THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matters of:	:	
	:	
JOHN T. SZYMKOWICZ, (Bar Registration No. 946079),	:	Bar Docket No. 2005-D179
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JOHN P. SZYMKOWICZ, (Bar Registration No. 462146),	:	Bar Docket No. 2007-D050
	:	
LESLIE SILVERMAN, (Bar Registration No. 448188),	:	Bar Docket No. 2007-D214
	:	
ROBERT KING, (Bar Registration No. 922575),	:	Bar Docket No. 2008-D420
	:	
Respondents.	:	
	:	
Members of the Bar of the District of Columbia Court of Appeals	:	

REPORT AND RECOMMENDATION OF THE BOARD ON PROFESSIONAL RESPONSIBILITY

This matter is before the Board on Professional Responsibility on remand from the Court of Appeals. In its order of September 17, 2015, the Court directed the Board to address five specific questions. *In re Szymkowicz*, 124 A.3d 1078, 1086-88 (D.C. 2015) (per curiam) ("*Szymkowicz I*"). Upon consideration of the record and the parties' briefs, the Board responds to the Court as follows.

I. SUMMARY OF PROCEDURAL HISTORY

Respondents John T. Szymkowicz ("JTS"), John P. Szymkowicz ("JPS"), Leslie Silverman ("Silverman"), and Robert King ("King") were charged with

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

violating D.C. Rules of Professional Conduct ("Rules") 1.5(b), 1.6(a)(1), 1.7(b)(2), 1.7(b)(3), 1.7(b)(4), 1.16(a), 8.4(c), and 8.4(d). On September 28, 2012, after twelve days of testimony, Hearing Committee Number Seven issued a Report and Recommendation ("H.C. Rpt.") finding that Disciplinary Counsel failed to prove that JTS, JPS, or Silverman committed any of the charged Rule violations. The Hearing Committee found that King violated Rule 1.5(b) by failing to provide his client with a written retainer agreement. On July 25, 2014, the Board issued an order ("Board Order") adopting the recommendation of the Hearing Committee and directing Disciplinary Counsel to issue an informal admonition to King based on his violation of Rule 1.5(b).

Disciplinary Counsel took exception to the Board's report and argued to the Court that Respondents violated Rules 1.7 (conflict of interest), 8.4(c) (conduct involving dishonesty, deceit, fraud or misrepresentation), and 8.4(d) (serious interference with the administration of justice). On September 17, 2015, the Court accepted the Board's determination that none of the Respondents violated Rule 8.4, but disagreed with the Board's conclusion that "J.T. Szymkowicz correctly determined, after adequate inquiry, that Mrs. Ackerman's interests and Dr. Ackerman's interests did not conflict." The Court held that "the Szymkowiczes could not properly represent both Ms. Ackerman and Dr. Ackerman without obtaining informed consent to the joint representation." *Szymkowicz I*, 124 A.3d at 1086. With respect to Silverman and King, the Court concluded that "there was a substantial risk of conflicting interests arising from Ms. Silverman's and Mr. King's

connections to Dr. Ackerman while they were representing Ms. Ackerman." *Id.* at 1088. Thus, the Court remanded the case "for further proceedings with respect to conflict-of-interest issues arising from respondents' representation of Ms. Ackerman," setting forth five specific questions for the Board to consider:

> 1. whether, as [Disciplinary] Counsel contends, respondents bear the burden of establishing that they obtained informed consent or whether instead [Disciplinary] Counsel bears the burden in disciplinary proceedings of establishing the absence of informed consent;
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> 2. whether, as the Hearing Committee appears to have assumed, the determination whether Mrs. Ackerman gave informed consent should be made under the standard applicable to the determination whether a party had the capacity to engage in a transaction;
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> 3. whether Rule 1.7(b)(2) is violated whenever the requisite informed consent is not in fact obtained, or whether instead it is a defense under the Rule that the attorney reasonably but mistakenly believed that informed consent had been obtained;
>
> 4. the implications of Rule 1.14, which addresses the obligations of a lawyer representing a client with diminished capacity . . . ; and
>
> 5. the date on which the Szymkowiczes ended their representation of Ms. Ackerman.

Id. at 1079, 1086-87.

On November 23, 2015, Disciplinary Counsel and the Szymkowiczes filed briefs addressing the Court's questions on remand. On February 1, 2016, Silverman and King filed a brief adopting and incorporating the Szymkowiczes' brief. Broadly speaking, Disciplinary Counsel argues that the Respondents did not obtain Mrs. Ackerman's informed consent, while all the Respondents argue that they did.

II. RESPONSES TO THE COURT'S QUESTIONS ON REMAND

A. Do Respondents Bear the Burden of Establishing that They Obtained Informed Consent or Does Disciplinary Counsel Bear the Burden in Disciplinary Proceedings of Establishing the Absence of Informed Consent?

Summary Response

When Disciplinary Counsel charges that a respondent violated Rule 1.7(b), it has the burden of proving that charge by clear and convincing evidence. If a respondent defends that charge by asserting that he or she obtained informed consent, the respondent bears the burden of producing evidence to support that assertion. If the respondent produces such evidence, Disciplinary Counsel bears the burden of proving by clear and convincing evidence that the respondent did not obtain informed consent. Disciplinary Counsel does not have to prove the absence of informed consent unless the respondent offers evidence that he or she obtained informed consent.

Analysis

Read together, Rules 1.7(b) and 1.7(c) prohibit a lawyer from representing a client with respect to a matter if such representation is prohibited by Rule 1.7(b) *unless* the lawyer obtains informed consent[1] from the client after full disclosure and

[1] Disciplinary Counsel charged a violation of the pre-February 1, 2007 version of Rule 1.7, which provided for waiver of a conflict of interest when there is "consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation." In February 2007, the requirement of "consent" was changed to one of "informed consent," mirroring a change to the ABA model rule that had been recommended by the American Bar Association Commission on Evaluation of the Rules of Professional Conduct (also known as the Ethics 2000 Commission). The D.C. Rules Review Committee did not consider the amendment to be a substantive change, noting that "informed

(Footnote continued on next page)

the lawyer reasonably believes that he or she will be able to competently and diligently represent the client. Thus, a client's informed consent is a factual defense that a respondent may raise when Disciplinary Counsel makes a prima facie case that informed consent was required.

