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

In the Matter of:	:	
	:	
NATHANIEL H. SPEIGHTS,	:	
	:	
Respondent.	:	Board Docket No. 14-BD-077
	:	Bar Docket No. 2010-D253
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 952036)	:	

REPORT AND RECOMMENDATION OF THE AD HOC HEARING COMMITTEE

Respondent, Nathaniel Speights, is charged with violating Rules 1.1(a), 1.1(b), 1.3(a), 1.3(c), and 8.4(d) of the District of Columbia Rules of Professional Conduct (the "Rules"), arising from his handling of funds in a wrongful death action while serving as court-appointed Personal Representative for an estate. Disciplinary Counsel[1] contends that Respondent committed all of the alleged violations, and should be suspended for one year with a fitness requirement for his misconduct. Respondent denied committing any of the charged violations, but did not file a post-hearing brief in a timely manner, and, as discussed below, Respondent's motion to late-file a post-hearing brief was denied.

As set forth below, the Hearing Committee finds clear and convincing evidence of each violation alleged by Disciplinary Counsel. The Hearing Committee recommends that Respondent be suspended for one year with the requirement that he prove fitness as a condition of reinstatement.

[1] This case was filed by the Office of Bar Counsel. The District of Columbia Court of Appeals changed the title of Bar Counsel to Disciplinary Counsel, effective December 19, 2015. We use the current title herein.

I. PROCEDURAL HISTORY

On October 10, 2014, Disciplinary Counsel served Respondent with a Specification of Charges ("Specification"). The Specification alleges that Respondent, in connection with his role as Personal Representative of the Estate of Arnold Lindsey, violated the following Rules:

- Rule 1.1(a), by failing to competently represent his client;
- Rule 1.1(b), by failing to serve his client with the skill and care commensurate with that generally afforded clients by other lawyers in similar matters;
- Rule 1.3(a), by failing to represent his client zealously and diligently within the bounds of the law;
- Rule 1.3(c), by failing to act with reasonable promptness in the representing his client; and
- Rule 8.4(d), by engaging in conduct that seriously interfered with the administration of justice.

Respondent filed an answer on June 12, 2015. A hearing was held on April 8, 2016, before this Ad Hoc Hearing Committee (the "Hearing Committee").[2] Disciplinary Counsel was represented

[2] Respondent received one continuance of the initial pre-hearing conference and two continuances of the hearing, which was originally scheduled to begin on April 28, 2015. Respondent's request for a continuance of the pre-hearing conference was based on his travel plans, was unopposed by Disciplinary Counsel, and was granted by the Hearing Committee. The first request for a continuance of the hearing, filed on February 27, 2015, was based on Respondent's attorney's health and was also unopposed. That request was granted. After holding three additional pre-hearing conferences to update the Hearing Committee on the status of Respondent's attorney's health, the Hearing Committee permitted Respondent to file an Answer, and scheduled the hearing for October 20-21, 2015. The second request for a continuance, filed on October 15, 2015, was based on Respondent's health, as well as that of his attorney, and was opposed by Disciplinary Counsel. The Hearing Committee granted Respondent's request, converted the October 20, 2015 hearing to a pre-hearing conference, and during a subsequent telephonic conference rescheduled the hearing for January 12-13, 2015. Respondent filed a third motion to continue the hearing on January 8, 2016, based on his inability to identify expert witnesses, which was opposed by Disciplinary Counsel and denied by the Hearing Committee. However, Respondent's counsel filed a motion to withdraw, and the January 2016 hearing was converted to a pre-hearing conference to address the motion. At a subsequent pre-hearing conference, the hearing was rescheduled for April 7-8, 2016. Respondent filed a fourth motion to continue the hearing on April 1, 2016, based on a purported need for additional discovery, which was opposed by Disciplinary Counsel and denied by the Hearing Committee.

at the hearing by Hamilton P. Fox, III, Esquire. Respondent was represented by James T. Maloney, Esquire.

Prior to the hearing, Disciplinary Counsel submitted Disciplinary Counsel's Exhibits ("DX") A-D and 1-32. At the hearing, Disciplinary Counsel submitted DX 33 and 34 as evidence in aggravation of sanction. All of Disciplinary Counsel's exhibits were received into evidence. Transcript of Proceedings ("Tr.") 171-73, 188-89. During the hearing, Disciplinary Counsel called Respondent to testify regarding his conduct as Personal Representative of the Lindsey Estate. Also prior to the hearing, Respondent submitted exhibits ("RX") 1 through 36. All of Respondent's exhibits were received into evidence without objection. Tr. 173. Respondent did not call any witnesses at the hearing, nor did he offer any evidence in mitigation.

After the close of the hearing, Disciplinary Counsel filed Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction. The Hearing Committee granted Respondent's counsel's motion to withdraw from the representation on June 22, 2016, and gave Respondent an additional month – to July 21, 2016 – in which to file his post-hearing brief; the Hearing Committee made clear to Respondent that no further extension to file his post-hearing brief would be granted. Respondent did not file a post-hearing brief, and his late-filed motion for a second extension of time – filed on July 22, 2016 – was denied by the Hearing Committee. Respondent filed a brief on August 24, 2016, and, on the same date, Disciplinary Counsel filed a motion to strike the brief for being untimely. The Hearing Committee granted Disciplinary Counsel's motion to strike Respondent's untimely brief on September 6, 2016.

II. FINDINGS OF FACT

The Hearing Committee makes the following findings of fact by clear and convincing evidence. *See* Board Rule 11.5.

1. Respondent was admitted to the Bar of the District of Columbia Court of Appeals on June 15, 1978, and assigned Bar number 952036. DX A.

