DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	)	
	)	
Karen Cleaver-Bascombe	)	
D.C. Bar No. 458922,	)	Bar Docket No. 183-02
	)	
Respondent.	)	

SUPPLEMENTAL REPORT AND RECOMMENDATION OF
THE BOARD ON PROFESSIONAL RESPONSIBILITY

This matter returns to the Board on Professional Responsibility on remand from the District of Columbia Court of Appeals following the Court's decision and opinion on February 9, 2006 (892 A.2d 396), directing the Board to make revised findings and a new recommendation regarding the appropriate sanction in this case consistent with those findings. The Court discerned an unreconciled tension between the Board's findings, which adopted those of its Hearing Committee, as to the conduct of Respondent Karen P. Cleaver-Bascombe. On the one hand, the Board construed the Hearing Committee's findings as reflecting clear and convincing evidence that Respondent had submitted a "patently false voucher" in support of her application for payment under the Criminal Justice Act (CJA), D.C. Code §§ 11-2601 *et seq.* (2001), for her representation of an indigent criminal defendant. On the other, in considering what sanction was appropriate, the Board determined that the Hearing Committee's findings did not support a conclusion that she had presented "false evidence or testimony" concerning her conduct in submitting the voucher. See 892 A.2d at 399.

The Court rightly viewed the conflicting findings as reflecting "a level of discomfort" by the Board and its Committee with the facts in this case. *Id.* at 412 n.14. As the Court recognized, the conflict is "even more pronounced" in the Board's Report and Recommendation.

Id. at 410. As directed by the Court, we shall endeavor to reconcile our findings to arrive at a consistent picture of Respondent's conduct.

There are limitations inherent in this remand process. The essential findings of fact, most importantly including credibility judgments, were made by the Hearing Committee more than two years ago when the witnesses gave their widely different accounts. The Board is obliged to accept those judgments and findings so long as they make sense and are supported by substantial evidence. The fact is that the Committee made two different sets of findings and labeled them as alternatives when, as the Court rightly points out, they are mutually inconsistent. Either Respondent submitted a voucher that attested that she had attended meetings with her client (i) when she knew that the meetings had not taken place, or (ii) when she knew that she had insufficient time-keeping records or independent recall accurately to attest that the meetings had taken place. Compare HC Report at 14-15 with HC Report at 23.[1] In short, Respondent either submitted her voucher knowing it was false, or she submitted it with reckless indifference to its accuracy. She did not do both.

Regrettably, the Board exacerbated the problem when we accepted the Committee's finding that Respondent submitted her voucher knowing that it billed for meetings she had not attended and concluded that any consideration of possible recklessness was unnecessary to the analysis,[2] but then accepted a sanction that is appropriate to remediating reckless time-keeping rather than core dishonesty.

---

[1] The Hearing Committee Report of May 5, 2004 is cited as "HC Report." The transcript of the September 12, 2003 hearing is cited as "Tr. I" and the September 17, 2003 hearing as "Tr. II."

[2] The Board declined to make a finding regarding recklessness based on our conclusion that, because Respondent knowingly submitted her voucher to the Court, it was not necessary for Bar Counsel to prove fraudulent intent. *See In re Shorter*, 570 A.2d 760, 767-68 (D.C. 1990) (*per curium*) (citation omitted)*; In re Schneider*, 553 A.2d 206, 209 (D.C. 1989).

The Court rightly points out the shortcomings of the Board's report. The answer to the Court's question of "what really occurred" (*Id* at 411) turns on determinations of what is most credible and most plausible. Of course, the Board did not hear the testimony or consider the demeanor of the witnesses. The Committee heard their testimony and considered their demeanor, but it is now more than two years removed from the evidentiary hearing. The Court has not directed us, however, to return the matter to the Hearing Committee, and in their briefs on remand neither Bar Counsel nor Respondent seeks remand to the Committee. In all events, we cannot fairly expect that, if it were reconvened, the Committee would now be able accurately to reconstruct the basis for its credibility impressions after such a passage of time – any more than we could expect a lawyer to reconstruct an accurate time record long after the fact – and to require a new evidentiary hearing at this juncture strikes us as unlikely to achieve a more reliable result. In these circumstances, the only course reasonably available to us is to review the Committee's findings anew with a view to identifying the conduct that we are confident at this juncture can be said to have been proved by clear and convincing evidence. We do so below.