In its opinion, the Court found that Disciplinary Counsel proved by clear and convincing evidence that the Szymkowiczes' joint representation of Mrs. Ackerman and Dr. Ackerman presented "a substantial risk that [Mrs. Ackerman's and Dr. Ackerman's] interests did or might diverge in particular respects relevant to the conduct of the joint representation." *Szymkowicz I*, 124 A.3d at 1086.[2] The Court also found that Silverman and King's relationship with a self-dealing third party (Dr. Ackerman) while they were representing Mrs. Ackerman presented a "substantial risk of conflicting interests" under Rule 1.7(b)(4). *Id.* at 1088.[3] Consequently, the Court found that all Respondents were obligated to obtain informed consent pursuant to Rule 1.7(c). *Id.*

On remand, Respondents argue that Disciplinary Counsel bears the burden of proving all elements of the Rule violation, including the absence of informed

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consent" was "similar to the existing D.C. Rules concept of consent after appropriate consultation." D.C. Bar Rules of Professional Conduct Review Committee, Proposed Amendments to the District of Columbia Rules of Professional Conduct: Report and Recommendations at 11 (2005). Accordingly, we use the term "informed consent" herein.

[2] Rule 1.7(b)(2) (1991) provides: "Except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if . . . [s]uch representation *will be or is likely to be* adversely affected by representation of another client." (emphasis added).

[3] Rule 1.7(b)(4) (1991) provides: "Except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if . . . [t]he lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party . . . ."

consent, by clear and convincing evidence. Szymkowicz Respondents' Brief on Remand from the District of Columbia Court of Appeals ("Szymkowicz Br.") at 4-8. Disciplinary Counsel argues that Respondents bear the burden of proving informed consent because the evidence that they obtained informed consent is uniquely within Respondents' control. Disciplinary Counsel's Brief ("ODC Br.") at 6-8.

The Board concludes that once Disciplinary Counsel presents evidence of a conflict of interest pursuant to Rule 1.7(b), a respondent may offer evidence showing that he or she obtained informed consent pursuant to 1.7(c), and thus did not violate Rule 1.7(b). Disciplinary Counsel retains the ultimate burden to prove a violation of a Rule by clear and convincing evidence, and therefore must rebut any evidence of informed consent. If a respondent fails to raise informed consent as a defense (or to explain adequately why such evidence is unavailable), Disciplinary Counsel need not prove the absence of informed consent.

In summary, when a Respondent offers evidence that he or she obtained informed consent, Disciplinary Counsel must prove by clear and convincing evidence that Respondent did not, in fact, obtain it. When a Respondent does not offer evidence of informed consent or sufficiently explain its absence, Disciplinary Counsel is not required to prove that informed consent was not obtained.

1. Disciplinary Counsel Bears the Burden of Proof in Disciplinary Prosecutions.

Disciplinary Counsel bears the burden of proving the violation of a Rule of Professional Conduct by clear and convincing evidence. *In re Anderson*, 778 A.2d 330, 335 (D.C. 2001); *In re Thompson*, 579 A.2d 218, 221 (D.C. 1990) (*Thompson II*). Thus, in any case in which a respondent presents a factual defense to a charged Rule violation, the Court will consider that factual defense together with all evidence produced by Disciplinary Counsel in determining whether Disciplinary Counsel has carried its burden of proving a Rule violation by clear and convincing evidence.

For example, in *In re Arneja*, 790 A.2d 552, 553-54 (D.C. 2002), Disciplinary Counsel proved that the balance in the respondent's trust account fell below the amount of entrusted funds he had received on behalf of two clients. In his defense, the respondent and other witnesses asserted that the clients had consented to allow him to use those funds to pay litigation fees, and thus he argued that he was permitted to withdraw the funds from the trust account. *Arneja*, 790 A.2d at 556. The Court accepted the Hearing Committee's finding that the clients had in fact consented to use the funds as litigation expenses. *Id.* After noting that, in order to prove misappropriation, "[Disciplinary] Counsel had to prove by 'clear and convincing evidence that the client did not consent to the attorney's use of the funds,'" the Court held that Disciplinary Counsel had not proven misappropriation because "[Disciplinary] Counsel failed to prove that [the respondent] lacked consent." *Id.* (quoting *In re Shelly*, 659 A.2d 460, 466 (N.J. 1995)).

Arneja is not unique. Where a respondent offers evidence to support a defense, the Court considers all evidence presented to determine whether Disciplinary Counsel has met its burden of proving a violation by clear and convincing evidence, not whether the respondent has disproved the violation. *See, e.g.*, *In re Ingram*, 584 A.2d 602, 603 (D.C. 1991) (per curiam) (where the balance in the respondent's bank account fell below the amount to be held in trust for a client, testimony that the respondent kept the money owed to the client intact in the client's file was "sufficient to negate a finding of misappropriation"); *Thompson II*, 579 A.2d at 223 (Disciplinary Counsel proved misappropriation by clear and convincing evidence, taking into account all the evidence, including the respondent's "implausible" explanation for his use of the funds, which is "circumstantial evidence which the Board may consider, along with all the other evidence," in determining whether Disciplinary Counsel has met its burden); *In re Gilchrist*, 488 A.2d 1354, 1357 (D.C. 1985) (no misappropriation where Disciplinary Counsel failed to offer testimony or evidence to refute the respondent's explanation for his use of the funds).

Disciplinary Counsel argues that a respondent bears the burden of proving informed consent because the evidence concerning the respondent's compliance is within respondent's control. ODC Br. at 8. But that is the case in most disciplinary proceedings, and no disciplinary case holds that a respondent has the burden of proving that he or she did not violate a Rule. We agree with Disciplinary Counsel in the respect that a respondent must produce evidence of informed consent—or a credible reason why such evidence is unavailable—before Disciplinary Counsel will

be required to prove its absence. But this does not shift the ultimate persuasion burden of proof to the respondent.

2. Cases Involving Other Safe Harbors Support the Board's Conclusion.

Although there are no cases directly addressing the burden of proof in a Rule 1.7 case, the Court considered an analogous issue in *In re Sofaer*, 728 A.2d 625 (D.C. 1999), a case involving the violation of Rule 1.11(a), which governs the acceptance of other employment following work as a public officer or employee. Rule 1.11(a) provides:

> A lawyer shall not accept other employment in connection with a matter which is the same as, or substantially related to, a matter in which the lawyer participated personally and substantially as a public officer or employee. Such participation includes acting on the merits of a matter in a judicial or other adjudicative capacity.

