the particular transaction[s] in which she is engaged," would have to be negatively answered.[9] Bar Counsel has incorrectly attempted to substitute voluminous general evidence of Mrs. Ackerman's diminished mental faculties for any specific evidence that Mrs. Ackerman did not have the capacity to contract when she retained the Respondents to provide legal services to her and otherwise interacted with them. We find that the record evidence before the Hearing Committee demonstrates clearly and convincingly that at all relevant times, Mrs. Ackerman had the capacity to contract, and thus, the capacity to retain counsel and direct Respondents in the cases giving rise to this disciplinary matter.

[9] Butler v. Harrison, 578 A.2d 1098, 1100 (D.C. 1990) (internal citations omitted).

30. Moreover, we reject Bar Counsel's claim that the arguments Respondents advanced in Mrs. Ackerman's name were not advanced for her benefit, but rather, were solely or primarily for Dr. Ackerman's benefit. Bar Counsel's claim rests on the notion that litigation brought to give estate assets to Dr. Ackerman could not have been in Mrs. Ackerman's interest because (1) litigation costs would reduce the value of the estate regardless of the outcome of the litigation; and (2) if Mrs. Ackerman prevailed in the litigation, she would give estate assets to her son, leaving fewer estate assets available to provide for her own support. This argument incorrectly assumes that Mrs. Ackerman's sole motivation could (or *should*) only have been the preservation of her estate assets. We find on the basis of clear and convincing evidence that Mrs. Ackerman had another motivation: to help her son, even if to her own financial detriment. As such, litigation that sought to provide greater estate assets to Dr. Ackerman was litigation brought in Mrs. Ackerman's interest, even if not in her presumed financial interest, particularly as that interest was perceived by Mrs. Abbott. Indeed, the evidence shows that such action was consistent with Mrs. Ackerman's conduct throughout her life as a mother: she was concerned about her son and was determined to take care of him. She loved both of her children, was grateful for the care and attention to her welfare of each of them, and was acutely distressed by the persistent strife between them.

31. Finally, even if one could conclude, in some absolute sense, that Mrs. Ackerman lacked the ability to contract at the relevant points in time because her decisions were not wise or rational from the perspective of Mrs. Abbott, or Bar Counsel, or even the Hearing Committee, Bar Counsel has not proven by clear and convincing evidence that any of the Respondents knew or should have known that Mrs. Ackerman

did not have the capacity to engage in the conduct at issue. As such, we find that, other than as noted above with respect to RK's violation of Rule 1.5, Respondents violated none of the Rules of Professional Conduct when they engaged in the conduct giving rise to this proceeding.

II. APPLICABLE LEGAL STANDARDS FOR THE HEARING COMMITTEE AND RELATED FINDINGS

A. Standard of Proof

32. All disciplinary charges brought by Bar Counsel are required to be proven by "clear and convincing evidence." D.C. Bd. on Prof'l Responsibility R. 11.5 (2011). This is an "intentionally elevated" standard and means "evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." Blackson v. U.S., 897 A.2d 187, 195 n.12 (D.C. 2006) (citing In re Dortch, 860 A.2d 346, 358 (D.C. 2004)). "While the 'preponderance' standard 'allows both parties to share the risk of error in roughly equal fashion,' the more stringent 'clear and convincing' standard 'expresses a preference for one side's interests' by allocating more of the risk of error to the party who bears the burden of proof." Id. (citing In re Dortch, 860 A.2d 346, 358 (D.C. 2004)) (quoting Herman & MacLean v. Huddleston, 459 U.S. 375, 390 (1983)). In other words, all parties agree that the Hearing Committee must conclude, on the basis of clear and convincing record evidence, that Bar Counsel has proven each element of each Rule violation alleged to have been committed by each Respondent in order to find, as Bar Counsel alleges, that any particular Respondent has violated any particular Rule. Otherwise, Bar Counsel has not met the requisite burden of proof, and the Hearing Committee must conclude that no violation, as particularly

alleged, has been found with respect to a particular Respondent and particular alleged Rule violation.

33. The Hearing Committee is not empowered to make findings or even comment on behavior revealed in the record which reflects adversely on anyone unless the behavior is relevant to Bar Counsel's charges. For this reason, the Hearing Committee is silent with respect to some behavior revealed in this record.

B. Witness Credibility

34. One important role of the Hearing Committee in the attorney disciplinary process is to make judgments with respect to witness credibility. In re Ukwu, 926 A.2d 1106, 1115 (D.C. 2007). The Board on Professional Responsibility must defer to Hearing Committee's "subsidiary findings of basic facts, which include such things as credibility determinations…." In re Micheel, 610 A.2d 231, 234 (D.C. 1992). Such deference is owed to the Hearing Committee because the Hearing Committee is the trier of fact and accordingly is in the best position to judge witness credibility. In re Temple, 629 A.2d 1203, 1208-09 (D.C. 1993); see also In re Ray, 675 A.2d 1381, 1387 (D.C. 1996) ("The Hearing Committee [is] the only decision-maker which had the opportunity to observe the witnesses and assess their demeanor…"). "Uncontradicted and unimpeached testimony" need not be accepted "if it is from an interested party or is inherently improbable." 9C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2586 (3d. ed. 2008). An evaluation of witness credibility involves "an overall evaluation of the testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence in the case." Id.

35. Additionally, in determining witness credibility, important considerations include, "whether the witness had a full opportunity to observe the matters about which he or she has testified; [and] whether the witness has any interest in the outcome of this case, or friendship or hostility toward other people concerned with this case." D.C. Criminal Jury Instructions, 2.200 (2011). The "reasonableness or unreasonableness, [and] the probability or improbability, of the testimony of a witness" may be considered when gauging credibility. Id. Finally, bias is an important factor when making determinations about the credibility of a witness:

> If you believe that any witness has shown him or herself to be biased or prejudiced, for or against either side in this trial, you may consider and determine whether such bias or prejudice has colored the testimony of the witness so as to affect the desire and capability of that witness to tell the truth.

Id. After weighing all of the relevant factors given above, the weight to be given to the testimony of a witness can be determined. Id.; accord Lin v. Gonzales, 446 F.3d 395 (2d Cir. 2006).

C. The Complaints

36. Mrs. Abbott is Bar Counsel's complaining witness. She filed one or more written complaints against each of the Respondents. BX 129 (JTS); BX 131 (JTS); BX 132 (JTS); BX 135 (JTS); BX 136 (JTS); BX 137 (JTS); BX 138 (JTS); BX 144 (JPS); BX 146 (JPS); BX 149 (LS); BX 151 (LS); BX 154 (LS); and BX 160 (RK). Appendix A contains excerpts from all of these exhibits except BX 138, which is quoted substantially in its entirety. These excerpts demonstrate (1) Mrs. Abbott's palpable anger at the Respondents, especially JTS, and (2) the close coordination between the case Mrs. Abbott prepared for Bar Counsel to support Mrs. Abbott's complaints and the case Bar

Counsel actually presented against Respondents. The record also contains numerous messages from Mrs. Abbott to Bar Counsel in connection with Bar Counsel's investigation. RX JTS/JPS 24; RX JTS/JPS 25; RX JTS/JPS 27; RX JTS/JPS 30. She was Bar Counsel's lead witness, and her testimony was offered over a three-day period (including an interruption for the testimony of an expert witness). Tr. at 68-286 (Oct. 13, 2009); Tr. at 329-436 (Oct. 14, 2009); Tr. at 657-776 (Oct. 15, 2009).

37. Mrs. Abbott's testimony and the letters and e-mail messages she wrote, taken as a whole, support the following findings and conclusions:

38. Mrs. Abbott deeply cares for and has long been concerned about her mother, Mrs. Ackerman, and her welfare. See Tr. 3147-3154 (Jan. 15, 2010). Although Mrs. Abbott was living in California at the time of Mrs. Ackerman's stroke in 1997, she came back to Washington and stayed in this area for months, caring for her parents; including her father who was then alive but quite infirm. Tr. at 96-98 (Oct. 13, 2009). She had her parents' home renovated to accommodate her parents' aging physical condition. Id. Mrs. Abbott initially arranged for day-time caregivers for her parents and eventually arranged for 24-hour care givers when their deteriorating health so warranted in her judgment. Tr. at 99-102 (Oct. 13, 2009). She arranged for her mother to give her a durable general health care power of attorney in 1999, Tr. at 105-06 (Oct. 13, 2009), and arranged for the creation of trusts for each parent in May, 2002. Tr. at 121-23 (Oct. 13, 2009).

39. Mrs. Abbott observed from afar Dr. Ackerman's (her brother's) too-low (in her estimation) standard of care for their aunt, Ms. Sullivan. Tr. at 91-94 (Oct. 13, 2009). She was concerned about his financial dependency on their mother's and Ms.

Sullivan's financial and other resources. See Tr. at 77 (Oct. 13, 2009). For many years, there has been tension and either poor or no communication between Mrs. Abbott and her brother. Tr. at 400-05 (Oct. 13, 2009). This distrust and miscommunication are plainly manifested in a 2005 exchange between Mrs. Abbott, RX JTS/JPS 31, and Dr. Ackerman, RX JTS/JPS 32. On one occasion, he allegedly physically attacked her. Tr. at 401-02 (Oct. 14, 2009). She recognized that he did not trust her. See Tr. at 402-03 (Oct. 14, 2009). She regarded her brother's behavior in initiating and pursuing the litigation against her and her husband, as trustee of her mother's trust, as self-destructive. Tr. at 403 (Oct. 14, 2009). She feared his control of their aunt's finances and his controlling influence over their mother. Tr. at 391-92 (Oct. 14, 2009). She and Dr. Ackerman disagreed strongly over the nature and level of care needed by their mother. She regarded Dr. Ackerman as paranoid even though he had never been diagnosed as having that or any other mental disorder. Tr. at 408 (Oct. 14, 2009).

40. In Mrs. Abbott's view, JTS is the principal villain in this family drama. As previously noted, Mrs. Abbott wrote seven letters to Bar Counsel complaining about Respondent JTS. BX 129; BX 131; BX 132; BX 135; BX 136; BX 137; BX 138. Excerpts from all of these exhibits, except BX 138, which is reproduced in full, are set forth in Appendix A. These excerpts illustrate the anger and passion motivating Mrs. Abbott in pressing the charges against Respondents.[10]

41. We have quoted Mrs. Abbott's complaining letters (Appendix A) and her cross examination (Appendix B) because these documents and her testimony illustrate

[10] Respondent LS, in response to Hearing Committee Member Wilairat's questions, explained the legal and family situation well. Tr. at 3147-3154 (Jan. 15, 2010). This testimony is reproduced in Appendix D.

her extreme anger and hostility toward Respondents and thus have convinced the Hearing Committee that Mrs. Abbott is a biased witness against the Respondents. It is apparent to us that her deep concern for her mother's welfare and for the protection of her limited financial resources, coupled with her fear and distrust of her brother, her lack of knowledge of lawyers' ethical obligations, Tr. at 769 (Oct. 15, 2009), and the applicable legal standards for determining mental capacity, led her to make and press substantially baseless and unwarranted charges of ethical misconduct against the Respondents.[11]

42. Furthermore, the evidence of Mrs. Abbott's anger and resulting hostility to the Respondents makes her *opinion* testimony against Respondents unreliable. Repeatedly she acknowledged that her "evidence" of misconduct was her belief that Respondents had engaged in abuse of the elderly and Dr. Ackerman, and had even engaged in criminal conduct; "It has been devastating…." Tr. at 358 (Oct. 14, 2009); id. at 394, 421; Tr. at 658, 676, 678-79, 686-87, 738-39, 746-47 (Oct. 15, 2009). Her anger at the situation in which she was so involved may well have been warranted, particularly from her perspective, but passion is not a substitute for fact. In spite of Bar Counsel's offering her complaining letters as factual evidence[12], Mrs. Abbott's hostile, bitter statements and uncorroborated testimony cannot be accepted as reliable or even relevant

[11] It was readily apparent to the Hearing Committee, not merely from her words recorded in the transcript, but also from the tone of her testimony and her demeanor and body language, that she was literally counting the days until she could publicly vent her anger and hostility toward the Respondents at the hearing in this proceeding. Mrs. Abbott testified that her testimony was presented 4 years, 4 months and 23 days from the date of filing the complaint. Tr. at 382 (Oct. 14, 2009).

[12] BX 129; Tr. at 347 (Oct. 14, 2009); BX 131; Tr. at 347 (Oct. 14, 2009); BX 132; Tr. at 348 (Oct. 14, 2009); BX 135; Tr. at 348 (Oct. 14, 2009); BX 136; Tr. at 349 (Oct. 14, 2009); BX. 137; Tr. at 349 (Oct. 14, 2009); BX 138; Tr. at 350 (Oct. 14, 2009); BX 144; Tr. at 352 (Oct. 14, 2009); BX 146; Tr. at 353 (Oct. 14, 2009); BX 149; Tr. at 353-56 (Oct. 14, 2009); BX 151; Tr. at 356 (Oct. 14. 2009); BX 160; Tr. at 357 (Oct. 14, 2009).

evidence against Respondents. Moreover, Mrs. Abbott's multiple conclusory statements about her mother's capacity are not reliable and do not constitute persuasive or relevant evidence against Respondents because she manifestly is not aware of applicable District of Columbia law on this subject (not being a lawyer, see, e.g., Tr. at 670-71 (Oct. 15, 2009) or otherwise counseled on this subject insofar as this record reveals).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING MRS. ACKERMAN'S MENTAL CAPACITY

A. Legal Mental Capacity Defined

43. Mrs. Ackerman's mental capacity is a critical issue in this case.[13] There is substantial medical and nonmedical evidence in the record pertaining to her capacity at different times and under different circumstances. We also have transcripts of Mrs. Ackerman's testimony with respect to many of the issues with which we are concerned.

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[13] Surprisingly, Bar Counsel takes a contrary position in her Reply Brief. Bar Counsel's Reply Br. 10-11. There she states:

> Mrs. Ackerman's lack of "capacity" (the term used in the Probate Statute) or competency is clearly a relevant issue in these disciplinary proceedings. However, *none of Bar Counsel's charges depend on a finding that Mrs. Ackerman was legally incapacitated or incompetent."* (Emphasis supplied.)

This position is radically at odds with Bar Counsel's position throughout these proceedings prior to this statement's appearing in the Reply Brief. Moreover, there is no explanation for this late shift in Bar Counsel's position.

Two cases are cited in support of this position. In re Devaney, 870 A.2d 53 (D.C. 2005); In re Austin, 858 A.2d 969 (D.C. 2004). Neither case is apposite to the matter before the Hearing Committee, and neither case supports Bar Counsel's position. *Devaney* involved no rule at issue in this matter, and *Austin* only tangentially involved Rule 8.4(c), which is at issue in our cases. However, both *Devaney* and *Austin* principally involve violations of Rule 1.8(a), which prohibits business transactions which create conflicts of interest between lawyers and clients (such as a lawyer's drafting a will for a non-family member client, naming the lawyer as a beneficiary of the will, or the lawyer's borrowing money from a client). The vulnerability of the client is not at issue under that Rule. Further, the respondents in those cases personally benefitted from the transactions in which they engaged. There is no charge and no evidence in this record of Respondents personally and wrongfully benefitting from their actions.

44. In order to comply with the Rules of Professional Conduct, all lawyers, including Respondents, are required to make a *legal judgment* with respect to the client's mental capacity. D.C. Rules of Prof'l Conduct R. 1.14 (2007).[14] All relevant evidence is appropriately considered and weighed by the attorney having responsibility to make a *legal judgment* concerning a client's capacity. It is the lawyer's reasonable judgment on this issue that is controlling, however. Id.[15]

45. New Oxford American Dictionary defines capacity as "the ability or power to do, experience, or understand something." *Capacity Definition*, The New Oxford American Dictionary Online. Black's Law Dictionary defines capacity as "the power to create or enter into a legal relation under the same circumstances in which a

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[14] See infra notes 17, 19.

[15] The statement and analysis of applicable District of Columbia law set forth in this Section III.A of the Report has been "the law" throughout the period of time covered by the record created by the parties before the Hearing Committee. Also, since at least June 2003, the American Bar Association (ABA) Commission on Law and Aging and the American Psychological Association (APA) Office on Aging have been working collaboratively to strengthen the legal rights, dignity, autonomy, quality of life, and quality of care of elderly persons. In the furtherance of these objectives, three publications have been jointly produced by the two organizations:

- Assessment of Older Adults With Diminished Capacity: A Handbook for Lawyers (2005);
- Judicial Determinations of Capacity of Older Adults in Guardianship Proceedings (2006) (Also in conjunction with the National College of Probate Judges); and
- Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists (2008).

Although both of the Handbooks disclaim that they are intended to establish standards of practice against which either lawyers, ABA Comm'n on L. & Aging & Am. Psychological Ass'n, Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers ii (2005), or clinical practitioners, ABA Comm'n on L. & Aging & Am. Psychological Ass'n, Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists 3 (2008), are to be evaluated, both publications have been prepared and reviewed by legal and medical practitioners who are experts in dealing with adults with diminished capacity. ABA Comm'n on L. & Aging & Am. Psychological Ass'n, A Handbook for Lawyers, supra, at ii, iv; ABA Comm'n on L. & Aging & Am. Psychological Ass'n, A Handbook for Psychologists, supra, at 3, 6.

normal person would have the power to create or enter into such a relation…." Black's Law Dictionary (9th ed. 2009). The parties in this case have consistently used the term "competency," not "capacity," to refer to Mrs. Ackerman's mental acuity, or lack thereof.

46. The distinction between "competency" and "capacity" is an important one. The common law made a sharp distinction between competency or sanity and incompetency and insanity. See Sullivan v. Flynn, 20 D.C. (9 Mackey) 396 (1892), 1892 WL 11492, at *4-5; Dexter v. Hall, 82 U.S. (15 Wall.) 9, 20 (1872).

47. In *Sullivan v. Flynn*, the Supreme Court of the District of Columbia pointedly held that a contract made a fortnight before the contracting party was declared "insane" was valid because, until someone is judicially determined to be insane, as a matter of law, they are presumed to be sane. See Sullivan v. Flynn, 20 D.C. (9 Mackey) 296 (1892), 1892 WL 11492, at *4-5; see also Dexter v. Hall, 82 U.S. (15 Wall.) 9, 20 (1872).

48. The modern practice is to focus on a person's capacity to take a specific action at a specific time. See D.C. Code § 21-2011(11) (2001); Charles P. Sabatino, Representing a Client with Diminished Capacity: How Do You Know It And What Do You Do About It?, 16 J. Am. Acad. Matrim. Law. 481, 489 (2000) ("Capacity is task-specific and time-specific…no universal definition of decision-making capacity exists."); ABA Comm'n on L. & Aging & Am. Psychological Ass'n, Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers 5 (2005). This fundamental point seemingly has eluded the parties in this proceeding. The concept that pervades the record

and briefs before us, namely that someone is either mentally competent or mentally incompetent, is not consistent with current, applicable District of Columbia law.[16]

49. D.C. Rule 1.14 and the comment, which are virtually identical to the ABA Model Rules of Professional Conduct 1.14, address legal capacity. Compare D.C. Rules of Prof'l Conduct R. 1.14 (2007) with Model Rules of Prof'l Conduct R. 1.14 (2010). It requires that attorneys, "as far as reasonably possible, maintain a typical client-lawyer relationship" with clients with diminished capacity. D.C. Rules of Prof'l Conduct R. 1.14 (2007).[17] The comment also states that, "a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being." See D.C. Rules of Prof'l Conduct R. 1.14 cmt. [1] (2007).

50. There are a number of oral examination questions which have traditionally been used by attorneys to examine client competency; however, these exams fail to determine gradations of legal mental capacity.[18]

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[16] Bar Counsel did recognize this point in one of her arguments on the admission of evidence, however. Tr. at 2077 (Dec. 10, 2009). Mr. Bergman likewise called attention to the difference between capacity and competence in his closing argument. Tr. at 3578-80 (Mar. 10, 2010).

[17] The text of Rule 1.14(a) prior to the amendment effective February 1, 2007, referred to "impaired" rather than "diminished" capacity. This change in terminology reflects the ABA Model Rule amendment, as adopted by this jurisdiction, which was "grammatical and reflective of the change in focus of the Rule to the continuum of a client's capacity." ABA Ethics 2000 Commission's Report on the Model Rules of Professional Conduct, Rule 1.14 Reporter's Memo of Explanation of Changes (submitted August 2001). To the extent any of the conduct subject to this disciplinary proceeding occurred prior to the February 1, 2007, amendment effective date, and thus may be subject to the pre-2007 Rules, we note that the Hearing Committee does not view the change in terminology as significantly different when applied to the facts in this matter. Since the pre-2007 version of Rule 1.14 noted that "the law recognizes intermediate degrees of competence," the grammatical change does not affect the Committee's analysis on this issue. See D.C. Rules of Prof'l Conduct R. 1.14 cmt. [1] (rev. 6-98).

[18] One example is the Short Portable Status Questionnaire, which is composed of the following questions:

1. Levels of Mental Capacity

51. D.C. law recognizes four qualitatively different levels of mental capacity including a lack of mental capacity or "unsoundness of mind:"

a. Full capacity, without impairment; this is an adult's default, or presumed mental state in the absence of evidence of impairment. Butler v. Harrison, 578 A.2d 1098, 1100-01

(footnote cont'd. from previous page)

1. What are the date, month, and year?
2. What is the day of the week?
3. What is the name of this place?
4. What is your phone number?
5. How old are you?
6. When were you born?
7. Who is the current President?
8. Who was the President before him?
9. What was your mother's maiden name?
10. Can you count backwards from 20 by 3's?

0-2 errors: normal mental functioning. 3-4 errors: mild cognitive impairment. 5-7 errors: moderate cognitive impairment. 8 or more errors: severe cognitive impairment.
*One more error is allowed in the scoring if a patient has had a grade school education or less.
*One less error is allowed if the patient has had education beyond the high school level.

E. Pfeiffer, A Short Portable Mental Status Questionnaire for the Assessment of Organic Brain Deficit in Elderly Patients, 23 J. of Am. Geriatrics Soc'y 433-41 (1975).

Using this test and grading system in a strict, rigid way is not a practicable way of evaluating one's mental capacity. Legal mental capacity has gradations. Accordingly, the Committee finds that this exam has an appropriate use as part of an attorney's attempt to evaluate client capacity. On its own, this exam is not extremely useful when trying to determine legal mental capacity at an applicable standard, such as the capacity to contract. However, this exam might be used to determine an initial finding of diminished capacity in terms of Rule 1.14. If this exam reveals no problems, however, it will help support a reasonable belief that the client is capable. If significantly diminished capacity is found, the lawyer is then required to assess the extent of that capacity deficiency and how it will affect the representation in accord with Rule 1.14. See generally ABA Comm'n on L. & Aging & Am. Psychological Ass'n, Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers (2005); ABA Comm'n on L. & Aging & Am. Psychological Ass'n, Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists (2008).

(D.C. 1990) (internal citations omitted); Uckele v. Jewett, 642 A.2d 119, 122 (D.C. 1994).

b. Impaired capacity to the extent that a person lacks capacity to manage all or some of his or her financial resources or to meet all or some essential requirements for his or her physical health, safety, habitation, or therapeutic needs; this level of impairment can result in the appointment of a court-ordered guardian or conservator. D.C. Code §21-2011 (11) (2001), enacted as D.C. law no.1987, Law 6-204.

c. Retained capacity to contract and make testamentary documents. Butler, 578 A.2d at 1100 (internal citations omitted); accord Uckele, 642 A.2d at 122.

d. Insanity or unsoundness of mind. Butler, 578 A.2d at 1100-01 (internal citations omitted) ("the party asserting incompetency must show not merely that the person suffers from some mental disease or defect such as dementia, but that such mental infirmity rendered the person incompetent to execute the particular transaction according to the standard set forth above").

2. Capacity Limitation Requiring a Guardian

52. Persons with diminished capacity do not necessarily lack or possess capacity in all situations they encounter. See ABA Comm'n on L. & Aging & Am. Psychological Ass'n, supra, at 5. A guardian may be appointed by the court if the:

> … ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that he or she lacks the capacity to manage all or some of his or her financial resources or to meet all or some essential requirements for his or her physical health, safety, habilitation, or therapeutic needs without court-ordered assistance or the appointment of a guardian or conservator.

D.C. Code § 21-2011(11) (2001).

53. Evidence of significant physical limitations, memory problems, trouble paying bills, managing financial assets or bank accounts, or getting proper healthcare and daily maintenance establishes incapacity under the guardianship statute. See id.

Significantly, one who is incapacitated under the guardianship standard is not necessarily lacking mental capacity, and indeed is presumed to have capacity. D.C. Code § 21-2004 (2001) ("A finding under this chapter that an individual is incapacitated shall not constitute a finding of legal incompetence. An individual found to be incapacitated shall retain all legal rights and abilities other than those expressly limited or curtailed in the order of appointment of a guardian or in a protective proceeding, or subsequent order of the court").

3. The Capacity to Contract

54. The capacity to contract is defined in D.C. by *Butler*:

> The test of mental capacity to contract is whether the person in question possesses a sufficient mind to understand, in a reasonable manner, the nature, extent, character, and effect of the particular transaction in which she is engaged…whether or not she is competent in transacting business generally. … It is presumed that an adult is competent to enter into an agreement and the burden of proof is on the party asserting incompetency. … Further, the party asserting incompetency must show not merely that the person suffers from some mental disease or defect such as dementia, but that such mental infirmity rendered the person incompetent to execute the particular transaction according to the standard set forth above.

Butler, 578 A.2d at 1100-01 (internal citations omitted); see Lawrence A. Frolik & Mary F. Radford, "Sufficient" Capacity: The Contrasting Capacity Requirements for Different Documents, 2 NAELA Journal 303, 315-16 (2006) (internal citations omitted); see also In re McMillan, 940 A.2d 1027, 1035 (D.C. 2008); Uckele v. Jewett, 642 A.2d 119, 122 (D.C. 1994).

55. A North Carolina court has recognized that capacity to contract or make a deed does not necessarily require the capacity to make wise decisions or to "drive a good bargain."

> The mental capacity required for the valid execution of a deed is the ability to understand the nature of the act in which the party is engaged and its scope and effect, or its nature and consequences—not that he should be able to act wisely or discreetly, nor to drive a good bargain, but that he should be in such possession of his faculties as to enable him to know at least what he is doing and to contract understandingly….
>
> A want of adequate mental capacity of itself vitiates the deed, while mere mental weakness or infirmity will not do so, if sufficient intelligence remains to understand the nature, scope, and effect of the act being performed.

Lamb v. Perry, 86 S.E. 179, 183 (N.C. 1915).

4. Insanity or Unsoundness of Mind

56. Insanity or unsoundness of mind indicates that one is incapacitated to the point where she cannot contribute to decisions regarding her own well-being. Cf. Butler, 578 A.2d at 1100-01 (finding that one cannot execute a contract, or if they have, the contract is void, if "they are of unsound mind or insane" when the contract was executed). Such a person does not have the capacity to contract. To establish insanity or unsoundness of mind, it must be shown that one has a mental disease, and that disease is preventing the individual from making or meaningfully contributing to any decisions for their own benefit. See id.

57. It is noteworthy that determining a client's capacity to engage in a legal act requires legal judgment. The lawyer, and perhaps ultimately a court, must weigh the relevant evidence and make the determination with respect to a client's mental capacity. D.C. Rule of Professional Conduct 1.14 addresses the subject of attorneys' responsibility when dealing with diminished capacity. D.C. Rules of Prof'l Conduct R. 1.14. The Rule requires attorneys *reasonably* to determine the client's level of capacity. Id. ("When the lawyer reasonably believes that the client has diminished capacity…the lawyer may take

reasonably necessary protective action…"). Because legal mental capacity is a relative concept, that is, capacity is task and time specific, a reasonable belief must be established that the client possesses the capacity to act in accord with the appropriate standard of capacity for the particular situation. Sabatino, supra, at 485. ("Capacity is task-specific and time-specific…no universal definition of decision-making capacity exists."); See ABA Comm'n on L. & Aging & Am. Psychological Ass'n, supra, at 5.

58. Therefore, lawyers must establish a reasonable belief that the client at least meets the *Butler* standard if the client demonstrates diminished capacity and is attempting to execute a contract or take analogous action. See D.C. Rules of Prof'l Conduct R. 1.14; Butler, 578 A.2d at 1100-01. Unlike capacity in guardianship law, capacity to contract must be judged by the client's "habitual or considered standards of behavior and values" and not those of others (hereinafter "ABA Rule"). ABA Comm. On Prof'l Ethics & Responsibility, Formal Op. 96-404, 3 n.3 (1996) (internal citations omitted); see D.C. Rules of Prof'l Conduct R. 1.14 cmt. [6]. Accordingly, a client making poor or unwise decisions, from the perspective of the lawyer, is not necessarily lacking mental capacity to contract or write a will. See D.C. Rules of Prof'l Conduct R. 1.14 cmt. [6]; ABA Comm. On Prof'l Ethics & Responsibility, Formal Op. 96-404, 3 (1996). When a client with diminished capacity desires to take actions which vary significantly from their historical value system and pattern of decision making, however, a reasonable belief of capacity to contract becomes questionable. Id. A reasonable belief of contractual capacity will consist of a finding (1) of the client's historical values and decision making patterns and (2) that the client's attempted or desired actions reasonably

comport with those past values and patterns. See D.C. Rules of Prof'l Conduct R. 1.14 cmt. [6].[19]

59. In the District of Columbia, testamentary and contractual capacity are synonymous. D.C. Code § 18-102 (2001).[20] Further, the capacity to make a valid gift or execute a deed, or to execute a Power of Attorney, is the same as the capacity to contract. See Frolik & Radford, supra, at 312-13.