While the Committee found that Respondent submitted a fraudulent voucher, its findings as to Respondent's state of mind when she submitted it are more equivocal. When we first reviewed those findings and the hearing record on which they were based, we read those findings as establishing not only that "Respondent charged for meetings that never took place" but that "[s]he knew the meetings did not take place yet she included them on her voucher." Bd. Report at 20.

Without question, Respondent did represent the indigent defendant in his extradition proceeding. She met with him prior to his arraignment, counseled him, appeared with him at the arraignment, inquired into the circumstances of his matter, spoke with him by telephone, wrote

to him, and successfully concluded her representation of him. Tr. I at 47-65 (Whitley); 221-250 (Respondent). None of this testimony is challenged by Bar Counsel. Respondent plainly had every right to submit a voucher for her services under the CJA program. While we cannot know for sure, it appears that if Respondent had scrupulously kept track of every minute of her time – including time she spent reviewing her file, tracking down the court personnel who could give her accurate information, dealing with her client's apparent need for assurances and reassurances, conducting basic research concerning her options in the extradition setting, considering her strategy, and implementing it – she could have billed something close to (and perhaps more than) the $735 amount that she actually billed.[3] We do know that the amount that she did bill was well within the range for what is typically paid in extradition matters; indeed, was less than half of the presumptive maximum for an extradition case. See Opinion at 6. The conflict in our initial report, and we believe in the Committee's, at least in part is a reflection of our conclusion that Respondent did not have to fabricate her voucher by making representations to the Superior Court, under oath, that she knew to be false, when, had she kept competent records of her activities, she could have submitted a voucher reflecting the true facts and likely been paid at least roughly as much. But the fact is that she did.

In short, the record does not support a finding that Respondent billed for a greater amount of time than she actually spent on the extradition matter in question. But what the record does support is the finding that Respondent's description of her specific activities in the voucher was false. One explanation is that the description was deliberately and knowingly dishonest. Another is that because of reckless time-keeping, Respondent submitted a voucher that she believed would compensate her for the fair value of the time she had actually spent but that she

[3] As directed by the Court (892 A.2d at 413), we have not made specific findings as to any legal services Respondent performed but for which she did not request compensation, but the fact is that there were such services.

knew it contained a description of services that she knew was inaccurate. In the final analysis, we must conclude that for purposes of this proceeding this is a distinction without a difference. Bar Counsel proved by clear and convincing evidence that Respondent knowingly submitted a false voucher and exacerbated the misconduct with false testimony at the hearing.

Respondent's submission of the voucher was more than an exercise of mere recklessness; she knew full well that she had no reliable basis for reconstructing the services she had rendered and so she made it up. That was our stated interpretation of the Committee's findings when we first considered the matter. It remains our conclusion. As the Court recognized, however, our choice of sanctions called that interpretation into question because we declined to find that the Respondent perjured herself in testifying that the voucher was accurate.

What persuaded us against the more culpable explanation in our initial report was the intrinsic sloppiness of the voucher itself. We found that Respondent knew that she never met with her client at the D.C. Jail. But surely she knew that she had attended his arraignment and talked with him at that time. Indeed, she testified that she spoke with her client on several occasions on the afternoon prior to his arraignment, spoke to his father at the courthouse, and made phone calls for background information, as she tried to determine why he was being held.[4] Yet the voucher seeks no payment for attending the arraignment in open court or for any meetings with her client at the time of the arraignment and instead billed for a meeting at the D.C. Jail. The voucher appears to be anything but careful. It looks like a scattershot of whatever occurred to Respondent at the time she prepared it without much deliberation of any kind. It looks reckless and careless, not cunning and calculating. But in the final analysis this does not help Respondent.

[4] Her testimony that she shuttled back and forth to speak with her client in the central cell block at the courthouse prior to the availability of the criminal jacket in an effort to determine why he thought he was being detained (Tr. I at 222-23) appears entirely plausible.

Like the Court, we have difficulty with Respondent's testimony at the hearing. Had Respondent admitted that she reconstructed her time records well after the fact, had she acknowledged that she did so based on her recollection but may well have made mistakes, and had she shown that she did not seek payment for more time than she actually spent on the matter, we suspect that the Court would not have questioned our recommended sanction. Instead, Respondent defended her voucher as written and insisted that it fairly reflected the services she rendered. The Hearing Committee heard her testify and found her testimony not to be credible, but it did not make a finding that her testimony was deliberately false. The Board should have done so and, in this respect on remand, does so now.