The Court adopted the Board's recommendation that, pursuant to the standard applicable in non-disciplinary cases, once a prima facie case is made by Disciplinary Counsel showing that the transactions at issue are substantially related, "'[t]he burden of producing evidence [not the burden of proof] that no ethical impropriety has occurred will then shift to [the respondent], who must rebut [Disciplinary Counsel's] showing by demonstrating that he or she could not have gained access to information during the first representation that might be useful in the later representation. Absent sufficient rebuttal, [Disciplinary Counsel] will have carried the burden of persuasion . . . .'" *Sofaer*, 728 A.2d at 644 (quoting *Brown v. Dist. of Columbia Zoning Adjustment*, 486 A.2d 37, 50 (D.C. 1984)).

The Board reached a similar conclusion in *In re Shannon*, Bar Docket No. 2004-D316 (BPR Nov. 27, 2012), *recommendation adopted after no exceptions filed*, 70 A.3d 1212 (D.C. 2013) (per curiam) regarding Rule 1.8(a), which prohibits an attorney from engaging in a business transaction with a client, unless:

> (1) The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
>
> (2) The client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
>
> (3) The client gives informed consent in writing thereto.

Rule 1.8(a)(1)-(3). Disciplinary Counsel alleged that the respondent violated Rule 1.8(a) when he obtained a joint tenancy in his client's house. *Shannon*, Bar Docket No. 2004-D316 at 3. Respondent argued that he came within the safe harbor of Rule 1.8(a)(1)-(3), but offered no evidence to show that he complied with the requirements of the Rule. *Id.* at 26.

The Board found that once Disciplinary Counsel had established that the respondent entered into a business transaction with his client, the respondent bore the burden of producing evidence demonstrating his compliance with the safe harbor of Rule 1.8(a). *Id.* at 25. It explained that "placing the burden [of coming forward with evidence] on the respondent is appropriate because the respondent is in a unique position to know whether the exceptions under Rule 1.8(a) were satisfied." *Id.* Still,

Shannon concluded that Disciplinary Counsel retains the ultimate burden of persuasion, *i.e.*, proving a Rule violation by clear and convincing evidence:

> [Disciplinary] Counsel *retains the burden of proof* by clear and convincing evidence, but the respondent cannot sit on his hands once the improper transaction has been established, especially where, as here, the lack of fairness is manifest and the client's mental facilities are questionable and require [Disciplinary] Counsel to prove the negative.

Id. at 25-26 (emphasis added).[4] Relying on several of the misappropriation cases cited above, the Board recognized that the Court has consistently held that Disciplinary Counsel bears the ultimate burden of proving each alleged Rule violation by clear and convincing evidence including, where appropriate, rebutting a respondent's proffered exculpatory evidence and/or explanation. *Id*. at 24 (citing *Anderson*, 778 A.2d at 335; *Thompson II*, 579 A.2d at 218). Ultimately, the Board in *Shannon* found that Disciplinary Counsel proved by clear and convincing evidence that the respondent had violated Rule 1.8(a) because Disciplinary Counsel made out a prima facie case that the respondent violated Rule 1.8 and the respondent offered *no* evidence of his client's informed consent. *Id.* at 25.

[4] We note that the *Shannon* Board Report also states that "'once proof has been introduced that the lawyer entered into a business transaction with a client, the *burden of persuasion* is on the lawyer to show that the transaction was fair and reasonable and that the client was adequately informed.'" *Shannon*, Bar Docket No. 2004-D316 at 25 (emphasis added) (quoting *Estate of Brown*, 930 A.2d 249, 254-55 n.4 (D.C. 2007) (a civil case) (quoting *Restatement (Third) of the Law Governing Lawyers* § 126, cmt. a (2000) (concerning Rule 1.8 (business transactions between a lawyer and a client)))). However, the quoted language, *supra* at 10-11, shows that the Board was actually discussing the burden of production and did not intend to re-allocate the burden of persuasion in disciplinary cases.

In its brief following remand, Disciplinary Counsel cites only one District of Columbia case, *Griva v. Davidson*, 637 A.2d 830 (D.C. 1994), for the proposition that, in disciplinary cases, the burden is on the attorney to prove that informed consent was obtained. ODC Br. at 7. But *Griva* (a civil, rather than a disciplinary, case) does not address who has the burden of proof to establish informed consent in civil litigation, let alone in a disciplinary case. *Griva* merely states that "[w]here dual representation creates a potential conflict of interest, the burden is on the attorney involved in the dual representation to approach both clients with an affirmative disclosure so that each can evaluate the potential conflict and decide whether or not to consent to continued dual employment." *Griva*, 637 A.2d at 845. *Griva* discusses an attorney's obligations under the Rules; it does not address who bears the burden of proof if Disciplinary Counsel alleges that the attorney did not comply with the Rules.

3. Comments to Rule 1.7 Do Not Alter the Burden of Proof in Disciplinary Cases.

Disciplinary Counsel also argues that the Respondent has the burden to prove informed consent, citing Comment [20] (now [28]) to Rule 1.7, which advises attorneys to obtain informed consent in writing and says that "[u]nder the District of Columbia substantive law, the lawyer bears the burden of proof that informed consent was secured." Neither the Rules nor the Comments define "substantive law."

The available legislative history of the Comment does not explain the significance of its reference to "burden of proof." The Rules of Professional Conduct Review Committee recommended that this sentence be added to the comments in

1993, but its report does not explain its understanding of "substantive law," and the Board has been unable to locate any documents that discuss the Committee's consideration of the issue. *See* Report to the Board of Governors of the District of Columbia Bar, Proposed Amendments to the District of Columbia Rules of Professional Conduct, at 16-29 (Dec. 8, 1993).

Nothing in the Report, however, suggests that the Rules Review Committee even considered the burden of proof in a disciplinary proceeding, much less that it intended to alter that burden *sub silentio*. Instead, the Comment, which encourages—but does not require—lawyers to obtain written consent, is best understood as a warning to lawyers that, as fiduciaries, if a client sues in civil court citing evidence of a conflict of interest, the lawyer would have to prove that there was no conflict. *See Perry v. Virginia Mortg. & Inv. Co.*, 412 A.2d 1194, 1197 (D.C. 1980) ("'When [in a civil case] it is shown that a fiduciary has conflicting interests, ancient principles require him to bear the burden of proving that he has been faithful to his trust.'" (quoting *Sheridan v. Perpetual Building Ass'n*, 299 F.2d 463, 465 (D.C. Cir. 1962) (en banc))).