2. On August 28, 2000, Judge Cheryl Long, sitting in the Probate Division of the Superior Court of the District of Columbia, appointed Respondent to serve as Personal Representative of the Estate of Arnold Lindsey. Judge Long determined that because of a dispute among Mr. Lindsey's heirs, the personal representative should be "a neutral member of the bar . . . ." RX 5 at 1; Tr. 86 (Speights). Respondent's law partner, Iverson Mitchell, Esquire, represented Respondent in his capacity as Personal Representative. DX 4.

3. The Lindsey Estate's primary asset was a wrongful death claim. Mr. Lindsey had been killed in an accident while rigging the stage for the Tom Joyner radio show at the Lincoln Theater. Tr. 82-83 (Speights). Respondent engaged Patrick Malone, Esquire, and Alan Perer, Esquire, to represent the Estate in the wrongful death action, which they filed in the Superior Court against Affordable Light and Sound, Inc., ABC Radio Network, and the District of Columbia. Tr. 87 (Speights).

4. Following a mediation in 2003, the parties to the wrongful death action agreed upon a settlement, pending court approval. Tr. 90 (Speights). DX 2. Pursuant to the settlement agreement, Mr. Malone and Mr. Perer recommended an administrative fee of $15,000 for Respondent to be paid from the settlement. DX 7.

5. Respondent, however, caused a motion to approve the settlement to be drafted by a settlement company with a different allocation of the funds among the heirs, the lawyers, and the Personal Representative. Respondent proposed increasing the amount of his fee from the $15,000 allocated in the terms of the settlement agreement to $51,000. Tr. 93-95 (Speights).

6. Mr. Malone and Mr. Perer objected to the proposed settlement, in part because they believed that the allocation for Respondent was too high. Mr. Malone so informed Respondent in an email dated March 15, 2003. DX 5; Tr. 94-95 (Speights).

7. Rather than responding to Mr. Malone's email, on March 18, 2003, Respondent moved in Superior Court for approval of the settlement. The proposed settlement continued to allocate $51,000 to Respondent's law firm as an administrative fee. DX 6; Tr. 96-97 (Speights).

8. On March 20, 2003, on his own and Mr. Perer's behalf, Mr. Malone wrote Respondent that his proposed settlement did not serve the best interests of the Estate. They objected to his proposal to more than triple the administrative fee they had recommended, and informed Respondent that they were filing a motion to stay consideration of Respondent's motion for approval of the settlement; they filed it in the Superior Court that same day. DX 7, 8; RX 2 at Apx. 29; Tr. 97-98, 103 (Speights).

9. As a result of their motion to stay consideration, Respondent fired Mr. Malone and Mr. Perer. On April 30, 2003, Respondent's lawyer and law partner, Mr. Mitchell, entered his appearance by praecipe, on behalf of the Estate in the Superior Court wrongful death action. DX 9; RX 2 at Apx. 26; Tr.103-106 (Speights).

10. At the hearing in this disciplinary matter, Respondent testified that, even though Respondent had fired them, Mr. Malone and Mr. Perer continued to represent the Estate. The sole basis for this position appears to be the fact that Mr. Malone and Mr. Perer had not formally withdrawn as counsel to the Estate. Tr. 105 (Speights). In an August 7, 2007, order, however, Judge Rhonda Reid Winston found that Respondent had discharged Mr. Malone and Mr. Perer in March 2003. DX 28 at 3; Tr. 107-09 (Speights). The Auditor-Master also reviewed the evidence and found that Respondent "essentially served as his own counsel . . . ." (DX 1 at 6 ¶

27; Tr. 109-10 (Speights)) after he terminated Mr. Malone and Mr. Perer from representing the Estate. DX 1 at 2 ¶ 1. Mr. Malone, however, did appear on his own and Mr. Perer's behalf in subsequent proceedings, because they had an interest in the attorneys' fees that were to be paid from the proceeds of the settlement. DX 21 at 2.

11. After the defendants in the wrongful death action filed a motion to enforce the settlement, the court finally approved it on July 8, 2003. In granting the motion, the court ordered Affordable Sound and Light, Inc. to pay the Lindsey Estate $475,000; ABC Radio Network, Inc. to pay $75,000; and the District of Columbia to pay $25,000. The order required the defendants to pay those sums by July 21, 2003. It did not allocate the proceeds of the settlement among the parties, the lawyers, or the Personal Representative. DX 10; Tr. 111-14 (Speights). Because this was an order and not a judgment, the settlement amounts did not earn interest between the date of the order and the date of payment. Tr. 113 (Speights).

12. Respondent took no personal action to collect the funds. He contended at the hearing that he relied on "his lawyers" to do that. After he discharged Mr. Malone and Mr. Perer in March 2003 (before the July 8, 2003 order enforcing the settlement), however, Respondent's law partner, Mr. Mitchell, was the only lawyer representing the Estate in the wrongful death action. Tr. 66-82 (Speights).

13. Affordable Light and Sound's insurance carrier contacted Respondent's law firm on July 15, 2003, seeking to ascertain the law firm's tax identification number so that it could cut a check for its payment of $475,000. DX 11. After receiving that number, the carrier sent a $475,000 check to Respondent's law firm on July 28, 2003. The settlement check was never negotiated. DX 15 at 2 ¶ 8; Tr. 146-47.

14. Thereafter, accountants for the Estate sent Respondent a form to sign to obtain an identification number for the Estate from the Internal Revenue Service. DX 13. After Respondent signed the form and the form was submitted, the IRS determined it contained an incorrect Social Security number for one of the heirs. The Estate's accountants sent Respondent a new form on July 31, 2003, but Respondent did not provide the correct information until December 2004, 17 months later. DX 30. *See generally* DX 1 at 7-12.

15. Although Respondent has denied that the failure to obtain the Estate's identification number from the IRS was his fault, he has admitted that he made little or no effort to follow up with the Estate's accountants. Tr. 140-46 (Speights); DX 1 at 12.