The purported jail visit is an example. While it is hard to imagine why Respondent would have made up the D.C. Jail visit out of whole cloth when she originally prepared her voucher – as we have noted, she did have encounters with her client to which she could have properly attributed time – we find that when she stuck with her story during the disciplinary proceedings, she did so knowing that it was false. The attempted cover-up often exceeds the initial misconduct. It did so here. And even though the Hearing Committee listened to her testimony and did not find it to be knowingly false, we find that the Committee erred in this respect. We find that Bar Counsel proved by clear and convincing evidence that Respondent knew when she testified to it that her story about the D.C. Jail visit was false. In the face of Bar Counsel's demand for disbarment, the Committee simply did not find that Respondent perjured herself when she gave this testimony or that she had suborned perjury by another. We find that Respondent perjured herself.

Further reflecting its discomfort with the notion that Respondent's conduct at core evinced deliberate and intentional dishonesty, the Committee recommended a sanction aimed at

correcting Respondent's time-keeping practices. In our initial report, we accepted that recommendation. While we have endeavored here to elucidate the Committee's analysis as best we can, on remand our additional finding the Respondent lied under oath requires us to revisit and revise our recommended sanction. And for the reason noted at the outset, we have considered our own remand to the Hearing Committee for further deliberations but have rejected that course as infeasible.

Bar Counsel advocates a suspension for "at least" one year, plus fitness for Respondent's "repeated acts of dishonesty . . . ." Statement of Bar Counsel at 13, 11. Bar Counsel notes that Respondent has shown no remorse and failed to acknowledge that she must address the "root causes" of her misconduct. *Id*. at 10.

We are mindful of the comments of the Court regarding sanctions. Having found Respondent's voucher deliberately false, the misconduct was exacerbated by Respondent's false testimony during the hearing. The Court put it thus (892 A.2d at 412): "lying under oath on the part of any attorney for the purpose of attempting to cover up previous disbarred conduct is absolutely intolerable . . ." (*citing In re Shillaire*, 549 A.2d 336, 351 (D.C. 1988)).

And we are equally mindful of the views of the dissent. Without even reaching the perjured testimony issue the dissenting Judge would disbar Respondent (892 A.2d at 415):

> A lawyer who, intentionally or recklessly, submits a voucher to get paid for work she did not do therefore commits (or attempts) a monetary fraud on the court even if the lawyer could have requested the court to consider awarding the same total amount of compensation for the work she actually performed.

One case which has substantial similarities is similarities is *In re Parshall*,878 A.2d 1253 (D.C. 2005) where the respondent submitted a false status report to a court and attached fabricated documents to support the false report. There, unlike here, respondent espoused regret and cooperated with the Office of Bar Counsel. The respondent in *Parshall* was suspended for 18 months.

Then there are cases in which the respondent's false statements were part and parcel of intentional misappropriations and thus brought disbarment. *In re Alexander*, 865 A.2d 541 (D.C. 2005); *In re Ayeur*, 822 A.2d 420 (D.C. 2003). In *In re Goffe*, 641 A.2d 548 (D.C. 1994), where respondent falsified evidence and forged signatures the Court said that "tendering fabricated documents [that] would constitute a felony involving moral turpitude if it had been prosecuted" is a significant aggravating factor.

With these cases as guideposts, and based upon our revised finding regarding Respondent's prevarication at the hearing, we recommend a longer suspension than the Office of Bar Counsel describes as the minimum it seeks.. We recommend a two-year suspension on the basis that the misconduct is more serious than *Parshall* .

With regard to fitness, the question is whether there is a serious doubt about Respondent's fitness to practice law. *In re Cater*, 887 A.2d 1, 22 (D.C. 2005). While the *Cater* decision seeks forth the factors usually considered, here we take our direction on fitness from the majority in the remand decision (892 A.2d at 398):

> The allegations in this case are extremely serious * * * Attorneys who accept CJA appointments are . . . expected to be scrupulously honest and to exercise a high degree of care in completing their vouchers, which are paid out of taxpayer funds, and which are submitted to the court under penalty of perjury. Where an attorney

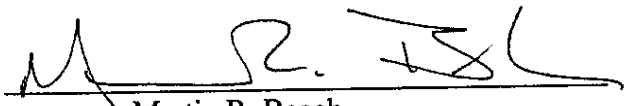
has deliberately falsified a voucher and sought compensation for work that he or she has not devoted to the case, that attorney's fitness to practice is called into serious question. This is especially true if the attorney has compounded his or her initial fraud by testifying falsely during the resulting disciplinary proceedings.