60. Individuals who demonstrate diminished mental capacity, or cause a lawyer to question their mental capacity, are nevertheless presumed to be capable except to the limited extent they are otherwise found to be incapable. See D.C. Code § 21-2004 (2001) ("A finding under this chapter that an individual is incapacitated shall not constitute a finding of legal incompetence. An individual found to be incapacitated shall retain all legal rights and abilities other than those expressly limited or curtailed in the order of appointment of a guardian or in a protective proceeding, or subsequent order of

[19] As discussed *supra* in note 17, Rule 1.14 was amended effective February 1, 2007, to reflect the focus of the Rule on the continuum of a client's capacity. Comment [6] merely "provides guidance on determining the extent of a client's diminished capacity." ABA Ethics 2000 Commission's Report on the Model Rules of Professional Conduct, Rule 1.14 Reporter's Memo of Explanation of Changes (submitted August 2001). To the extent any of the conduct subject to this disciplinary proceeding occurred prior to the February 1, 2007, amendment, and thus may be subject to the pre-2007 Rules, we note that the "Comments are intended as guides to interpretation." The Committee has analyzed this issue using Comment [6] as guidance and not as a controlling principle. D.C. Rules of Prof'l Conduct Scope [6]; see also Griva v. Davison, 637 A.2d 830, 841 n.12 (D.C. 1994).

[20] "A will, testament, or codicil is not valid for any purpose unless the person making it is at least 18 years of age and, at the time of executing or acknowledging it as provided by this chapter, of sound and disposing mind and capable of executing a valid deed or contract."

the court."); Sabatino, supra, at 489-90; see Uckele, 643 A.2d at 122; Butler, 578 A.2d at 1100-01; D.C. Code §§ 21-2203,[21] 21-2204[22] (2001).

61. Consistent with Rule 1.14, lawyers may gather information about historical values and patterns of decision making by talking with a client's family or "other interested persons" about capacity determinations. ABA Comm. On Prof'l Ethics & Responsibility, Formal Op. 96-404, 3-4 (1996). Such information gathering, when limited to capacity issues, is permissible under Rule 1.6. Id; see also ABA Comm. On Ethics & Prof'l Responsibility, Informal Op. 89-1530 (1989).

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[21] "An individual shall be presumed capable of making health-care decisions unless certified otherwise under § 21-2204. Mental incapacity to make a health-care decision shall not be inferred from the fact that an individual:

(1) Has been voluntarily or involuntarily hospitalized for mental illness pursuant to § 21-501 et seq.;
(2) Has a diagnosis of mental retardation or has been determined by a court to be incompetent to refuse commitment under § 7-1301.01 et seq.; or
(3) Has a conservator or guardian appointed pursuant to § 21-1501 et seq. or § 21-2001 et seq."

[22] "(a) Mental incapacity to make a health-care decision shall be certified by 2 professionals who are licensed to practice in the District and qualified to make a determination of mental incapacity. One of the 2 certifying professionals shall be a physician and one shall be a qualified psychologist or psychiatrist. At least 1 of the 2 certifying professionals shall examine the individual in question within 1 day preceding certification. Both certifying professionals shall give an opinion regarding the cause and nature of the mental incapacity as well as its extent and probable duration.

(b) All professional findings and opinions forming the basis of certification under subsection (a) of this section shall be expressed in writing, included in the patient-care records of the individual, and provide clear evidence that the person is incapable of understanding the health-care choice, making a decision concerning the particular treatment or services in question, or communicating a decision even if capable of making it.

(c) Certification of incapacity under this section shall be limited in its effect to the capacity to make health-care decisions and shall not be construed as a finding of incompetency for any other purpose."

B. Evaluation of Medical Evidence Concerning Capacity to Contract

62. Contrary to the positions of all parties, the medical testimony in the record does not conflict. Analysis of the reports and testimony shows that it is in fact consistent in showing that Mrs. Ackerman, over a period of years, in spite of forgetfulness and other cognitive impairment resulting from mild to moderate dementia, possessed the capacity to contract and make a will. We so find.

1. Dr. Richard Ratner

63. Although Dr. Ratner is not an attorney, he alone among the medical practitioners whose reports and opinions were provided to us, expressed awareness of the applicable legal standard for determining Mrs. Ackerman's capacity to act as she did in relation to Respondents. His report of May 11, 2006, BX 30 at 7-8; RX JTS/JPS 14, concludes as follows:

> Taking into account both my interview and the findings of Dr. Negro, I think it is clear that Ms. Ackerman shows some signs of dementia and probably meets criteria for this diagnosis. (Dr. Negro assumes the origin is vascular, though this is unclear). Clearly, her memory is problematic, and her ability to abstract has deteriorated from what we must assume was a normal ability when she was a younger woman. One can agree that her ability to plan and execute complex behaviors is impaired.
>
> I disagree with Dr. Negro, however, in terms of the degree to which this situation impairs Ms. Ackerman's competency to participate in the current proceedings. I believe that Ms. Ackerman had been steadily of the belief that she did not get appropriate input about her finances from Mr. and Mrs. Abbott, that they were not responsive when she complained,[23] and that as a result, she now wants to withdraw the power of attorney from her son in law and invest it in her son.[24] She was at all times able

[23] This information is corroborated directly by Mrs. Ackerman's deposition testimony on November 18, 2005. See BX 54 at 6-8, 14-17.

[24] See BX 54 at 11.

> to express this to me, despite any other deficiencies in her mental status, and it was done, so to speak, more in sorrow than in anger.[25]
>
> As I understand the court's ruling in Uckele v. Jewett, it is insufficient for purposes of finding someone incompetent merely to diagnose them with dementia or some other mental illness. Rather, the question is whether the condition "rendered the person incompetent to execute the particular transaction according to the standard set forth above." The standard is whether the person can understand in a reasonable manner, the "nature, extent, and effect of the particular transaction in which [he] is engaged…"
>
> In my opinion, for the purpose of revoking the power of attorney and/or the trust arrangement in which her son in law has control, and granting those powers instead to her son, Stephen, Jr., Ms. Genevieve Ackerman is competent.

64. Dr. Ratner was questioned, Tr. at 1965-92 (Dec. 10, 2009), and extensively cross examined, Tr. at 1992-2137 (Dec. 10, 2009); Tr. at 2138-65 (Dec. 11, 2009), then subjected to redirect and recross examination, Tr. at 2170-2241 (Dec. 11, 2009), over a two-day period. Bar Counsel offered no objection to his appearing as an expert for Respondents JTS and JPS. Tr. at 1970 (Dec. 10, 2009). In fact, Dr. Ratner had been engaged by and performed services for Bar Counsel, including providing testimony on behalf of Bar Counsel, between eight and fifteen times over the course of the prior fifteen years. Tr. at 1968 (Dec. 10, 2009). Dr. Ratner's entire file concerning his examination of Mrs. Ackerman is in the record. RX JTS/JPS 38 at 5-134. Dr. Ratner met Bar Counsel prior to the hearing, delivered his entire Genevieve Ackerman file to her and responded to her questions about the file contents. Tr. at 1977-78, 1995 (Dec. 10, 2009).

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[25] See BX 54 at 10.

65. In order to prepare his report dated May 11, 2006, RX JTS/JPS 38 at 86-93, Dr. Ratner met with Mrs. Ackerman on three occasions. Tr. at 1978 (Dec. 10, 2009). He also reviewed documents referenced in the report and spoke to Dr. Blee, Mrs. Ackerman's personal physician, as well as to Dr. Ackerman. Tr. at 1979, 2010 (Dec. 10, 2009). On cross examination, he described his conversation with Dr. Blee:

BY MS. PORTER:

…

Q. You testified in response to Mr. Levin's questions that you did speak with Dr. Blee?

A. Yes.

Q. And you said that he said she was competent, meaning Mrs. Ackerman; competent to do what?

A. I think I actually have a paragraph here describing that. This is Page 89. It says, "Dr. Blee opined that while Miss Ackerman's memory is in decline he believes that she maintains a good grasp on who she is and what she wants to have happen.

"He is treating her with small doses of Paxillin, antidepressants which he feels may help to cushion the prolonged grief associated with the lots of letter husband.

"Despite this and the memory problems and the fact that she is nearly blind he feels she is clearly capable of making decisions in her own best interest."

Q. Did you discuss with Dr. Blee what decisions she was capable of making and what decisions she wasn't?

A. I'm sure we had some conversation about it.

Q. And it was your opinion that Mrs. Ackerman did not have the a capacity or the competency to manage her own financial affairs?

A. Correct.

Q. Did Dr. Blee opine otherwise?

A. I can't recall specifically, but I would be surprised if he thought that she could, depending on what we mean by managing her own affairs.

Tr. at 2041-43 (Dec. 10, 2009).

66. Dr. Ratner's testimony is clear and unequivocal that he found that Mrs. Ackerman possessed the capacity to understand the purpose and intended effects of the litigation in which she was participating:

Q. Would you tell us what your observations were during the three clinical interviews with Mrs. Ackerman.

A. Well, very pleasant, frail elderly lady, very friendly, who did not show signs of any mental illness, with the exception of dementia. She had a degree of dementia that had been observed by others, as well.

Q. Did you reach a conclusion as to her legal competence?

A. For this purpose, yes.

Q. What was that conclusion?

A. I felt that she was competent to participate in this particular issue.

Q. And what was the issue that you understood to be involved?

A. She had sued, I believe, to regain control of her trust that had at the time been in the hands of her daughter and son-in-law, and she wanted the control back and wanted it to be managed instead by her son Stephen.

Q. Were you able to form an opinion as to whether she understood she was in fact involved in litigation over those issues?

A. Yes.

Q. Did she tell you that?

A. In so many words, I don't know, but I think she knew. It was clear that she knew.

Q. In connection with preparing the report that begins at Page 86 of 134 in this exhibit, did anyone representing the Szymkowicz firm try to influence your professional judgment?

A. I don't think I could say that. I mean, they obviously provided information to me, but short of that, they wanted me to reach a determination according to my medical judgment.

Q. Are you aware that a Dr. Negro came to a different conclusion than yours?

A. Yes.

Q. What effect does that have, if any, on the opinions you reached in this document?

A. Well, I reviewed Dr. Negro's reports, among others. I took what he had to say into account. There are a number of his conclusions that I did not disagree with, but when it came to the ultimate issue of whether she was competent to participate in this process, I disagreed with him.

Q. And what was Dr. Blee's opinion as he recited it to you?

A. Doctor Blee also felt she was competent.

Q. And what was Dr. Blee to Mrs. Ackerman, as you understood it?

A. Personal physician.

Q. You testified you came to the conclusion she met the legal definition of competence.

What was your understanding and what is your understanding about what a patient has to demonstrate to be legally competent, although, as you testified, impaired with some dementia?

> A. Well, I believe that she had to understand and be able to demonstrate an understanding of what the issue was about. Some of it I think is similar in some ways to test a memory capacity where somebody has to understand who he or she is, who are the natural objects, if you will, of the bounty, something about the property, and have a clear understanding of what he or she wants to do with the property, and I felt that she met those tests.

Tr. at 1979-82 (Dec. 10, 2009).

67. Dr. Ratner provided pertinent and helpful testimony with respect to the definitions of dementia and mental illness, yet he recognized that in a legal setting, legal authorities can and must determine whether a person has the mental capacity to perform certain functions. Tr. at 2180-83, 2193-98, 2226-27 (Dec. 11, 2009).[26]

68. Dr. Ratner was extensively cross examined by Bar Counsel with respect to whether information set forth in his report, which she asserted to be false or provided by an unreliable source, would change the conclusions set forth in his report. He acknowledged that if the "facts" as presented in his report were different from those as stated in the report, he would not necessarily have come to the conclusions stated in the report, Tr. at 2173 (Dec. 11, 2009), but he nevertheless concluded that his conclusions with respect to Mrs. Ackerman's capacity to understand the purpose and effect of her actions (with respect to the execution of a power of attorney) would "probably not" change. Tr. at 2175 (Dec. 11, 2009). He specifically testified that Mrs. Ackerman's

[26] Dr. Ratner's entire testimony in response to the Hearing Committee members' questions is set forth in Appendix C. The Committee finds his testimony credible, pertinent and persuasive. As previously noted, Dr. Ratner's credibility is also supported by the fact that he has appeared as an expert witness on behalf of Bar Counsel between eight and fifteen times during the preceding fifteen years. Tr. at 1968 (Dec. 10, 2009).

memory problems were not a controlling factor in his conclusions. Tr. at 2176 (Dec. 11, 2009).

69. Dr. Ratner testified that Mrs. Ackerman's diagnosis was mild to moderate dementia. Tr. at 2214-16 (Dec. 11, 2009). On this subject, he said that he and Dr. Negro were in agreement. Tr. at 2180 (Dec. 11, 2009). He also said that stress and hostility exacerbate the degree of dementia manifested in a given setting. Tr. at 2221 (Dec. 11, 2009).

70. Dr. Ratner also viewed the video, BX 16, introduced by Bar Counsel, showing Mrs. Ackerman executing the very documents with respect to which he rendered his report. Tr. at 2223-26 (Dec. 11, 2009). On the basis of what he saw in the video, he concluded that in his opinion Mrs. Ackerman was competent to execute the documents presented to her. Tr. at 2224-26, 2228-29 (Dec. 11, 2009). He explained in detail why he came to that conclusion and then testified that "common sense and observation"—not medical expertise—were the foundation for his conclusions. Tr. at 2226-27 (Dec. 11, 2009). He also acknowledged that there is a difference between one's basic competency to act and one's ability to exercise good judgment: "I think competent people act foolishly every day." Tr. at 2228 (Dec. 11, 2009).

71. Dr. Ratner's testimony and report support findings, which we make, that Mrs. Ackerman was mildly to moderately demented and therefore was not so impaired as to prevent her from having the capacity to execute a power of attorney in favor of Dr. Ackerman and to make other such decisions.

2. Dr. Lila McConnell

72. Dr. Lila McConnell, who had been Mr. and Mrs. Ackerman's physician for four or five years prior to writing her report, BX 25, in January 22, 2004, Tr. at 170-71 (Oct. 13, 2009), wrote:

> This letter is in response to your request re: Genevieve Ackerman who is my patient. Mrs. Ackerman is kind and sweet and retains social graces at this time. However, I think she has significant cognitive impairment and is unlikely to be able to adequately participate in any intense or detailed questioning.
>
> I think it would be very hard on her physically and mentally to undergo 2-3 hours of questioning and recommend that she does not do this.

73. Dr. McConnell does not address Mrs. Ackerman's capacity to participate effectively in a deposition. She refers to her inability to "adequately participate in any intense or detailed questioning" for two or three hours.

74. The context for Dr. McConnell's writing her brief memorandum is noteworthy too. Mrs. Abbott testified:

> Q. What were the circumstances for this -- well, if you know, what were the circumstances for Dr. McConnell writing this letter, To Whom It May Concern, on January 22nd, 2004?
>
> A. This was in the middle, this was after we had been sued about, for the first lawsuit, and one of the plans that our attorney had was to depose my mother. And I was, I couldn't imagine how with, in her condition and in her distraught state over my father and this whole turmoil that she was in, I couldn't imagine her testifying, either being able to testify appropriately, or because of the pressure that would be put on her for this thing, I just felt it would be really unfair.
>
> So I told our attorney that I did not want my mother to be deposed. And he said, well, he said if we can, you know, do this, you know, we will ask her doctor if she is able to stand up to it, and so he contacted the

> doctor and asked the doctor if it was a good idea for Mrs. Ackerman to be deposed, you know, to testify, and this was the response, this was Dr. McConnell's statement.
>
> Q. And do you know if Dr. McConnell's letter was shared with the lawyers who were representing your brother?
>
> A. Absolutely.
>
> Q. And was your mother deposed?
>
> A. My mother was not deposed.

Tr. at 171-72 (Oct. 13, 2009).

75. In short, it is reasonable to interpret Dr. McConnell's report as both an accommodation to Mrs. Abbott's concern for her mother's welfare and as an expression of an opinion that Mrs. Ackerman was not "up" to what she imagined would be a stressful, even grueling deposition, reflecting Mrs. Abbott's fears and concerns. Dr. McConnell expresses no opinion on whether Mrs. Ackerman has the capacity to make a contract or write a will. BX 25. Her letter does not rule out such a possibility.

3. Dr. William J. Polk

76. Dr. William J. Polk was asked to examine Mrs. Ackerman at Mrs. Abbott's request during the time when Mrs. Ackerman wanted to return to her home from Spring House.[27] Tr. at 184-85 (Oct. 13, 2009). He evaluated her psychiatrically in June, 2004 because of Mrs. Abbott's concerns about her mother's depression and questions about her capacity to make health care and personal decisions. He concluded that:

[27] The references to "Spring House" or "Springhouse" are to the same facility. The spelling differs according to the cited source.

> Her thoughts are logical and organized. There is no evidence in the interview of paranoia or psychotic phenomena. She has a very clear grasp of her situations, as well as that of her husband. She is quite aware of her children's lawsuit …. She displays good judgment with generic test questions for judgment. She knows of several of her medical problems…. She has a good knowledge of the source of her income, including a trust, a pension, and her sister's estate.

BX 26.

77. Dr. Polk concluded his report: "She has the capacity to make health care and personal decisions for herself." BX 26.

78. There is no indication that Dr. Polk was asked to evaluate Mrs. Ackerman's capacity to understand in a reasonable manner the nature, extent, character and effect of a particular transaction in which she is engaged. It is reasonable to conclude that if she can make healthcare decisions for herself, she has the capacity to contract or make a will.

4. Margi Helsel-Arnold, Geriatric Social Worker

79. Margi Helsel-Arnold is the geriatric social worker who assisted Mrs. Ackerman in preparing to move from Springhouse assisted living back home to the Plymouth Street residence, one of Mrs. Ackerman's long-held goals. See BX 27. Her report of the July 20, 2005 care plan conference summary at which she served as facilitator shows a positive working relationship among Mrs. Ackerman and both of her children, her caregiver and the nurse from the agency providing caregivers. Id. The report makes it clear that Mrs. Ackerman wanted to return to her home, and the other participants were working together to make the move feasible, including safe, for Mrs. Ackerman. No one was reported to object to Mrs. Ackerman's prospective move. See also Tr. at 821-22 (Oct. 15, 2009). Mrs. Emery, Administrator, presumably of

Springhouse, reportedly informed Mrs. Ackerman that she could stay at Springhouse longer than the 30-day notice she provided to Springhouse and that Mrs. Emery believed Mrs. Ackerman's "better option" would be to remain at Springhouse. Mrs. Ackerman responded that she was planning to return to her home. BX 27 at 1.

80. Ms. Helsel-Arnold's testimony at the hearing confirms that Mrs. Ackerman needed twenty-four hour assistance with housekeeping, personal care, medication supervision, and walking on stairs because of her macular degeneration. Tr. at 783-95, 798 (Oct. 15, 2009). Her testimony is that in her opinion, Mrs. Ackerman lacked capacity to make healthcare and personal decisions for herself. Tr. at 815-16, 820-21 (Oct. 15, 2009). She disagreed with Dr. Polk's opinion in this regard. Tr. at 814-16 (Oct. 15, 2009).

81. Bar Counsel did not ask questions of Ms. Helsel-Arnold to elicit information from which the Committee could make a determination of whether Ms. Ackerman possessed the capacity to make a contract or will. Her testimony clearly supports a finding that Mrs. Ackerman would qualify for a guardian under District of Columbia law.

82. In response to questions from the Chair about calibrating Mrs. Ackerman's short-term memory deficiency or degree of cognitive impairment, Ms. Helsel-Arnold testified that Mrs. Ackerman had scored twenty three on the Mini Mental Status test, a research-based exam used by healthcare professionals, social workers and psychiatrists as a baseline. Tr. at 860-61 (Oct. 15, 2009). She explained the significance of a score of twenty three:

> Usually people who score somewhere around twenty-four or below, from my experience over the years and understanding of

> this test, shows a fair amount of cognitive impairment to the point that there's a questionable concern about living independently, and I do recall she scored twenty three out of thirty--actually for her it was probably less than thirty, because she wasn't able to do the writing and the reading party because of her vision."

Tr. at 861 (Oct. 15, 2009).

83. Ms. Helsel-Arnold also testified that scores of fourteen to eighteen on the Mini Mental Status test indicate moderate cognitive impairment and a score below fourteen would indicate a "fairly severe case of cognitive impairment, short-term memory." Tr. at 863-64 (Oct. 15, 2009).

84. This testimony supports our finding that at the time the Mini Mental Status test was administered to Mrs. Ackerman, in 1997, Tr. at 861-62 (Oct. 15, 2009), her short-term memory and corresponding level of cognitive impairment only restricted her capacity to live independently. Her score was significantly above the level of someone who had a moderate level of cognitive impairment. Id. Nothing in Ms. Helsel-Arnold's report, BX 27, or testimony is to the contrary. Conversely, this evidence does not support Bar Counsel's contention that Mrs. Ackerman was "incompetent."

5. Dr. Paulo J. Negro

85. Dr. Paulo J. Negro, Board certified in General Psychiatry, Tr. at 450 (Oct. 14, 2009), testified as an expert called by Bar Counsel, Tr. 447, 453-54 (Oct. 14, 2009). His experience includes conducting competency examinations to determine whether a patient is competent to make decisions for their treatment or to participate in research; he also has experience in determining whether a guardianship is appropriate. Tr. 452-53 (Oct. 14, 2009).

86. Dr. Negro is not a lawyer and did not appear as a legal expert. Tr. at 560-61 (Oct. 14, 2009).

87. The record contains two reports with respect to Dr. Negro's evaluation of Mrs. Ackerman's mental capacity, one in 2004, BX 28, and the other, two year later, in 2006, BX 29. These reports were prepared at Mrs. Abbott's request.[28] Tr. at 455 (Oct. 14, 2009). Dr. Negro's first report (2004) concludes:

> Ms. Ackerman presents with cognitive impairment evidenced by both testing and clinical interview…. In her present state it is my opinion that Ms. Ackerman's ability to receive and evaluate information effectively is impaired to such an extent that she lacks the capacity to independently manage her health and safety, and is unable to exercise proper judgment.

BX 28 at 6.

88. His second report (2006) likewise concludes:

> This interviewer had the opportunity of evaluating Ms. Ackerman twice. She meets criteria for dementia. Ms. Ackerman shows impairment of several cognitive domains. The cognitive impairment is more pronounced in her ability to process complex information and in her executive functioning (i.e. ability to plan and executive complex behaviors). She is easily overwhelmed by pressure of time and multiple tasking. During the interview she was unable to understand and explain the nature, scope and effect of changing her Power of Attorney. In fact, she stated that she did not even know which papers she had signed with her son's attorney. Her cognitive impairment is chronic. The underlying dementia will not improve.
>
> **"I just want peace."**

[28] This fact is significant because Dr. Negro testified that just as "attorneys are hired with—to defend their client so it's natural to be biased toward the client, right. I believe that." Tr. at 610-11 (Oct. 14, 2009); see also Tr. at 505, 584 (Oct. 14, 2009). Mrs. Abbott told Dr. Negro that his report would be used in a competency proceeding concerning her mother. Tr. at 535 (Oct. 14, 2009).

> Ms. Ackerman makes it clear she is suffering with the perceived family strife. This is a vulnerable elderly person who is grieving her husband after decades of marriage. She is not cognitively equipped any longer to process complex information and is clearly vulnerable to emotional pressures to appease perceived conflicts in the family. She will most likely sign any legal documentation pressured upon her, particularly if she is made to believe that her signature or verbal agreement would bring "peace" to the family. Due to her dementia, she is impaired in the processing of complex information, particularly when associated to negative emotional states. Although this interviewer found her unable to understand the complexities of the Durable Power of Attorney, she clearly communicated her wishes that the underlying legal conflict be resolved as soon as possible.

BX 29 at 2-3.

89. Both of Dr. Negro's reports address Mrs. Ackerman's need for assistance with her health care and safety.[29] She was not able to process complex information. BX 28; BX 29. These facts address the need for a guardian or conservator. Id. They do not address the applicable legal standard to determine Mrs. Ackerman's capacity to make a contract or will. Id.

90. First, Dr. Negro's understanding of the applicable legal standard is minimal, if it exists at all. He repeatedly declined to express an opinion calling for a legal conclusion or was precluded from doing so because of timely objection. See, e.g., Tr. at 518-19, 533-37, 552-53, 559-561, 582, 592-93, 600-605 (Oct. 14, 2009).

91. Second, Dr. Negro plainly misunderstood the applicable legal standard with which the Hearing Committee is dealing in this proceeding. Note the following exchange between Bar Counsel and Dr. Negro:

---

[29] See Tr. at 534 (Oct. 14, 2009); Dr. Negro was asked, at the time of both the 2004 and 2006 assessments to access Mrs. Ackerman's capacity to make health care decisions and about her living situations. Id. He was not asked to evaluate her capacity to contract or make a will.

> Q. Doctor, if you have concerns about whether or not someone was cognitively impaired, is one thing you would do is ask the patient to explain back to you what it is that you are doing or why it is you're doing something?
>
> MR. LEVIN: Objection, relevance.
>
> CHAIRMAN QUINN: That's certainly relevant. Overruled.
>
> THE WITNESS: That's the standard of any consent. It's not enough to explain, the person needs to explain back to you because if the person does not do that, how do you know that the person understood?
>
> That's true for every single consent, that at least in the medical part of it, research, treatment, a good example is, let's say you want to consent someone for heart surgery. It's not enough that they say yes, they have to explain what they're going to be doing. It's different degree if you are going to consent someone to do a blood draw. That's very low risk. Then if they say, yes, they're going to do a blood draw, but don't exactly know what the blood draw is for, it's usually okay, but if it's something that is invasive and risky and has problems, then you have to have a detailed explanation from the patient that the patient understood what you explained.
>
> It goes with the complexity and the risk, the degree of explanation back. That's really the standard that is used.
>
> MS. PORTER: Nothing further.

Tr. at 612-13 (Oct. 14, 2009).

92. It is clear that Dr. Negro was applying this standard in evaluating Mrs. Ackerman's competency. One can understand the purpose and effect of a course of action without being able to explain it back to a doctor or lawyer. Dr. Negro's testimony and reports show that Mrs. Ackerman was quite mindful of her long-term interests and articulate about them:

- She wanted peace. Tr. at 522 (Oct. 14, 2009); BX 29 at 3.

- She wanted to return to her home on Plymouth Street. Tr. at 522-23 (Oct. 14, 2009); BX 28 at 2, 5.

- She wanted to make her own decisions. Tr. 524 at (Oct. 14, 2009); BX 28 at 1.

The 2004 report, BX 28, points out the following:

- Mrs. Ackerman was collaborative and pleasant.

- She was oriented to date and location.

- She was able to understand questions and respond appropriately.

- Her thought was coherent, logical and goal directed.

- There were no loose associations or flights of ideas.

- She did not express delusional content.

- She reported anxiety about her husband's medical condition.

- Judgment and insight were impaired.

- She scored eighteen on the Mini Mental Status test, but if she had correctly performed writing/reading tests, but which were excluded because of her visual impairment, her score would have been twenty one; a score below twenty four shows cognitive impairment. Mrs. Ackerman's score indicates moderate dementia, Tr. at 569 (Oct. 14, 2009), not severe dementia. See Tr. 564-76 (Oct. 14, 2009).

93. Dr. Negro's testimony and reports support an affirmative finding that Mrs. Ackerman met the standard to contract or make a will, and we so find. His conclusion that she needed help with health care decisions and complex legal or logistical issues is different from but not inconsistent with this finding. If the issue before the Hearing Committee were whether Mrs. Ackerman qualifies for a conservator or guardian, Dr.

Negro's reports and testimony would support such a finding, but that is not the issue before this Committee.

C. Conclusory Findings Concerning Mrs. Ackerman's Capacity

94. As shown above, all of the medical evidence in this record shows that Mrs. Ackerman had memory problems which indicated mild to moderate dementia. However, she retained her long-term, natural, social graces and the capacity to recognize and articulate her fundamental interests such as (a) promoting "peace" in her family by seeking to overcome the strife between her adult children, (b) protecting her son, Dr. Ackerman, (c) desiring to provide both financial and non-financial support for Dr. Ackerman, and (d) wanting him to manage her financial affairs as distinguished from her son-in-law, Mr. Abbott's, doing so. Under these circumstances, we find on the basis of reliable, credible, clear and convincing evidence, in consideration of the record as a whole, that Mrs. Ackerman retained the capacity to contract and reasonably could have manifested that capacity at all times relevant to the decision points affecting Respondents' conduct as disclosed in this record. We further find and conclude that on the record before us, Bar Counsel has not sustained the burden of proof that Mrs. Ackerman is incompetent.

IV. CREATION OF ACKERMAN TRUSTS

95. Bar Counsel notes that Mrs. Ackerman's need for substantial assistance began as early as 1998, when Mrs. Abbott "assumed responsibility for taking care of most, if not all, of her parents' needs." Bar Counsel's Br. 9. The Ackerman Trusts, however, were created on May 24, 2002. BX 9; BX 10; Tr. at 2556 (Jan. 7, 2010). Applying Bar Counsel's logic that the various actions taken by the Respondents violated

the Rules of Professional Conduct, if consistently applied, would present the question of whether Mrs. Ackerman possessed capacity to create her trust. Mr. Coroneos at least in part testified that Mr. Ackerman was "not competent" in April 2002. Tr. at 1315 (Nov. 30, 2009). He had reservations concerning Mrs. Ackerman's vulnerability, but apparently he concluded, without reservation, that Mrs. Ackerman was of "sound mind" at the time she executed her trust. See Bar Counsel's Br. 11, 13-14; Tr. at 1319-21 (Nov. 30, 2009).

96. Mrs. Ackerman suffered memory loss with respect to the trusts after their creation. See, e.g., Tr. at 830-31 (Oct. 15, 2009) (stating that Mrs. Ackerman forgot that her husband had died). For example, at various times, she forgot that the trusts existed, and what assets were in them. Based on Bar Counsel's argument, it would seem that Mrs. Ackerman, on account of her memory problems, also lacked the competence to execute the trusts. Id. There is, however, no contention by any party that Mrs. Ackerman lacked capacity to execute her trust agreement.