16. The case was transferred to the Probate Division after the settlement was approved. There was considerable disagreement as to how the settlement funds should be allocated. Ultimately, in October 2004, Judge Jose Lopez, sitting in the Probate Division, entered an order sending the allocation to arbitration. RX 11. Tr. 114-17 (Speights).

17. Affordable Light and Sound's insurer sent a new check for $475,000 to Respondent dated December 9, 2004. DX 18; DX 19. Respondent deposited this check in his escrow account in January 2005. Tr. 151 (Speights). He still had not received payment from ABC or the District of Columbia. Tr. 151-53 (Speights).

18. The arbitrator issued his final order in May 2005. In addition to allocating the funds among the heirs to Mr. Lindsey's Estate, the arbitrator allocated $205,000 in legal fees and expenses to Mr. Malone and Mr. Perer, $10,000 to Respondent for his services as Personal Representative, and $5,000 to himself for his hourly fees and costs. RX 12 at 10-11; Tr. 118 (Speights).

19 The Probate Court held a hearing on the arbitration award on July 8, 2005. At this hearing, counsel for one of the heirs informed the court that Respondent had represented that he had not yet collected all of the settlement funds. DX 21 at 8. Respondent confirmed to the Court that he had not yet collected the settlement from ABC and the District of Columbia. *Id.* at 10; Tr. 121-22 (Speights). The court adopted the arbitration award. It also ordered Respondent to distribute proportionately the assets of the Estate in accordance with the award, and to file a report detailing what additional assets he expected to receive. DX 22. Despite the passage of two years since the approval of the settlement, and despite having collected Affordable Light and Sound's $475,000 share of the settlement seven months earlier, Respondent had not distributed anything to the beneficiaries of the Estate. Tr. 123-25 (Speights). Respondent did not appeal this order. RX 1 at Apx. 12-13.

20. By check dated September 2, 2005, ABC's insurer paid the Estate $75,000. DX 20. By check dated November 17, 2005, the District of Columbia paid the Estate $25,000. DX 23. Both checks were made out to Respondent as personal representative of the estate. At this point, all the funds owed to the Estate had been collected. Tr. 151-53 (Speights).

21. In May 2006, Respondent filed a Statement of Account with the Probate Division. He disclosed that he had only distributed $100,000 of the assets to the heirs. This distribution had occurred in October 2005, three months after the court had ordered a proportionate distribution of the assets on hand, and at a time when Respondent had received $550,000 of the $575,000 settlement proceeds. DX 24; Tr. 127-28 (Speights).

22. In the May 2006 Statement of Account, Respondent proposed to pay himself $10,000, consistent with the arbitration award, but also to pay his law partner, Mr. Mitchell, $65,000, which the award had not authorized. The Statement of Account included no funds to

pay the arbitrator for his services even though the award, which the court had adopted, authorized a payment of $5,000. Nor did Respondent propose to pay anything to Mr. Malone and Mr. Perer, to whom the award had authorized a payment of $205,000. DX 24 at 5; Tr. 129-31 (Speights).

23. Following objections to the Statement of Account, on June 6, 2006, the court ordered Respondent to amend the account to reflect the distributions in accordance with the arbitration award, including the award of attorney's fees. Respondent was ordered to file a new account by July 19, 2006. DX 26; Tr. 131-32 (Speights).

24. Respondent appealed the June 6, 2006 order to the D.C. Court of Appeals, which dismissed the appeal on August 14, 2006. RX 1 at Apx. 10-11; DX 28 at 9 ¶ 17; Tr. 133 (Speights). The reason for the dismissal is not in the record, and is not material to any of the issues before the Hearing Committee.

25. Mr. Malone and Mr. Perer moved the Probate Division to remove Respondent as Personal Representative. On August 7, 2007, Superior Court Judge Winston found that Respondent had "willfully disregarded the Court's Order of July 8, 2005, adopting the arbitration awards, as evidenced by his filing the First-Ninth and Final Account dated May 5, 2006, which ignored the arbitration order without any justification." DX 28 at 11-12 ¶ 25; Tr. 155 (Speights).

26. Judge Winston concluded that Respondent's "failure to comply with the Court's Orders and the attendant delays caused by them have prolonged the administration of this estate and have caused at least one of the decedent's heirs and his widow, in addition to the other claimants, to await that to which they were entitled. In short, the Personal Representative has failed to perform material duties of office, which include the "'duty to settle and distribute the estate of the decedent in accordance [with] the . . . laws of intestacy, as expeditiously and

efficiently as is prudent and consistent with the best interest of the persons interested in the estate.'" DX 28 at 12 ¶ 2 (quoting from D.C. Code § 20-701 (2007)). The court held in abeyance the motion to remove and referred the matter to the Auditor-Master to determine whether Respondent had caused the Estate to lose money by his failure promptly to collect and deposit the settlement funds into interest-bearing accounts and, if so, the amount of lost interest. DX 28 at 13-15; Tr. 155-57 (Speights).

27. The Auditor-Master held evidentiary hearings on September 25, 2007 (DX 31) and on December 17, 2007. DX 32; Tr. 157-58 (Speights). He issued his report on June 1, 2009. DX 1. The Auditor-Master found Respondent had made no effort to collect the settlement proceeds prior to the dates on which the defendants in the wrongful death action paid them. *Id.* at 6 ¶ 21. He rejected Respondent's testimony blaming the delay on the accountants' inability to obtain a taxpayer identification number from the IRS. *Id.* at 12-14 ¶ 59-69. He recommended that Respondent be ordered to pay the Estate $51,312.32. *Id.* at 21; *See* Tr. 158-62 (Speights).

28. On August 29, 2009, Judge Winston adopted the Auditor-Master's report. DX 2 at 27. She removed Respondent as Personal Representative and directed him to pay the full $51,312.32 that the Auditor-Master had recommended. *Id.* at 28; Tr. 163 (Respondent).