B. Should the Determination of Whether Mrs. Ackerman Gave Informed Consent Be Made Under the Standard Applicable to the Determination of Whether a Party Had the Capacity to Engage in a Transaction?

Summary

Yes. The Board agrees with the Hearing Committee's detailed analysis and conclusion that the appropriate standard to determine whether Mrs. Ackerman had the capacity to give informed consent was "'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 was engaged, . . . whether or not she [was] competent in transacting business generally." H.C. Rpt. at ¶ 54 (quoting *Butler v. Harrison*, 578 A.2d 1098, 1100 (D.C. 1990)).

Analysis

Although various legal standards have been used to assess diminished capacity (*see* ABA Comm'n on Law & Aging and American Psychological Ass'ns, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* 5 (2005)), Disciplinary Counsel and Respondents agree that the contractual capacity standard is appropriate to determine whether a client has given informed consent. *See* ODC Br. at 18; Szymkowicz Br. at 10-11. The Board continues to believe that this is the appropriate standard.

Disciplinary Counsel disagrees with the *outcome* of the Hearing Committee's and the Board's application of that test, which resulted in the finding that Mrs. Ackerman had the capacity to consent. Thus, Disciplinary Counsel contends that Mrs. Ackerman "did not have the capacity to understand the ramifications—at each stage of the joint representation with her son—that threatened the plan she had created to protect herself and provide equally for her children." ODC Br. at 21.

The capacity to contract is determined by evaluating:

> [W]hether 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 (citations omitted); *accord Hernandez v. Banks*, 65 A.3d 59, 71 (D.C. 2013) (en banc) (noting that a person with diminished capacity "may have some capacity to contract and its existence in a specific case may depend on the nature of the particular transaction at issue").

Capacity to contract is evaluated by examining the client's "'habitual or considered standards of behavior and values,'" even if the client makes decisions the attorney feels may be unwise. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 96-404 at 4 n.5 (1996) (quoting M. Silberfield & A. Fish, *When the Mind Fails: A Guide to Dealing with Incompetency* (1994)). Even if an individual suffers some impairment, such as memory lapses, he or she retains the capacity to convey property in testamentary documents. *See Uckele v. Jewett*, 642 A.2d 119, 122 (D.C. 1994). This approach is consistent with Rule 1.14, which provides that "[w]hen a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." Rule 1.14(a) (1991).

The Hearing Committee found that the evidence "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." H.C. Rpt. at ¶ 29. The Board agreed (Board Order

at 2-3), and continues to agree, with that conclusion. The Court has similarly rejected Disciplinary Counsel's argument that "Mrs. Ackerman was incompetent and lacked capacity to make the decisions at issue in this case and that respondents knew or should have known that to be true." *Szymkowicz I*, 124 A.3d at 1084.

C. Is Rule 1.7(b)(2) Violated Whenever the Requisite Informed Consent Is Not in Fact Obtained, or Is It a Defense Under the Rule that the Attorney Reasonably, but Mistakenly, Believed that Informed Consent Had Been Obtained?

Summary

We conclude that an attorney does not violate Rule 1.7(b)(2) if he or she has an objectively reasonable belief that that the client gave informed consent, even if the attorney is wrong in that belief and the client did not, in fact, give informed consent.

Analysis

On remand, Disciplinary Counsel argues that an attorney violates Rule 1.7(b)(2) or (4) if that attorney mistakenly believes he or she obtained informed consent, even if that belief was reasonable. ODC Br. at 21-22. Disciplinary Counsel's argument is based on the general concept that a respondent's good faith is not a defense to disciplinary charges. *Id.* (citing *In re Boykins*, Bar Docket No. 375-96 (BPR June 17, 1999)). The Szymkowiczes argue that an attorney does not violate Rule 1.7(b) if he reasonably believes that informed consent was obtained pursuant to Rule 1.7(c). Szymkowicz Br. at 12-13. King and Silverman respond that "such [informed] consent was present in the POAs Mrs. Ackerman executed in favor

of Dr. Ackerman." Brief of Respondents Leslie Silverman and Robert King on Remand from the District Court of Appeals ("Silverman & King Br.") at 6.

We have identified no applicable D.C. cases directly responsive to the Court's question. However, in misappropriation cases, it is well-settled that an objectively reasonable, albeit erroneous belief can be sufficient to reduce an otherwise reckless misappropriation to a negligent misappropriation, with the corresponding reduction in sanction from disbarment to a six-month suspension. *See, e.g.*, *In re Chang*, 694 A.2d 877, 880-82 (D.C. 1997) (per curiam) (appended Board Report) (finding negligent misappropriation where attorney mistakenly, but not unreasonably, believed he had enough earned fees in the account to cover the check); *In re Evans*, 578 A.2d 1141, 1142 (D.C. 1990) (*Evans I*) (per curiam) (imposing a six-month suspension for negligent misappropriation based on findings that respondent "had an objectively reasonable, albeit erroneous, belief that his actions were proper").

With respect to conflicts of interest, the Restatement provides that "[i]n a multiple-client situation, the information [disclosed to clients about a conflict] normally should address . . . any material reservations that a disinterested lawyer *might reasonably harbor* about the arrangement if such a lawyer were representing only the client being advised . . . ." *Restatement (Third) of the Law Governing Lawyers* § 122, cmt. c(1) (2000) (emphasis added). Furthermore, in a case decided under a rule analogous to Rule 1.7(b), the Supreme Court of Montana found that a respondent violated the rule where it was not reasonable for him to believe that informed consent was obtained, because the attorney "should have recognized" that

additional consultation and disclosures were necessary to adequately inform the client of the attorney's obligations under Rule 1.7. *In re Marra*, 87 P.3d 384, 388-89 (Mont. 2004). Similarly, in a Missouri case dealing with a conflict of interest arising from dual representation, the Court held that "[c]onsent purportedly given by a client whom the lawyer should reasonably know lacks capacity to give consent is ineffective." *In re Schaeffer*, 824 S.W.2d 1, 3 (Mo. 1992) (en banc).