97. Although there is no doubt that Mrs. Abbott had the best interests of her mother in mind, she also had personal financial interests at stake with respect to Mrs. Ackerman's assets. For example, the trusts made distribution to Dr. Ackerman of Mr. or Mrs. Ackerman's trust assets, with limited exceptions, advances against his residual share of their estates, thereby serving to protect Mrs. Abbott's future inheritance. BX 9 at 5-7, BX 10 at 5-7. Also, Mrs. Abbott occasionally paid some of Mrs. Ackerman's expenses with Mrs. Abbott's personal funds; the trusts created a source of funds for those expenses and when available, for reimbursement of Mrs. Abbott when she used personal funds for her mother's expenses. See Tr. at 145 (Oct. 13, 2009) (Mrs. Abbott testifying that she

facilitated paying her parents bills with the trust money allocated to those bills); see also Tr. at 271-72 (Oct. 13, 2009) (Mrs. Abbott testifying that she set up a separate account to pay the home health care aides out of her own funds so her mother would receive adequate care). More significantly, the provision in Mrs. Ackerman's trust for a small allowance for Dr. Ackerman ostensibly put a cap on the amount of her mother's assets that would be available to her brother. Most importantly, the trusts removed substantial control and access to the senior Ackermans' assets from the senior Ackermans to the Trustee, Mr. Abbott, who would not be subject to Dr. Ackerman's influence. Also, importantly, it is reasonable to infer that Article XII of Mrs. Ackerman's trust agreement, BX 9 at 15, the *in terrorem* clause, was inserted by Mr. Coroneos at least in part to protect Mrs. Abbott's interests in her parents' assets, directly contrary to the expressed interests of Mrs. Ackerman, who did not understand the purpose or effect of the clause until after the agreement was executed. See Tr. at 1041 (Oct. 16, 2009); Tr. at 2869-70 (Jan. 14, 2010); BX 54 at 6. (Unfortunately, much of the drama described in this record is the foreseeable but unintended consequence of inserting this clause in the trust agreement.)

V. MRS. ACKERMAN'S LONG-TERM INTERESTS WERE ALIGNED WITH DR. ACKERMAN'S INTERESTS

98. The record is replete with evidence from Bar Counsel's principal witness, Mrs. Abbott, that supports the fundamental point that Mrs. Ackerman's long-term interests and values were to protect her son, Dr. Ackerman. See Tr. at 82-83, 94-95, 113, 116, 136-38, 160-61, 170, 184, 210-17, 228, 243, 253, 255, 275-76 (Oct. 13, 2009); Tr. at 388-89, 391 (Oct. 14, 2009). For example, Mrs. Abbott testified that her mother

seemingly approved of her brother's conduct with respect to care for their aunt when Mrs. Abbott was highly critical of that behavior:

BY MS. PORTER:

Q. Okay, let me back up. The comments that you made to your brother or statements that you made to your brother concerning your Aunt's care, when did those begin and end?

A. They were in the '90s, I know I can, well, I believe it was 1996 that I wrote a let to a doctor that had been treating my aunt expressing grave concerns about the care that she was receiving, so it would have been around that time.

Q. And you also expressed those concerns to your brother?

A. Yes, and I expressed those concerns to my brother.

Q. Was there anything else happening I guess in the mid '90s to 2001 when your Aunt died that caused a rift between you and your brother?

A. Well, my brother -- yes, there was the sale, and, let's see, that was in 2001. Things were always kind of tense with my brother. He was quick to consider discussions or suggestions as criticism, and I always felt that I was kind of walking on eggshells with him. He was -- it was mainly the care of my aunt that created the problem. At this point I can't remember anything else, other than just general.

Q. Well, you testified that you moved to NAPA, California in '95, and were you in daily contact, or I believe you testified about being in daily contact with your parents. Did that continue after you moved to Napa?

A. Yes, it did.

Q. How often did you communicate with your brother?

A. I communicated with him rarely.

Tr. at 94-95 (Oct. 13, 2009).

BY MS. PORTER:

Q. Thank you.

Ms. Abbott, you said you had grave concerns about the care that your Aunt was getting. Could you tell the Hearing Committee what those concerns were?

A. Yes. There came a time when my aunt was not mobile, and she couldn't walk without assistance. My brother would leave for periods of time, such as to go to a football game, and she would be left there by herself, and I was very, very worried about her.

There were health hazards in the house that I had brought to my brother's attention and he was reluctant to do anything about it. She needed somebody to help her as elderly people do with their hygiene and care.

He didn't, my brother was initially reluctant to have any type of health care assistance in the house, and I was told that at times my aunt would be left at home without a health care aide, that she would not have any help with her hygiene from Friday until the aide returned on Monday.

These were the types of things that I was very, very concerned about, and the problem was I, if I expressed these concerns they were met with anger and resistance.

Q. When you expressed these concerns to who?

A. My brother.

Q. Let me back up a little bit and see if I can get some dates. You said at some point your Aunt was not mobile, do you know when that was?

A. Oh, gosh, it would have been probably around 1996, I would say.

Q. And you indicated or you testified that at some point there were aides that were assisting your brother?

A. Yes.

Q. When was that?

A. That would have been, progressively they were brought in from I guess around '96, '97, somewhere in there, or maybe '95, but they were only part-timers, and I thought she needed a level of care that was over and above what she was getting.

Q. You testified that you raised these concerns with your brother. Did you raise these concerns with anyone else?

A. Yes, I raised them with my mother.

Q. And what if any response did she have?

A. My mother's response was, Stevie is doing a good job.

Tr. at 81-83 (Oct. 13, 2009).

99. Mrs. Abbott and her brother were not on "good terms." Tr. at 113 (Oct. 13, 2009). Her actions with respect to their mother's business affairs "caused a huge uproar" with her brother. Tr. at 115-16 (Oct. 13, 2009); see also Tr. at 160, 184 (Oct. 13, 2009); Tr. at 401-02 (Oct. 14, 2009).

100. Mrs. Ackerman disliked the trust and its restrictions on her finances in August, 2003. Tr. at 137-38, 212, 229 (Oct. 12, 2009); Tr. at 389 (Oct. 14, 2009); Tr. at 754 (Oct. 15, 2009); Tr. at 2923 (Jan. 14, 2010).

101. Mrs. Ackerman did not like living at Spring House and wanted to go home. Tr. at 177-78, 190, 197 (Oct. 13, 2009); Tr. at 523 (Oct. 14, 2009) (Negro); Tr. at 2923 (Jan. 14, 2010).

102. Mrs. Ackerman repeatedly said she wanted the trust liquidated in accord with her instructions in a letter to Mr. Abbott dated December 8, 2004. See BX 15; Tr. at 208-10, 228, 243 (Oct. 13, 2009); Tr. at 523-24 (Oct. 14, 2009) (Negro); Tr. at 672 (Oct. 15, 2009) (Abbott); Tr. at 760-61 (Oct. 15, 2009); see BX 54 at 15-16.

103. Mrs. Ackerman's greatest desire was to restore peace in her family. Tr. at 212, 216-17 (Oct. 13, 2009); Tr. at 522, 547 (Oct. 14, 2009) (Negro). She loved both of her children, Tr. at 1320-22 (Nov. 30, 2009); Tr. at 3147-48 (Jan. 15, 2010); see BX 54 at 20, but she wanted her son taken care of. Tr. at 2327 (Dec. 11, 2009); Tr. at 2686 (Jan. 7, 2010).

104. Mrs. Ackerman's interests and those of her son were aligned, according to her understanding. BX 15; Tr. at 255, 275-76 (Oct. 13, 2009); Tr. at 388, 391 (Oct. 14, 2009); Tr. at 673 (Oct. 15, 2009); 2327 (Dec. 11, 2009), BX 54 at 12, 14-15, 18 -20, Tr. at 2923 (Jan. 14, 2010); Tr. at 3147-49 (Jan. 15, 2010); but see BX 14 and BX 54 at 4.

105. Mrs. Ackerman was fairly strong minded about maintaining her independence. Tr. at 101 (Oct. 13, 2009), 3149-51 (Jan.15, 2010); BX 54 at 16.

106. Dr. Ratner also testified that Mrs. Ackerman wanted Dr. Ackerman to control her finances. Tr. at 2053 (Dec. 10, 2009).

107. Mrs. Ackerman testified in a deposition that "He's been through an awful lot in the past. As a matter of fact, he had ten operations in one year. He never complained. He's been accused of being a hypochondriac, which he never was. And he's the kindest person I've ever met." BX 54 at 3; see also id. at 8-10.

108. On the basis of the record as a whole, including the foregoing evidence, the Hearing Committee concludes that Mrs. Ackerman believed that her interests were aligned with those of her son, Dr. Ackerman, and she had the mental capacity so to believe.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING RESPONDENT JOHN T. SZYMKOWICZ

A. JTS's Professional Background

109. JTS was admitted to the D.C. Bar on March 6, 1978. He was assigned Bar No. 946079. BX 2 at 1; BX 4 at 3.

110. In 2009 JTS was a sixty-three year old attorney who was educated in the Prince George's County Public School System, and was awarded a scholarship to the University of Maryland from which he graduated in 1968 with a Bachelor's of Science degree with a major in economics. Tr. at 1948-49 (Dec. 10, 2009). He served as a United States Marine Corps officer before attending Georgetown University Law School, from which he received a Juris Doctor degree in 1974. Id.

111. Since leaving U.S. Government service as a lawyer with the U.S. Interstate Commerce Commission in the mid-1970's, JTS, who is also a member of the Maryland Bar, has been engaged in the private practice of law with an emphasis on civil litigation. Tr. at 1950-57, 1961 (Dec. 10, 2009). He is currently practicing law with his son, JPS, in the firm, Szymkowicz & Szymkowicz, LLP. See Tr. at 1948, 1955, 1961 (Dec. 10, 2009).

112. JTS has never previously been charged with any disciplinary violation and has no disciplinary record, with no pending disciplinary matter other than this case. Tr. at 1961-62 (Dec. 10, 2009).

B. JTS Client Representations

1. Representation of Dr. Ackerman

113. On August 6, 2003, JTS filed the Ackerman I complaint on behalf of Dr. Ackerman. BX 34. Dr. Ackerman had previously engaged JTS with respect to problems

Dr. Ackerman believed existed with Mrs. Ackerman's recently created trust. Dr. Ackerman explained to JTS that he believed the Sea Colony condominium was meant to be given to him and that Mrs. Ackerman actually wanted him to have that real property. Tr. at 2245-53 (Dec. 11, 2009). JTS, along with JPS, filed the complaint against the Trustee for an accounting, to remove the Trustee, and have a disinterested person appointed, and to reform the trust to the settlor's intent. BX 34.

114. During the course of this representation, JTS met Mrs. Ackerman on March 27, 2004 to ask her to execute an affidavit in support of Dr. Ackerman's position in this case. Tr. at 2260, 2263, 2269-70, 2271-72; see BX 12. In the Affidavit, Mrs. Ackerman stated that she did not understand that she was conveying the Sea Colony property to her trust, and wanted to leave it instead to Dr. Ackerman, as did her sister, Margaret Sullivan. BX 12 at 1. It also stated that Mrs. Ackerman wished to have Dr. Ackerman as co-trustee, and to eliminate the *in terrorem* clause of the trust, "specifically to protect… Stephen J. Ackerman, Jr.'s status as a beneficiary of this trust or of my will." Id. at 2. The Affidavit also states that Mrs. Ackerman did not intend to include the *in terrorem* clause in the trust. Id.

2. Representation of Mrs. Ackerman

115. In early May, 2005, JTS also began to represent Mrs. Ackerman while he was still representing Dr. Ackerman in Ackerman I. Tr. at 2283-2316 (Dec. 11, 2009); Tr. at 2584-85 (Jan. 7, 2010). This suit ("Ackerman II") was filed against Mr. Abbott as trustee of Mrs. Ackerman's trust for the purpose of revoking the trust and giving control of the trust assets to Mrs. Ackerman. BX 49. Therefore, until he withdrew as counsel for Mrs. Ackerman in Ackerman II on March 7, 2007, JTS was representing Mrs. Ackerman

and her son in separate actions against the same trust which was for the current benefit of Mrs. Ackerman and Dr. Ackerman. See BX 45; BX 48; BX 61.

116. Mrs. Ackerman stated at times that she was interested in transferring various properties to Dr. Ackerman. BX 42 at 62-64; BX 54 at 19-20; see Tr. at 2249. Further, it is clear that Mrs. Ackerman wanted to provide for Dr. Ackerman. Tr. at 2870, 2878, 2891 (Jan. 14, 2010).

117. On November 22, 2005, Mrs. Ackerman executed two Power of Attorney documents which JTS had drafted. See BX 16; BX 17; BX 18; Tr. at 2360-62. JTS supervised the execution of these documents, and arranged for a videographer to video record the execution. See BX 16.

C. Discussion of Potential Conflict of Interest

118. Before JTS began to represent Mrs. Ackerman in Ackerman II, JTS discussed the conflict of interest with Mrs. Ackerman and obtained informed consent to the representation. See Tr. 2488, 2585-86, 2594-95 (Jan. 7, 2010); BX 54 at 12. Mrs. Ackerman testified in her Ackerman II deposition that she had discussed the conflict of interest issue with JTS after JTS had raised the issue. BX 54 at 12. Mrs. Ackerman stated that she did not want to change attorneys when Judge Motley asked her about the potential conflict of interest in Ackerman II. BX 60 at 24.

D. JTS Actions Involving Mrs. Ackerman After Ackerman II

119. Mrs. Ackerman executed several documents drafted by JTS after JTS's withdrawal from Ackerman II.[30] Mrs. Ackerman executed a will on October 17, 2007, which JTS drafted. See Tr. at 2694-95 (Jan. 7, 2010); BX 23. Although he drafted the

[30] JTS withdrew from Ackerman II on March 7, 2007. BX 61.

will, JTS was not present when it was executed. He did not discuss the terms of the will with Mrs. Ackerman, nor did he advise Mrs. Ackerman to execute it. See Tr. at 2694-98 (Jan. 7, 2010); Tr. at 2791 (Jan. 14, 2010). The draft will was transmitted to LS and Dr. Ackerman by JTS. See id.; RX JTS/JPS 46. This will contained provisions which changed Mrs. Ackerman's beneficiaries from her trust to her two children. BX 23.

120. Additionally, JTS prepared an assignment document which Mrs. Ackerman executed on August 31, 2007. BX 22. As with the will, JTS drafted the document and sent it to LS and Dr. Ackerman. See Tr. at 2709-12 (Jan. 7, 2010); RX JTS JPS 46. JTS did not discuss the Assignment with Mrs. Ackerman, he did not advise her to sign the Assignment, and he was not present when it was executed. See Tr. at 2709-12 (Jan. 7, 2010); Tr. at 2787 (Jan. 14, 2010). It was sent to LS and Dr. Ackerman as a draft for LS's consideration. RX JTS/JPS 46. By its terms, the Assignment transferred all of Mrs. Ackerman's interests in the Sullivan Estate to Dr. Ackerman. BX 22. JTS discussed the strategy of creating and executing an assignment with Mrs. Ackerman, Dr. Ackerman, and LS, but not the specifics of the document which was executed. See Tr. at 2351 (Dec. 11, 2009). At that time, JTS indicated that it would be desirable for such an assignment to be executed before trial in Mr. Abbott's declaratory judgment action. See id.

E. JTS Decision Points

121. Mrs. Ackerman's mental capacity at each of multiple decision points affecting JTS's professional obligations is critical to the outcome of this case. Bar Counsel broadly alleges that Mrs. Ackerman lacked the capacity to engage in nearly all legal acts with JTS. Bar Counsel's Br. 25, 89-90, 92, 95-97; Tr. at 16 (Oct. 13, 2009).

Accordingly, to prove that Mrs. Ackerman lacked capacity, the specific points in time when her capacity would have been evaluated by JTS must be identified. At each such decision point, there must first be a legal determination of the level of capacity which is required in order for Mrs. Ackerman to act.

122. The question before the Hearing Committee is whether there is clear and convincing evidence that JTS could not have formed a reasonable belief that Mrs. Ackerman possessed the required capacity at each decision point. Without a clear and convincing showing that Mrs. Ackerman lacked the requisite capacity to act as she did, she is presumed as a matter of law to have the requisite capacity. See D.C. Code § 21-2004 (2001); Butler v. Harrison, 578 A.2d 1098, 1100-01 (D.C. 1990) (internal citations omitted).

1. Ackerman I Affidavit

123. The first time that JTS had to make a determination about Mrs. Ackerman's mental capacity was on March 31, 2004 when he presented a proposed affidavit for her to sign supporting Dr. Ackerman's claims in Ackerman I. See BX 12; Tr. at 2271-72 (Dec. 11, 2009). As explained below, Bar Counsel alleges that JTS's conduct with respect to this Affidavit violated Rule 8.4(c) and 8.4(d) because she was "incompetent" when she executed the document, and because JTS knew she was "incompetent" at the time she executed the Affidavit. Bar Counsel's Br. 94-99; Tr. at 16 (Oct. 13, 2009).

124. At the outset of our analysis, we determined that the questions before us are whether Mrs. Ackerman possessed the capacity to contract at the time she executed the Affidavit, and whether JTS reasonably determined that she possessed such capacity.

125. At this time, JTS had a copy of Dr. Lila McConnell's report dated January 23, 2004, finding that Mrs. Ackerman was cognitively impaired. BX 175 at 2 ("I think [Mrs. Ackerman] has significant cognitive impairment and is unlikely to be able to adequately participate in any intense or detailed questioning"); Tr. at 2570-71 (Jan. 7, 2010). JTS met with Mrs. Ackerman on March 27 and March 31, 2004. Tr. at 2571-72 (Jan. 7, 2010); Tr. at 2260-73 (Dec. 11, 2009). On both occasions, JTS testified that he tested Mrs. Ackerman with questions which satisfied him as to her competency. See Tr. at 2264-72 (Dec. 11, 2009) (stating JTS asked Mrs. Ackerman general factual questions: What are the time, date, and month? Who is the President? What is your address? He also asked her specific questions about Mrs. Ackerman's trust, and her responses led JTS to believe that she had the mental capacity to understand the contents of the Affidavit as well as its purpose and effect). JTS also discussed her trust with him and the issues regarding the Sea Colony property. See id. JTS read the proposed affidavit, paragraph by paragraph, to Mrs. Ackerman on March 31, 2004 and asked if she understood the Affidavit. Tr. at 2272 (Dec. 11, 2009). She affirmatively confirmed the substance of the Affidavit with him. She then signed the Affidavit. See Tr. at 2271-73 (Dec. 11, 2009).

126. Bar Counsel acknowledges that: "To be sure, Mrs. Ackerman wanted to please her son and…would agree to whatever [Dr. Ackerman]…requested, even if it was contrary to her own interests…." Bar Counsel's Br. 91.

127. At certain subsequent times, Mrs. Ackerman did not remember that she signed the Affidavit. See Tr. at 1172 (Oct. 16, 2009) (describing Mrs. Ackerman's forgetfulness with respect to a legal document she signed). Despite forgetting this event, Mrs. Ackerman continued to show that she did not want Dr. Ackerman to be disinherited

and that she wanted to modify or terminate the trust. See, e.g., Tr. at 1041 (Oct. 16, 2009) (stating that Mrs. Ackerman was upset by the terminology of the *in terrorem* clause); Tr. at 2869-70 (Jan. 14, 2010) (stating that Mrs. Ackerman thought "it would be terrible" if Dr. Ackerman were disinherited by the *in terrorem* clause); BX 54 at 6 (stating that Mrs. Ackerman objected to the *in terrorem* clause when the trust was presented to her initially). She also showed a desire to leave real property to Dr. Ackerman by attempting to assign the North Carolina Avenue property to him. See BX 22. For example, Mrs. Ackerman pursued the Ackerman II litigation in order to terminate the trust. See BX 49. Also, although Sea Colony was eventually sold by Mr. Abbott, Mrs. Ackerman pursued opposition to Mr. Abbott's declaratory judgment action to put other real property (North Carolina Avenue) in her trust, which Mrs. Ackerman intended to give to Dr. Ackerman. See BX 86; BX 22 (Assignment executed by Mrs. Ackerman transferring North Carolina Avenue property to Dr. Ackerman).

128. Bar Counsel does not contest JTS's testimony about his interactions with Mrs. Ackerman when she executed the Affidavit. Bar Counsel cites the following circumstances to prove that Mrs. Ackerman lacked the mental capacity to execute the Affidavit: Dr. McConnell's report, Mrs. Ackerman's dementia, cognitive impairment, and memory problems, the fact that she was easy to manipulate by both of her children,[31]

[31] The record substantially demonstrates that Mrs. Ackerman was subject to influence by both of her children. See BX 14; Tr. at 1157-60 (Oct. 16, 2009); Tr. at 204-06, 212 (Oct. 13, 2009). Her dominant interest was "peace in the family." Tr. at 243 (Oct. 13, 2009); Tr. at 485 (Oct. 14, 2009); Tr. at 1056 (Oct. 16, 2009). Nonetheless, such manipulation or influence is irrelevant to the charges against the Respondents in this case. Evidence that Mrs. Ackerman was easily influenced by both or either of her children does not prove that she could not understand the purpose and effect of her actions. Loving and trusting each of her children equally and being easily persuaded by both of them does not prove by clear and convincing evidence that Mrs. Ackerman lacks legal mental capacity.

the fact that she never told Mrs. Abbott about the Affidavit, the fact that she never told Mrs. Abbott that she wanted to change the trust, and the facts that Mrs. Ackerman later denied requesting a new trustee and admitted transferring Sea Colony to the trust. See Bar Counsel's Br. 25, 89.

129. Bar Counsel asserts that Dr. McConnell's report constitutes evidence proving that JTS should have determined that Mrs. Ackerman was not capable of understanding the text or the purpose or effect of the Affidavit before she signed it. Bar Counsel's Br. 23; see BX 25. However, as pointed out above, supra Part III.B.2, Dr. McConnell's report was created in response to an inquiry from the Abbotts' attorney, George Huckabay, concerning Mrs. Ackerman's physical capacity to participate in a deposition. See Tr. at 170-72 (Oct. 13, 2009). Dr. McConnell's report finds that Mrs. Ackerman, "has significant cognitive impairment and is unlikely to be able to adequately participate in any intense or detailed questioning" and that, "it would be very hard on her physically and mentally to undergo 2-3 hours of questioning." BX 25.

130. This evidence presented by Bar Counsel does not establish clearly and convincingly that Mrs. Ackerman lacked the capacity to execute the Affidavit, or that JTS knew or should have known that Mrs. Ackerman lacked the capacity to execute the document. In fact, it is entitled to little or no weight with regard to the issue before the Hearing Committee. The applicable capacity standard is identical to that of contractual capacity. See supra Part III. The capacity to contract requires one to understand the purpose and effect of the action to be taken. This is the *Butler/Uckele* standard. See id. A reasonable belief that one has contractual capacity is established through a showing that the person's attempted actions are consistent with that person's historical system of

values and decisions. See id. Dr. McConnell's report does not constitute evidence that Mrs. Ackerman could not understand the purpose and effect of signing the Affidavit. "Significant cognitive impairment" is evidence that Mrs. Ackerman has capacity issues, but this statement does not address the extent to which she could or could not understand the purpose and effect of her actions. See BX 25. Further, the fact that Mrs. Ackerman would likely struggle to answer intense or detailed questions in a deposition setting does not mean that she cannot understand her actions. See id. Answering intense or detailed questions would require a higher level of capacity than simply understanding the purpose or effect of one's actions. Dr. McConnell's report correlates to Mrs. Ackerman's being incapacitated under the D.C. guardianship standard, but it does not address her capacity to contract, much less support a conclusion that Mrs. Ackerman lacked the capacity to understand the purpose and intended effect of the Affidavit. See D.C. Code § 21-2011(11) (2001).

131. Mrs. Ackerman undisputedly had short-term memory problems. Tr. at 2174 (Dec. 11, 2009). Again, this does not prove that at the time Mrs. Ackerman executed the Affidavit, she lacked the capacity to do so. See supra Part III; Tr. at 2176 (Dec. 11, 2009). Mrs. Ackerman was able to answer JTS's questions and discuss her trust comprehensively. Tr. at 2270-73 (Dec. 11, 2009). She discussed the contents of the Affidavit with JTS and indicated an understanding of the document. Id. Mrs. Ackerman's subsequently forgetting what actions she had taken does not demonstrate that she could not understand the purpose and effect of the Affidavit at the time she executed it. The facts that Mrs. Ackerman did not tell Mrs. Abbott about the Affidavit or mention a desire to change the terms of her trust, then later denied executing the

Affidavit, constitute evidence of short-term memory loss – or perhaps simply Mrs. Ackerman's persistent yearning for peace, not more controversy, with her family.

132. Mrs. Ackerman's deposition response on November 18, 2005 to the effect that Sea Colony was part of the trust property also does not establish that Mrs. Ackerman lacked contractual capacity when she executed the Affidavit on March 31, 2004. See BX 54 at 4 (stating that Mrs. Ackerman thought that Sea Colony was in the trust). The Affidavit acknowledges that Sea Colony was conveyed to the trust but states that its conveyance was contrary to her intent at the time of the conveyance. BX 12 at 1. There is no contradiction between the Affidavit and Mrs. Ackerman's subsequent deposition testimony. BX 54 at 4. Moreover, the particular question for the Hearing Committee is whether or not JTS could have formed a reasonable belief about her capacity at the time she signed the Affidavit. She demonstrated comprehension of the Affidavit and her trust to JTS when she signed it. Tr. at 2270-73 (Dec. 11, 2009). Further, her act is in accord with her life-long practice of providing support and aid to Dr. Ackerman. See Tr. at 2516-17 (Jan. 7, 2010) (JTS's testimony that Dr. Ackerman had been living on his mother's property rent free for an extended amount of time and received a monthly allowance from his mother for his living expenses). Because there is no time-specific evidence demonstrating by a clear and convincing standard that Mrs. Ackerman could not have understood the purpose or effect of executing the Affidavit, or that executing the Affidavit is inconsistent with her value system and historical decision making, Mrs. Ackerman must be presumed capable of contracting when she executed the Affidavit. See supra Part III. We so find.

2. Beginning of JTS Representation and Ackerman II Litigation

133. On May 8, 2005, JTS began to represent Mrs. Ackerman and the following day filed a complaint on her behalf to initiate Ackerman II. BX 49; see Tr. at 2460 (Jan. 7, 2010) (JTS retained by Mrs. Ackerman on May 8). When Mrs. Ackerman realized that the *in terrorem* clause of her trust had disinherited Dr. Ackerman because of the Ackerman I litigation he pursued, she became upset and wanted to remove it from the trust. See Tr. at 1040-41 (Oct. 16, 2009) (Mr. Abbott testifying that Mrs. Ackerman was upset by the terminology of the *in terrorem* clause); Tr. at 1383, 1392-93 (Nov. 30, 2009) (Mr. Coroneos testifying that he never told Mrs. Ackerman that Dr. Ackerman would be disinherited if he challenged the trust, but that he described the *in terrorem* clause generally); Tr. at 2869-70 (Jan. 14, 2010) (JTS testifying that Mrs. Ackerman thought, "it would be terrible" if Dr. Ackerman were disinherited by the *in terrorem* clause); BX 54 at 6 (stating that Mrs. Ackerman objected to the *in terrorem* clause when the trust was presented to her initially). Mrs. Ackerman's primary objectives in initiating Ackerman II were to end the litigation among the family and to remove the *in terrorem* clause from the trust, both of which this record clearly and convincingly shows she wanted to accomplish. See BX 49 at 4.

134. Because JTS was also representing Dr. Ackerman in Ackerman I at the time he began to represent Mrs. Ackerman, a potential conflict of interest issue was presented. JTS discussed the conflict of interest with Mrs. Ackerman and obtained her informed consent to the representation. See Tr. at 2488 2585-86, 2594-95 (Jan. 7, 2010). Bar Counsel does not contest that these events occurred, but questions Mrs. Ackerman's capacity to give informed consent at the time. Bar Counsel's Br. 89. Mrs. Ackerman

also testified during questioning by George Huckabay in Ackerman II, that she had discussed the conflict of interest issue with JTS and he brought it up. BX 54 at 12. Further, Mrs. Ackerman said that she did not want to change attorneys when Judge Motley suggested that she should consider conflict-free representation in Ackerman II. BX 60 at 24.

135. Bar Counsel contends that Mrs. Ackerman, at this time, did not possess the required capacity to give informed consent. Because of Mrs. Ackerman's dementia, cognitive impairment, and memory problems, the fact that she was easy to manipulate by her children and unable to manage her finances, Bar Counsel concludes that Mrs. Ackerman lacked capacity. Bar Counsel's Br. 25, 40, 90, 119. Additionally, Bar Counsel claims that the fact that JTS, in his Ackerman I complaint, alleged that Mrs. Ackerman did not understand the terms of her trust when it was created is evidence of her incapacity. See Bar Counsel's Br. 89. Bar Counsel also points to Dr. Negro's testimony that a discussion of conflicts of interest would be "totally over her head." Tr. at 471 (Oct. 14, 2009); Bar Counsel's Br. 92. In essence, the core of Bar Counsel's evidence is the same as the evidence presented with respect to the Affidavit.

136. Engaging JTS to represent her and to begin Ackerman II created a contract. Accordingly, Mrs. Ackerman's capacity at this point must be judged against the standard for capacity to contract, the *Butler/Uckele* standard. See supra Part III. Under that standard, JTS was required to determine that Mrs. Ackerman had sufficient capacity to understand the purpose and effect of the contract. Id. To make this determination, JTS should have tried to ascertain what the historical values and habitual practices of Mrs. Ackerman were, and how the proposed action would fit with them. JTS did establish that

Mrs. Ackerman had a strong commitment to providing support to Dr. Ackerman and to protecting him. See Tr. at 2870, 2878, 2891 (Jan. 14, 2010). This was a life-long pattern of behavior by Mrs. Ackerman, however. See Tr. at 1320-22 (Nov. 30, 2009).