29. Respondent appealed. In a *per curiam* opinion issued on May 29, 2013, the Court of Appeals found that Respondent had offered "no serious challenge to Judge Reid Winston's well-substantiated conclusion that his repeated non-compliance with 'the Court's Orders and the attendant delays caused by them prolonged the administration of this estate . . . .'" DX 3 at 1. It held "[a]lthough appellant attempts to lay much of the blame for his failure to collect and distribute estate assets at the feet of the attorneys who represented him at the time, the governing statutes clearly made appellant, as personal representative, the 'fiduciary' . . . responsible for

'tak[ing] possession or control of the decedent's estate' and taking 'all steps reasonably necessary for [its] management, protection and preservation." BX 3 at 2 (alterations in original) (citation omitted). The Court summarily affirmed Judge Winston. *See* Tr. 163-65 (Speights).

30. Respondent eventually paid the $51,312.32 to the Estate. Tr. 167-70 (Speights).

31. Portions of Respondent's testimony at the April 8, 2016 disciplinary hearing conflicted with previous court findings, or other parts of his own testimony, or were simply incredible. The Hearing Committee finds that the Respondent was not a credible witness in that his testimony was intentionally false in the following respects: Respondent testified that even though he discharged Mr. Malone and Mr. Perer, they refused to withdraw, remained the lawyers for the Estate, and remained responsible for collecting the settlement. Tr. 75-82 (Speights). He testified that Superior Court Judge Lopez's order appointing an arbitrator falsely reported in open court that all parties had consented to arbitration. Tr. 117-18 (Speights). He testified that he had no responsibility for failing to collect the Affordable Light and Sound settlement for the 18-month period between when it was due and when it was paid. Tr. 140-48 (Speights). He gave conflicting testimony about the check Affordable Light and Sound's insurer sent him in July 2003—that he could not negotiate the check because the bank would not accept it, but also that he did not receive it. Tr. 146-48 (Speights). He testified that the Auditor-Master, whose findings were approved by Judge Winston and the Court of Appeals, made a number of "false findings." Tr. 159-60 (Speights).

III. CONCLUSIONS OF LAW

Disciplinary Counsel contends that Respondent violated Rules 1.1(a), 1.1 (b), 1.3(a), 1.3(c), and 8.4(d). As explained below, we find that Disciplinary Counsel has proven all charged Rule violations by clear and convincing evidence.

A. As Personal Representatives of an Estate, Respondent is to be Held to the Same Standard as a Lawyer Representing a Client.

It is well-established in the District of Columbia that a lawyer who serves as the personal representative of an estate is held to the same standards as a lawyer representing a client. *See In re Fair*, 780 A.2d 1106, 1107-08, 1107 n.1 (D.C. 2001) (finding violations for personal representative's "serious pattern of neglect . . . of her duties with respect to the estate"); *In re Edwards*, Bar Docket No. 488-02 (BPR Dec. 18, 2006) (respondent violated Rule 1.1(b) for abandoning duties as personal representative), *recommendation adopted*, 990 A.2d 501, 508 n.2 (D.C. 2010); *see also In re Confidential*, 664 A.2d 364, 367 (D.C. 1995) (former misappropriation rule applicable even when no attorney-client relationship exists so long as "transactions hav[e] a reasonable relationship to an attorney's conduct in his professional capacity"). In appointing Respondent, Judge Long found that the Lindsey Estate needed a lawyer to serve as its personal representative. FF 2. Specifically, a lawyer-personal representative must provide the estate with competent representation, pursuant to Rule 1.1(a); serve the estate with the skill and care generally afforded estates by other lawyers, pursuant to Rule 1.1(b); represent the estate zealously and diligently within the bounds of the law, pursuant to Rule 1.3(a); and act with reasonable promptness in representing the estate, pursuant to Rule 1.3(c).

In a recent Report and Recommendation, the Board found that a lawyer serving as personal representative to an estate violated Rules 1.1(a) and (b) by failing to represent the estate with competence, skill, and care. *In re Hargrove*, Bar Docket No. 2013-D127 at 11-14 (BPR Apr. 26, 2016), *review pending on exceptions filed by Respondent*, No. 16-BG-385 (D.C. July 19, 2016). The Board also found that Ms. Hargrove had violated Rule 1.3(c) by failing to act

with reasonable promptness in representing the estate. As with Respondent, Ms. Hargrove represented and neglected a case for many years—from 1996 until her removal in 2008.

Like the District of Columbia, other jurisdictions hold attorneys acting as personal representatives or executors to estates to the standards reflected in their Rules of Professional Conduct. *See State, ex rel. Oklahoma Bar Ass'n v. Mansfield*, 350 P.3d 108, 118 (Okla. 2015) ("Attorneys are subject to the [Rules of Professional Conduct] regardless of what role they play in the administration of an estate, and it makes no difference in our view that Respondent may not have technically represented any client with regard to the administration of the [estate]."); *In re Goldsmith*, 61 A.D.3d 132, 133 (N.Y. App. Div. 2009) (finding New York Rule 1.1 and other disciplinary violations because "[a]lthough he was acting as executor, as opposed to the attorney for [the] estate, he still had a fiduciary relationship with the beneficiaries, and an obligation to conduct himself in accordance with the [[R]ules of Professional Conduct]."); *In re Miller*, 112 P.3d 169, 173 (Kan. 2005) (executor violated Kansas Rule 1.1 by failing to completely administer estate); *Kentucky Bar Ass'n v. Mitchell*, 348 S.W.3d 764, 766 (Ky. 2011) (executor violated Kentucky equivalent to Rule 1.1 by failing to competently administer estate); *Lawyer Disciplinary Bd. v. Martin*, 693 S.E.2d 461, 465 (W. Va. 2010) (executor violated West Virginia disciplinary rules by failing to promptly disperse estate funds); *In re Bowman*, 310 P.3d 1054, 1058 (Kan. 2013) (Kansas Rule 1.3 applies to executor or administrator of estate).