In *Shaeffer*, the attorney was hired to assist a client with the transfer of a large sum of money to a woman while the dissolution of his previous marriage was still ongoing. *Id.* at 2. The court found that even if the attorney had obtained informed consent, it would have been unreasonable to rely on it, because the respondent "should reasonably have known that [the client]'s judgment, at least on the subjects of [the woman] and money, was impaired and that [the client]'s capacity to give knowing consent to any transaction involving [the woman] and funds or assets to which [the client] had access was in question." *Id.* at 4. This conclusion was based on a finding that the attorney was actually aware of the fact that the client was "obsessed" with the woman, had lost employment as a result of giving her merchandise without charge, had misappropriated funds from an organization where he was serving as an officer, and had been under the care of psychiatrists. *Id.*

We therefore conclude that attorneys do not violate Rules 1.7(b)(2) if they mistakenly believe they have obtained informed consent to a conflict or potential conflict, so long as that belief is objectively reasonable.

To find otherwise would transform Rule 1.7 into one of strict liability: If Disciplinary Counsel proved that a client was incapable of consenting, the respondent would have violated Rule 1.7, no matter that the respondent had a sincerely held, objectively reasonable belief that he or she obtained consent. Such a standard would make it impractical for practitioners to represent clients like Mrs. Ackerman, who may suffer some impairment, but who retain the capacity to make testamentary documents and enter into other transactions.

D. What Are the Implications to this Case of Rule 1.14, Which Addresses the Obligations of a Lawyer Representing a Client with Diminished Capacity?

Rule 1.14 is relevant to this case in two respects. First as explained above, Rule 1.14 reinforces the applicability of the transactional capacity standard. Specifically, Rule 1.14(a) requires a lawyer to "as far as reasonably possible, maintain a normal client-lawyer relationship with the client" with diminished capacity. Rule 1.14(b) permits, but does not require, an attorney to seek the appointment of a guardian or take other protective action, "only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest." The comments to Rule 1.14 view the client's capacity to make decisions as transaction-specific, noting that "a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being." Rule 1.14, cmt. [1] (1991).

Second, Rule 1.14 is relevant to the question of whether Respondents disclosed sufficient information to Mrs. Ackerman to enable her to give informed

consent. Maintaining a normal attorney-client relationship pursuant to Rule 1.14 involves tailoring the disclosure to the client's level of understanding. *See* American College of Trust and Estate Counsel, *Commentaries on the Model Rules of Professional Conduct* 132 (4th ed. 2006) (interpreting Rule 1.14 and explaining that "the risk of harm to a client and the amount of harm that a client might suffer should both be determined according to a different scale than if the client were fully capable" and that diminished capacity "increases the risk of harm and the possibility that any particular harm would be substantial"); *see also* D.C. Legal Ethics Op. 309 (Sept. 2001) (providing that when giving full disclosure of a potential conflict of interest under Rule 1.7(c), "more explanation may be required to satisfy the Rules' consent and consultation criteria where a less sophisticated client is involved").

E. On What Date Did the Szymkowiczes End Their Representation of Mrs. Ackerman?

The Szymkowiczes ended their representation of Mrs. Ackerman on March 7, 2007. As the Hearing Committee found, JTS withdrew from his representation of 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." H.C. Rpt. at ¶ 22. JTS ended his representation of Mrs. Ackerman, and Silverman began representing Mrs. Ackerman, on March 7, 2007. H.C. Rpt. at ¶¶ 22-23. We treat JPS as withdrawing from the representation at the same time as JTS, since he was subordinate to JTS and never entered a formal appearance in the case. *See* Disciplinary Counsel's Exhibit ("BX") 48 (docket sheet); *see also* ODC Br. at 26-27 (treating JTS and JPS as one unit for the purposes of this question from the Court).

Disciplinary Counsel contends that the Szymkowiczes continued to represent Mrs. Ackerman after March 7, 2007 because JTS spoke with and sent Silverman drafts of various documents after that date. ODC Br. at 27.[5] The Hearing Committee found that there was no attorney-client relationship between JTS and Mrs. Ackerman after March 7, 2007. H.C. Rpt. at ¶¶ 150, 166. We agree.

Before the Board in *Szymkowicz I*, Disciplinary Counsel relied on *In re Shay*, 756 A.2d 465, 474 (D.C. 2000) (per curiam) (appended Board Report), for the proposition that drafting a will establishes an attorney-client relationship. In *Shay*, however, the finding of an attorney-client relationship was based on (1) the fact that the client sought professional advice and assistance from the respondent; (2) the respondent held herself out as an attorney in delivering her advice and services; and (3) she used her law firm's letterhead and resources for her work. *Shay*, 756 A.2d at 474-75 (appended Board Report). Whether an attorney-client relationship existed between Mrs. Ackerman and the Szymkowiczes depends on the "totality of the circumstances," not on the isolated facts Disciplinary Counsel has identified. *See In re Fay*, 111 A.3d 1025, 1030 (D.C. 2015) (per curiam) (finding that, *inter alia*, by holding himself out to the court as the client's lawyer, the respondent "assumed the ethical responsibilities and duties of [the client's] attorney"); *In re Ryan*, 670 A.2d

[5] Disciplinary Counsel also asserts that JTS and JPS "participat[ed] in the trial preparations of *Ackerman II*, including preparing Ms. Ackerman to testify . . . ." ODC Br. at 27 (citing Tr. 2779-2780). The record does not support this proposition. Rather, at the portion of the transcript cited by Disciplinary Counsel, JTS testified that he met with Silverman and King, but he "wouldn't call it assisting in preparation of trial," and that he and Dr. Ackerman were merely "present" for a meeting between Mrs. Ackerman, Silverman, and King. Tr. 2779-2780.

375, 379 (D.C. 1996) (an attorney's ethical duties to a client arise from the fiduciary relationship between attorney and client); *In re Lieber*, 442 A.2d 153, 156 (D.C. 1982) (a client's perception of an attorney as her client is a consideration in determining whether an attorney-client relationship existed).