137. The main thrust of Bar Counsel's argument is based on the evidence previously discussed. See supra Part III. Again, this evidence is demonstrative of memory problems, and generally, a diminished state of capacity. Nonetheless, evidence of memory-loss, cognitive impairment and dementia do not prove a clear and convincing lack of ability to understand the purpose and effect of one's actions at a particular point in time. Id.

138. Bar Counsel presents Dr. Negro's testimony as additional evidence addressing JTS's representation of Mrs. Ackerman. See Bar Counsel's Br. 92. Dr. Negro's statement that Mrs. Ackerman could not have understood a conflict of interest is not relevant to the question of whether JTS could have formed a reasonable belief about her capacity at the time she signed their retainer agreement. Dr. Negro's testimony at the hearing, years after JTS was retained by Mrs. Ackerman, only expresses his medical opinion about cognitive impairment generally. See Tr. at 457 (Oct. 14, 2009) (testimony by Dr. Negro stating his opinion of Mrs. Ackerman's level of impairment when he evaluated her in 2004). Lawyers are required to have a reasonable belief of the client's capacity to take specific action at a specific time. Dr. Negro's testimony does not state an opinion as to whether a non-medical person could have reasonably formed a belief about Mrs. Ackerman's capacity at this time. See Tr. at 559-76 (Dr. Negro testifying to his trained medical opinion). Therefore, this testimony addressing Mrs. Ackerman's ability to understand a conflict of interest is irrelevant to the specific question of JTS's

reasonable belief about Mrs. Ackerman's capacity. See also supra at Part III.B.5 (discussing Dr. Ratner's testimony).

139. Another point made by Bar Counsel to demonstrate incapacity is that Mrs. Ackerman was unable to manage her finances, a fact which is not significantly in dispute (except to the extent that Mrs. Abbott testified that her mother did have access to her own checking account and used it for withdrawal purposes). Bar Counsel's Br. 40, 119; Tr. at 143-46 (Oct. 13, 2009). Again, this fact shows that Mrs. Ackerman met the D.C. guardianship standard of incapacity, but nothing more. See D.C. Code § 21-2011(11) (2001). As stated in the Guardianship code, one who is incapacitated is not necessarily lacking mental capacity. See D.C. Code §21-2004 (2001); see also D.C. Rules of Prof'l Conduct R. 1.14 cmt. [1]. The laws of D.C. clearly recognize that one can still contribute meaningfully to decisions about their well-being and think about and analyze decisions, although they might be incapable of managing their daily affairs.

140. Mrs. Ackerman's actions are not inconsistent with her historical values and decisions so as to suggest a lack of contractual capacity. See supra Part V. Mrs. Ackerman has an unwavering history of protecting Dr. Ackerman, and sought to provide for him throughout his life. See id.; Tr. at 2516-17 (Jan. 7, 2010). Accordingly, filing suit to terminate the trust is consistent with her value system since Dr. Ackerman stood to be disinherited by the *in terrorem* clause. Mrs. Ackerman's relationship with Dr. Ackerman also supports the conclusion that she would be willing to give informed consent to a conflict of interest between them. She plainly trusted her son and relied on his advice. See Tr. at 2270 (Dec. 11, 2009) (stating that Mrs. Ackerman wanted Dr.

Ackerman to take care of her affairs); Tr. at 2870, 2878, 2891 (Jan. 14, 2010) (stating that Mrs. Ackerman wanted to provide support for Dr. Ackerman).

141. Bar Counsel has the burden of proving by clear and convincing evidence that Mrs. Ackerman's decision to waive the conflict, retain JTS and file Ackerman II was inconsistent with her value system and habitual practices to such an extent that no reasonable attorney could have believed that she had the capacity to contract. Bar Counsel has proven that Mrs. Ackerman was an incapacitated person under the guardianship standard in D.C. See supra Part III. However, this record does not clearly and convincingly demonstrate any lack of capacity to contract or otherwise act as Mrs. Ackerman did in dealing with JTS. Further, Mrs. Ackerman's actions are in accord with her traditional values and decision making patterns. As a result, there is no clear and convincing evidence of her incapacity to contract and engage counsel to commence Ackerman II, and we so find.

142. On the basis of the record, the Hearing Committee cannot find that Mrs. Ackerman lacked mental capacity under the *Butler/Uckele* standard at the time she retained JTS. Bar Counsel presents nearly identical evidence to support a finding that Mrs. Ackerman was incapable of contracting at each decision point. See supra Part III. Bar Counsel has not met the clear and convincing burden of showing that JTS could not have formed a reasonable belief as to Mrs. Ackerman's capacity to contract.

3. November 2005 Powers of Attorney and Assignment

143. On November 22, 2005, Mrs. Ackerman executed two powers of attorney in favor of Dr. Ackerman, both prepared by JTS. BX 17; BX 18. The execution of these documents was recorded on video. BX 16. JTS read the documents to Mrs. Ackerman

and asked her if she understood them and wanted to sign them. Id. JTS met Mrs. Ackerman about a week before the execution of the powers of attorney, at which time she demonstrated understanding about the meaning of the same documents. See Tr. at 2650-51 (Jan. 7, 2010). Dr. Ratner, a psychiatrist, testified after watching this video that in his opinion, Mrs. Ackerman manifested the requisite mental capacity to execute those documents. See Tr. at 2223-27 (Dec. 11, 2009). The Hearing Committee likewise finds that the video, BX 16, demonstrates that Mrs. Ackerman possessed the capacity to understand and execute the documents she signed at that time.

144. The capacity required to execute a power of attorney is the same as contractual capacity. See Frolik & Radford, supra, at 313. The capacity to create a trust is testamentary capacity and in D.C., testamentary capacity is equivalent to that of contractual capacity. D.C. Code § 18-102 (2001) ("A will… is not valid for any purpose unless the person making it is at least 18 years old and, at the time of executing or acknowledging it as provided by this chapter, of sound and disposing mind and capable of executing a valid deed or contract"); see also Frolik & Radford, supra, at 307.

145. The evidence proffered by Bar Counsel to prove Mrs. Ackerman's incapacity is essentially the same with respect to all decision points. See supra Part III. Again, Bar Counsel has failed to show that JTS could not have formed a reasonable belief about Mrs. Ackerman's contractual capacity. See id. The reports from Dr. Negro and Dr. McConnell do not demonstrate that JTS could not reasonably believe that Mrs. Ackerman possessed contractual capacity in accord with the *Butler/Uckele* standard. See id. Mrs. Ackerman's inability to attend to finances, manage her health care, and short-term memory loss do not prove a lack of capacity under *Butler/Uckele*. See id. Further,

Mrs. Ackerman's actions are consistent with her past behavior. See Tr. at 2516-17 (Jan. 7, 2010) (JTS's testimony that Dr. Ackerman had been living on his mother's property rent free for an extended amount of time and received a monthly allowance from his mother for his living expenses). Executing a power of attorney in favor of Dr. Ackerman, given their relationship, reasonably comports with her value system and habitual decisions as Mrs. Ackerman and Dr. Ackerman had a close, trusting relationship. See Tr. at 2870, 2878, 2891 (Jan. 14, 2010) (JTS testifying that Mrs. Ackerman wanted Dr. Ackerman to take care of her affairs).

146. On August 31, 2007 Mrs. Ackerman executed an Assignment which by its terms transferred to Dr. Ackerman all interests Mrs. Ackerman had in the Sullivan Estate for $1.00. BX 22. On October 19, 2007 Mrs. Ackerman executed a new Will which by its terms made Dr. Ackerman the Personal Representative of Mrs. Ackerman's estate, changed the beneficiary of Mrs. Ackerman's estate to Dr. Ackerman and Mrs. Abbott instead of her trust, as well as other changes to the estate plan provided in the trust. BX 23. These documents were executed by Mrs. Ackerman after JTS ceased representing her in Ackerman II. BX 61; Tr. at 2710-12 (Jan. 7, 2010). After drafting both documents, JTS sent them to Dr. Ackerman and LS. RX JTS/JPS 46. JTS never discussed any of the documents with Mrs. Ackerman, he never advised Mrs. Ackerman to execute the documents, nor was he present at the execution of either document. See Tr. at 2667-69, 2694-98, 2709-12 (Jan. 7, 2010); Tr. at 2787, 2791 (Jan. 14, 2010). Further, the "draft Will" and draft Assignment were sent to successor counsel, LS, and Dr. Ackerman with clear indications that LS would use them as "draft models from which to work." RX JTS/JPS 46 at 1. Although Bar Counsel suggests that the execution of these

documents would create what we call a decision point, we disagree. By drafting the documents and sending them to successor counsel, absent any manifested intent or directive to have them executed without regard for Mrs. Ackerman's mental capacity, JTS is not responsible for evaluating Mrs. Ackerman's mental capacity to execute these documents because he could reasonably assume as he did, that LS would consider them in light of Mrs. Ackerman's current interests, modify them to reflect those interests, and supervise their execution, making any requisite determination of mental capacity at that time. See id.

F. Alleged Violation of Rule 1.7(b)(2)

147. Bar Counsel claims that JTS violated Rule 1.7(b)(2) because his representation of Mrs. Ackerman and Dr. Ackerman simultaneously constituted a conflict of interest. Bar Counsel's Br. 87-94. On February 1, 2007, the D.C. Rules of Professional Conduct were amended. For the purposes of this case, the pre-February 2007 Rule is relevant. The text of the relevant portion of the Rule is below:

> (b) Except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if: … (2) Such representation will be or is likely to be adversely affected by representation of another client; …
>
> (c) A lawyer may represent a client with respect to a matter in the circumstances described in paragraph (b) above if each potentially affected client provides consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation.

D.C. Rules of Prof'l Conduct R. 1.7(b)(2) (1991).

148. First, the Committee must assess whether or not there was an adverse effect on Mrs. Ackerman (the client), from her perspective alone, because of JTS's

representation of another client (Dr. Ackerman). Szymkowicz counsel points out that Mrs. Ackerman demonstrated a desire to give Dr. Ackerman financial and other support throughout her life. See Tr. at 2870, 2878, 2891 (Jan. 14, 2010); JTS/JPS Br. 76. She stated that she considered giving the Sea Colony property to him. BX 54 at 20. But see Tr. at 1040 (Oct. 16, 2009) (Mr. Abbott recounting that Mrs. Ackerman placed the Sea Colony property in the trust and did not inform him that she wished it to go to Dr. Ackerman). Because we have determined that Mrs. Ackerman possessed the capacity to contract, her desires and decisions should be respected. Accordingly, there is not necessarily an adverse effect simply because her assets would diminish as the result of Dr. Ackerman's litigation in which he was represented by JTS. It is at least possible, as she testified in her deposition on November 18, 2005, that she wanted to give the Sea Colony property to Dr. Ackerman. BX 54 at 20. Further, she assigned the property from the Sullivan Estate to Dr. Ackerman. If her desires involved giving property or assets to Dr. Ackerman, she was competent to do that. See id.; Tr. at 2870, 2878, 2891 (Jan. 14, 2010). Because of Mrs. Ackerman's desire to support Dr. Ackerman and her affirmative actions to provide for Dr. Ackerman, there is no clear and convincing evidence that JTS's representation of Dr. Ackerman created an adverse effect on Mrs. Ackerman. Therefore the first element of a Rule 1.7(b)(2) violation is lacking.

149. Further, Bar Counsel alleges that JTS violated Rule 1.7(b)(2) by preparing and having Mrs. Ackerman execute several power of attorney documents in favor of Dr. Ackerman. See Bar Counsel's Br. 92-93. First, we have found that Mrs. Ackerman did not lack the capacity to execute these documents at the time of execution. See supra Part III. Next, we note again that Mrs. Ackerman's continued interest in providing financial

assistance to Dr. Ackerman is evident in the record. See BX 54 at 20. The record does not demonstrate that Mrs. Ackerman lacked the capacity to carry out her wishes. See supra Part III. Stated alternatively, Mrs. Ackerman was capable of determining what was adverse to her interests and what was not. See id. The execution of power of attorney documents in favor of Dr. Ackerman is consistent with her interests and her prior patterns of behavior. See Tr. at 2870, 2878, 2891 (Jan. 14, 2010). Therefore, JTS's representation of Mrs. Ackerman was not adversely affected, or likely to be adversely affected, because JTS was acting in accord with Mrs. Ackerman's interests when creating the power of attorney documents. See D.C. Rules of Prof'l Conduct R. 1.7(b)(2) (1991).

150. Bar Counsel also alleges that certain actions JTS performed after ceasing his representation of Mrs. Ackerman violated Rule 1.7(b)(2). See Bar Counsel's Br. 93-94 (stating that preparation of a will and assignment for Mrs. Ackerman by JTS constituted a conflict of interest). Rule 1.7(b)(2) prohibits one attorney-client relationship from adversely affecting another attorney-client relationship. See D.C. Rules of Prof'l Conduct R. 1.7(b)(2) (1991). The Will and Assignment were both executed after March 7, 2007, the date JTS ended his representation of Mrs. Ackerman. See Tr. at 2530-31 (Jan. 7, 2010) (JTS testifying that his representation of Mrs. Ackerman lasted from May 8, 2005, through March 7, 2007); BX 22; BX 23. Under these circumstances, JTS did not violate Rule 1.7(b)(2) when he sent the draft Will and Assignment to LS after March 7, 2007 because there was no attorney-client relationship between JTS and Mrs. Ackerman at that time, which is precisely why he sent these drafts to LS. See supra ¶ 146.

151. Even if there was an adverse effect on Mrs. Ackerman, she gave informed consent and waived the conflict of interest, allowing JTS to carry out his representation. JTS discussed the conflict of interest with Mrs. Ackerman and obtained informed consent to the representation. See Tr. 2488, 2585-86, 2594-95 (Jan. 7, 2010). Mrs. Ackerman also testified during questioning by George Huckabay in Ackerman II, that she had discussed the conflict of interest issue with JTS and he brought it up. BX 54 at 12. Further, Mrs. Ackerman stated that she did not want to change attorneys when apprised of the conflict of interest when Judge Motley suggested the same in Ackerman II. BX 60 at 24. Bar Counsel does not challenge that Mrs. Ackerman purported to give informed consent, but rather Mrs. Ackerman's capacity to do so. We have determined that Mrs. Ackerman at all relevant times, did not lack the capacity to contract and thus to give informed consent. Accordingly, the waiver eliminates any possible violation of Rule 1.7(b)(2) with respect to JTS. We so conclude.

G. Alleged Violation of Rule 8.4(c)

152. Bar Counsel alleges that fraudulent and dishonest conduct of the part of JTS resulted in a Rule 8.4(c) violation, which states :

> It is professional misconduct for a lawyer to:
> …
> (c) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

D.C. Rules of Prof'l Conduct R. 8.4(c).

153. The term "dishonesty" includes not only fraudulent, deceitful or misrepresentative conduct, but also "conduct evincing 'a lack of honesty, probity or integrity in principle; [a] lack of fairness and straightforwardness.'" In re Shorter, 570

A.2d 760, 767-68 (D.C. 1990) (per curiam) (quoting Tucker v. Lower, 434 P.2d 320, 324 (Kan. 1967)); accord In re Cleaver-Bascombe, 892 A.2d 396, 404 (D.C. 2006). Thus, conduct that "may not legally be characterized as an act of fraud, deceit or misrepresentation may still evince dishonesty." Shorter, 570 A.2d at 768[32]; accord In re Romansky, 825 A.2d 311, 315 (D.C. 2003) ("dishonesty, fraud, deceit and misrepresentation are four different violations, that may require different quantums of proof").

154. Bar Counsel alleges that JTS's conduct amounted to dishonesty, and at one point, fraud. See Bar Counsel's Br. 94-98. The following actions and events are alleged to be grounds for his 8.4(c) violation:

1. JTS filing Ackerman I, "to get Sea Colony" for Dr. Ackerman. See id. at 95.

2. Writing and having Mrs. Ackerman sign the Affidavit in Ackerman I "which contained false statements." Id.

3. JTS arranging for Herbert Callihan, Esq. to represent Mrs. Ackerman and prepare documents for her to benefit Dr. Ackerman. Id.

4. JTS having Mrs. Ackerman sign documents when he knew she was cognitively impaired and had memory loss. Id.

5. JTS acting as counsel for Mrs. Ackerman in Ackerman II and having her sign the complaint. Id. at 96.

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[32] In *Shorter*, the Court noted that the encyclopedia definitions of fraud, deceit and misrepresentation have more specific meanings. "Fraud is a generic term which embraces all the multifarious means … resorted to by one individual to gain an advantage over another by false suggestions or by suppression of the truth. [Deceit is] the suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact," and is thus a subcategory of fraud. "[Misrepresentation is] the statement made by a party that a thing is in fact a particular way, when it is not so; untrue representation; false or incorrect statements or account." 570 A.2d at 767-68 n.12 (citations omitted; brackets in original; first ellipsis in original).

6. JTS seeking to prevent Mrs. Ackerman from being medically examined in Ackerman II. Id.

7. JTS arranging for Dr. Ratner to examine Mrs. Ackerman on the basis of false and misleading information presented as undisputed. Id.

8. JTS filing Ackerman II because it was not truly an attempt to recover assets for Mrs. Ackerman but was an attempt to get control of assets for Dr. Ackerman. Id. at 96-97.

9. JTS drafting legal documents for Mrs. Ackerman after withdrawing from Ackerman II. Id. at 97.

10. JTS drafting an assignment to transfer control of the assets to be transferred to Mrs. Ackerman from the Sullivan Estate. Id.

11. JTS continuing to pursue claims for Dr. Ackerman based on the Assignment. Id.

We address each of these charges in order.

1. Filing of Ackerman I

155. Bar Counsel alleges that JTS knowingly filed Ackerman I on behalf of Dr. Ackerman to attempt to have the Sea Colony property removed from Mrs. Ackerman's trust and transferred to Dr. Ackerman, and that this was dishonest. Bar Counsel's Br. 95. First, the complaint in Ackerman I, as JTS notes, does not request changing the title to Sea Colony. BX 34; see Tr. at 2257-59 (Dec. 11, 2009). The purpose of Ackerman I, in accordance with the complaint, was to appoint an independent trustee. Id. There is no evidence demonstrating that JTS could not credit the claims and concerns of his client regarding the Ackerman trusts. (Surely, Bar Counsel's implied contention that a lawyer must accept a client's *adversary's* version of facts as the only source of accurate information is unfounded.) Ackerman I was filed in response to these concerns and to

remove Mr. Abbott as trustee in accord with Dr. Ackerman's instructions. BX 34. Further, Mrs. Ackerman executed an affidavit in favor of Dr. Ackerman's claim. BX 12. As discussed above, there has been no showing that Mrs. Ackerman was mentally incapable of executing that Affidavit. Because there is no clear or convincing evidence that JTS was asserting the claim of his client in bad faith, there has been no Rule 8.4(c) violation merely because he filed and pursued Ackerman I; we so find.

2. Execution of Affidavit in Ackerman I

156. Bar Counsel next alleges that preparing and having Mrs. Ackerman execute the Affidavit in Ackerman I amounted to dishonest conduct because it contained false and misleading statements. See Bar Counsel's Br. 95. Bar Counsel alleges that Mrs. Ackerman lacked the capacity to execute the Affidavit. As discussed above, Mrs. Ackerman has not been shown to lack the capacity to understand and execute the Affidavit. See supra Part III. Even though Mrs. Ackerman is presumed to have possessed the capacity to execute the Affidavit, if it contains false and misleading statements known to be such to JTS, JTS would nevertheless be in violation of the Rule for presenting it to Mrs. Ackerman knowing of the false or misleading statements, or for presenting it to the court knowing of the false or misleading statements. Bar Counsel alleges that the provisions of the Affidavit stating Mrs. Ackerman's claim that Sea Colony was not to be included in the trust, as well as Mrs. Ackerman's request for a new trustee are false and misleading. See Bar Counsel's Br. 25, 95. However, Bar Counsel has failed to prove that these statements were false or misleading, and further, has failed to prove that JTS would have known that these statements were false and misleading in any event. Bar Counsel's position requires a finding that JTS was required to accept Mr.

Coroneos's and Mrs. Abbott's versions of the truth, as distinguished from that of his client, Dr. Ackerman, and his witness, Mrs. Ackerman. There is no credible basis for such a finding in this record.

157. Bar Counsel's allegation that Mrs. Ackerman's claim in the Affidavit regarding Sea Colony is false and misleading is based on the fact that Mrs. Ackerman later stated that Sea Colony was intended to go into the trust. See Bar Counsel's Br. 25. This fact only provides evidence of Mrs. Ackerman's memory problem. Bar Counsel does not deny that Mrs. Ackerman complained to JTS about the trust, or that she indicated an understanding of the Affidavit and what it said. Id.; Tr. at 2271-75 (Dec. 11, 2009). Because Mrs. Ackerman has been found legally capable of executing the Affidavit, JTS had the right to rely upon her claims in preparing the Affidavit. Further, JTS had no independent information upon which to rely when weighing the validity of Mrs. Ackerman's claims, and because he judged Mrs. Ackerman to have the requisite capacity, he accepted her statements as true. Id. Moreover, the Affidavit is consistent with Mrs. Ackerman's long term memory to the effect that Sea Colony was to have been given to Dr. Ackerman. See BX 54 at 19-20; BX 42 at 62-64.

158. Although Bar Counsel cites BX 42 at 81 for the proposition that Mrs. Ackerman later denied that she requested a new trustee, Bar Counsel's Br. 25, this response was stricken from the record by the Court. See BX 42 at 81. In any event, Mrs. Ackerman's short-term memory loss is not evidence of a lack of capacity to contract. See supra Part III. Because Mrs. Ackerman told JTS she wanted a new trustee, any future, forgetful, statement she might have made does not prove that JTS knowingly included a false statement about her request for a new trustee when drafting the Affidavit. Because

Mrs. Ackerman possessed the capacity to execute the Affidavit, and none of the statements within the Affidavit has been shown to be false or misleading, JTS did not violate Rule 8.4(c) on these grounds. Moreover, the Affidavit is consistent with Mrs. Ackerman's desire for Dr. Ackerman to manage her affairs. Tr. at 1980 (Dec. 10, 2009); Tr. at 2150–51 (Dec. 11, 2009).

3. Herbert Callihan and JTS

159. Bar Counsel alleges that JTS *arranged* for Herbert Callihan to represent Mrs. Ackerman and draft documents to benefit Dr. Ackerman. Bar Counsel's Br. 95. There is no evidence in the record that suggests that JTS arranged for Herbert Callihan to represent Mrs. Ackerman. The record shows only that JTS and Herbert Callihan were friends and had some minor, relatively short term, business associations. BX 58 at 15; Tr. at 2272, 2276-79 (Dec. 11, 2009). JTS asked Mr. Callihan to serve as a notary to execute Mrs. Ackerman's Affidavit. See Tr. at 2272-73 (Dec. 11, 2009). JTS denies arranging for Mr. Callihan to represent Mrs. Ackerman. See Tr. at 2276-79 (Dec. 11, 2009) (JTS testifying about his relationship with Mr. Callihan—mostly professional with minimal social interactions over a twenty to twenty-five year period). It appears that Dr. Ackerman was the person who arranged for such representation after he called and asked JTS for Mr. Callihan's phone number. See Tr. at 2279 (Dec. 11, 2009); see also Tr. 2279-80 (Dec. 11, 2009) (stating JTS was not present when Mrs. Ackerman engaged Mr. Callihan and did not find out about this representation until Mr. Callihan called JTS to inform him). Because JTS was not directly involved in Mr. Callihan's being retained by Mrs. Ackerman, JTS did not violate Rule 8.4(c). Even if JTS did make arrangements for Mr. Callihan's representation, there is no evidence of how that alone would violate Rule

8.4(c). In short, we find no violation of Rule 8.4(c) on the basis of JTS's involvement with Mr. Callihan.

4. Mrs. Ackerman Executing Documents During JTS's Representation

160. Throughout this case, JTS presented to Mrs. Ackerman for her execution numerous documents which he prepared. These documents include the Powers of Attorney in 2005 and 2007, the Ackerman II complaint, and the Affidavit in Ackerman I. See BX 12; BX 21; BX 17; BX 18; BX 49; BX 53 at 11-12. Bar Counsel alleges that because of Mrs. Ackerman's lack of capacity, JTS was dishonest in having her execute these documents. Bar Counsel's Br. 95. There has been no showing that Mrs. Ackerman lacked the capacity to contract when she executed any of the referenced documents under JTS's supervision. See supra Part III. Aside from the capacity issues, Bar Counsel raises no other objection to the execution of these documents, and this record is devoid of any credible evidence proving an 8.4(c) violation on the basis of JTS's preparing the referenced documents for Mrs. Ackerman's execution. Therefore JTS did not violate Rule 8.4(c) on this basis.

5. JTS Filing Complaint in Ackerman II

161. Bar Counsel alleges that because Mrs. Ackerman was incapable of understanding the Ackerman II complaint and because she was led to sign it under false pretenses, JTS acted dishonestly. Bar Counsel's Br. at 95-96. First, Mrs. Ackerman has not been shown to have lacked the capacity to execute the complaint. See supra Part III. Second, JTS told Mrs. Ackerman that filing Ackerman II would end the Ackerman I litigation. Tr. at 2280 (Dec. 11, 2009); BX 15. JTS based this statement on what his Ackerman I client, Dr. Ackerman, had agreed to previously. JTS had advised Dr.

Ackerman to withdraw the Ackerman I litigation to avoid being disinherited from his parents' estates, and Dr. Ackerman agreed that he would dismiss Ackerman I if Ackerman II was filed. See Tr. at 2280, 2289 (Dec. 11, 2009). Dr. Ackerman, however, refused to comply with his undertaking to dismiss Ackerman I after Ackerman II was filed because Mr. Abbott demanded that Dr. Ackerman agree in writing not to pursue any further claims against the trust. See Tr. 2319-22 (Dec. 11, 2009); Tr. at 2466-69 (Jan. 7, 2010). JTS relied on the commitments of his client in good faith, and on that basis advised Mrs. Ackerman that filing Ackerman II would end Ackerman I. Tr. at 2280-89 (Dec. 11, 2009); BX 15. JTS's conduct was not dishonest because of his reasonable reliance on Dr. Ackerman's prior agreement. There is no Rule 8.4(c) violation as the result of JTS's filing the Ackerman II complaint or his representations to Mrs. Ackerman as inducement to her to sign the complaint initiating Ackerman II.

6. JTS Seeking to Prevent Medical Exam of Mrs. Ackerman

162. In Ackerman II, JPS, acting at JTS's direction, sought to prevent Mrs. Ackerman from being examined to provide evidence for the litigation. See Tr. at 1867 (Dec. 10, 2009). Mrs. Ackerman, however, stated her desire to avoid being examined medically, and JTS acted in accord with her wishes. Id.; BX 53 at 11-12; BX 54 at 15, 21 (Mrs. Ackerman).[33] Bar Counsel does not show that Mrs. Ackerman was incapable of making that decision or that JTS was unreasonable, much less dishonest, in first determining that Mrs. Ackerman had the capacity to decide that she did not want to be examined and then to comply with her instructions. See supra Part III. Acting in accord

[33] JPS, not JTS, signed and filed Plaintiff Genevieve Ackerman's Motion for a Protective Order. BX 53 at 9; BX 48 at 6.

with the instructions of a client with appropriate mental capacity does not violate Rule 8.4(c). Thus, there is no Rule 8.4(c) violation related to Mrs. Ackerman's effort to avoid an examination.

7. Allegation that JTS Misled Dr. Ratner

163. Bar Counsel alleges that JTS gave Dr. Ratner false and misleading information, which was represented as undisputed information, which is dishonest conduct and thus violated Rule 8.4(c). Bar Counsel's Br. 96. Dr. Ratner, at the request of JTS, examined Mrs. Ackerman in connection with the Ackerman II litigation. Dr. Ratner indicates in his report that JTS requested that he determine "with reasonable medical certainty… whether in fact she [Mrs. Ackerman] is competent" to "confer power of attorney on her son…and end the management of her funds by her son-in-law, Frank Abbott, and her daughter, Mary Frances Abbott." BX 30 at 1. Dr. Ratner found that under the *Uckele* standard, which is analogous to the *Butler* standard, Mrs. Ackerman had the capacity to revoke the trust and appoint Dr. Ackerman as attorney-in-fact. Id. at 8. Bar Counsel alleges that JTS arranged for this examination and provided Dr. Ratner with false and misleading information that he represented to Dr. Ratner as undisputed. Bar Counsel's Br. 96.

164. If JTS commissioned an expert report to be used in a court proceeding and knew that any material fact in the report upon which Dr. Ratner's conclusions were based was false or knew that Dr. Ratner based conclusions upon facts which he believed to be undisputed which were actually in dispute, he would have acted dishonestly. First, contrary to Bar Counsel's allegation, there is no clear and convincing evidence that JTS provided any information other than documents and other information attributed to him in

Dr. Ratner's report. See Tr. at 2013-17 (Dec. 10, 2009). JTS did not provide the information that Bar Counsel contends is false. Further, Dr. Ratner says that Dr. Ackerman or Mrs. Ackerman provided the non-documentary information on which his report is based. BX 30 at 2. Also, Dr. Ratner was a witness in court to explain or defend his report and the opinion expressed therein; he was subject to cross examination during which any error or weakness in the premises of his report could be exposed. BX 70 at 55-92; see Tr. at 1978-2072 (Dec. 10, 2009), Tr. at 2143-2241 (Dec. 11, 2009). No false or dishonestly presented information was identified, much less was such information attributed to JTS. In short, Bar Counsel has presented no evidence in this proceeding that JTS engaged in dishonesty or fraud with respect to Dr. Ratner's report. Therefore, JTS did not engage in dishonest conduct with respect to Dr. Ratner's report, and we so find.