B. Respondent Violated Rules 1.1(a) and (b) by Failing to Represent the Lindsey Estate with Competence, Skill and Care.

Rule 1.1(a) requires a lawyer to "provide competent representation to a client." The Court has determined that competent representation requires the "legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." *See In re Drew*, 693 A.2d 1127, 1132 (D.C. 1997) (per curiam) (lawyer who has requisite skill and knowledge, but

who does not apply it for particular client, violates obligations under Rule 1.1(a)); *see, e,g.*, *In re Sumner*, 665 A.2d 986, 988-89 (D.C. 1995) (per curiam) (appended Board Report) (failure to make required filings in a criminal appeal violated Rules 1.1(a) and (b)). The comments to Rule 1.1 state that competent representation includes "adequate preparation, and continuing attention to the needs of the representation to assure that there is no neglect of such needs." Rule 1.1, cmt. [5]. Rule 1.1(b) provides that "a lawyer shall serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters."

In *In re Evans*, the Court explained that:

> To prove a violation [of Rule 1.1(a)], [Disciplinary] Counsel must not only show that the attorney failed to apply his or her skill and knowledge, but that this failure constituted a serious deficiency in the representation. . . . The determination of what constitutes a "serious deficiency" is fact specific. It has generally been found in cases where the attorney makes an error that prejudices or could have prejudiced a client and the error was caused by a lack of competence. . . . Mere careless errors do not rise to the level of incompetence.

902 A.2d 56, 69-70 (D.C. 2006) (per curiam) (appended Board Report). Although the Board referred to Rule 1.1(a) only, the "serious deficiency" requirement applies equally to 1.1(b). *See In re Yelverton*, 105 A.3d 413, 421-22 (D.C. 2014). To prove a "serious deficiency," Disciplinary Counsel must prove that the conduct "prejudices or could have prejudiced the client." *Id.* at 422.

In contrast, Rule 1.1(b) is "better tailored [than Rule 1.1(a)] to address the situation in which a lawyer capable to handle a representation walks away from it for reasons unrelated to his competence in that area of practice." *In re Lewis*, 689 A.2d 561, 564 (D.C. 1997) (per curiam) (appended Board Report). A Hearing Committee, however, may find a violation of the standard of care without expert testimony when an attorney's "conduct is so obviously lacking that expert testimony showing what other lawyers generally would do is unnecessary." *In re Nwadike*, Bar Docket No. 371-00 at 28 (BPR July 30, 2004), *aff'd*, 905 A.2d 221 (D.C.

2006) (*inter alia*, at the time of the deadline for a plaintiff's attorney to file a D.C. Super. Ct. Civil R. 26(b)(4) expert witness statement and by the close of discovery, the attorney not only failed to fulfill the attorney's court-ordered discovery obligations regarding essential expert opinion, but also had not yet even obtained an opinion and was unaware of whether or not the attorney had proof to sustain the plaintiff's claim); *In re Schlemmer*, Bar Docket Nos. 444-99 & 66-00 at 13 (BPR Dec. 27, 2002), *aff'd*, 840 A.2d 657 (D.C. 2004) (noting, in a case where the respondent attorney failed to file an immigration appeal after the client paid the initial fee for the appeal, that [Disciplinary] Counsel need not "necessarily produce evidence of practices of other attorneys in order to establish a Rule 1.1(b) violation").

In the instant matter, the Estate of Arnold Lindsey and its heirs clearly were prejudiced by Respondent's conduct. As a general matter, Respondent's failures to timely collect payments from the three defendants and to comply with court orders unnecessarily prolonged the administration of the Estate and caused the claimants to wait, for a considerable period of time, for that to which they were entitled. This delay alone would constitute prejudice to the Estate and to the claimants sufficient to find that Respondent violated Rule 1.1(a).

The prejudice caused by Respondent's conduct, however, was even more specific. As determined by the Auditor Master, Respondent, by his protracted failure to meet his obligation to collect the payments from the three defendants in the wrongful death action, lost the Estate interest in the amount of $51,312.32. Respondent's conduct in this regard was a serious deficiency in his representation of and service to the Estate as Personal Representative; this serious deficiency clearly and concretely prejudiced the Estate.

Respondent's attempts to blame others for his prolonged failure to collect payments from the defendants are unavailing. Respondent's contention is based on a far-fetched and

false argument that the lawyers whom he himself had fired before the settlement was approved were somehow responsible for the delay. *See* Tr. 74-77.

With respect to Rule 1.1(b), Respondent failed to serve as Personal Representative to the Estate with the skill and care commensurate with this role. The totality of the record in this matter establishes that Respondent's conduct as Personal Representative was so obviously lacking that expert testimony showing what other lawyers acting as personal representatives generally would do was unnecessary. The record of such obviously lacking conduct by Respondent includes proof by clear and convincing evidence of: his prolonged delay in collecting the total payments of $575,000 from the three defendants; his claim that other lawyers represented the Estate, after he himself had already discharged these lawyers; his extended failure – for approximately 17 months – to provide correct information to accountants for the Estate; and his failures to comply with court orders, thereby prolonging administration of the Estate.

Judge Winston's language, from her August 7, 2007, order, already quoted above, may be applied to describe Respondent's overall failure in this matter to meet the standard of care commensurate to his fiduciary role and responsibilities as Personal Representative to the Estate: Respondent "failed to perform material duties of office, which include the 'duty to settle and distribute the estate of the decedent in accordance [with] the . . . laws of intestacy, as expeditiously and efficiently as is prudent and consistent with the best interest of the persons interested in the estate.'"

C. Respondent Violated Rules 1.3(a) and (c) by Failing to Represent the Lindsey Estate Zealously and Diligently Within the Bounds of the Law and with Reasonable Promptness.