Accordingly, we further recommend that at the end of her suspension the Respondent be required to demonstrate her fitness to resume the practice of law.

As the court noted, this appears to be a case of first impression. It may be that the Court will decide that Respondent's violations are so strikingly similar to a misappropriation that disbarment is the presumptive sanction. The Board will leave that decision to the Court.

As a consequence, we hereby revise our previous report and, on that basis, recommend that Respondent be suspended from the practice of law for two years, with fitness.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: 

Martin R. Baach
Chair

All members of the Board concur in this Report and Recommendation except Mr. Mercurio, who has filed a dissenting statement joined by Ms. Williams, Ms. Helfrich who has filed a dissenting statement, and Mr. Nathan and Ms. Kapp, who did not participate.

Dated: JUL 2 1 2006

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
KAREN P. CLEAVER-BASCOMBE,	:	
	:	
Respondent.	:	Bar Docket No. 183-02
	:	
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 458922)	:	

DISSENTING STATEMENT OF MEMBER JAMES P. MERCURIO

As much as I respect the opinions of the Chair and my fellow Board members, I cannot join them in recommending, for this matter, a suspension from the practice of law for two years, with reinstatement conditioned on Respondent's demonstrating, by clear and convincing evidence, her fitness to resume the practice of law. For a sole practitioner like Respondent, that sanction is tantamount to permanent disbarment, and it is, in my view, not called for by the circumstances in the record. I therefore respectfully dissent from the recommendation in the Board's supplemental report.

In December 2004, the Board unanimously recommended that Respondent be suspended for three months with reinstatement conditioned on her "successful completion of a recordkeeping and timekeeping course," the same sanction that the Hearing Committee had unanimously recommended. Like the Hearing Committee, we rejected a fitness condition, applying the test in our *Cater* report, which test the Court has since endorsed. *In re Cater*, 887 A.2d 1 (D.C. 2005). We adopted the three-month suspension period after careful analysis of the four cases discussed in the Hearing Committee's report – all of which involved dishonest billing

for fees or expenses.[1] We found that sanction as falling "to the middle of [the] range of discipline imposed for dishonesty" and were "mindful that any suspension has a serious impact on the practice of a sole or small firm practitioner." In re Cleaver-Bascombe, Docket No. 101-02 (BPR Dec. 17, 2004) at p. 29 (citation omitted).

The majority today casts that recommendation aside and instead recommends a suspension that is twice as long as the suspension Bar Counsel now asks for in this matter.[2] The principal, if not only, reason the majority gives for that striking change of heart is that, after further study, members in the majority now believe that "the Hearing Committee [who] listened to [Respondent's] testimony and did not find it to be knowingly false" was in error, at least "in this respect." Supplemental Bd. Report at 6. The majority then finds on its own that "Respondent perjured herself." *Id.*

Whether false testimony before a Hearing Committee is known by the witness to be false at the time he or she testifies, however, is a question that the Hearing Committee is uniquely competent to answer. The Committee not only "listened to" that testimony, as the majority notes, it also had the decided advantage over the Board of watching the witness, observing all her facial expressions and personal behavioral traits. In sum, the committee members are able, as we are not, to draw important inferences and meaningful impressions from the witness's demeanor, as the trial judge did in finding against the defendant in *United States v. Dominguez*, 992 F.2d 678, 685 (7th Cir. 1993) (trial judge based finding of perjury on, among other things,

[1] We also considered a case, *In re Jackson*, 650 A.2d 678 (D.C. 1994) (per curiam), that Bar Counsel had cited to us.

[2] Bar Counsel, abandoning its previous insistence that only disbarment would appropriately address the misconduct found in this matter, now recommends that the sanction include a suspension of "at least" one year. Statement of Bar Counsel at 13. I take that to mean that Bar Counsel would be satisfied with a suspension for one year in this matter.

observations that defendant was "very nervous and very uncomfortable, especially during . . . his testimony where he challenged the identity and identification").