8. Purpose of Ackerman II

165. Bar Counsel next argues that the true purpose of Ackerman II was to get assets into Dr. Ackerman's control, and not to benefit Mrs. Ackerman. Bar Counsel's Br. 96-97. The complaint in Ackerman II states that the purpose of the litigation was to terminate the trust and have the assets returned to Mrs. Ackerman's control. BX 49 at 1, 4. This record clearly and convincingly demonstrates that these were Mrs. Ackerman's objectives. See supra Part V. Assuming Dr. Ackerman had an interest in achieving this result and that Dr. Ackerman desired or intended for assets to be transferred to him after the trust was terminated, nonetheless, Mrs. Ackerman had the capacity to sign the complaint and commence Ackerman II under the terms stated in the complaint. Accordingly, there was no dishonesty resulting from JTS's commencing the Ackerman II litigation in accord with Mrs. Ackerman's interests and instructions. There is no Rule

8.4(c) violation on the basis of JTS's involvement with the commencement of Ackerman II.

9. Allegation that JTS Represented Mrs. Ackerman After Withdrawing from Ackerman II

166. Bar Counsel alleges that JTS continued to represent Mrs. Ackerman after his withdrawal from Ackerman II, and that this conduct amounts to dishonesty. Bar Counsel's Br. 97. JTS was involved in drafting two documents, an Assignment, and a new Will, which Mrs. Ackerman eventually executed after he withdrew from Ackerman II. See BX 22; BX 23. There is no evidence, however, that JTS did anything other than draft these documents which were sent to Dr. Ackerman, his client, and LS, Mrs. Ackerman's successor lawyer in Ackerman II. See Tr. at 2694-98, 2709-12 (Jan. 7, 2010); Tr. at 2787, 2791 (Jan. 14, 2010) (stating JTS only drafted the Will). He did not supervise the execution of those documents, nor did he discuss the documents with Mrs. Ackerman. See id. The draft Will and Assignment were sent to LS as successor counsel to Mrs. Ackerman. RX JTS/JPS 46. JTS's conduct was not dishonest because he merely drafted documents for LS either to accept or modify as she saw fit in her capacity as Mrs. Ackerman's successor lawyer.[34] He is not responsible for LS's actions, as he was not directly involved in the execution of the Assignment or the Will he drafted. There is no violation of Rule 8.4(c) resulting from JTS's drafting these documents.

10. JTS Drafted the Assignment for Mrs. Ackerman

167. Bar Counsel alleges that the Assignment JTS drafted and had Mrs. Ackerman execute was a fraud against Mrs. Ackerman. Bar Counsel's Br. 97. Bar

[34] See In re Fengling Liu, 664 F.3d 367, 369-73 (2d Cir. 2011) (per curiam).

Counsel's brief defines fraud as the means used by one to gain advantage over another "by false suggestions or by suppression of the truth." Bar Counsel's Br. 95 n.30. Bar Counsel's argument is premised on the assertion that Mrs. Ackerman was incompetent, which, of course, is contrary to the evidence in this record. Because the record does not demonstrate that Mrs. Ackerman lacked the requisite capacity to understand and execute the Assignment, that document presumably reflects her intention. See supra Part III. Both because there is affirmative evidence of Mrs. Ackerman's capacity to contract, and we are required to assume Mrs. Ackerman's capacity to understand and execute the Assignment in the absence of clear and convincing evidence to the contrary, we find that Mrs. Ackerman knew and understood the purpose and effect of the document. See supra Part III. Again, this record is devoid of any evidence of any fraud by JTS in connection with the Assignment. Under these circumstances the Assignment was not executed "by false suggestions or by suppression of the truth." Bar Counsel has not proven with clear and convincing evidence that Mrs. Ackerman did not want to give the Sullivan Estate property to Dr. Ackerman, nor has it been proven with clear and convincing evidence that Mrs. Ackerman did not understand what she was doing when she signed the Assignment. Therefore, JTS's drafting and indirectly arranging for the execution of the Assignment involved neither fraud nor dishonesty.

168. Furthermore, JTS merely drafted the Assignment and sent it to LS, then representing Mrs. Ackerman, and his client, Dr. Ackerman. See Tr. at 2694-98, 2709 (Jan. 7, 2010); RX JTS/JPS 46. He did not advise Mrs. Ackerman to sign the document nor was he directly involved in the execution of it. See Tr. at 2709-12 (Jan. 7, 2010); Tr. at 2787 (Jan. 14, 2010). Accordingly, he is not responsible for the execution of the

Assignment. There is no evidence of dishonest or fraudulent conduct in drafting the Assignment. We find that there is no Rule 8.4(c) violation on the basis of JTS's drafting the Assignment.

11. JTS Continued to Pursue Claims on the Basis of the Assignment

169. Bar Counsel charges that JTS violated Rule 8.4(c) because he pursued claims on the basis of the Assignment. Bar Counsel's Br. 97-98. As explained in the immediately preceding paragraph, JTS did not violate Rule 8.4(c) by continuing to assist Mrs. Ackerman by providing a draft of the Assignment. Because the Assignment has not been proven illegitimate, fraudulent, or dishonestly created, there is no reason why JTS could not ethically pursue claims on the basis of it. Again, there is no Rule 8.4(c) violation on the basis of JTS's involvement with the Assignment.

H. Alleged Violation of Rule 8.4(d)

170. Rule 8.4(d) states that, "It is professional misconduct for a lawyer to: … (d) Engage in conduct that seriously interferes with the administration of justice." D.C. Rule of Prof'l Conduct R. 8.4(d). In order to violate Rule 8.4(d), the lawyer's conduct must (1) be "improper"; (2) "bear directly upon the judicial process . . . with respect to an identifiable case or tribunal"; and (3) "taint the judicial process in more than a *de minimis* way." In re Uchendu, 812 A.2d 933, 940 (D.C. 2002) (quoting In re Hopkins, 677 A.2d 55, 60-61 (D.C. 1996)). On the basis of several cases addressing Rule 8.4(d) violations, "tainting the judicial process" refers to conduct which affects the decision making process of the tribunal or court, such as falsifying evidence. See In re Uchendu, 812 A.2d 933 (D.C. 2002); In re Hopkins, 677 A.2d 55 (D.C. 1996); In re Reback, 487 A.2d 235,

238-39 (D.C. 1985); In re Goffe, 641 A.2d 45 (D.C. 1994); In the Matter of Sablowsky, 529 A.2d 289 (D.C. 1987).

171. Bar Counsel claims that (1) filing and pursuing Ackerman I; (2) filing and pursuing Ackerman II; and (3) intervening in the declaratory judgment action on behalf of Dr. Ackerman constituted Rule 8.4(d) violations by JTS. Bar Counsel's Br. 98.

172. Bar Counsel alleges that the claims presented by JTS on behalf of Dr. Ackerman in Ackerman I were "totally baseless" and thus violated Rule 8.4(d). See Bar Counsel's Br. 98. However, neither elements one nor three from *Hopkins* is satisfied with respect to JTS and Ackerman I. See In re Hopkins, 677 A.2d at 60-61. Element one requires that an attorney's conduct be improper. Id. Because JTS filed Ackerman I based on his reasonable reliance on Dr. Ackerman's claims, which are expressly verified by Dr. Ackerman in the Complaint, BX 34 at 7, and supported by Mrs. Ackerman's Affidavit, BX 12, when he had no compelling reason to believe otherwise, JTS did not act improperly when he filed Ackerman I. Further, element three from *Hopkins* is not satisfied. See In re Hopkins, 677 A.2d at 60-61. *Hopkins* element three requires that the actions of JTS "taint the judicial process in more than a *de minimis* way, that is, at least potentially impact upon the process to a serious and adverse degree." Id. at 61. There is no evidence that JTS's behavior adversely affected the court process during Ackerman I. Therefore, JTS's actions with respect to Ackerman I do not constitute a Rule 8.4(d) violation.

173. Next, there is nothing in the record before us with respect to the Ackerman II litigation which constitutes an 8.4(d) violation. The first element, as stated in *Hopkins*, requires the lawyer's conduct to be improper. See id. As stated above, we have found

that Bar Counsel has failed to meet the burden of demonstrating that Mrs. Ackerman lacked the capacity to contract or to authorize this litigation. See supra Part III. Accordingly, JTS did not act improperly and thus did not violate Rule 8.4(d) when he filed Ackerman II or pursued its claims on behalf of Mrs. Ackerman.

174. Further, the third element from *Hopkins* is also not satisfied. Bar Counsel claims that the judicial process was tainted in Ackerman II because the pleadings misled the court about the "real party in interest and the bona fides of legal documents purportedly executed by Mrs. Ackerman at a time when she clearly lacked capacity to do so", and because judicial resources were wasted on baseless claims. See Bar Counsel's Br. 99. The record does not prove that Mrs. Ackerman lacked capacity to execute any of the legal documents she executed with respect to the Ackerman II litigation. Therefore, she was the real party in interest in that litigation. Tainting of the judicial process involves the improper influence over the decision making of a court. See, e.g., In re Uchendu, 812 A.2d 933 (D.C. 2002); In re Hopkins, 677 A.2d 55 (D.C. 1996). The filing of a law suit on behalf of a client with capacity does not constitute improper influence over a court's decision making. For that reason, filing Ackerman II and pursuing it did not taint the judicial process and does not satisfy the third *Hopkins* element. See In re Hopkins, 677 A.2d at 61. The fact that Ackerman II was eventually lost by Mrs. Ackerman does not prove or even indicate that the claims were baseless. Therefore, JTS's behavior with respect to Ackerman II does not constitute a Rule 8.4(d) violation.

175. Lastly, Bar Counsel claims that JTS violated Rule 8.4(d) when he represented Dr. Ackerman and intervened in the declaratory judgment action by Mr. Abbott as Trustee of Mrs. Ackerman's trust because he did so on the basis of the

Assignment. Bar Counsel's Br. 98-99. Bar Counsel also claims that JTS's failure to reveal to the court that he drafted the Assignment violated the Rule as well. The first *Hopkins* element is not satisfied because there is no evidence that JTS acted improperly with respect either to the Assignment or to the declaratory judgment action. There is no showing that the Assignment was improperly executed because of Mrs. Ackerman's lack of the requisite mental capacity. Further, there is no reason that JTS would have had to reveal that he drafted the Assignment.[35] He did not discuss the document with Mrs. Ackerman or advise her to sign it. Tr. at 2694-98 (Jan. 7, 2010). It reflected Mrs. Ackerman's intentions, and it has not been shown that she executed it without the requisite capacity. Also, the third *Hopkins* element is also not satisfied. Because the Assignment was legitimate, opposing Mr. Abbott in the declaratory judgment action on the basis of the Assignment did not taint the decision making process of the court. See supra Part VI.G.10. Further, because the Assignment was legitimate, there was no reason for JTS to reveal that he had prepared the document. By not revealing that information, he did not interfere with or affect the court's decision making process. Accordingly, JTS's actions in the declaratory judgment action do not constitute a Rule 8.4(d) violation.

I. Alleged Violation of Rule 1.16(a)

176. Rule 1.16(a) states:

> …a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
>
> (1) The representation will result in violation of the Rules of Professional Conduct or other law;

[35] See Liu, 664 F.3d at 369-73.

> (2) The lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
>
> (3) The lawyer is discharged. …

D.C. Rules of Prof'l Conduct R. 1.16(a) (2007).

With respect to JTS, a Rule 1.16(a) violation would be contingent upon a "violation of the Rules of Professional Conduct or other law." Id. Because we have found no violation of the Rules of Professional Conduct or any other law by JTS, he has not violated Rule 1.16(a).

J. Conclusory Findings Concerning JTS Charges

177. In summary, Bar Counsel has not presented clear and convincing evidence of any violation of Rules 1.7(b)(2), 1.7(b)(3), 8.4(c), 8.4(d) and 1.16(a) of Professional Conduct by JTS, and we so find and conclude.

VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING RESPONDENT JOHN P. SZYMKOWICZ

A. JPS's Professional Background

178. JPS was admitted to the D.C. Bar on February 1, 1999. Tr. at 1612 (Dec. 1, 2009). He was assigned Bar No. 462146.

179. JPS was born on October 1, 1969 at Camp Lejeune, North Carolina, a United States Marine Corps base where his father, JTS, was stationed prior to his deployment to Vietnam. Tr. at 1614 (Dec. 1, 2009). JPS has worked for JTS since he was in elementary school, performing clerical tasks until he went to college. JPS began working as a lawyer with his father in 1995. Tr. at 1615-16 (Dec. 1, 2009); RX JTS/JPS 33.

180. JPS was a Boy Scout as a youth, rising to the level of Life Scout. Tr. at 1615-16 (Dec. 1, 2009).

181. JPS received a Bachelor of Science degree in Business Administration with a specialization in finance from Georgetown University in May 1991 and received a Juris Doctor degree from the University of Miami in 1994. Tr. at 1616-17 (Dec. 1, 2009).

182. JPS was admitted to practice law in Maryland in December 1994, followed by New York and Virginia in 1995, New Jersey in 1996 and the District of Columbia in 1999. Tr. at 1612 (Dec. 1, 2009).

183. JPS has had an active pro bono career, including his work for Smokefree-DC, an organization which encouraged adoption of the law that outlawed smoking in bars and restaurants in the District of Columbia; advising the AARP on mortgage fraud issues where senior citizens and other at-risk people were the victims of fraudulent lending practices; and representing an individual in conjunction with the Whitman-Walker clinic. Tr. at 1625-26 (Dec. 1, 2009).

184. JPS has never been sued for malpractice or been sanctioned by any court. He has no disciplinary record with any Bar of which he has ever been a member. Tr. at 1613 (Dec. 1, 2009); Tr. at 1854 (Dec. 10, 2009).

185. As a member of the Virginia and New York Bars, JPS has enrolled in at least twelve hours of Continuing Legal Education courses, including at least two hours of ethics, every year since 1995 or 1996, and sometimes has taken more than the required number of hours. Tr. at 1613-14 (Dec. 1, 2009).

B. JPS and JTS Professional Relationship

186. JPS and JTS are the only two partners in the firm, Szymkowicz & Szymkowicz, LLP. Tr. at 1618-19 (Dec. 1, 2009). While JTS had more involvement in the proceedings constituting this case, JPS was also significantly involved. Tr. at 1627-32, 1663-67 (Dec. 1, 2009). Although JPS argues that he was not involved closely enough with his father, whose behavior in certain respects Bar Counsel has argued constituted violations of ethical rules, the evidence does not support JPS's position. JTS/JPS Br. 124-25. JPS had a limited role with respect to in-person meetings with both Dr. Ackerman and Mrs. Ackerman and with respect to appearing in court in all relevant matters for those clients. See Tr. at 1633-66 (Dec. 1, 2009). JPS did, however, work actively on both cases, was familiar with all aspects of the litigation, and his name and bar number were on pleadings and filings in Ackerman I, Ackerman II, and the declaratory judgment action. Id.; see e.g., BX 34, BX 47, BX 53, BX 87, BX 95.

187. JPS reviewed the complaint in Ackerman I, on which his name appears; he authorized the use of his name on the complaint (indeed, it was standard office practice to use both JTS and JPS names on pleadings filed in the District of Columbia and Maryland). Tr. at 1629-30 (Dec. 1, 2009); BX 34. His name also appears on the Answer to the Counter-claim in Ackerman I, but he did not personally sign it. BX 36; Tr. at 1636 (Dec. 1, 2009). During Ackerman I, JPS worked on discovery, principally by organizing documents and processing them for transmittal to the opposing party. Tr. at 1635-36 (Dec. 1, 2009). JTS signed and filed a notice of appeal in Ackerman I on June 7, 2005; JPS's name and Bar number are also on the Notice of Appeal. Tr. at 1638-40 (Dec. 1, 2009); BX 44. Although JPS' name does not appear on the Ackerman II complaint, he

assisted in litigating the matter. Tr. at 1648-65 (Dec. 1, 2009). JPS testified that although his father began representing Mrs. Ackerman on May 8, 2005, he (JPS) entered his appearance in Ackerman II at a later time. See Tr. at 1704-05 (Dec. 1, 2009). During Ackerman II, he also filed and signed a motion for a protective order to prevent a psychiatric evaluation of Mrs. Ackerman on November 17, 2005. See BX 53. Also during Ackerman II, JPS forwarded Dr. Ratner's report to the trust's counsel. Tr. at 1895-97 (Dec. 10, 2009). In the declaratory judgment action filed by Mr. Abbott, JPS signed and filed a motion to intervene on October 3, 2007, along with JTS. BX 87. On October 26, 2007, JPS prepared and filed a response to Mr. Abbott's summary judgment motion in the declaratory judgment action and later a response to the court's intervention order. BX 94; BX 95. On February 28, 2008, JPS filed an appeal for Dr. Ackerman in the declaratory judgment action, and in August 2008 filed an appellate brief which he alone signed. See BX 99; BX 105.

188. As discussed below, an attorney who places his or her name on pleadings and court documents is assuming the responsibility of representing the client involved. D.C. Superior Court R. 11. As also discussed below, an attorney may rely on and accept information given by a partner or other such supervisory professional colleague, or may rely on judgments made by such a colleague with respect to certain clients and any ethical questions involved, such as a conflict of interest. That attorney is still individually responsible and potentially liable for representing the client, however. JPS's argument does not withstand these propositions. Although he was less involved in the Ackerman matters than JTS was, he was still fully representing Dr. Ackerman and Mrs. Ackerman in those matters. Signing his name to pleadings and other court documents made him

responsible for representing Dr. Ackerman and Mrs. Ackerman. It therefore became his responsibility to satisfy himself that there has been and that he is in full compliance with all applicable ethical requirements. JPS accepted JTS's determinations about the conflict of interest and Mrs. Ackerman's capacity at his own risk.

189. The Szymkowicz firm signs the names of both partners to pleadings for "convenience" and as a standard practice. Tr. at 1630 (Dec. 1, 2009). This practice is inappropriate unless both attorneys are familiar with every client's case and are personally satisfied with the ethical compliance in each case because both attorneys are individually liable. D.C. Superior Court Rule 11(b) states that any attorney filing a document with the court is representing that he or she has made a reasonable inquiry into the claims stated in that document, and further, that there is evidentiary support for the claims and that the claims are warranted by existing law. D.C. Superior Court R. 11(b).

190. JPS's argument that he could not have violated the Rules of Professional Conduct because of the "division of labor" within the Szymkowicz firm is untenable. It is clear that he was representing Dr. Ackerman throughout Ackerman I. The extent of his responsibility with respect to Ackerman II is arguably less clear because BX 48, the docket sheet for Ackerman II, does not reflect JPS's entering an appearance or withdrawing from that case, however, it does reflect his filing a motion to extend time and a motion for a protective order on behalf of Mrs. Ackerman. BX 48 at 6. The record also shows that JPS was otherwise involved with JTS in representing Mrs. Ackerman in Ackerman II. See, e.g., BX 53; BX 105.

191. Rule 5.2 governs the responsibilities of subordinate lawyers.[36] In its entirety, Rule 5.2 states:

> (a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
>
> (b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

D.C. Rules of Prof'l Conduct R. 5.2 (2007). Comment [2] to Rule 5.2 further provides:

> When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. *For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.*

D.C. Rules of Prof'l Conduct R. 5.2 cmt. [2] (2007) (emphasis added).

192. As just stated, Rule 5.2(b) provides that "[a] subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."

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[36] Rule 5.2 distinguishes between "subordinate lawyer[s]" and "supervisory lawyer[s]." D.C. Rules of Prof'l Responsibility R. 5.2 (2007). It does not distinguish between "partners" and "associates." Id. Thus, although JPS may have been a name partner like his father, the factual record supports a finding that he worked as a subordinate and that his conduct is governed by Rule 5.2. See, e.g., Tr. at 1615 (Dec. 1, 2009) ("I went to work *for my dad* full-time in approximately February, 1995.") (emphasis added); Tr. at 1619-20 (Dec. 1, 2009) ("Typically when a new client comes in *they meet my dad and he decides whether to take the case for himself or whether to give it to me* and once that decision is made the case becomes either my case or his case.") (emphasis added).

D.C. Rules of Prof'l Conduct R. 5.2(b) (2007). Further, Comment [2] to Rule 5.2 provides that "if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged." D.C. Rules of Prof'l Conduct R. 5.2 cmt. [2] (2007).

193. Thus, JPS was entitled to rely on the judgment of JTS as to whether Mrs. Ackerman had validly waived the conflict of interest with Dr. Ackerman, so long as JTS's resolution of that issue was "reasonable" which we have found to be the case. Id. JPS was therefore entitled to rely on JTS's resolution of that issue.

194. We note, however, that a subordinate lawyer is only entitled to rely on a supervisory lawyer's ethical judgment where that judgment pertains to "an arguable question of professional duty." D.C. Rules of Prof'l Conduct R. 5.2(b) (2007). Accordingly, JPS cannot validly claim that the extent of JTS's involvement in the case completely absolves him (JPS) of any potential ethical violations. Rather, JPS can only rely on JTS's ethical judgments where those judgments address "arguable question[s] of professional duty." Id.; see also D.C. Rules of Prof'l Conduct R. 5.2(a) (2007) ("A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person."); D.C. Rules of Prof'l Conduct R. 5.2 cmt. [2] (2007) ("If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it.").

C. JPS Decision Points

195. As stated before, Mrs. Ackerman's mental capacity is critical to the outcome of this case. Bar Counsel alleges that Mrs. Ackerman lacked the capacity to

engage in nearly all legal acts with JPS. See Bar Counsel's Br. 102-03. Accordingly, to prove that Mrs. Ackerman lacked capacity, the specific points in time when capacity would have been required must be identified, which are referred to in this Report as decision points. At each decision point, it must be shown which standard of capacity was required. The question before the Hearing Committee is whether there is clear and convincing evidence with respect to each Respondent's reasonable belief about Mrs. Ackerman's capacity at each decision point at which the particular Respondent was representing Mrs. Ackerman and either recommending that she take particular actions or acting on her behalf with either expressed or reasonably implied authority from Mrs. Ackerman to do so.

1. Ackerman I Affidavit

196. Although JPS did not participate actively in the drafting and execution of the Affidavit that Mrs. Ackerman executed in Ackerman I, JPS was representing Dr. Ackerman in that case. See supra Part VII.B. JPS's name was on the Ackerman I complaint. BX 34. JPS was responsible for the validity of all documents filed with the court in that case. Because the Affidavit was filed on behalf of Dr. Ackerman, JPS shared responsibility for ensuring that the document was legitimate. A legitimate Affidavit required Mrs. Ackerman to have the capacity to contract when she executed it. See supra Part III. Because JTS primarily drafted and was the only attorney who oversaw the execution of that Affidavit, JPS accepted JTS's determination of her capacity at that time. As discussed above, there is no evidence that Mrs. Ackerman lacked the requisite capacity to execute that Affidavit. See supra Parts III, VI.G.10. JPS reasonably relied upon JTS's determination that the Affidavit was legitimate.

2. Beginning of JPS Representation and Ackerman II Litigation

197. On May 8, 2005, JPS at least constructively began to represent Mrs. Ackerman in that he was working on the complaint that was signed and filed the next day by JTS to begin Ackerman II. In that complaint, Mrs. Ackerman took issue with the *in terrorem* clause of her trust as it would have disinherited Dr. Ackerman if he lost Ackerman I. BX 49. [This record clearly and convincingly demonstrates that Mrs. Ackerman did not understand the meaning of the clause when the trust was created, and once she did understand it, she objected to it. Tr. at 1040-41 (stating that Mrs. Ackerman was upset by the terminology of the *in terrorem* clause) (Oct. 16, 2009); BX 47 at 3 n.2; Tr. at 2869-70 (Jan. 14, 2010) (stating that Mrs. Ackerman thought, it "would be terrible" if Dr. Ackerman were disinherited by the *in terrorem* clause); BX 54 at 6 (Mrs. Ackerman's objecting to the *in terrorem* clause when the trust was presented to her initially).]

198. As previously stated, JPS's name was not on the Ackerman II complaint, but he assisted substantially in litigating the matter, and eventually effectively entered his appearance on November 17, 2005 when he filed a motion for a protective order in the case. See Tr. at 1867 (Dec. 10, 2009); BX 53. Because JPS was also representing Dr. Ackerman in Ackerman I at this time, a potential conflict of interest issue arose. To waive the conflict, and retain JPS, Mrs. Ackerman must have had the capacity to give her informed consent to the joint representation with Dr. Ackerman and to waive any actual or potential conflict of interest resulting from the joint representation. The waiver is part of forming a contract for legal representation. Bar Counsel contends that Mrs. Ackerman, throughout Ackerman II, did not possess the required capacity because she

could not understand the potential conflict of interest, and that JPS knew of her condition or should have known of it because of the information he had received or reviewed in the course of the Ackerman litigation. Bar Counsel's Br. 102-03. JPS, however, had virtually no contact with Mrs. Ackerman directly and did not discuss with her a potential conflict of interest. Tr. at 1706 (Dec. 1, 2009). Instead, JPS relied on JTS's assessment of Mrs. Ackerman's capacity to begin the litigation and waive the conflict. Id. As stated above, Bar Counsel has failed to prove by clear and convincing evidence that Mrs. Ackerman lacked the requisite capacity to contract when she retained JTS and JPS on May 8, 2005.[37] JPS could therefore reasonably rely on JTS's determination of Mrs. Ackerman's capacity and her waiver of any conflict.

D. Alleged Violation of Rule 1.7(b)(2)

199. Bar Counsel alleges that Rule 1.7(b)(2) was violated by JPS because of a conflict of interest between Mrs. Ackerman and Dr. Ackerman to which Mrs. Ackerman could not give informed consent. Bar Counsel's Br. 102-03. On February 1, 2007, the D.C. Rules of Professional Responsibility were amended. For the purposes of this case, the pre-February 2007 Rule is relevant. The text of the relevant portion of the Rule is below:

> (b) Except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if: …

[37] The Committee has determined that while the execution of the 2005 Powers of Attorney was a decision point for JTS, execution of those documents was not a decision point for JPS. The record does not demonstrate that JPS was involved in drafting or arrangements for executing these documents. Although Bar Counsel alleges that JPS used these documents improperly during his representation of Mrs. Ackerman, there is no requirement that JPS make a capacity determination with respect to them, unless he was involved in either the drafting of the documents or the effort to execute these documents or otherwise had reason to question their validity.

> (2) such representation will be or is likely to be adversely affected by representation of another client; …
>
> (c) lawyer may represent a client with respect to a matter in the circumstances described in paragraph (b) above if each potentially affected client provides consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation.

D.C. Rules of Prof'l Conduct R. 1.7(b)(2) (1999).

200. The Hearing Committee must first determine whether JPS's representation of Dr. Ackerman caused an adverse effect on Mrs. Ackerman. The record shows a demonstrated desire by Mrs. Ackerman to aid and support Dr. Ackerman throughout her life. See Tr. at 2870, 2878, 2891 (Jan. 14, 2010); see also supra Part V. There has been no showing that Mrs. Ackerman lacked capacity when she began Ackerman II. See supra Part III. Mrs. Ackerman must be presumed capable, and a capable person is entitled to make decisions that others may deem unwise. It is clear on this record that Mrs. Abbott considered Mrs. Ackerman "incompetent" because she strongly believed that her actions were inconsistent with what she thought were in her mother's best interests; Dr. Negro's testimony supports Mrs. Abbott's contentions. See Tr. at 203, 208–11, 229 (Oct. 13, 2009); Tr. at 359–62, 472–80 (Oct. 14, 2009); Tr. at 701 (Oct. 15, 2009). However, a decision that would have caused the diminishment of trust assets alone is not an adverse effect because Mrs. Ackerman had a long-standing interest in providing for her son, and she has not been shown to have lacked the capacity to contract when she began Ackerman II. On the basis of the record, it cannot be said that representing Dr. Ackerman adversely affected Mrs. Ackerman because they both sought the same outcome, and because Mrs. Ackerman must be presumed to have and has been found to

have had the capacity to contract. Accordingly, an adverse effect on Mrs. Ackerman has not been shown by clear and convincing evidence.

201. Additionally, Mrs. Ackerman gave informed consent, and has not been shown to have lacked the capacity to contract, and therefore, must be presumed to have and has been found to have had the capacity to give informed consent. JTS discussed the conflict of interest with Mrs. Ackerman and obtained informed consent to the representation. See Tr. at 2488, 2585-86, 2594-95 (Jan. 7, 2010); see also BX 54 at 12 (Mrs. Ackerman states during her deposition that she discussed the conflict of interest with JTS and that he brought up the issue). JPS accepted the determination of capacity JTS made and the waiver of the conflict that JTS received. See Tr. at 1628-29, 1706 (Dec. 1, 2009). JPS did not personally discuss the potential conflict with Mrs. Ackerman. Bar Counsel only challenges Mrs. Ackerman's capacity to give informed consent. We have determined that Mrs. Ackerman at all relevant times must be presumed competent because Bar Counsel has failed to meet the burden of proof with respect to proving her incapacity. See supra Part III. The informed consent provided by Mrs. Ackerman means JPS did not violate Rule 1.7(b)(2). We so find.

E. Alleged Violation of Rule 8.4(c)

202. Bar Counsel alleges a Rule 8.4(c) violation on the basis of dishonest conduct by JPS. BX 2 at 32. Rule 8.4(c) reads as follows:

> It is professional misconduct for a lawyer to: …
>
> (c) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

D.C. Rules of Prof'l Conduct R. 8.4(c) (2007).