Rule 1.3(a) states that an attorney "shall represent a client zealously and diligently within the bounds of the law." "Neglect has been defined as indifference and a consistent failure to

carry out the obligations that the lawyer has assumed to the client or a conscious disregard of the responsibilities owed to the client." *In re Wright*, 702 A.2d 1251, 1254 (D.C. 1997) (quoting *In re Reback*, 487 A.2d 235, 238 (D.C. 1985), *adopted in relevant part*, 513 A.2d 226 (D.C. 1986) (en banc) ("*Reback II*")). Rule 1.3(a) "does not require proof of intent, but only that the attorney has not taken action necessary to further the client's interests, whether or not legal prejudice arises from such inaction." *In re Bradley*, Bar Docket Nos. 2004-D240 & 2004-D302 at 17 (BPR July 31, 2012), *adopted in relevant part*, 70 A.3d 1189, 1191 (D.C. 2013) (per curiam); *Lewis*, 689 A.2d at 564 (Rule 1.3(a) violated even where "[t]he failure to take action for a significant time to further a client's cause . . . [does] not [result in] prejudice to the client").

The Court has found neglect in violation of Rule 1.3(a) where an attorney persistently and repeatedly failed to fulfill duties owed to the client over a period of time. *See Reback*, *supra*, 487 A.2d at 238 (respondent violated Rule 1.3(a) by failing to respond to discovery requests, a motion to compel, and a show cause order, and failed to respond to the client's numerous requests for information); *In re Chapman*, 962 A.2d 922 (D.C. 2009) (per curiam) (respondent violated Rule 1.3(a) where he did not perform any work on the client's case during the eight month term of the representation, failed to conduct any discovery, and did not respond to discovery requests from the opposing party); *In re Ukwu*, 926 A.2d 1106, 1135 (D.C. 2007) (appended Board Report) (respondent violated Rule 1.3(a) when he repeatedly failed to inform his clients about the status of their cases, prepare his clients for hearings and interviews with immigration officials, or prepare himself for court appearances).

Rule 1.3(c) provides that an attorney "shall act with reasonable promptness in representing a client." "Perhaps no professional shortcoming is more widely resented by clients than procrastination," and "in extreme instances, as when a lawyer overlooks a statute of

limitations, the client's legal position may be destroyed." Rule 1.3, cmt. [8]. The Court has held that failure to take action for a significant time to further a client's cause, whether or not prejudice to the client results, violates Rule 1.3(c). *In re Dietz*, 633 A.2d 850 (D.C. 1993). Comment [8] to Rule 1.3 provides that "[e]ven when the client's interests are not affected in substance . . . unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness," making such delay a "very serious violation."

Respondent's prolonged neglect of his duty to collect for the Estate the damages from the wrongful death action also violated his obligation to represent the Estate zealously and diligently and with reasonable promptness. *Cohen*, 847 A.2d at 1166; *see also In re Robinson* 74 A.3d 688, 697 (D.C. 2013). Not only did Respondent's inaction over a significant period of time delay the collection of all the funds for more than two years (FF 17, 20), he also failed to distribute them promptly even after he collected them. FF 19, 21. After that, he ignored the court-approved arbitration award, and delayed the final resolution of the estate in a futile effort to further enrich himself with legal fees that the court had not authorized. FF 18-24.

D. Respondent Violated Rule 8.4(d) by Engaging in Conduct that Seriously Interfered with the Administration of Justice.

Rule 8.4(d) provides that it is professional misconduct for a lawyer to "[e]ngage in conduct that seriously interferes with the administration of justice." To establish a violation of Rule 8.4(d), Disciplinary Counsel must demonstrate by clear and convincing evidence that: (i) Respondent's conduct was improper, *i.e.*, that Respondent either acted or failed to act when he should have; (ii) Respondent's conduct bore directly upon the judicial process with respect to an identifiable case or tribunal; and (iii) Respondent's conduct tainted the judicial process in more than a *de minimis* way, *i.e.*, it must have potentially had an impact upon the process to a serious and adverse degree. *In re Hopkins*, 677 A.2d 55, 60-61 (D.C. 1996). Rule 8.4(d) is violated if

the attorney's conduct causes the unnecessary expenditure of time and resources in a judicial proceeding. *See In re Cole*, 967 A.2d 1264, 1266 (D.C. 2009); s*ee also In re Delate*, 598 A.2d 154, 157 (D.C. 1991) (per curiam) (appended Board Report) (finding conduct prejudicial to the administration of justice, in violation of former Disciplinary Rule 1-102(A)(5), where the respondent failed to complete required accountings on behalf of an estate, causing "creditors [to] remain[] unpaid and the rightful heirs . . . unable to receive distributions from the estate").

In the instant case, and as discussed above, Respondent's improper conduct included both failures to act when he should have and actions that were themselves improper. Respondent failed to act when he should have by failing to collect the $575,000 for the Lindsey Estate, and then by failing to distribute payments to the beneficiaries in a timely and appropriate manner. Respondent also affirmatively acted in willful disregard and in violation of court orders, specifically including Judge Lopez's July 8, 2005 order adopting the arbitrator's award and ordering the Respondent to distribute proportionately the assets of the Estate in accordance with that award. Respondent's conduct, as established by the record in this matter and as discussed above, bore directly on the judicial process in the matter of the Estate of Arnold Lindsey. And Respondent's conduct tainted the judicial process in that matter in more than a *de minimis* way in that his failure and refusal to distribute the assets in accordance with the arbitration award prolonged and multiplied the proceedings, extending until 2013 a matter that could have been settled, and should have been settled, in 2003. These proceedings included an allocation hearing before an arbitrator, a hearing in probate court adopting the arbitration award, a probate court order instructing Respondent to amend the account to reflect the distributions in accordance with the arbitration award, an appeal of the allocation to the D.C. Court of Appeals, which was dismissed, a hearing before an Auditor-Master to remove Respondent as personal representative,

a probate court order adopting the Auditor-Master's report, and an unsuccessful appeal of his removal to the D.C. Court of Appeals.