Here, there is no evidence that Mrs. Ackerman understood that the Szymkowiczes represented her after March 2007, or that they held themselves out as her lawyer. *See* H.C. Rpt. at ¶ 166. Rather, JTS communicated solely with Silverman, the counsel who replaced him. *Id.* Whatever JTS's motivation in drafting the document may have been, he knew that Silverman was Mrs. Ackerman's attorney, as did Silverman, and she was thus ultimately responsible for acting in the best interests of her client. *See* H.C. Rpt. at ¶¶ 146, 150. At most, JTS drafted a will and assignment that he sent to Silverman. H.C. Rpt. at ¶ 150. That conduct did not resurrect an attorney-client relationship. It is not at all unusual—indeed, it is in the client's best interest—for attorneys to transmit work product to successor counsel when a substitution of counsel has been effected, and otherwise to cooperate in that transition.

We recognize that in *Fay*, the Court held that there was an attorney-client relationship between a lawyer serving as local counsel and the client, based on the "totality of the circumstances," even though the client did not know that the respondent was representing him. 111 A.3d at 1030. However, in *Fay*, the respondent, who had been engaged by his client's lead counsel who was acting as

the client's agent, held himself out to the court as the client's lawyer, by signing and filing a complaint and other papers on the client's behalf. *Id.* at 1028.

III. WHETHER DISCIPLINARY COUNSEL PROVED BY CLEAR AND CONVINCING EVIDENCE THAT RESPONDENTS VIOLATED RULE 1.7(b)

The Court has determined that Disciplinary Counsel proved by clear and convincing evidence that the Szymkowiczes, Silverman, and King faced an actual or likely conflict of interest under Rule 1.7(b). Accordingly, we must determine whether the Szymkowiczes, Silverman, or King offered evidence that they complied with Rule 1.7(c) and, if so, whether Disciplinary Counsel effectively rebutted that evidence. We find that Disciplinary Counsel failed to prove by clear and convincing evidence that the Szymkowiczes failed to obtain informed consent pursuant to Rule 1.7(c) after JTS offered evidence of informed consent, but did carry that burden with respect to Silverman and King.

A. The Szymkowiczes

Disciplinary Counsel argues that JTS did not receive, and could not have reasonably believed he had received, informed consent from Mrs. Ackerman, particularly after filing *Ackerman II* on May 9, 2005 (the day after the Szymkowiczes began representing Mrs. Ackerman), because JTS "[took] no steps to make the disclosures required under 1.7(c)." ODC Br. at 22.

Based on the Hearing Committee's findings, the Board's Order, and substantial evidence in the record, we conclude that JTS (and therefore JPS) obtained Mrs. Ackerman's informed consent pursuant to Rule 1.7(c). JTS "pressed Mrs.

Ackerman to determine whether she truly wanted to undertake litigation" and "told her 'many times' that she could be represented by another attorney, but she refused to consider it and adamantly wanted to continue." Board Order at 24 (citing Tr. 2463, 2366-67, 2370 ("you can discharge me, you can end the litigation, you can get other counsel")). Further:

> 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.

H.C. Rpt. at ¶ 151; *see also* H.C. Rpt. at ¶ 134 (same).

JTS also explained the financial implications at stake. For example, before executing the retainer agreement, JTS informed Mrs. Ackerman that the trust was paying the legal fees for both *Ackerman I* and *Ackerman II*, that the litigation could cost "tens of thousands of dollars," that she could be responsible for paying the fees of her own and the trustee's lawyers, and the litigation could, in any event, fail. Board Order at 24-25 (citing Tr. 2308-09, 2460-62, 2592-94). Even after the adverse decision in *Ackerman I*, JTS "'sat down and . . . explained to her that, if in fact she didn't want to proceed, [he] was obligated then to dismiss the case,' but 'she was even more adamant than before' about continuing with her claim." *Id.* (citing

Tr. 2322); *see also* Tr. 2681 (when he asked her if she wanted to end the litigation, her answer "was always no").[6]

Finally, JTS cautioned Mrs. Ackerman that "if her litigation were to succeed, she could be victimized by her son when he gained control of her assets ('Steve could take the money, fly to Monte Carlo [or] hire financial advisors who were incompetent'), but she was undeterred." Board Order at 25 (quoting Tr. 2307-09).

Disciplinary Counsel did not impeach this testimony at the hearing or otherwise offer evidence that would tend to disprove it on remand.[7] In light of the uncontroverted evidence of compliance with the safe harbor of Rule 1.7(c), we find that Disciplinary Counsel has not carried its burden of proving by clear and convincing evidence that JTS violated Rule 1.7(b)(2).

Based on this conclusion, we also see no reason to revisit our previous finding (H.C. Rpt. at ¶¶ 189-193; Board Order at 26-27) that JPS reasonably relied on his father's assurances that he had obtained Mrs. Ackerman's informed consent under Rule 5.2 (subordinate lawyers).

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[6] *See generally* Szymkowicz Br., "Appendix A – Informed Consent" (containing a substantial number of examples of testimony bearing on informed consent with citations to the transcript).

[7] In our previous order, we noted that JTS should have cautioned his clients about the generic risks inherent in a joint representation, *i.e.*, that information relevant to the common representation would be shared, and that he might have to withdraw if a conflict arose. Board Order at 27. We noted as well that any failure to make those particular disclosures had not been raised by Disciplinary Counsel to support the charges against Respondents. *Id.* That remains the case. In any event, once JTS offered evidence of informed consent, Disciplinary Counsel had to prove the absence of informed consent by clear and convincing evidence. Thus, if Disciplinary Counsel believed that the failure to disclose these generic risks would have precluded informed consent, it was required to prove that by clear and convincing evidence. Disciplinary Counsel did not do so here.

B. Silverman and King

On remand, Silverman and King fail to respond adequately to the Court's conclusion that they could not rely solely on Mrs. Ackerman's Powers of Attorney in favor of her son to demonstrate the absence of a conflict of interest or to show the presence of informed consent. *Szymkowicz I*, 124 A.3d at 1088. Instead, Silverman and King continue to argue that informed consent was either present through the POAs Mrs. Ackerman executed in favor of Dr. Ackerman or was unnecessary because Dr. Ackerman was a surrogate decision-maker for Mrs. Ackerman's through the Powers of Attorney and informed consent was therefore obtained from Mrs. Ackerman as a matter of law. Silverman & King Br. at 6-7.

Our examination of the record shows that at the beginning of her representation of Mrs. Ackerman, Silverman "questioned [Mrs. Ackerman] about what was going on in the litigation," and that Mrs. Ackerman "gave [her] the sense that she understood what was happening in the litigation, and that in fact she wanted to proceed in the litigation." Tr. 2940-42. However, neither Silverman nor King offered evidence that they obtained Mrs. Ackerman's informed consent during this or any other conversation.