203. The term "dishonesty" includes not only fraudulent, deceitful or misrepresentative conduct, but also "conduct evincing 'a lack of honesty, probity or integrity in principle; [a] lack of fairness and straightforwardness.'" In re Shorter, 570 A.2d 760, 767-68 (D.C. 1990) (per curiam) (quoting Tucker v. Lower, 434 P.2d 320, 324 (Kan. 1967)); accord In re Cleaver-Bascombe, 892 A.2d 396, 404 (D.C. 2006). Thus, conduct that "may not legally be characterized as an act of fraud, deceit or misrepresentation may still evince dishonesty." Shorter, 570 A.2d at 768; accord In re Romansky, 825 A.2d 311, 315 (D.C. 2003) ("dishonesty, fraud, deceit and misrepresentation are four different violations, that may require different quantums of proof").

204. Bar Counsel alleges that JPS' conduct amounted to dishonesty, and at one point, fraud. BX 2 at 32. The following actions or events are asserted by Bar Counsel to be grounds for an 8.4(c) violation by JPS:

1. JPS filed Ackerman I. See Bar Counsel's Br. 104.

2. JPS used Mrs. Ackerman as a witness in Ackerman I. See id.

3. JPS litigated Ackerman II on the basis of a false promise and for the benefit of Dr. Ackerman. See id.

4. JPS opposed reopening the Sullivan Estate and Mrs. Abbott's appointment as Personal Representative of same. See id. at 105.

5. JPS coordinated with LS and RK regarding the request for a temporary restraining order regarding the proposed sale of North Carolina Ave. See id.

6. JPS was aware of the Assignment which was a fraud. See id.

7. JPS played a lead role in the declaratory judgment action on the basis of the fraudulent Assignment. See id.

We address each of these charges in order.

1. Filing of Ackerman I

205. Bar Counsel alleges that JPS knowingly filed Ackerman I to attempt to have the Sea Colony property removed from Mrs. Ackerman's trust, and transferred to Dr. Ackerman, and that this was dishonest. See Bar Counsel's Br. 104. First, the complaint in Ackerman I does not request changing the title of Sea Colony. BX 34. The purpose of Ackerman I, based on the complaint, was to request appointment of an independent trustee. Id. Dr. Ackerman was entitled to representation for this claim, and JPS was obligated to pursue his client's claims zealously. D.C. Rules of Prof'l Conduct R. 1.3(a) (2007). Ackerman I was filed in response to Dr. Ackerman's concerns and to remove Mr. Abbott as trustee. Tr. at 1634-35 (Dec. 1, 2009). Representing Dr. Ackerman on the basis of his claims, in good faith, is not dishonest conduct. There is no Rule 8.4(c) violation with respect to JPS's involvement with Ackerman I. We so find.

2. Execution of Affidavit in Ackerman I

206. Bar Counsel next alleges that the Affidavit JTS prepared and had Mrs. Ackerman execute amounted to dishonest conduct because it contained false and misleading statements. See Bar Counsel's Br. 104. Because JPS was representing Dr. Ackerman in that case, JPS was responsible for the authenticity of all documents filed with the court, and all material representations made to the court. As discussed above, there has been no showing that Mrs. Ackerman was mentally incapable of executing the Affidavit. See supra Part III. Because she was not incapable, the Affidavit must be

deemed legitimate, and thus JPS's involvement with it does not amount to dishonest conduct or violate Rule 8.4(c). We so find.

3. JPS Litigating Ackerman II

207. Bar Counsel alleges that because Mrs. Ackerman was incapable of understanding the complaint she signed in Ackerman II, and because she was led to sign it under false pretenses, JPS acted dishonestly. See Bar Counsel's Br. 104. First, Mrs. Ackerman has not been shown to have lacked the capacity to retain JTS and implicitly JPS and pursue the litigation. See supra Part III. Although Mrs. Ackerman's winning Ackerman II might have ultimately benefited Dr. Ackerman, the direct purpose of the litigation was to terminate the trust. BX 49. If Dr. Ackerman was to benefit from Ackerman II, that would have been Mrs. Ackerman's choice. Mrs. Ackerman made the decision to pursue the litigation and has not been shown incapable of doing so. Second, JTS told Mrs. Ackerman that filing Ackerman II would end the Ackerman I litigation because Dr. Ackerman had previously agreed to dismiss his case upon the filing of Ackerman II. Tr. at 665-66 (Oct. 15, 2009); Tr. at 1057-58 (Oct. 16, 2009). JTS advised Dr. Ackerman to withdraw the Ackerman I litigation to avoid being disinherited from his parents' estates. Tr. at 2250-51 (Dec. 11, 2009). Dr. Ackerman, however, refused to comply with this course of action after Ackerman II was filed because discussions broke down after disagreements over the terms of a settlement. See Tr. at 2280, 2289, 2319-22 (Dec. 11, 2009); Tr. at 2466-69 (Jan. 7, 2010). JPS and JTS relied on the commitments of their client and on that basis JTS advised Mrs. Ackerman that filing Ackerman II would end Ackerman I. See id. Due to unforeseen actions on the part of Mr. Abbott, Dr.

Ackerman changed his mind. Therefore, this conduct is not dishonest and is not the basis of a Rule 8.4(c) violation by JPS. We so find.

4. JPS Opposing Reopening of Sullivan Estate on Behalf of Dr. Ackerman

208. JPS, along with JTS, represented Dr. Ackerman in opposing the reopening of the Sullivan Estate and the appointment of Mrs. Abbott as successor personal representative. BX 77; BX 78; see Bar Counsel's Br. 105. Dr. Ackerman was the original personal representative of the Sullivan Estate. Tr. at 111 (Oct. 13, 2009). Bar Counsel claims that this action was part of a plan ultimately to deprive Mrs. Ackerman of the assets she stood to inherit. See Bar Counsel's Br. 104-05. This theory disregards the fundamental point that Dr. Ackerman is entitled to representation. Bar Counsel does not make any specific allegations as to false or misleading representations made to the court in that matter by JPS. Further, the documents filed on behalf of Dr. Ackerman in that matter to oppose the reopening of the Sullivan Estate were signed by JTS, not JPS. See BX 77; BX 78. The record does not demonstrate what, if anything, JPS did individually within the Sullivan Estate matter on behalf of Dr. Ackerman. Absent a showing of improper conduct, there is no dishonest conduct by JPS simply for representing Dr. Ackerman in that matter. No Rule 8.4(c) violation has been proved with respect to JPS' involvement in the Sullivan Estate matter. We so find.

5. JPS Coordinated With LS and RK Regarding the Temporary Restraining Order to Bar the Trust from Selling the North Carolina Avenue Property

209. Bar Counsel alleges that JPS coordinated with LS and RK regarding the filing of a motion for a temporary restraining order to prevent the sale of the North Carolina Avenue property. See Bar Counsel's Br. 105. Facially, there is no dishonest

conduct that springs from JPS' awareness that LS and RK were going to move to prevent the sale of the North Carolina Avenue property. Bar Counsel does not provide any evidence or even argument explaining why JPS's coordinating with LS and RK was dishonest. All the record demonstrates is that JPS was representing Dr. Ackerman in the Sullivan Estate matter when he learned that LS and RK were going to file a motion for the temporary restraining order on behalf of Mrs. Ackerman. Tr. at 2713-14 (Jan. 7, 2010). There is no evidence, much less clear and convincing evidence, of any violation by JPS of Rule 8.4(c) on this basis. We so find.

6. JPS Knew About the Assignment Mrs. Ackerman Executed

210. Bar Counsel alleges that the Assignment JTS drafted was a fraud against Mrs. Ackerman, and further, that JPS knew about the Assignment. See Bar Counsel's Br. 105. Bar Counsel's brief defines fraud as the means used by one to gain advantage over another "by false suggestions or by suppression of the truth." Id. As discussed above, Bar Counsel has not shown that Mrs. Ackerman was incapable of executing the Assignment and thus is presumed to have had the capacity to contract. See supra Part III. Further, JTS merely drafted the Assignment and did not discuss it with Mrs. Ackerman, nor was he involved with her execution of it. Tr. at 2520-21, 2694 (Jan. 7, 2010). JPS was not directly involved in the drafting or execution of the Assignment either. Even if he was, there is no clear and convincing evidence that the Assignment is illegitimate because of Mrs. Ackerman's lack of capacity. JPS did not violate Rule 8.4(c) on this basis. We so find.

7. JPS Continued to Pursue Claims on the Basis of the Assignment

211. The immediately preceding paragraph discusses why the Assignment must be considered legitimate. Accordingly, there was no reason why JPS could not rely upon a legitimate Assignment to pursue the claims of Dr. Ackerman in the declaratory judgment action. JPS's pursuing the claims of Dr. Ackerman in the declaratory judgment action on the basis of the Assignment, which he had no reason to suspect was invalid or illegitimate, is not dishonest conduct. There is no Rule 8.4(c) violation by JPS with respect to the Assignment. We so find.

F. Alleged Violation of Rule 8.4(d)

212. Bar Counsel alleges that JPS violated Rule 8.4(d) by interfering with the administration of justice. Bar Counsel's Br. 106. The Rule states that, "It is professional misconduct for a lawyer to: … (d) Engage in conduct that seriously interferes with the administration of justice." D.C. Rules of Prof'l Conduct R. 8.4(d). A lawyer's conduct must satisfy the following elements to violate Rule 8.4(d): (1) be "improper"; (2) "bear directly upon the judicial process … with respect to an identifiable case or tribunal"; and (3) "taint the judicial process in more than a *de minimis* way." In re Uchendu, 812 A.2d 933, 940 (D.C. 2002) (quoting In re Hopkins, 677 A.2d 55, 60-61 (D.C. 1996)). "Tainting the judicial process" traditionally refers to conduct which affects the decision making process of the tribunal or court, such as falsifying evidence. See In re Uchendu, 812 A.2d 933; In re Reback, 487 A.2d 235, 238-39 (D.C. 1985). See generally In re Hopkins, 677 A.2d 55; In re Goffe, 641 A.2d 458 (D.C. 1994); In the Matter of Sablowsky, 529 A.2d 289 (D.C. 1987).

213. Bar Counsel alleges that (1) filing Ackerman I; (2) filing and pursuing Ackerman II; and (3) intervening in the declaratory judgment action on behalf of Dr. Ackerman separately constituted Rule 8.4(d) violations by JPS. For the reasons previously stated, with respect to JTS, Bar Counsel has also not sustained the burden of proving that JPS violated Rule 8.4(d). See supra Part VI.H. The arguments advanced by Bar Counsel with respect to JTS's alleged violation of Rule 8.4(d) are also presented to support Bar Counsel's charge that JPS violated Rule 8.4(d). The lack of evidence that JTS met any of the *Hopkins* elements required to be proven to sustain a Rule 8.4(d) violation results in our finding that JPS also did not violate Rule 8.4(d).

214. Bar Counsel argues that Dr. Ackerman's statement in his guardianship petition to the effect that Mrs. Ackerman was incapable of transferring property is inconsistent with JPS's actions and proves that JPS should have known that Mrs. Ackerman lacked the capacity to contract. See Bar Counsel Br. 74-75; see BX 111 at 2. The petition was filed on November 28, 2007, several months after the Assignment was executed on August 31, 2007, however. See BX 22; BX 111. The petition filed by Dr. Ackerman does not address the contractual capacity standard, but instead the incapacity standard in the D.C. Guardianship law. See BX 111. Because capacity decisions are time specific, Dr. Ackerman's statement did not address the precise time when the Assignment was executed. See id. Because the petition does not address Mrs. Ackerman's capacity to contract, that document does not have any bearing on JPS's assessment of Mrs. Ackerman's contractual capacity. Accordingly, JPS's actions in the declaratory judgment action did not constitute a Rule 8.4(d) violation. We so find.

G. Alleged Violation of Rule 1.16(a)

215. The text of Rule 1.16(a) follows:

> Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
>
> (1) The representation will result in violation of the Rules of Professional Conduct or other law;
>
> (2) The lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
>
> (3) The lawyer is discharged.

See D.C. Rules of Prof'l Conduct R. 1.16(a) (2007). With respect to JPS, a violation of this Rule would hinge upon his violation of the Rules of Professional Conduct or other law. As stated above, however, JPS did not violate any of the rules as charged by Bar Counsel. The record is silent on the subject of any other violations of law by JPS. Therefore, JPS did not violate Rule 1.16(a). We so find.

H. Conclusory Finding Concerning JPS Charges

216. In summary, Bar Counsel has not presented clear and convincing evidence of any violation of Rules 1.7(b)(2), 1.7(b)(3), 8.4(c), 8.4(d), and 1.16(a) of Professional Conduct by JPS, and we so find and conclude.

VIII. FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING RESPONDENT LESLIE SILVERMAN

A. LS's Professional Background

217. LS was admitted to the D.C. Bar on October 2, 1995. BX 1 at 3. She was assigned Bar No. 448188. Id.

218. LS graduated from the University of Binghamton in New York with a B.A. in 1989. Tr. at 2935 (Jan. 14, 2010). She graduated from Washington College of Law at American University in 1992 with a J.D. degree. Tr. at 2936 (Jan. 14, 2010).

219. LS, in addition to being a member of the D.C. Bar since 1995, is also admitted to practice in Maryland, since 1993, and in Virginia, since 1997. Tr. at 2934-35 (Jan. 14, 2010).

220. LS is a sole practitioner and has been since 1999. Tr. at 2936-37 (Jan. 14, 2010). Her practice is about 35-40% criminal work, 30% bankruptcy, representing debtors, and the balance, civil litigation. Tr. at 2936-2937 (Jan. 14, 2010).

221. LS was reprimanded by the Maryland Attorney Grievance Committee on December 22, 2003. BX 180. On November 9, 2006, she was publicly censured by the District of Columbia Court of Appeals upon recommendation of the Board on Professional Responsibility. BX 182. On May 21, 2009, she was suspended by the Virginia State Bar Disciplinary Board from practicing law in Virginia for 60 days. BX 181.

B. LS Findings of Fact

222. LS's involvement in this case began with Ackerman II. JTS and Dr. Ackerman were present when LS originally met Mrs. Ackerman, and they discussed LS's potential representation of Mrs. Ackerman in Ackerman II. Tr. at 2940-41 (Jan. 14, 2010). Bar Counsel claims that many issues were discussed between Dr. Ackerman and LS. Bar Counsel's Br. 107. The record shows significant amounts of e-mail traffic between Dr. Ackerman and LS throughout this case as well. BX 168 at 4-7, 20, 26, 35, 46, 63, 91, 92-97, 100, 101, 117-118, 154, 161, 168, 169, 207. They discussed how to

proceed and what actions to take in the various matters in which Mrs. Ackerman was involved. Id. LS was actively representing Mrs. Ackerman at least between March 7, 2007 and March 7, 2008. See Tr. at 2531 (Jan. 7, 2010); Tr. at 3113 (Jan. 15, 2010). Mrs. Ackerman executed Powers of Attorney in favor of Dr. Ackerman on November 22, 2005 and February 28, 2007. Tr. at 3287 (Jan. 15, 2010); Tr. at 2019 (Dec. 10, 2009); BX 18; BX 21. These documents were eventually found to be void on June 24, 2008, after LS's representation of Mrs. Ackerman ended. See BX 122.[38]

223. Bar Counsel contends that Mrs. Ackerman never consented to LS's releasing information regarding Mrs. Ackerman to Dr. Ackerman. Bar Counsel's Br. 112; see BX 2 at 32. There is no contention, however, that LS disclosed any specific confidential information to Dr. Ackerman, who held his mother's Power of Attorney. LS contends that the Powers of Attorney in favor of Dr. Ackerman were presumptively valid until they were ruled to be invalid by the court. See Tr. at 3077, 3081 (Jan. 15, 2010). LS also contends that the e-mails between her and Dr. Ackerman demonstrate a reluctance to follow Dr. Ackerman's instructions in favor of a course of action LS believed would be more beneficial to Mrs. Ackerman's interests. Tr. at 3088, 3113, 3120, 3128, 3130-31 (Jan. 15, 2010) (LS explaining that she did not follow many of Dr. Ackerman's requests including those to compel Mr. Abbott to resume paying Mrs. Ackerman's health care costs because she believed other action was in Mrs. Ackerman's best interests). Although the legal actions taken by LS for Mrs. Ackerman could have been, if successful, a benefit to Dr. Ackerman, they were also consistent with Mrs. Ackerman's interests. First, the Ackerman II litigation would have given Mrs. Ackerman

[38] See infra note 42.

the ability to give Dr. Ackerman further financial support and it effectively would have removed the *in terrorem* clause from the trust, which disinherited Dr. Ackerman because of his claim against the trust in Ackerman I. See BX 49. The motion for a temporary restraining order filed in the declaratory judgment action would have preserved any chance that Dr. Ackerman had of receiving the North Carolina Avenue property from Mrs. Ackerman. See BX 66. The Assignment was an attempt to have any assets from the Sullivan Estate bypass the trust and go to Dr. Ackerman. See id. It is on this basis, and the basis of the significant level of involvement which Dr. Ackerman had in this case on behalf of his mother, which Bar Counsel bases the argument that LS actually represented Dr. Ackerman during the time she represented Mrs. Ackerman. See Bar Counsel's Br. 108-09. Bar Counsel also contends that any potential conflict of interest between Mrs. Ackerman and Dr. Ackerman was never discussed by LS with Mrs. Ackerman. See id at 109. LS denies that she only "purportedly" represented Mrs. Ackerman and instead represented Dr. Ackerman. Tr. at 3130-31 (Jan.15, 2010).

224. Bar Counsel contends that LS agreed to serve as Mrs. Ackerman's guardian. See Bar Counsel's Br. 76. LS disputes the fact that she agreed to serve as Mrs. Ackerman's guardian at any time, however. See Tr. at 3098 (Jan. 15, 2010).

C. LS Decision Points

225. Bar Counsel claims that Mrs. Ackerman's lack of mental capacity is the basis of several Rules violations by LS. Bar Counsel's Br. 107-113. Legal mental capacity is time and task specific, thus we give the specific times at which Mrs. Ackerman's mental capacity is questioned and then find the proper standard of capacity which applies. See supra Part III. Bar Counsel must prove by clear and convincing

evidence that LS could not have had a reasonable belief that Mrs. Ackerman had the required capacity to take a certain action. See D.C. Rules of Prof'l Conduct R. 1.14 (2007). We examine Bar Counsel's evidence to support a lack of capacity at each decision point.

1. LS Represents Mrs. Ackerman

226. On March 7, 2007, LS began to represent Mrs. Ackerman in the Ackerman II proceedings. Tr. at 2531 (Jan. 7, 2010); BX 62. LS was advised by JTS that Mrs. Ackerman needed an attorney. Tr. at 2938-39 (Jan. 14, 2010). LS met Mrs. Ackerman at her home and spent about an hour and a half questioning Mrs. Ackerman about the litigation and her position with respect to the case. Tr. at 2940-44 (Jan. 14, 2010). She found that Mrs. Ackerman had a general understanding of the litigation and the related issues. Id. at 2943-44. LS also told Mrs. Ackerman that LS was not associated with JTS, and further, that Mrs. Ackerman could select other counsel if she wished. Tr. at 2942 (Jan. 14, 2010). LS then told Mrs. Ackerman to contact her if she wanted to retain her services. Id. LS called Mrs. Ackerman the next day, and Mrs. Ackerman informed her she wanted to retain LS. Tr. at 2945 (Jan. 14, 2010). They agreed to a flat fee of $20,000 for Ackerman II. Tr. at 2983-84 (Jan. 14, 2010). LS then brought a retainer agreement to Mrs. Ackerman, which was executed, and LS entered her appearance on March 7, 2007 in Ackerman II. Tr. at 2945 (Jan. 14, 2010); BX 62.

227. Retaining a lawyer to render legal services involves forming a contract. Therefore, this decision point requires the capacity to contract. There is a rebuttable presumption that Mrs. Ackerman possesses the capacity to contract, which requires a determination that she can understand the purpose and effect of her actions. See D.C.

Rules of Prof'l Conduct R. 1.14; see supra Part III. Moreover, LS testified in detail about her experience working with Mrs. Ackerman during the Ackerman II litigation and why she (LS) believed that Mrs. Ackerman understood what she was doing. Tr. at 3154-3166 (Jan. 15, 2010). We credit this testimony. Bar Counsel presents virtually the same evidence each time capacity is addressed: Mrs. Ackerman suffered from memory loss; she was easily influenced or manipulated by her children[39]; she could not manage her finances or health care affairs. (Further, none of this evidence is time-connected to the decision points for each of the Respondents.) On the basis of this evidence, Bar Counsel concludes that Mrs. Ackerman could not have possessed the capacity to contract. As explained above, however, this evidence only addresses the capacity standard applicable to the D.C. Guardianship law. See D.C. Code § 21-2011(11). It does not constitute evidence that Mrs. Ackerman lacked capacity to contract.

228. Bar Counsel's proffered evidence fails to prove clearly and convincingly that Mrs. Ackerman could not understand the purpose and effect of her actions. While Mrs. Ackerman's frailty, memory loss, and her inability to manage the details of her finances and personal affairs proves that her capacity was diminished, these facts do not prove that she lacked mental capacity to contract. See D.C. Rules of Prof'l Conduct R. 1.14 cmt. [1]; D.C. Code § 21-2004 (2001). The contractual capacity standard requires that Mrs. Ackerman understand the purpose and effect of her actions at the moment when the contract is executed. See supra Part III. Memory loss, frailty, and the inability to manage personal and financial affairs are indicative of incapacity under the D.C. guardianship standard but do not address whether Mrs. Ackerman lacked the capacity to

[39] See supra note 31.

understand the purpose and effect of her actions. See supra Part III; D.C. Code § 21-2004 (2001).[40]

229. To demonstrate that Mrs. Ackerman lacked contractual capacity at the time that she retained LS, one of two forms of clear and convincing evidence is required: (1) evidence addressing the lack of capacity to contract at the specific time in question; or (2) evidence that shows that Mrs. Ackerman's attempted actions are inconsistent with her historical value system or patterns of decision making. See supra Part III. A client's conduct must be evaluated relative to that person's historical values, and not on the basis of someone else's judgment with respect to a wise course of action. Therefore, a conventionally unwise decision does not constitute clear and convincing evidence of the lack of capacity to contract. The determining question is whether the action comports with the client's historical values and prior decision making patterns. The record does not support Bar Counsel's position with respect to this decision point: Bar Counsel cites no evidence narrowly addressing the capacity to contract, and makes no effort to compare Mrs. Ackerman's actions against her values and prior decisions. On the contrary, we have found that Mrs. Ackerman was acting consistently with her life-long pattern of providing for Dr. Ackerman by retaining LS to continue Ackerman II. See supra Part V; Tr. at 2330 (Dec. 11, 2009); Tr. at 2523, 2686 (Jan. 7, 2010); Tr. at 2878, 2891, 2923

[40] Bar Counsel does not allege that LS had any of the medical expert reports regarding Mrs. Ackerman's mental capacity that are in the record and thus does not allege that LS should have proceeded differently on the basis of those reports. However, as previously described, these medical reports regarding Mrs. Ackerman do not provide clear and convincing evidence that Mrs. Ackerman lacked the capacity to contract at any given time. See supra Part III. Further, the record does not reveal when or if LS received any of the reports. Thus, there is no evidence in this record that LS could not reasonably find that Mrs. Ackerman possessed the capacity to act as she acted in dealing with LS.

(Jan. 14, 2010). The only time-specific evidence relating to Mrs. Ackerman's engaging LS to represent her is that of LS who has also given uncontested, credible testimony that Mrs. Ackerman discussed the status of Ackerman II knowledgeably and demonstrated an understanding of the purpose of the litigation. See Tr. at 2940-42 (Jan. 14, 2010); Tr. at 3154-3166 (Jan. 15, 2010). Bar Counsel has shown only that Mrs. Ackerman was incapacitated under the D.C. guardianship standard but has not proven that LS could not have formed a reasonable belief that she possessed the capacity to contract.

2. LS & RK File Motion for Temporary Restraining Order in Ackerman II

230. On May 30, 2007, LS and RK filed a motion on behalf of Mrs. Ackerman for a temporary restraining order in Ackerman II. BX 66; Tr. at 3063-64 (Jan. 15, 2010). The motion was filed to prevent the trustee from selling the North Carolina Avenue property that was to be transferred to Mrs. Ackerman and then into her trust. Id.; Tr. at 3220-21 (Jan. 15, 2010). The motion stated that Mrs. Ackerman intended to deed that property to Dr. Ackerman. Id.; Tr. at 3014-15 (Jan. 14, 2010).

231. The standard of capacity at this decision point is thus contractual capacity. Bar Counsel provides the same evidence of incapacity as discussed above. Mrs. Ackerman, by default, must be considered to have had the capacity to contract. See D.C. Rule of Prof'l Conduct R. 1.14. Mrs. Ackerman did not want to sell the North Carolina Avenue property, and she had an interest in maintaining Dr. Ackerman's residence there. Tr. at 2327 (Dec. 11, 2009); Tr. at 2943, 2952-53, 3018 (Jan. 14, 2010); Tr. at 3147-49 (Jan. 15, 2010). Since Mr. Abbott stated that he would sell the North Carolina Avenue property to solve the trust's liquidity problems, attempting to prevent the sale of the property comports with Mrs. Ackerman's values and prior decisions. The record does

not show that Mrs. Ackerman lacked the capacity to take this action. For the same reasons stated in that discussion, Bar Counsel's evidence is insufficient to demonstrate that LS and RK could not have formed a reasonable belief that Mrs. Ackerman was mentally capable of contracting.

3. LS Answer to Declaratory Judgment Action

232. On October 3, 2007, on behalf of Mrs. Ackerman, LS filed an answer to the declaratory judgment action filed by Mr. Abbott, which at this point was a new matter. BX 86. The record is silent as to how LS was engaged, or by whom she was engaged. Assuming, however, that Mrs. Ackerman engaged LS for this assignment, too, this decision point is a new legal matter so a contract is involved. Accordingly, the capacity to contract is the appropriate standard of capacity at this decision point. Bar Counsel relies on the previously described condition of Mrs. Ackerman's mental health to argue that she could not understand or appreciate the nature or purpose of this action. See Bar Counsel's Br. 71. Again, Bar Counsel's proffered evidence fails to provide clear and convincing evidence that Mrs. Ackerman lacked the capacity to contract. However, contesting Mr. Abbott's action for the declaratory judgment fits with Mrs. Ackerman's prior patterns of behavior: she wanted to have the ability to control her property so that she might provide for Dr. Ackerman. Tr. at 2327 (Dec. 11, 2009); Tr. at 2943, 2952-53, 3018 (Jan. 14, 2010); Tr. at 3147-49 (Jan. 15, 2010). Further, she filed Ackerman II to terminate the trust, apparently for the same reason. Trying to prevent Mr. Abbott from selling the North Carolina Avenue property is consistent with Mrs. Ackerman's prior decisions and with her desire to provide for Dr. Ackerman. Id.

4. Appeal of Declaratory Judgment Action

233. On March 7, 2008, LS filed notice to appeal the decision against Mrs. Ackerman in the declaratory judgment action. BX 100. It does not appear that LS communicated with Mrs. Ackerman about filing the notice. However, LS never pursued the appeal because Mrs. Ackerman was unresponsive to LS's efforts to communicate with her regarding the appeal, after two attempts to address the matter. See BX 154 at 2; Tr. at 2966 (Jan. 14, 2010). Noting an appeal to protect the interests of a client is not an ethical violation. LS, as counsel for Mrs. Ackerman, at least had the implied authority to note the appeal, especially because no adverse consequences existed for Mrs. Ackerman by LS's so acting. Because LS had the implicit authority to act alone in noting this appeal, Mrs. Ackerman's capacity is irrelevant at this specific point. Nevertheless, there is no record evidence of Mrs. Ackerman's lacking the capacity to authorize LS's action if she had been asked to do so.

5. Declaratory Judgment Appeal Abandoned

234. LS did not file a brief or take any further action after filing notice of the appeal in the declaratory judgment action for Mrs. Ackerman. Tr. at 2959-62 (Jan. 14, 2010). On September 15, 2008 the D.C. Court of Appeals ordered LS to respond within several weeks. BX 107. LS took no action nor notified the Court of her intentions, and the Court of Appeals dismissed the appeal on October 15, 2008. BX 108. LS claims that she wrote to Mrs. Ackerman about the appeal on September 25, 2008, requesting $2,500 to write a brief for the appeal. See BX 154 at 2. LS also claims that she called Mrs. Ackerman around that time. See Tr. at 2966 (Jan. 14, 2010). There was no response from Mrs. Ackerman to either the phone call or letter from LS. See id.

235. Assuming *arguendo* that LS's abandoning the appeal constitutes a decision point, there is no showing that Mrs. Ackerman was incapable of contracting at this point in time. Bar Counsel relies upon the same broad evidence that describes Mrs. Ackerman as incapacitated under the D.C. Guardianship law definition. See Bar Counsel's Br. 89-90; See supra Part III. The required specific evidence of capacity or incapacity at the time this action was taken is not in the record. Accordingly, there is no clear and convincing evidence that Mrs. Ackerman lacked the capacity to contract at this point in time.

D. Alleged Violation of Rule 1.6(a)(1)

236. Bar Counsel alleges that LS violated Rule 1.6(a)(1), which was amended on February 1, 2007. D.C. Rule of Prof'l Conduct R. 1.6(a)(1). The relevant portion of the Rule, however, was unchanged by the amendment. The Rule states:

> Except when permitted under paragraph (c) or (d), a lawyer shall not knowingly:
>
> Reveal a confidence or secret of the lawyer's client.

D.C. Rules of Prof'l Conduct R. 1.6(a)(1) (1999).

237. Bar Counsel alleges that because LS communicated with Dr. Ackerman about her representation of Mrs. Ackerman throughout LS's representation of Mrs. Ackerman, she violated client confidentiality. Bar Counsel's Br. 112. Bar Counsel claims the e-mail communications between LS and Dr. Ackerman prove these violations, and states that they occurred through February, 2008. See id. However, as LS's counsel notes, she was communicating with Dr. Ackerman in recognition of his Power of

Attorney executed by Mrs. Ackerman in favor of Dr. Ackerman.[41] Silverman King Br. 12-14; BX 17, 21.