IV. RECOMMENDED SANCTION

Disciplinary Counsel has asked the Hearing Committee to recommend the sanction of a one-year suspension with a fitness requirement. For the reasons set forth below, we agree with Disciplinary Counsel's recommendation.

A. Standard of Review

The sanction imposed in an attorney disciplinary matter is one that is necessary to protect the public and the courts, maintain the integrity of the legal profession, and deter the respondent-attorney and other attorneys from engaging in similar misconduct. *See, e.g.*, *Martin*, 67 A.3d 1032, 1053 (D.C. 2013); *In re Cater*, 887 A.2d 1, 17 (D.C. 2005); *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc). "In all cases, [the] purpose in imposing discipline is to serve the public and professional interests . . . rather than to visit punishment upon an attorney." *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (en banc) (citations omitted); *see also In re Goffe*, 641 A.2d 458, 464 (D.C. 1994).

The sanction also must not "foster a tendency toward inconsistent dispositions for comparable conduct or . . . otherwise be unwarranted." D.C. Bar R. XI, § 9(h)(1); *see, e.g.*, *Martin*, 67 A.3d at 1053 (citing *In re Elgin*, 918 A.2d 362, 376 (D.C. 2007)); *In re Berryman*, 764 A.2d 760, 766 (D.C. 2000); *Hutchinson*, 534 A.2d at 923-24. In determining the appropriate sanction, the Court of Appeals considers a number of factors, including: (1) the seriousness of the conduct at issue; (2) the prejudice, if any, to the client which resulted from the conduct; (3) whether the conduct involved dishonesty; (4) the presence or absence of violations of other provisions of the disciplinary rules; (5) whether the attorney has a previous disciplinary history; (6) whether the attorney has acknowledged his wrongful conduct; and (7) circumstances in

mitigation or aggravation. *See, e.g.*, *Martin*, 67 A.3d at 1053 (citing *Elgin*, 918 A.2d at 376). The Court also considers "'the moral fitness of the attorney'" and the "'need to protect the public, the courts, and the legal profession. . . .'" *In re Rodriguez-Quesada*, 122 A.3d 913, 921 (D.C. 2015) (quoting *In re Howes*, 52 A.3d 1, 15 (D.C. 2012) (internal quotation marks omitted)).

B. Application of the Sanction Factors

1. The Seriousness of the Misconduct

Respondent's misconduct was serious, as reflected in his prolonged neglect of his duties as Personal Representative to collect the payments totaling $575,000 owed to the Lindsey Estate, and by his interference with the judicial process from at least 2003 to 2013.

2. Prejudice to the Client

Respondent prejudiced the Lindsey Estate and its heirs, not only generally by causing a prolonged and substantial wait for payments to which they were due, but also, more specifically, by causing, through this delay, the loss of over $51,000 in interest, which he repaid after being ordered to do so.

3. Dishonesty

Respondent has not been charged with dishonesty in this matter. However, we found that Respondent gave intentionally false testimony with respect to his firing of Mr. Malone and Mr. Perer, Judge Lopez's order appointing an arbitrator, his responsibility for collecting settlement funds, whether he received the check from Affordable Light and Sound's insurer, and the truthfulness of the Auditor-Master's findings. *See* FF 31, *supra*. We consider this false testimony in aggravation of sanction.

4. Violations of Other Disciplinary Rules

Respondent violated multiple rules: 1.1(a) and (b); 1.3(a) and (c); and 8.4(d).

5. Previous Disciplinary History

Respondent received an informal admonition in 2000 for inadequate recordkeeping related to irregularities in his law firm's escrow account. DX 34. In addition, on October 11, 2016, the Board has recommended that the Court find that Respondent neglected and incompetently handled a personal injury case, and should be suspended for six months. DX 34. The Court has not yet issued a final order.

6. Acknowledgement of Wrongful Conduct

Respondent has not acknowledged his wrongful conduct in this matter, and in fact has obdurately refused to acknowledge any wrongdoing, notwithstanding the clear and convincing evidence in this case as well as adverse factual findings and rulings by the Auditor Master, by the Superior Court, and by the Court of Appeals. Respondent insists he has done nothing wrong and has engaged in a pattern of finding fault in the conduct of others and shifting blame to others, including to lawyers whom he had already fired before the conduct for which he blames them occurred.

7. Other Circumstances in Aggravation and Mitigation

The Hearing Committee finds the misconduct of Respondent proven in this matter to be sufficiently serious to warrant the sanction recommended below, without citing any additional evidence or conduct in aggravation.

C. Sanctions Imposed for Comparable Misconduct

Sanctions in cases involving incompetence, neglect, conduct seriously interfering with the administration of justice, and prior discipline range from 30-day to six-month suspensions. *See, e.g.*, *In re Askew*, 96 A.3d 52, 62 (D.C. 2014) (six-month suspension for court-appointed

appellate neglect with all but 60 days suspended in favor of one-year probation, aggravated by similar prior misconduct and failure to recognize the seriousness of the misconduct); *In re Chapman*, 962 A.2d 922, 926-27 (D.C. 2009) (per curiam) (60-day suspension with 30 days stayed in favor of one-year probation for neglect of a case for the entire eight-month term of the representation); *In re Mance*, 869 A.2d 339, 341-42 (D.C. 2005) (per curiam) (30-day suspension stayed in favor of one-year probation for intentionally failing to correct an untimely filing); *In re Bernstein*, 707 A.2d 371, 377 (D.C. 1998) (30-day suspension for failure to pursue settlement negotiations for over three years); *In re Drew*, 693 A.2d 1127, 1128 (D.C. 1997) (per curiam) (60-day suspension for failure to note an appeal in two cases); *In re Lyles*, 680 A.2d 408, 417-420 (D.C. 1996) (per curiam) (appended Board Report) (six-month suspension for neglect, lack of competence, and serious interference with the administration of justice in four matters, where the Board noted the absence of dishonesty and prior discipline); *In re Knox*, 441 A.2d 265, 268 (D.C. 1982) (three-month suspension for intentional failure to pursue a client's personal injury claim for nine years). When the neglect is aggravated by significant prior discipline, the Court has imposed suspensions of up to one year. *See, e.g.*, *In re Tinsley*, 582 A.2d 1192, 1195-96 (D.C. 1990) (one-year suspension with fitness for neglect, failure to return client property, and conduct prejudicial to the administration of justice in five matters, aggravated by prior discipline); *In re Alexander*, 513 A.2d 781, 783 (D.C. 1986) (per curiam) (one year and one day suspension for neglect and lack of competence in four matters, aggravated by prior discipline).