Thus, there is no evidence that Silverman and King reasonably believed that they had obtained informed consent from Mrs. Ackerman. Accordingly, the Board finds that, pursuant to the parameters of the Court's decision, Disciplinary Counsel proved by clear and convincing evidence that Silverman and King violated Rule 1.7(b)(4).

IV. SANCTION

A. The Court Should Not Impose a Sanction for the Rule 1.7(b) Violation Given the Unique Facts of this Case.

We recommend that the Court not impose a sanction on Silverman and King for their failure to obtain informed consent because a lawyer's obligations in instances in which a POA-holder engages in self-dealing were clarified for the first time in *Szymkowicz I*. There, the Court acknowledged that Rule 1.14, cmt. [4] instructs attorneys that if a surrogate decision-maker has already been appointed for the client, the lawyer "can *ordinarily* look to that person for decisions on behalf of the client," but the Court determined that "the circumstances of this case were not ordinary." *Szymkowicz I*, 124 A.3d at 1088 (emphasis added).[8]

Although the Court found that Dr. Ackerman's self-interest makes this case "not ordinary," in a way that causes it to fall outside the guidance of Rule 1.14, cmt. [4], Silverman and King's reliance on the POAs (and, therefore, on Dr. Ackerman's input) in representing Mrs. Ackerman was understandable given that, as the Court notes, the District of Columbia is not among the jurisdictions that "presumptively prohibit POA holders from relying on a POA to make property transfers to the POA holder," *i.e.*, self-dealing. *Id*. Because of the novelty of the issue in this jurisdiction, we suggest that the Court withhold sanction from Silverman and King. *See, e.g.*, *In*

[8] We note that Rule 1.14, cmt. [4] directs that a lawyer "*should* ordinarily look to" a previously-appointed surrogate decision-maker, while *Szymkowicz I* presents consultation with the surrogate decision-maker as an option: "Comment [4] to Rule 1.14 states that an attorney *can* ordinarily look to" the surrogate. We do not see the distinction between "should" and "can" as relevant to the Court's decision on this issue.

re Kline, 113 A.3d 202, 216 (D.C. 2015) (no sanction where the respondent's obligations under the charged rule had been ambiguous); *Martin*, 67 A.3d at 1046 (new rule interpretation applied only prospectively); *In re Mance*, 980 A.2d 1196, 1199 (D.C. 2009) ("As we announce this interpretation of the rule for the first time in this case, however, we apply it prospectively . . . .").

B. Sanction Analysis of the Misconduct in this Case.

In the event that the Court determines that Silverman and King should be sanctioned for the Rule 1.7(b) violation, we set forth our sanction analysis below.

1. Standard of Review

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

The sanction also must not "foster a tendency toward inconsistent dispositions for comparable conduct or . . . otherwise be unwarranted." D.C. Bar R. XI, § 9(h)(1); *see, e.g.*, *Hutchinson*, 534 A.2d at 923-24; *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). 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).

2. Application of the Sanction Factors

a. The Seriousness of the Misconduct

Silverman and King's misconduct was potentially serious because they accepted direction from Dr. Ackerman pursuant to the POAs Mrs. Ackerman had executed in his favor, even though Dr. Ackerman could use the authority created by the POAs to engage in self-dealing.

b. Prejudice to the Client

The Hearing Committee found, and we agree, that Disciplinary Counsel failed to prove that Mrs. Ackerman was harmed by her representation by Silverman and King. To the contrary, the Hearing Committee found that all the actions Silverman and King took on her behalf were consistent with Mrs. Ackerman's own objectives. *See* H.C. Rpt. at ¶¶ 241-43 (Silverman), ¶¶ 298-301 (King).

c. Dishonesty

There is no finding that Silverman or King engaged in dishonesty.

d. Violations of Other Disciplinary Rules

The Court found that King violated Rule 1.5(b) by failing to obtain a written retainer agreement. *See Szymkowicz I*, 124 A.3d at 1088. Silverman did not violate any other Rules in this matter.

e. Previous Disciplinary History

Silverman was disciplined in December 2003 by the Attorney Grievance Commission of Maryland for violating Maryland Rule of Professional Conduct 8.1(b) based on her failure to respond on multiple occasions to lawful demands for information from the Maryland Office of Bar Counsel in connection with three separate complaints, for which she was given a public reprimand. H.C. Rpt. at ¶ 221; BX 180. Silverman was also previously disciplined in May 2009 for violations of Virginia Rules of Professional Conduct 1.3 (diligence), 1.15 (safekeeping of property), and 5.5 (unauthorized practice of law), for which she received a sanction of a sixty-day suspension. H.C. Rpt. at ¶ 221; BX 181. Silverman received reciprocal discipline in the District of Columbia on both occasions. BX 181-82.

On December 7, 2006, King was publicly reprimanded by the Attorney Grievance Commission of Maryland for violations of Maryland Rules of Professional Conduct 1.1 and 8.4(d) for failure to act competently in his attempt to obtain issuance of a writ of habeas corpus and engaging in conduct that was prejudicial to the administration of justice. H.C. Rpt. at ¶ 265; BX 183. Pursuant to D.C. Bar R. XI, § 11(c), the Office of Disciplinary Counsel was required to publish

the fact of that discipline. A public reprimand in Maryland is not subject to reciprocal discipline in the District of Columbia.

f. Acknowledgement of Wrongful Conduct

Silverman and King have not acknowledged that they engaged in misconduct pursuant to 1.7(b)(4), and they continue to argue that they were entitled to rely on the POAs, even after the Court in *Szymkowicz I* held that they were not. 124 A.3d at 1088. We do not treat their denial of wrongdoing as an aggravating factor because, as explained below, their reliance on the POAs was understandable, if incorrect, due to ambiguity in the law.

g. Other Circumstances in Aggravation and Mitigation

There are no other circumstances in aggravation.

In mitigation, the Hearing Committee and the Board both found that "there is no credible evidence that [Dr. Ackerman] in any way abused or financially victimized his mother, that he would dissipate her assets, or that he did not have her best interests at heart. To the contrary, Respondents credibly testified that the interests of Mrs. Ackerman and her son were '100% aligned.'" Board Order at 23 (citing Tr. 2919). Indeed:

> 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).