238. On August 10, 2004, Mrs. Ackerman signed a Power of Attorney in favor of Dr. Ackerman. BX 13. But on November 23, 2004, Mrs. Abbott assisted Mrs. Ackerman in executing a hand-written revocation of this Power of Attorney document, but it was not initially distributed to anyone. BX 14. After the revocation was revealed, another Power of Attorney was executed on November 22, 2005 by Mrs. Ackerman in favor of Dr. Ackerman. BX 17. She also executed Powers of Attorney in his favor in 2006 and 2007. See BX 20; BX 21. LS had no reason to question these documents, which had been witnessed and notarized before other people, and were prima facie valid. Tr. at 2971-73 (Jan. 14, 2010); Tr. at 3078-81 (Jan. 15, 2010). It was not until June 24, 2008 that Judge Burgess nullified all of these Powers of Attorney, several months after Bar Counsel contends that communications between LS and Dr. Ackerman ceased.[42]

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[41] But see Tr. at 31 (Oct. 13, 2009) (Bar Counsel arguing that the multiple Powers of Attorney executed by Mrs. Ackerman in favor of Dr. Ackerman constitute circumstantial evidence of Mrs. Ackerman's diminished mental state).

[42] Moreover, there is no basis for Judge Burgess' Order, BX 122, being applicable to any of the Respondents. It was not. Judge Burgess' June 24, 2008 finding in the guardianship proceeding brought by Mary Frances Abbott, that Mrs. Ackerman was not competent to execute the Powers of Attorney she signed after July 27, 2004 is not binding on any party to this proceeding, much less this Hearing Committee. See BX 122; see also BX 121 at 172 (finding "by clear and convincing evidence" that Mrs. Ackerman "cannot think for herself," and that "[s]he cannot evaluate information effectively to protect herself").

We have reached a different conclusion both because our factual record is substantially different from that before Judge Burgess and because the Respondents were neither parties to the Superior Court proceedings, nor in privity with any parties to the Superior Court proceedings.

Collateral estoppel "prohibits the relitigation of factual or legal matters decided in a previous proceeding and essential to the prior judgment." Elwell v. Elwell, 947 A.2d 1137, 1140 (D.C. 2008) (internal citations omitted). The following factors are used to determine whether collateral estoppel applies:

Because Dr. Ackerman had authority to receive information on behalf of Mrs. Ackerman as her attorney-in-fact, LS did not violate Rule 1.6(a)(1) by communicating with him on

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(footnote cont'd. from previous page)

> (1) the issue must be actually litigated and (2) determined by a valid, final judgment on the merits; (3) *after a full and fair opportunity for litigation by the parties or their privies;* (4) under circumstances where the determination was essential to the judgment, and not merely dictum.
>
> Id. (internal citations omitted) (emphasis added).

This doctrine applies in discipline cases. Respondents would be bound by rulings in prior proceedings in which they were parties. See e.g., In re Spikes, 881 A.2d 1118, 1124 (D.C. 2005) (where the respondent had been the plaintiff, he was collaterally estopped from re-litigating a legal issue that was decided against him and affirmed on appeal); In re Travers, 764 A.2d 242, 247 (D.C. 2000) (where respondent was a party to the lawsuit, a court finding that respondent himself was subject to a D.C. Code provision governing personal representatives was "binding … under principles of collateral estoppel" in a subsequent disciplinary proceeding).

Because Respondents were not parties to the proceedings in Superior Court, they did not have a full and fair opportunity to litigate the matters decided there. The Court of Appeals has held that "[g]enerally, a person who was not a party to a suit is not deemed to have had a 'full and fair opportunity to litigate' the issues decided in that suit. Therefore, with limited exceptions, issue preclusion may not be asserted against one who is not a party in the first case." Franco v. District of Columbia, 3 A.3d 300, 304-05 (D.C. 2010) (internal citations omitted).

The "most recognized exception" to this general rule "is where privity exists between the party in the second case and the party bound by the prior judgment." Id. at 305. In Franco, the Superior Court had collaterally estopped Mr. Franco based on a judgment entered in another case, one involving Mr. Franco's neighbor, but not Mr. Franco. Id. The Superior Court held that the privity exception applied to Mr. Franco because "(1) his interest 'mirrors the interests of the [d]efendants' in that case, (2) both property owners asserted that the stated reason for the taking of property in the Skyland site was pretextual, and (3) the District was a party to both actions." Id. The Court of Appeals reversed because these factors were "insufficient to establish privity for application of issue preclusion." Id.

The Court of Appeals noted that "[a] privy is one so identified in interest with a party to the former litigation that he or she represents precisely the same legal right in respect to the subject matter of the case." Id. "The orthodox categories of privies are those who control an action although not parties to it…; those whose interests are represented by a party to the action…; [and] successors in interest." Modiri v. 1342 Res. Group, Inc., 904 A.2d 391, 396 (D.C. 2006). Since Respondents were not in privity with any of the litigants in Superior Court, the "privity exception" does not apply. Thus, this case is governed by the general rule that issue preclusion may not be asserted against non-parties. See Franco, 3 A.3d at 304-05.

Mrs. Ackerman's behalf. See BX 20; BX 21. As discussed above, Bar Counsel has failed to prove that the Power of Attorney documents were illegitimate because Mrs. Ackerman lacked the capacity to execute them. See supra Part III. Even if she had lacked the capacity to execute them, LS had no reason to question those documents, as they were facially valid. Because of the Powers of Attorney in favor of Dr. Ackerman, LS did not inappropriately communicate with Dr. Ackerman and thus did not violate Rule 1.6(a)(1). We so find.

E. Alleged Violation of Rule 1.7(b)(4)

239. Rule 1.7(b)(4) addresses conflicts of interest, and although it was amended on February 1, 2007, the relevant portion of the Rule was not changed. D.C. Rule of Prof'l Conduct R. 1.7(b)(4) (2007). It states that:

> (b) Except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if:
> . . .
> (4) The lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests.

D.C. Rules of Prof'l Conduct R. 1.7(b)(4) (2007).

240. Bar Counsel alleges that LS violated Rule 1.7(b)(4) because of a conflict of interest between her representation of Mrs. Ackerman and LS's alleged interest in aiding and benefitting Dr. Ackerman. Bar Counsel's Br. 108. Bar Counsel claims that Ackerman II was without merit as far as Mrs. Ackerman was concerned, and in actuality, was for the benefit of Dr. Ackerman. Evidence used to support this contention includes

the fact that Dr. Ackerman was present throughout LS's meetings with Mrs. Ackerman,[43] he provided payment to LS on behalf of Mrs. Ackerman, and arranged for LS to represent Mrs. Ackerman. Bar Counsel's Br. 107. Bar Counsel further alleges that efforts taken by LS to keep the North Carolina Avenue property out of the trust were to benefit Dr. Ackerman only. Bar Counsel's Br. 110. Finally, Bar Counsel claims that LS's willingness to be Mrs. Ackerman's guardian conflicted with LS's representation in the declaratory judgment action that was on going at the time Bar Counsel's Br. 109.

241. As previously discussed, Mrs. Ackerman has not been shown to have lacked the capacity to contract, and thus lack the capacity to retain LS to pursue Ackerman II. See supra Part III. Mrs. Ackerman's expressed desires must be respected; this record is devoid of evidence of any legally recognizable adverse effect on Mrs. Ackerman by LS's pursuing the objectives stated in Ackerman II. Although in Bar Counsel's and Mrs. Abbott's judgment, Mrs. Ackerman was acting adversely to her own interests, Mrs. Ackerman's value system is the only relevant one for present purposes. Her historical support of Dr. Ackerman is consistent with the goals and purpose of Ackerman II. Tr. at 2516-17 (Jan. 7, 2010); Tr. at 2870, 2787, 2891 (Jan. 14, 2010); see supra Part V. Mrs. Ackerman had the right to engage counsel to pursue her interests and LS, once engaged to represent Mrs. Ackerman, had a duty to pursue Ackerman II in furtherance of Mrs. Ackerman's interests as she (Mrs. Ackerman) identified them.

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[43] But Dr. Ackerman did not contribute significantly to at least LS's first meeting with Mrs. Ackerman. He was present as a comfort to his mother. Tr. at 2942 (Jan.14, 2010). See also RK's testimony that Dr. Ackerman routinely left the room during Mrs. Ackerman's meetings with LS and RK because "he did not want it to appear that he was having any influence on anything his mother did." Tr. At 3216-17 (Jan. 15, 2010).

242. Next, there is no record relationship between LS and Dr. Ackerman that would create a conflict of interest. Dr. Ackerman was Mrs. Ackerman's attorney-in-fact because of the various Powers of Attorney she executed throughout this case. LS had no reason to doubt their legitimacy. Tr. at 2971-72 (Jan. 14, 2010). The limited record evidence of Dr. Ackerman's presence at meetings, his payment to LS for services with Mrs. Ackerman's funds, and his possible arranging for LS to represent Mrs. Ackerman all fall within the powers granted by the Power of Attorneys. BX 17, BX 20, BX 21. Further, we have found above that Mrs. Ackerman must be presumed to have had the capacity to contract, as Bar Counsel's proffered evidence of incapacity is effectively the same at all decision points. See supra Part III. Efforts to prevent the North Carolina Avenue property from entering the trust were consistent with Mrs. Ackerman's expressed interests and thus do not adversely affect Mrs. Ackerman's interests as she determined them. Although these measures arguably may have ultimately benefited Dr. Ackerman, Mrs. Ackerman requested that these actions be pursued and had the capacity to do so. Tr. at 2943 (Jan. 14, 2010) (LS testifying that Mrs. Ackerman expressed a desire to retrieve her property from the trust during their first meeting). Again, although Mrs. Ackerman's actions were deemed unwise by Mrs. Abbott, Mrs. Ackerman was not acting inconsistently with her prior history of giving significant aid to Dr. Ackerman.

243. Finally, whatever conflict might have existed between LS's serving as counsel in the declaratory judgment action and as a potential guardian never materialized. The record does not show that LS ever petitioned a court to become Mrs. Ackerman's guardian, although the proposition was discussed. Tr. at 3095-98 (Jan. 15, 2010). If she had filed such a petition, LS would have had the opportunity to withdraw from

representing Mrs. Ackerman in litigation. See Tr. at 3107-09 (Jan. 15, 2010) (LS testifying that the guardian discussion did not develop to a point where a conflict between guardian and attorney may have developed). Bar Counsel has failed to provide any evidence of a relationship between LS and Dr. Ackerman that would cause an adverse effect on Mrs. Ackerman because of LS's representation, and therefore LS has not violated Rule 1.7(b)(4). We so find.

F. Alleged Violation of Rule 8.4(c)

244. Bar Counsel alleges that LS violated Rule 8.4(c) because of dishonest behavior and fraud. The Rule states:

> It is professional misconduct for a lawyer to: …
>
> Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

D.C. Rules of Prof'l Conduct R. 8.4(c) (2007).

245. The term "dishonesty" also includes "conduct evincing 'a lack of honesty, probity or integrity in principle; [a] lack of fairness and straightforwardness.'" In re Shorter, 570 A.2d 760, 767-68 (D.C. 1990) (per curiam) (quoting Tucker v. Lower, 434 P.2d 320, 324 (Kan. 1967)); accord In re Cleaver-Bascombe, 892 A.2d 396, 404 (D.C. 2006). Thus, conduct that "may not legally be characterized as an act of fraud, deceit or misrepresentation may still evince dishonesty." In re Shorter, 570 A.2d at 768; accord In re Romansky, 825 A.2d 311, 315 (D.C. 2003) ("dishonesty, fraud, deceit and misrepresentation are four different violations, that may require different quantums of proof").

246. Bar Counsel bases this claim upon the following:

1. LS represented Mrs. Ackerman in Ackerman II.

2. LS represented Mrs. Ackerman in the declaratory judgment action.

3. LS agreed with Dr. Ackerman and the other Respondents that Mrs. Ackerman would assign Sullivan Estate assets to Dr. Ackerman.

4. LS did nothing to prevent Mrs. Ackerman from executing the Assignment.

5. LS used the Assignment to advance her position in the declaratory judgment action.

247. We will address these allegations in order.

1. LS represented Mrs. Ackerman in Ackerman II

248. As discussed above multiple times, Mrs. Ackerman has not been shown to be incapable of commencing and pursuing Ackerman II. See supra Part III. Bar Counsel has not provided clear and convincing evidence that Mrs. Ackerman lacked the capacity to contract when she retained LS in Ackerman II. Because we cannot find that Mrs. Ackerman lacked the capacity to pursue Ackerman II, there is nothing dishonest about LS's representing Mrs. Ackerman in that matter. There is no Rule 8.4(c) violation by LS with respect to her conduct in Ackerman II. We so find.

2. LS represented Mrs. Ackerman in the declaratory judgment action

249. Similarly, Mrs. Ackerman has not been shown to have lacked the capacity to oppose Mr. Abbott in the declaratory judgment action. There is no clear and convincing, time-specific showing of the lack of capacity on Mrs. Ackerman's part to contract at any decision point. See supra Part III. Because Mrs. Ackerman is presumed to be capable of pursuing Ackerman II, there is nothing dishonest about LS's representing Mrs. Ackerman in the declaratory judgment action. There is no Rule 8.4(c) violation by LS with respect to the declaratory judgment action. We so find.

3. LS agreed with Dr. Ackerman and the other Respondents that Mrs. Ackerman would assign Sullivan Estate assets to Dr. Ackerman

250. The Assignment executed by Mrs. Ackerman was drafted by JTS after consultation with LS and Mrs. Ackerman. Tr. at 2973-74 (Jan. 14, 2010). Although LS received the draft Assignment, she did not review the document with Mrs. Ackerman, she did not discuss it with her, she did not advise her to execute it, nor did she supervise or appear at its execution. Tr. at 2974-75 (Jan. 14, 2010). Further, Mrs. Ackerman has not been proven incapable of executing that Assignment. See supra Part III. LS did not act dishonestly by discussing the Assignment or the concept thereof with the other Respondents. Although the lack of LS's substantive involvement with respect to the execution of the Assignment is not explained on this record, she was tangentially involved with the Assignment and did not violate Rule 8.4(c) on this basis. Further, as we have previously found, there is nothing fraudulent or dishonest about the Assignment itself. It was consistent with Mrs. Ackerman's often-expressed interests. There is no Rule 8.4(c) violation by LS with respect to the Assignment. We so find.

4. LS did nothing to prevent Mrs. Ackerman from executing the Assignment

251. Bar Counsel alleges that LS did nothing to prevent Mrs. Ackerman from executing the Assignment, which is true. Bar Counsel's Br. 110-11; Tr. at 2973-75 (Jan. 14, 2010). LS was not involved in the drafting or execution of the Assignment. Id. Because Mrs. Ackerman is presumed capable of executing the Assignment, and no clear and convincing evidence has been shown which proves she lacked the capacity to contract, there is nothing improper about her executing the Assignment. Insofar as the record before us shows, Mrs. Ackerman executed the Assignment on her own accord

with the requisite capacity. There is no evidence in this record or authority presented by Bar Counsel that Rule 8.4(c) imposed an obligation on LS to prevent Mrs. Ackerman from executing the Assignment, hence again, there is no Rule 8.4(c) violation by LS with respect to the Assignment. We so find.

5. LS used the Assignment to advance her position in the declaratory judgment action

252. Finally, Bar Counsel claims that by opposing Mr. Abbott's declaratory judgment action on the basis of the Assignment, LS acted dishonestly. Bar Counsel's Br. 110. Because there is no showing that Mrs. Ackerman lacked the capacity to contract at any point in time during this case, Mrs. Ackerman is presumed to have had the capacity to contract, and thus we deem the Assignment legitimate. See supra Part III. Further, LS was not involved in the execution of the Assignment, and accordingly, would not have had reason to know if Mrs. Ackerman did lack capacity at the precise time it was executed. See Tr. at 2975-76 (Jan. 14, 2010). LS did not commit dishonest conduct by using the Assignment in the declaratory judgment action and therefore did not violate Rule 8.4(c) with regard to it.

253. There is no clear and convincing evidence of any Rule 8.4(c) violation by LS. We so find.

G. Alleged Violation of Rule 8.4(d)

254. Bar Counsel alleges that LS violated Rule 8.4(d) by interfering with the administration of justice. The Rule states:

> It is professional misconduct for a lawyer to: …
>
> (d) Engage in conduct that seriously interferes with the administration of justice;

D.C. Rules of Prof'l Conduct R. 8.4(d) (2007).

255. In order to violate Rule 8.4(d), the lawyer's conduct must (1) be "improper"; (2) "bear directly upon the judicial process . . . with respect to an identifiable case or tribunal"; and (3) "taint the judicial process in more than a *de minimis* way." In re Uchendu, 812 A.2d 933, 940 (D.C. 2002) (quoting In re Hopkins, 677 A.2d 55, 60-61 (D.C. 1996). On the basis of several cases addressing Rule 8.4(d) violations, "tainting the judicial process" refers to conduct which affects the decision making process of the tribunal or court, such as falsifying evidence. See In re Uchendu, 812 A.2d 933; In re Reback, 487 A.2d 235, 238-239 (D.C. 1985). See generally In re Hopkins, 677 A.2d 55; In re Goffe, 641 A.2d 458 (D.C. 1994); In re Sablowsky, 529 A.2d 289 (D.C. 1987).

256. Bar Counsel claims that LS interfered with the administration of justice by representing Mrs. Ackerman in litigation she could not understand and by using the Assignment to "defraud" Mrs. Ackerman of property from the Sullivan Estate. Bar Counsel's Br. 111. Further, Bar Counsel claims that by filing a notice of appeal without Mrs. Ackerman's consent or knowledge, and failing to take any action thereafter, LS violated Rule 8.4(d). See Bar Counsel's Br. 112.

257. First, LS's representation of Mrs. Ackerman in Ackerman II does not satisfy elements one and three of the *Hopkins* test. See In re Hopkins, 677 A.2d 55, 60-61 (D.C. 1996). LS's representing Mrs. Ackerman in Ackerman II was not improper. Mrs. Ackerman must be presumed to have been capable of retaining LS and pursuing Ackerman II. See supra Part III. LS had every right to represent Mrs. Ackerman and pursue her claims. The third element of the test is not satisfied because LS's conduct did not improperly influence the decision making process of the court in Ackerman II. Bar

Counsel does not show any deceitful or dishonest conduct that affected the court's decision making or attempted to affect that decision making. Mrs. Ackerman was capable of pursuing the Ackerman II litigation, so there is nothing inherently misleading about the representation. LS's representing Mrs. Ackerman in Ackerman II did not interfere with the administration of justice.

258. Next, Bar Counsel alleges that LS interfered with the administration of justice because she attempted to "defraud" Mrs. Ackerman's trust of Sullivan Estate assets on the basis of the Assignment. Bar Counsel's Br. 111. As discussed above, the Assignment has not been proven illegitimate by clear and convincing evidence. Accordingly, LS's conduct was not improper on account of using the Assignment in the declaratory judgment action. Further, using the Assignment did not improperly interfere with the court's decision making process. Since the first and third elements of the *Hopkins* test are not satisfied, LS did not interfere with the administration of justice by using the Assignment to advance Mrs. Ackerman's claims.

259. Finally, Bar Counsel submits that by filing a Notice of Appeal without conferring with Mrs. Ackerman and then failing to take any further action, resulting in the D.C. Court of Appeals ultimately dismissing the appeal, LS violated Rule 8.4(d). Bar Counsel's Br. 112. Bar Counsel bases this claim on the concept that LS wasted the court's time and resources. The concept of interfering with the administration of justice applies to the improper influence on the court's decision making process. See, e.g., In re Uchendu, 812 A.2d at 840. First, LS did not act unethically by only filing a Notice of Appeal to protect her client's interest. The appeal was filed without consultation with the client; LS only noted the appeal to protect the option of pursuing that action. Second, LS

did not affect the decision making process of the court improperly. The appeal was dismissed by the Court of Appeals. BX 108. Even though it may be considered bad practice to file a Notice of Appeal and then take no further action, including not withdrawing from the case or failing to withdraw the appeal, this does not amount to a Rule 8.4(d) violation because it did not affect the decision making process of the Court of Appeals. LS did not violate Rule 8.4(d). We so find.

H. Alleged Violation of Rule 1.16(a)

260. Bar Counsel alleges that LS violated Rule 1.16(a) which states:

> Rule 1.16(a)—Declining or Terminating Representation
>
> (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
>
> (1) The representation will result in violation of the Rules of Professional Conduct or other law;
>
> (2) The lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
>
> (3) The lawyer is discharged. . . .

D.C. Rules of Prof'l Conduct R. 1.16(a) (2007).

261. A Rule 1.16(a) violation by LS based on this record would require a violation of the Rules of Professional Conduct or other law. Id. As stated above, LS has not been shown to have violated any Rules of Professional Conduct or other laws. Therefore, LS has not violated Rule 1.16(a). We so find.

I. Conclusory Finding Concerning LS Charges

262. In summary, Bar Counsel has not presented clear and convincing evidence of any violation of Rules 1.6(a)(1), 1.7(b)(4), 8.4(c), 8.4(d) and 1.16(a) of Professional Conduct by LS, and we so find and conclude.

IX. FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING RESPONDENT ROBERT KING

A. RK's Professional Background

263. RK was admitted to the D.C. Bar on November 4, 1969. BX 1 at 4. He was assigned Bar No. 922575. Id.

264. RK attended Memphis State University and George Washington University. Tr. at 3208 (Jan. 15, 2010). The record does not reveal whether he has an undergraduate degree, however, he received a Juris Doctor degree from Catholic University Law School in 1969. Tr. at 3208-09 (Jan. 15, 2010).

265. In addition to being a member of the D.C. Bar, RK is also a member of the Maryland Bar and has been since 1969. Tr. at 3208 (Jan. 15, 2010). He was publicly reprimanded by the Attorney Grievance Commission of Maryland on December 27, 2006. BX 183.

266. RK is and has been a sole practitioner since 1976 or 1977. Tr. at 3210 (Jan. 15, 2010). He and LS were affiliated with each other for bankruptcy matters for a few years beginning in 2007. Id. His practice consists of trial work, criminal work, personal injury work and some domestic relations work. Tr. at 3210-11 (Jan. 15, 2010). He still does bankruptcy work and writes wills and trusts and occasionally administers estates. Id.

B. RK Findings of Fact

267. RK began representing Mrs. Ackerman at the request of LS during April, 2007. Tr. at 3211-12 (Jan. 15, 2010). The purpose of his representation was to act as co-counsel with LS during the Ackerman II litigation. Tr. at 3212 (Jan. 15, 2010). RK met Mrs. Ackerman twice at her house when Dr. Ackerman was present. Tr. at 3216-17 (Jan. 15, 2010). On both occasions, Dr. Ackerman left the room to avoid any suggestion that he was influencing Mrs. Ackerman's decision making during the course of the meetings. Tr. at 3217 (Jan. 15, 2010). RK also met Mrs. Ackerman twice at LS's office, and it is unclear whether Dr. Ackerman was there at those times. Id. Dr. Ackerman was involved in the decisions and actions made in the course of RK's representation of Mrs. Ackerman, and retained him to represent Mrs. Ackerman with respect to Mrs. Abbott's guardianship petition, in his capacity as attorney-in-fact for Mrs. Ackerman. Tr. at 3223 (Jan. 15, 2010). However, Mrs. Ackerman executed Powers of Attorney in favor of Dr. Ackerman on November 22, 2005 and February 28, 2007. BX 2 at 17; BX 21. These documents were eventually found void on June 24, 2008, after RK's representation of Mrs. Ackerman ended.[44] BX 122. At an evidentiary hearing in Mrs. Abbott's guardianship petition, RK appeared to represent Mrs. Ackerman, although he had failed properly to enter an appearance. Tr. at 3223-24 (Jan. 15, 2010). Before addressing the court, RK apparently became ill and then left the courtroom. Tr. at 3225 (Jan. 15, 2010). As he left, he gave to Dr. Ackerman the client file he had regarding Mrs. Ackerman. Id. The file, according to RK, contained only Dr. Ratner's and Dr. Negro's reports and a copy of a DVD with the video of Mrs. Ackerman signing a Power of Attorney in favor of

[44] See supra note 42.

Dr. Ackerman on November 22, 2005. Tr. at 3225-26 (Jan. 15, 2010). BX 123. After the court essentially ruled in favor of Mrs. Abbott, on July 11, 2008, a motion for reconsideration was filed by another attorney representing Dr. Ackerman. RK gave an "affidavit" in support of the motion to Dr. Ackerman's new counsel, which stated, among other things, that he had entered an appearance on behalf of Mrs. Ackerman in that matter, and that Dr. Negro was not a board certified doctor. See BX 124 at 6.

268. At the beginning of his representation in Ackerman II, Mrs. Ackerman agreed to have RK represent her as co-counsel with LS; however, no written retainer agreement was presented by RK, nor was one executed by Mrs. Ackerman. Tr. at 3219-20 (Jan. 15, 2009). RK claims that Mrs. Ackerman agreed to his representation and understood the arrangement and the terms of his work. Id.

C. RK Decision Points

269. Mrs. Ackerman's mental capacity at several specific points in time at which RK was required to find that Mrs. Ackerman had the particular capacity to act is at issue with respect to several violations Bar Counsel charges against RK. To address these charges, we must examine Mrs. Ackerman's mental capacity at the relevant points in time. Because legal mental capacity is time and task specific, we identify the specific times and actions where Mrs. Ackerman's mental capacity is questioned, and then determine the proper standard of capacity which applies. See supra Part III. To establish that Mrs. Ackerman lacked legal mental capacity, Bar Counsel must prove by clear and convincing evidence that RK could not have established a reasonable belief that Mrs. Ackerman had the required capacity to take a certain action. See id.; D.C. Rules of Prof'l

Conduct R. 1.14 (2007). Under this standard, we determine whether Mrs. Ackerman lacked legal mental capacity at each relevant decision point.

1. RK Represents Mrs. Ackerman

270. During April, 2007 RK met Mrs. Ackerman to discuss potential representation of her as co-counsel with LS in Ackerman II. Tr. at 3212 (Jan. 15, 2010). After discussing Ackerman II for about an hour and RK's potential role in representing her, Mrs. Ackerman agreed to his representation. See Tr. at 3211-12 (Jan. 15, 2010); Tr. at 3384-85 (Mar. 10, 2010). He also testified that Mrs. Ackerman understood what the Ackerman II litigation was about. See Tr. at 3366-68. RK carefully questioned Mrs. Ackerman during this meeting to ensure that she was legally competent. See Tr. at 3216 (Jan. 15, 2010). Her answers about past and current events with respect to the various legal actions convinced him that Mrs. Ackerman had the appropriate capacity to make decisions concerning the Ackerman II litigation. Tr. at 3214-15 (Jan. 15, 2010). Because this testimony is consistent with other testimony by other Respondents who testified about their own conversations with Mrs. Ackerman and it has not been rebutted by Bar Counsel, we credit it.

271. Mrs. Ackerman's retaining RK to represent her requires the creation of a contract. Therefore, the standard of capacity at this decision point is the capacity to contract. We begin with the rebuttable presumption that Mrs. Ackerman has the capacity to contract. See supra Part III; D.C. Rules of Prof'l Conduct R. 1.14. The capacity to contract requires that Mrs. Ackerman understand the purpose and effect of her actions. Bar Counsel cites no further specific evidence with respect to this decision point. Bar Counsel's theory is that Mrs. Ackerman was frail, she suffered from memory loss, she

could not manage her financial affairs, and therefore she was incompetent. See Bar Counsel's Br. 59-60, 113. Bar Counsel also alleges that Dr. Ackerman's control and direction of RK with respect to Mrs. Ackerman's various legal matters is evidence of her lack of capacity. Bar Counsel's Br. 59. Bar Counsel's evidence relates only to Mrs. Ackerman's qualifying for a guardian or conservator and does not show that she lacked capacity to make a contract or will. See supra Part III.

272. None of Bar Counsel's proffered evidence proves clearly and convincingly that Mrs. Ackerman could not understand the purpose and effect of her actions. Mrs. Ackerman's frailty, memory loss, and her inability to manage the details of her finances do not prove that she lacked mental capacity. The law clearly states that one can have diminished capacities and still maintain legal mental capacity. See D.C. Rules of Prof'l Conduct R. 1.14 cmt. [1]; D.C. Code § 21-2004 (2001).[45]

273. To demonstrate that Mrs. Ackerman lacked contractual capacity at the time that she approved RK's becoming LS's co-counsel in Ackerman II, one of two forms of clear and convincing evidence is required: (1) evidence narrowly addressing the

[45] Although Bar Counsel does not allege that RK should have found that Mrs. Ackerman lacked the capacity to contract, and thus lacked the capacity to retain RK, on the basis of Dr. Negro's report, the record shows that RK had the report in his possession at Mrs. Abbott's guardianship petition hearing. Tr. at 3225 (Jan. 15, 2010) (stating that RK had Dr. Negro's report and Dr. Ratner's report); see BX 29; BX 30. As we have previously found, analysis shows that there is no conflict in the medical evidence regarding Mrs. Ackerman's capacity and that Dr. Ratner's conclusion is supported by the credible evidence he cites. See supra III.B.1. There is no clear and convincing evidence that RK could not have had a reasonable belief that Mrs. Ackerman possessed contractual capacity. Additionally, the record does not show whether RK had Dr. Negro's first report. Even if he did have that report, however, it addresses Mrs. Ackerman's capacity broadly, and does not comment specifically on the capacity to contract. See BX 28. Therefore, Dr. Negro's first report is also irrelevant for the purpose of determining Mrs. Ackerman's capacity to contract, particularly as far as RK is concerned.

lack of capacity to contract at the specific time in question; or (2) evidence that Mrs. Ackerman's attempted actions are inconsistent with her historical value system or patterns of decision making. It is important to note that a client's conduct must be evaluated relative to that client and not on the basis of someone else's judgment with respect to a wise course of action. For that reason, what others might deem to be an unwise decision is not evidence of the lack of capacity to contract. The question is whether the action comports with the client's historic values and prior decision making patterns. The record does not support Bar Counsel's position with respect to this decision point. See supra Part V. Furthermore, by retaining RK, Mrs. Ackerman was acting consistently with her life-long pattern of providing for Dr. Ackerman. Id. RK has also given uncontested testimony that Mrs. Ackerman discussed the status of Ackerman II knowledgeably and demonstrated an understanding of the purpose of the litigation. Tr. at 3214-15 (Jan. 15, 2010). Bar Counsel has shown only that Mrs. Ackerman was incapacitated under the D.C. guardianship standard. D.C. Code § 21-2011(11) (2001). Bar Counsel has not provided the time-specific evidence that is required to show she lacked the capacity to contract at this decision point, or that RK could not have formed a reasonable belief that she was capable.