In a recent case involving extreme neglect and serious interference with the administration of justice, aggravated by deliberately dishonest testimony in the disciplinary proceedings, the Court imposed a two-year suspension with fitness. *See In re Bradley*, 70 A.3d 1189, 1192-95 (D.C. 2013) (per curiam) (abandoning one court-appointed ward with

developmental disabilities in a nursing home for ten years and failing to file required reports in Superior Court, and neglecting another court-appointed client by failing to safeguard her assets, file for benefits, or file tax returns for five years, aggravated by intentional dishonesty to the Hearing Committee and prior discipline).

As noted, Respondent received an informal admonition in 2000 for a record-keeping violation, and the Board has already recommended a six-month suspension for Respondent for neglect and incompetent conduct in another matter, but in that case there was no conduct substantially prejudicial to the administration of justice. While we do not consider this pending case as prior discipline, we do consider Respondent's informal admonition in aggravation of sanction.

In determining the appropriate sanction in this case, we view Respondent's dishonest testimony in these proceedings as a significant aggravating factor. *See In re Cleaver-Bascombe*, 892 A.2d 396, 412-13 (D.C. 2006) (providing that "lying under oath on the part of an attorney for the purpose of attempting to cover up previous dishonest conduct is absolutely intolerable"). While this case did not involve the sort of extreme, intentional neglect of multiple court-appointed clients at issue in *Bradley*, Respondent's dishonest testimony makes the totality of his misconduct more serious than in other neglect cases, such as *Bernstein* and *Lyles*, in which there were no such aggravating factors. On balance, although there is no case exactly on point, the requirement of comparability leads this Committee to recommend that the Court impose a one-year suspension in this case.

D. Fitness

A fitness showing is a substantial undertaking. *In re Cater*, 887 A.2d 1, 20 (D.C. 2005). Thus, in *Cater*, the Court held that "to justify requiring a suspended attorney to prove fitness as a

condition of reinstatement, the record in the disciplinary proceeding must contain clear and convincing evidence that casts a serious doubt upon the attorney's continuing fitness to practice law." *Id*. at 6. Proof of a "serious doubt" involves "more than 'no confidence that a Respondent will not engage in similar conduct in the future.'" *In re Guberman*, 978 A.2d 200, 213 (D.C. 2009). It connotes "real skepticism, not just a lack of certainty." *Id.* (quoting *Cater*, 887 A.2d at 24).

In articulating this standard, the Court observed that the reason for conditioning reinstatement on proof of fitness was "conceptually different" from the basis for imposing a suspension. As the Court explained:

> The fixed period of suspension is intended to serve as the commensurate response to the attorney's past ethical misconduct. In contrast, the open-ended fitness requirement is intended to be an appropriate response to serious concerns about whether the attorney will act ethically and competently in the future, after the period of suspension has run. . . . [P]roof of a violation of the Rules that merits even a substantial period of suspension is not necessarily sufficient to justify a fitness requirement . . . .

Cater, 887 A.2d at 22.

In addition, the Court found that the five factors for reinstatement set forth in *In re Roundtree*, 503 A.2d 1215, 1217 (D.C. 1985), should be used in applying the *Cater* fitness standard. They include:

> (a) the nature and circumstances of the misconduct for which the attorney was disciplined;
>
> (b) whether the attorney recognizes the seriousness of the misconduct;
>
> (c) the attorney's conduct since discipline was imposed, including the steps taken to remedy past wrongs and prevent future ones;
>
> (d) the attorney's present character; and
>
> (e) the attorney's present qualifications and competence to practice law.

Cater, 887 A.2d at 21, 25.

Respondent's prolonged neglect of, and his apparent failure even to recognize, his duties and obligations as an attorney serving in the role of a personal representative—even in the face of multiple court orders—calls for a fitness requirement as a condition of reinstatement. Without such a showing, there is no reasonable assurance that Respondent is fit to engage in the practice of law, or that he will not further damage clients. *In re Cater*, 887 A.2d 1, 20 (D.C. 2005). His ten-year campaign to secure an unfair portion of his client's settlement award provides clear and convincing evidence raising a serious doubt about his continuing fitness, as do his continuing failure to recognize or acknowledge his wrongdoing and his continuing efforts to blame others for his own neglect and misconduct. Absent a fitness requirement, there is every reason to believe that, if given the chance, Respondent will neglect and handle incompetently other cases, thereby prejudicing other clients.

V. CONCLUSION

For the foregoing reasons, the Hearing Committee finds that Respondent violated Rules 1.1(a), 1.1(b), 1.3(a), 1.3(c), and 8.4(d), and should receive the sanction of a one-year suspension with a fitness requirement. We direct Respondent's attention to the requirements of D.C. Bar R. XI, § 14, and their effect on eligibility for reinstatement. *See* D.C. Bar R. XI, § 16(c).

AD HOC HEARING COMMITTEE

/RLW/
Robert L. Walker, Esquire, Chair

/JF/
Judy Franz, Public Member

/JA/
Julie Abbate, Esquire, Attorney Member

Dated: October 26, 2016