H.C. Rpt. at ¶ 140; *see also* H.C. Rpt. at ¶ 108. More specifically, the Hearing Committee found that with respect to, for example, efforts to keep the North Carolina Avenue property out of the trust, "[a]lthough these measures arguably may have ultimately benefited Dr. Ackerman, Mrs. Ackerman requested that these actions be pursued and had the capacity to do so." H.C. Rpt. at ¶ 242 (discussion of Silverman's representation of Mrs. Ackerman). Thus, to the extent that Dr. Ackerman was engaged in "self-dealing," he was doing so consistent with his mother's interests.

h. Sanctions Imposed for Comparable Misconduct

In the event that the Court finds that a sanction should be imposed for the Rule 1.7(b)(4) violation, we recommend that Silverman and King be suspended from the practice of law for thirty days.

Generally, the Court has imposed suspension of thirty to 180 days for violations of Rule 1.7. We find the Court of Appeals decisions in *Shay*, 756 A.2d at 465, *In re Cohen*, 847 A.2d 1162 (D.C. 2004), *In re Evans*, 902 A.2d 56 (D.C. 2006) (*Evans II*) (per curiam), and *Elgin*, 918 A.2d at 362, informative. In *Shay*, the respondent drafted reciprocal wills for two purportedly married clients with the knowledge that the husband had failed to finalize a divorce before marrying the wife, making their marriage invalid. 756 A.2d at 468-69 (appended Board Report). The respondent failed to withdraw and withheld the facts surrounding the invalidity of the marriage from the wife for six years, in violation of Rules 1.7(b)(2) and (b)(4), 1.16(d), 8.4(c), and the corresponding former Disciplinary Rules. *Id.* at 469-470,

473-74 (appended Board Report). The respondent also advised the wife not to report that her signature had been forged on the couple's bank note, due to the negative impact it would have on the husband's earning potential as an investment banker. *Id.* at 470-72 (appended Board Report). The Court adopted the Board's recommendation and imposed a ninety-day suspension, where the Board stressed potential harm and lack of remorse as aggravating factors. *Id.* at 466, 480-86 (appended Board Report).

In *Cohen*, the respondent undertook representation of a company and its exclusive distributor in a trademark application matter, but when "directly adverse" interests arose, he acted on behalf of one client to withdraw a trademark application without consulting the other, in violation of Rules 1.4(a), 1.7(b), 1.16(d), 5.1(a), and 5.1(c)(2). 847 A.2d at 1163-65. The Court imposed a thirty-day suspension, finding that the misconduct was mitigated by the respondent's clean disciplinary record and acknowledgement of wrongdoing. *Id.* at 1167.

In *Evans II*, the respondent initiated a probate proceeding on behalf of a borrower in a real estate transaction to secure title to the property she wished to encumber, while also serving as the owner of the title company handling the closing, without obtaining the client's informed consent. 902 A.2d at 61 (appended Board Report). The Court and the Board found that respondent's representation of the client had the potential to be adversely affected by his business interest in the title company because he had a financial incentive to secure title to the property on behalf of his client so that the loan would close. *Id.* at 58, 65-66 (appended Board Report). As a

result of his incentive to complete the closing, even at the expense of his client's interests in the probate proceeding, the respondent "took shortcuts and made mistakes" in the probate proceeding, resulting in the filing of a deficient probate petition and ultimately his client's removal as personal representative of the estate, in violation of Rules 1.1(a) and (b), 1.7(b)(4), and 8.4(d). *Id.* at 58, 68-69 (appended Board Report). The Court imposed a six-month suspension, partially stayed in favor of probation, because the conduct "arose from self-interest" and was aggravated by prior discipline, prejudice to the client, and lack of remorse. *Id.* at 58, 74-77 (appended Board Report).

The conduct at issue here is less serious than the conduct in any of these cases. However, both Silverman and King have prior disciplinary records, which augur in favor of a brief suspension of thirty days.

C. Silverman Should Be Suspended for Three Years, with Fitness, for Misconduct in This and Another Matter.

Silverman is the subject of another matter pending in the discipline system: *In re Silverman*, Bar Docket No. 2011-D017 (BPR May 19, 2017). In that matter, the Board recommends that the Court find that Silverman violated Rules 1.1(a), 1.1(b), 1.4(a), 1.4(b), 3.1, 3.3(a)(1), 8.1(a), 8.4(c), and 8.4(d), that she be suspended for three years, and that she be required to prove fitness as a condition of reinstatement. In *In re Thompson (Thompson I)*, the Court directed that when different cases are at different steps of the disciplinary process, the Board should recommend a sanction as if all matters were before the Board simultaneously. 492 A.2d 866, 867 (D.C. 1985). Silverman's conduct in *In re Silverman* is far more serious than the conduct

at issue here, and the Board's recommended sanction in *In re Silverman* is the maximum sanction short of disbarment (a three-year suspension with a fitness requirement). *See* D.C. Bar R. XI, § 3(a)(2). We do not find that the misconduct here is sufficient to increase the three-year suspension in *In re Silverman* to disbarment for her collective misconduct. Thus, we recommend that the Court suspend Silverman for three years, with fitness, for her misconduct in both cases.

V. CONCLUSION

The Board finds that Disciplinary Counsel failed to prove by clear and convincing evidence that either John T. Szymkowicz or John P. Szymkowicz violated Rule 1.7(b). The Board thus recommends that the case against the Szymkowiczes be dismissed.

The Board also finds that Disciplinary Counsel proved by clear and convincing evidence that Leslie Silverman and Robert King violated Rule 1.7. As discussed above, the Board recommends that Silverman and King not be sanctioned for their violation of Rule 1.7 because of the absence of prior legal authority. If the Court adopts this approach, King should nevertheless receive an informal admonition for his violation of Rule 1.5, which was not the subject of the Court's remand order.

If the Court decides that King and Silverman should be sanctioned for the Rule 1.7 violation, the Board recommends that King be suspended for thirty days for his violation of Rules 1.5 and 1.7. The Board further recommends that Silverman be

suspended for three years, with fitness, for her misconduct in this case, as well as her misconduct in *In re Silverman*, Bar Docket No. 2011-D017.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: __/RCB/_____
Robert C. Bernius

Dated: May 19, 2017

All members of the Board concur in this Report and Recommendation.