2. LS & RK File Motion for Temporary Restraining Order in Ackerman II

274. On May 30, 2007 LS and RK filed a motion for a temporary restraining order in Ackerman II. BX 66; Tr. at 3064 (Jan. 15, 2010). The motion was filed to prevent the trustee from selling the North Carolina Avenue property that was to be transferred to Mrs. Ackerman and then into her trust. BX 66; Tr. at 3220-21 (Jan. 15,

2010). The motion stated that Mrs. Ackerman intended to deed that property to Dr. Ackerman. BX 66.

275. RK's filing the motion for a temporary restraining order on behalf of Mrs. Ackerman required another determination of Mrs. Ackerman's interests with respect to the North Carolina Avenue property. The standard of capacity at this decision point is thus contractual capacity. Bar Counsel provides the same evidence of incapacity as discussed above. See supra Part III. For the same reasons stated in that discussion, Bar Counsel's evidence is insufficient to demonstrate that RK could not have formed a reasonable belief that Mrs. Ackerman was mentally capable of contracting. Mrs. Ackerman, by default, must be considered to have had the capacity to contract. See Butler v. Harrison, 578 A.2d 1098, 1100-01 (D.C. 1990) (internal citations omitted); Uckele v. Jewett, 642 A.2d 119, 122 (D.C. 1994); see also D.C. Code § 21-2004 (2001); Sabatino, supra, at 489-90.

3. Mrs. Abbott's Guardianship Petition

276. RK attempted to enter an appearance to represent Mrs. Ackerman in Mrs. Abbott's guardianship matter on May 6, 2008. Tr. at 3223-25 (Jan. 15, 2010). Acting as Mrs. Ackerman's attorney-in-fact, Dr. Ackerman retained RK to represent Mrs. Ackerman in this matter and paid him $1,000. Tr. at 3223 (Jan. 15, 2010). RK failed properly to enter an appearance, however. Tr. at 3224-25 (Jan. 15, 2010). There was an evidentiary hearing on June 23, 2008 in that matter, at which RK arrived to represent Mrs. Ackerman. Id. RK became sick, left the court room and did not address the court. Tr. at 3225 (Jan. 15, 2010). It is not clear what, if any, communication between RK and Mrs. Ackerman took place regarding this matter. Because he was unable to represent

Mrs. Ackerman at the June 23 hearing, RK returned the $1,000 he had received. Tr. at 3228-29 (Jan. 15, 2010). On July 11, 2008, a motion for reconsideration was filed after the Court ruled for Mrs. Abbott. BX 123. This motion was filed by another attorney representing Dr. Ackerman but was supported by a document titled "Affidavit" of RK (it is not notarized). BX 123 at 3. Bar Counsel alleges RK did not discuss this document with Mrs. Ackerman, his client. Bar Counsel's Br. 116-17.

277. This decision point also represents a contract: RK is being retained for legal services regarding another matter. Tr. at 3223 (Jan.15, 2010). Bar Counsel offers the same evidence to prove that Mrs. Ackerman did not have the capacity to contract. See supra Part III. As discussed above, this evidence is insufficient to prove that RK could not have formed a reasonable belief as to Mrs. Ackerman's capacity to contract. See supra Part III. Mrs. Ackerman is presumed to have had the capacity to contract. See Butler v. Harrison, 578 A.2d 1098, 1100-01 (D.C. 1990) (internal citations omitted); Uckele v. Jewett, 642 A.2d 119, 122 (D.C. 1994); see also D.C. Code § 21-2004 (2001); Sabatino, supra, at 489-90.

278. Furthermore, Dr. Ackerman held what was at the time a valid Power of Attorney his mother had executed in his favor. Tr. at 3223 (Jan. 15, 2010). Although Bar Counsel alleges that Mrs. Ackerman lacked the capacity to execute this document, we found above that the record does not support that contention. As Mrs. Ackerman's attorney-in-fact, Dr. Ackerman had the authority to conduct litigation on her behalf. See BX 20; BX 21. He retained RK and arranged for him to represent Mrs. Ackerman in this matter. Tr. at 3223 (Jan. 15, 2010). It was not until the day following this hearing that

the court ruled that this Power of Attorney was void. See BX 119; BX 120.[46] Because Dr. Ackerman had the *prima facie* authority to retain RK and direct the litigation on behalf of Mrs. Ackerman, her mental capacity is irrelevant at this point.

D. Alleged Violation of Rule 8.4(c)

279. Bar Counsel alleges that RK violated Rule 8.4(c) because of fraudulent and dishonest conduct. The Rule states:

> It is professional misconduct for a lawyer to: …
>
> Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

D.C. Rules of Prof'l Conduct R. 8.4(c) (2007).

280. The term "dishonesty" includes not only fraudulent, deceitful or misrepresentative conduct, but also "conduct evincing 'a lack of honesty, probity or integrity in principle; [a] lack of fairness and straightforwardness.'" In re Shorter, 570 A.2d 760, 767-68 (D.C. 1990) (per curiam) (quoting Tucker v. Lower, 434 P.2d 320, 324 (Kan. 1967)); accord In re Cleaver-Bascombe, 892 A.2d 396, 404 (D.C. 2006). Thus, conduct that "may not legally be characterized as an act of fraud, deceit or misrepresentation may still evince dishonesty." In re Shorter, 570 A.2d at 768; accord In re Romansky, 825 A.2d 311, 315 (D.C. 2003) ("dishonesty, fraud, deceit and misrepresentation are four different violations, that may require different quantums of proof").

281. Bar Counsel claims that RK violated the rule by (1) representing Mrs. Ackerman in Ackerman II, and (2) agreeing that Mrs. Ackerman would give Dr.

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[46] See also supra note 42.

Ackerman her assets from the Sullivan Estate. Bar Counsel's Br. 115-16. Bar Counsel claims that because Mrs. Ackerman lacked the capacity to understand the Ackerman II litigation, RK acted dishonestly in representing her and did it only to benefit Dr. Ackerman. We have previously found that Mrs. Ackerman was capable of retaining RK to pursue Ackerman II. See supra Part III. Although Mrs. Abbott found Mrs. Ackerman's decision to pursue Ackerman II unwise, Mrs. Ackerman's conduct is only to be judged relative to her historic values and practices. Mrs. Ackerman sought to terminate her trust to provide for Dr. Ackerman, and to remove the risk of his being disinherited by the *in terrorem* clause. Tr. at 2870-71 (Jan. 14, 2010). That action is consistent with Mrs. Ackerman's historic devotion to providing for Dr. Ackerman. See Tr. at 2516-17 (Jan. 7, 2010); Tr. at 2870, 2878 and 2891 (Jan. 14, 2010) (portraying Mrs. Ackerman's current and past desire to support her son, both emotionally and financially). RK's representing Mrs. Ackerman in Ackerman II did not constitute dishonest conduct.

282. Bar Counsel also alleges that when RK "agreed that Mrs. Ackerman would give [Dr. Ackerman] all her interest in North Carolina Ave. from [the Sullivan Estate]" he committed fraud. Bar Counsel's Br. 116; see supra Part V. Mrs. Ackerman executed an Assignment which by its terms transferred all of her interests in Sullivan Estate property to Dr. Ackerman. BX 22. There is no evidence, however, that RK had anything to do with the drafting or execution of that document. See Tr. 3265-66 (Jan 15, 2010) (RK testified that he had nothing to do with the assignment); Tr. at 2974-76 (Jan. 14, 2010) (LS testified that JTS drafted the document). There is no evidence that RK saw the draft of the document or ever discussed it with Mrs. Ackerman, nor is there any evidence that RK advised Mrs. Ackerman to execute the document. See id. The fact

that RK "agreed" that Mrs. Ackerman would transfer her interest in Sullivan Estate property to Dr. Ackerman is immaterial. RK did not violate Rule 8.4(c). We so find.

E. Alleged Violation of Rule 8.4(d)

283. Bar Counsel alleges that RK violated Rule 8.4(d) by interfering with the administration of justice. The Rule states:

> It is professional misconduct for a lawyer to: …
>
> (d) Engage in conduct that seriously interferes with the administration of justice;

D.C. Rules of Prof'l Conduct R. 8.4(d) (2007).

284. In order to violate Rule 8.4(d), the lawyer's conduct must (1) be "improper"; (2) "bear directly upon the judicial process . . . with respect to an identifiable case or tribunal"; and (3) "taint the judicial process in more than a *de minimis* way." In re Uchendu, 812 A.2d 933, 940 (D.C. 2002) (quoting In re Hopkins, 677 A.2d 55, 60-61 (D.C. 1996). On the basis of several cases addressing 8.4(d) violations, "tainting the judicial process" refers to conduct which affects the decision making process of the tribunal or court, such as falsifying evidence. See In re Uchendu, 812 A.2d 933; In re Reback, 487 A.2d 235, 238-239 (D.C. 1985). See generally In re Hopkins, 677 A.2d 55; In re Goffe, 641 A.2d 458 (D.C. 1994); In re Sablowsky, 529 A.2d 289 (D.C. 1987).

285. Bar Counsel claims that RK violated the rule by representing Mrs. Ackerman throughout this case in spite of her incapacity and only to benefit Dr. Ackerman, by attempting to deprive the Ackerman trust of Sullivan Estate assets. See Bar Counsel's Br. 116-17. Bar Counsel also alleges that RK violated the rule by representing Mrs. Ackerman in the D.C. Probate Court proceedings with respect to Mrs. Abbott's guardianship petition, and then by filing an "affidavit" without the knowledge

or consent of his client, falsely averring that he had entered an appearance in that matter and making other false statements. See id.

286. RK did not act improperly or taint the judicial process by representing Mrs. Ackerman in Ackerman II or in the declaratory judgment action. As a result, elements one and three of the *Hopkins* test are not satisfied. Mrs. Ackerman has not been proven to have lacked the capacity to engage RK or to pursue either Ackerman II or the declaratory judgment action. See supra Part III. Because Mrs. Ackerman has not been proven incapable of taking these actions, she is presumed to have the capacity to do so. Representing a capable client in a matter that has a low chance of success does not taint the judicial process because it does not improperly affect the judicial decision-making process. Cf. In re Uchendu, 812 A.2d 933 (D.C. 2002); In re Hopkins, 677 A.2d 55 (D.C. 1996); In re Reback, 487 A.2d 235, 238-239 (D.C. 1985); In re Goffe, 641 A.2d 458 (D.C. 1994); In re Sablowsky, 529 A.2d 289 (D.C. 1987)

287. RK also did not violate this Rule by representing, or attempting to represent, Mrs. Ackerman in the matter relating to Mrs. Abbott's guardianship petition. First, RK did not actually represent Mrs. Ackerman in a court proceeding and returned the fee paid on her behalf. Tr. at 3224-29 (Jan. 15, 2010). He did not address the court, he did not enter an appearance, and he left the courtroom on the day of the hearing due to illness. See id. Since he did not take any action with respect to representing Mrs. Ackerman in that matter, he could not have interfered with the court's decision making. See, e.g., In re Uchendu, 812 A.2d 933 (D.C. 2002). Also, Dr. Ackerman retained RK under the still presumptively-valid Power of Attorney he was given by Mrs. Ackerman.

Tr. at 3223 (Jan. 15, 2010). Consequently, Mrs. Ackerman's capacity to retain RK for the guardianship proceeding is irrelevant.

288. Bar Counsel further claims that RK violated the Rule by preparing an affidavit to be filed with the D.C. Probate Court by Claude Roxborough, another attorney retained by Dr. Ackerman to address Mrs. Abbott's guardianship petition. RX JTS/JPS 30. RK did not interfere with the administration of justice because his actions did not taint the judicial process in accord with the third *Hopkins* element. See In re Hopkins, 677 A.2d 55, 60-61 (D.C. 1996). Bar Counsel alleges that RK "filed" the affidavit without consulting Mrs. Ackerman, and that affidavit contained knowingly false statements. Bar Counsel's Br. 115, 117. First, Bar Counsel incorrectly states that RK "filed" the affidavit. Mr. Roxborough attached this document to his Supplemental Memorandum in Support of Dr. Ackerman's Motion for Reconsideration, which he filed with the Probate Court. See BX 124. RK only executed this "affidavit." Nonetheless, RK is responsible for the accuracy of a document he prepared for submission to a court.

289. First, there is no reason why RK would have had to consult with Mrs. Ackerman to avoid interfering with the administration of justice. Nothing in the "affidavit" purports to be from Mrs. Ackerman directly. By not discussing the document with Mrs. Ackerman, RK did not improperly affect the decision making process of the court. Second, the false statements in the document do not clearly and convincingly taint the judicial process. There are two false statements in the "affidavit": (1) stating that RK entered his appearance in the matter; and (2) stating that Dr. Negro is not a board certified psychiatrist. See BX 124 at 6. It does not appear that either of these statements was a deliberate attempt to mislead the court. Rather, the document seems to be

carelessly written and is error-filled. See id. The court, for example, could take judicial notice that RK did not enter an appearance. It does not appear on this record that the issue of whether Dr. Negro was a Board certified psychiatrist was of material concern to the court. See BX 29. Moreover, RK could hardly be a competent witness with regard to that issue, so whatever he said on that subject would be of no weight to the court. The nature of the document does not demonstrate by clear and convincing evidence an intent improperly to influence the court's decision making process, but even if there were such intent or effect, the effect was *de minimis* and did not significantly taint the court's decision making process. RK did not violate Rule 8.4(d). We so find.

F. Alleged Violation of Rule 1.5(b)

290. Bar Counsel alleges that RK violated Rule 1.5(b) because he did not provide a written retainer agreement to Mrs. Ackerman when he began to represent her in Ackerman II as LS's co-counsel. Bar Counsel's Br. 117. Rule 1.5(b) was amended on February 1, 2007. Both versions of the Rule apply to RK, and are both given below, the older version when he began to represent Mrs. Ackerman in Ackerman II, and the current version when he began to represent Mrs. Ackerman in Mrs. Abbott's guardianship petition matter. The current version of Rule 1.5(b) states:

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

D.C. Rules of Prof'l Conduct R. 1.5(b) (2007).

291. The pre-February 1, 2007 version of the Rule states:

> When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation.

D.C. Rules of Prof'l Conduct R. 1.5(b) (1999).

292. RK admits that he did not have a written retainer agreement in accord with Rule 1.5(b). See King Silverman Br. 21; Tr. at 3219-20 (Jan. 15, 2010). RK, through counsel, claims that "it would have been an act of futility" to have Mrs. Ackerman sign a retainer agreement because she was blind. See King/Silverman Br. 21. Because RK explained the terms of the representation to Mrs. Ackerman orally, and she understood what she was "signing on to," counsel argues that the Rule should not be rigorously applied, and no sanction should result. Id. Further, counsel claims that such enforcement of the Rule would mean "that a disabled client, unable to read or even sign a written retainer, would be unable to obtain counsel because of the absence of a formal retainer." Id. Counsel concludes that this is a "patently preposterous" position and is against the spirit of the Rule. Id.

293. Counsel's meritless argument does nothing to counter the unequivocal admission of a violation of Rule 1.5(b) by RK. If Mrs. Ackerman possessed the capacity to retain attorneys, pursue litigation, and execute estate documents, as counsel claims and as we agree was the case, then Mrs. Ackerman certainly had the capacity at least to make a mark on a written retainer agreement. See Tr. at 3214 (Jan. 15, 2010) (RK stated that although she was blind and somewhat incapacitated, she could understand her property and the lawsuits). Moreover, the record contains numerous examples of Mrs. Ackerman's signing documents. See, e.g., BX 7 at 4; BX 8 at 3; BX 9 at 17; BX 11 at 2; BX 12 at 3; BX 13 at 2; BX 14; BX 15; BX 16; BX 17 at 4; BX 18 at 2; BX 19; BX 20 at

4; BX 21 at 4; BX 23 at 2. Dr. Ackerman, as attorney-in-fact for Mrs. Ackerman, could also have executed a written retainer agreement. Tr. at 3223 (Jan. 15, 2010). Further, RK made no attempt to memorialize the terms of the representation in writing in any way. Tr. at 3220 (Jan. 15, 2010). As counsel suggests, the spirit of the Rule does indicate one purpose of it is to ensure that clients know what they are "signing on to." D.C. Rules of Prof'l Conduct R. 1.5 cmt. [2]. However, another major purpose of the Rule is to prevent disputes from arising over fees in the future, or leaving clients uncertain about the relationship with their lawyer. See id.; see also In re Williams, Jr. 693 A.2d 327, 329 (D.C. 1997). Although RK was acting as co-counsel in Ackerman II, Rule 1.5(e) still requires a written agreement to be provided to the client regarding fee sharing arrangements, which was not done.[47] Past arguments that no sanction should be imposed for violations of Rule 1.5(b) due to the relatively minor nature of the rule have failed, demonstrating that contrary to counsel's argument, the Rule has been rigorously enforced. See Williams, Jr., 693 A.2d at 328-29; In re Confidential (J.E.S.), 670 A.2d 1343, 1346 (D.C. 1996).

294. The Committee finds clear and convincing evidence that RK violated Rule 1.5(b). We so find.

G. Alleged Violation of Rule 1.6(a)(1)

295. Bar Counsel alleges that RK violated Rule 1.6(a)(1) by revealing client confidences. The current Rule, which is applicable on the basis of Bar Counsel's allegations, states:

[47] Bar Counsel does not charge either LS or RK with violating Rule 1.5(e).

> Except when permitted under paragraph (c), (d), or (e), a lawyer shall not knowingly:
>
> a. reveal a confidence or secret of the lawyer's client;

D.C. Rules of Prof'l Conduct R. 1.6(a)(1) (2007).

296. Bar Counsel claims that when RK left Mrs. Abbott's guardianship petition hearing after falling ill on June 23, 2008, and gave his client file on Mrs. Ackerman to Dr. Ackerman, he revealed the client confidences of Mrs. Ackerman to Dr. Ackerman. Tr. at 3225 (Jan. 15, 2010). RK did not violate the Rule because Dr. Ackerman, at the time, held a *prima facie* valid Power of Attorney for Mrs. Ackerman. Tr. at 3223 (Jan. 15, 2010). Dr. Ackerman had the authority to deal with litigation and legal matters on her behalf, and he was the person who retained RK to represent Mrs. Ackerman in this matter. See BX 20; BX 21. Because Dr. Ackerman was Mrs. Ackerman's attorney-in-fact, he was entitled to review whatever information was in the client file. RK did not violate Rule 1.6(a)(1). We so find.

H. Alleged Violation of Rule 1.7(b)(4)

297. Bar Counsel alleges that RK violated Rule 1.7(b)(4), which addresses conflicts of interest. Although it was amended on February 1, 2007, the relevant portion of the rule was not changed. It states that:

> (b) Except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if:
>
> …
>
> (4) The lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests.

D.C. Rules of Prof'l Conduct R. 1.7(b)(4) (2007).

298. Bar Counsel claims that Mrs. Ackerman was incompetent to retain counsel, and yet RK pursued Ackerman II although he knew that its only purpose was to benefit Dr. Ackerman. Bar Counsel's Br. 113-14. RK further pursued action to prevent Sullivan Estate assets from entering the trust, which Bar Counsel alleges was an effort to benefit Dr. Ackerman only, to Mrs. Ackerman's detriment. Bar Counsel's Br. 114. Bar Counsel further contends that yet another alleged conflict occurred when RK represented Mrs. Ackerman in Mrs. Abbott's guardianship petition matter because Dr. Ackerman retained RK on behalf of Mrs. Ackerman. Bar Counsel's Br. 115. After the initial hearing in that matter, Bar Counsel claims RK created another conflict of interest situation by filing an "affidavit" for Dr. Ackerman to use in support of his motion to reconsider. Bar Counsel's Br. 115.

299. We have decided that Bar Counsel has not proved that Mrs. Ackerman lacked the capacity to retain RK and pursue Ackerman II. See supra Part III. Because she is presumed to have been competent in authorizing the filing of the Ackerman II complaint, her interests were not adversely affected by Dr. Ackerman's interests. Nonetheless, Bar Counsel fails to allege a sufficient relationship between RK and Dr. Ackerman that would provide the basis for a conflict with RK's representation of Mrs. Ackerman. Dr. Ackerman held a *prima facie* valid power of attorney throughout these matters, which gave him the authority to manage the litigation on behalf of Mrs. Ackerman. Tr. at 3223 (Jan. 15, 2010). Similarly, Mrs. Ackerman must be considered to have been competent to execute the Assignment transferring her interests in the Sullivan Estate to Dr. Ackerman. See supra Part III. Because Mrs. Ackerman wanted to give those assets to Dr. Ackerman, no conflict is created by RK's attempting to achieve those

goals. Although Mrs. Ackerman's decision was deemed unwise by Mrs. Abbott and others, it is not inconsistent with her prior decisions and values. See Tr. at 2516-17 (Jan. 7, 2010); Tr. at 2870, 2878 and 2891 (Jan. 14, 2010). Because Mrs. Ackerman has not been proven to lack the appropriate mental capacity, and because Dr. Ackerman held a valid Power of attorney for Mrs. Ackerman, RK did not violate Rule 1.7(b)(4) because of his conduct with respect to the Ackerman II litigation and the declaratory judgment action.

300. Bar Counsel's next allegation regarding Mrs. Abbott's guardianship petition is similarly dealt with: there was no conflict of interest between Mrs. Ackerman and Dr. Ackerman. Mrs. Ackerman's Power of Attorney in favor of Dr. Ackerman gave him the authority to retain RK to represent Mrs. Ackerman and to make litigation decisions on her behalf. Tr. at 3223 (Jan. 15, 2010). Accordingly, there is no violation of the Rule because of Dr. Ackerman's involvement in that matter on behalf of his mother.

301. Bar Counsel also claims that RK's "affidavit," which supplemented Attorney Roxborough's Motion for Reconsideration in Mrs. Abbott's guardianship petition, created a conflict of interest because RK was serving Dr. Ackerman's interests while he was representing Mrs. Ackerman. Bar Counsel's Br. 115. Bar Counsel's argument fails because there is no conflict created. RK's "affidavit" is simply a statement of the "facts" as they related to his attempted representation of Mrs. Ackerman in Mrs. Abbott's guardianship petition matter. Contrary to what Bar Counsel alleges, RK's "affidavit" is not based on the fact that Dr. Ackerman was without counsel, but instead stated that Mrs. Ackerman was without his representation in the hearing. Id. RK was knowledgeable to describe what happened with respect to Mrs. Ackerman's

representation. Id. The basic purpose of the "affidavit" is to explain RK's failure to represent Mrs. Ackerman in accord with his understanding with Dr. Ackerman. Id. The basic facts pertaining to this failure to represent Mrs. Ackerman are stated correctly, thus fulfilling the primary purpose of the document. Because it is simply a substantially accurate statement of the facts as they occurred in that particular matter, and purports to aid Mrs. Ackerman in receiving a determination from the Court in her favor, there is no conflict created. RK did not violate Rule 1.7(b)(4). We so find.

I. Alleged Violation of Rule 1.16(a)

302. Bar Counsel alleges that RK violated Rule 1.16(a), which states:

> Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
>
> (1) The representation will result in violation of the Rules of Professional Conduct or other law;
>
> (2) The lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
>
> (3) The lawyer is discharged.

D.C. Rules of Prof'l Conduct R. 1.16(a) (2007). A Rule 1.16(a) violation by RK is contingent upon his violation of a Rule of Professional Conduct or other law. While the Hearing Committee has found that RK violated Rule of Professional Conduct Rule 1.5, Bar Counsel does not allege a Rule 1.16(a) violation on the basis of RK's Rule 1.5 violation. Further, case law demonstrates that when a respondent has violated Rule 1.5 only, they have not historically also been found to have violated Rule 1.16. See Williams, Jr., 693 A.2d at 329; Confidential (J.E.S.), 670 A.2d at 134. RK has not violated Rule 1.16(a). We so find.

J. Conclusory Findings Concerning RK and Proposed Sanction for RK

303. The Hearing Committee has found only one Rule violation: RK violated Rule 1.5(b) by failing to provide Mrs. Ackerman with a written retainer agreement. Most of the precedential cases which have found a Rule 1.5(b) violation have also included other Rules violations. Because of the relatively minor nature of Rule 1.5(b) violations, there is little analysis of Rule 1.5(b) in these opinions. We were able to find two cases which address only Rule 1.5(b) violations, however. See Williams, Jr., 693 A.2d at 327; In re Confidential (J.E.S.), 670 A.2d at 1343. Both of these cases acknowledge two points: (1) Rule 1.5(b) violations are relatively minor; and (2) despite their relatively minor nature, Rule 1.5(b) violations should result in a sanction. In both cases, an informal admonition was the sanction. See id. We are also mindful of RK's public reprimand by the Attorney Grievance Commission of Maryland in 2006. See BX 183. Of course, this has some exacerbating effect. However, on the basis of the cases cited, and the previous relatively minor offense in Maryland, we recommend a sanction of an informal admonition for RK. While his violation is undisputed, there are mitigating circumstances such as the lack of any harm to his client, the fact that he was engaged as co-counsel with LS and she had a written fee agreement with the client, and lastly, RK's fee was to be paid by LS from her fee which the client agreed to pay.

304. Bar Counsel has not presented clear and convincing evidence of any violation of Rules 8.4(c), 8.4(d), 1.6(a)(1), 1.7(b)(4), and 1.16(a) of Professional Conduct by RK, and we so find and conclude.

X. CONCLUSION

305. Judging the wisdom, or lack thereof, of any of the participants in the drama revealed in this record is not the task of the Hearing Committee. Nor has it been the responsibility of Bar Counsel to judge the wisdom of any of the Respondents, or other lawyers whose actions are revealed on this record, in acting as they respectively did. The sole questions before this Hearing Committee are whether the Respondents violated the Rules of Professional Conduct, as charged.

306. The Hearing Committee has listened to arguments and testimony for twelve hearing days, carefully reviewed over 3,800 pages of transcript (including the two pre-hearing conferences) and several more thousand pages comprising the 228 exhibits admitted in evidence, and considered the arguments set forth in the approximately 300 pages of briefs submitted by the parties.[48] This careful review enables us to say, with confidence, that there is no credible evidence, much less clear and convincing evidence, supporting any of Bar Counsel's charges other than the admitted evidence supporting a single charge of a Rule 1.5(b) violation by one of the Respondents.

307. It is obvious that the family situation described in this record is quite distressing. The wisdom that was plainly called for at countless points in time was sadly

[48] The Hearing Committee is acutely mindful that this Report is being issued over two years later than Board Rule 12.2 requires. This delay is due to the Committee's having to conduct its own review and analysis of the massive record, which includes cumulative evidence (submitted in violation of the Chair's repeated directives to avoid same), without the benefit of Bar Counsel's customary relevant briefing. Further, all of the parties failed to recognize, let alone analyze, the critical issue in this case: the well-established law in the District of Columbia regarding mental capacity, leaving it to the Hearing Committee to do the necessary research and then locate among the thousands of pages comprising the record the appropriate citations which support the Committee's findings.

lacking by virtually everyone involved in this saga. Outside observers, as the Hearing Committee members are, can easily find fault with much of the behavior that is revealed in the record, but that is not our function. It is easy to understand why Mrs. Ackerman yearned for peace in her family. Throughout the years described in this record, there was no peace in the Ackerman family. It is also easy to understand Mrs. Abbott's anger at the situation with which all participants in this tragic drama were faced. The palpable anger and resulting hostility of Mrs. Abbott towards the Respondents is misplaced, however.

308. We do not contest her right to express her opinions on any topic of her choosing, including the behavior of Respondents. However, that anger should not have affected Bar Counsel's investigation in this matter. It is nevertheless clear that Mrs. Abbott's "case" against the Respondents became Bar Counsel's "case" against Respondents. Bar Counsel asked Mrs. Abbott to attest to the truthfulness of her complaining letters.[49] But Bar Counsel's charges were substantially undermined by Mrs. Abbott's hostility and bias against Respondents, as clearly demonstrated in Mrs. Abbott's cross examination. Further, Bar Counsel's serious misunderstanding of District of Columbia law with respect to mental capacity and consequently her failure to show that Mrs. Ackerman lacked capacity to interact with Respondents requires that the charges be dismissed against all Respondents, expect for the Rule 1.5 violation by RK.

[49] See supra note 12.

309. Wherefore, the Hearing Committee unanimously recommends:

a. That all pending charges against JTS be dismissed.

b. That all pending charges against JPS be dismissed.

c. That all pending charges against LS be dismissed.

d. That clear and convincing evidence of RK's violation of Rule 1.5 having been presented and the violation of Rule 1.5 thus having been proven, that RK be sanctioned by informal admonition; and that all other charges against RK be dismissed.

Respectfully submitted,

/JHQ/
John H. Quinn, Jr., Chair

/BLK/
Beverly Lewis-Koch, Attorney Member

/KW/
Kawin Wilairat, Public Member

Dated: September 28, 2012