The record does not suggest that the Committee in this matter overlooked the question of Respondent's knowledge at the time she was testifying. Bar Counsel, in its posthearing submissions, intensely and explicitly pressed the issue. It told the Hearing Committee members that they "cannot ignore that Respondent presented perjured testimony[.]" Bar Counsel's Proposed Findings of Fact at 23. And in further argument: "Respondent not only attempted to defraud the court by submitting inflated vouchers for the work she performed, but also lied to the Hearing Committee and presented evidence she knew to be false." *Id*. at 25.

In its report, the Committee wrote that it "finds on the record before it that Respondent knowingly billed the Court for services that she did not perform[,]" thus expressing a "firm conviction" about that fact, if only "on the record before it." HC Rpt. p. 14; *see In re Dortch*, 860 A.2d 1, 346, 358 (D.C. 2004) ("Clear and convincing evidence" is "evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established") (citation omitted). But on the related, but separate, question whether Respondent, at the time she testified, believed that she had billed for services she did not perform, the Hearing Committee demurred. The Committee wrote only that "Respondent's testimony at the hearing was inconsistent with other testimony and documentation offered" and that "[i]n light of the inconsistencies between her testimony and the credible testimony of Mr. Whitley, Ms. Koustenis and Ms. Baird, the Committee must conclude that Respondent is not credible on several key points as noted above." HC Report at 24. Finding testimony "not credible" is not equivalent to finding it perjury. Moreover, the Hearing Committee, after rejecting Bar Counsel's position that

Respondent be disbarred, considered whether a fitness condition should be part of the sanction. Applying the *Cater* test, the committee wrote that "[w]e do not believe that the record here shows clearly and convincingly that a serious doubt exists as to Respondent's fitness to practice law." *Id*. at 24-25.

What the Hearing Committee's report distinctly conveys is that the committee members considered and rejected Bar Counsel's contentions that Respondent's hearing testimony was perjured. They judged the testimony of three witnesses who had no apparent reason for bias and the records of the District of Columbia jail as having a credibility that the testimony of Respondent and Mr. Exum lacked. As for the consistency of that judgment and the Committee's failure to find that Respondent perjured herself at the hearing, the Committee's report does not specifically address the question. The Committee members, however, evidently saw no contradiction between their finding with respect to Respondent's state of mind on March 21, 2002, the day she prepared the voucher, and their refusal to find that, on the day she testified before them, she knowingly lied. The explanation for the difference in those two Committee decisions could be simply that, because of all the contrary evidence, the Committee members had a firm conviction that on March 21, 2002, Respondent knew that she had not visited the DC Jail a month earlier, but they did not have a firm conviction, as they watched her testimony and observed her demeanor throughout the hearing, that she then believed that what she testified to a year and a half later, in September 2003, was false.

The rational decision-making process at the appellate level, which generally considers only written records, does lend itself to making such impressionistic judgments, but our legal system, and in my view, our disciplinary system, ordinarily accords such judgments special

weight when it comes to the question of a person's credibility, which includes the question whether he or she knowingly gave false testimony. In a decision rendered over 30 years ago by the Pennsylvania Supreme Court, which the District of Columbia Court of Appeals cited with approval in *In re Shillaire*, 549 A.2d 336, 343 (D.C. 1988), the court observed that, "[s]ince our review of attorney discipline is *de novo*, we are not bound by the findings of the trier of fact below but are free to evaluate for ourselves the evidence presented before the Hearing Committee." *Office of Disciplinary Counsel v. Campbell*, 345 A.2d 616, 620 (Pa. 1975) (citation omitted). Despite that broad *de novo* review authority, the court nonetheless held that "credibility is an issue particularly within the province of the trier who views the testifying witness." *Id.*

The pivotal question on this remand, in my judgment, is whether the Board should make what is essentially a credibility finding when the Hearing Committee was asked to make the same finding, but refused to do so. I answer that question in the negative, because of the substantial likelihood that the Hearing Committee's refusal was based upon its observations of Respondent's demeanor. I have found no precedent in which an appellate tribunal took it upon itself to find that a witness committed perjury during a trial or hearing in which the hearing tribunal did not so find. I doubt that one exists, at least not in the federal criminal system. In *United States v. Dunnigan*, 507 U.S. 87 (1993), the Supreme Court held that, while the United States Sentencing Guidelines provide a "sentence enhancement" for a defendant who commits perjury in a criminal trial, the following procedure must be observed in the trial court:

> [I]f a defendant objects to a sentence enhancement resulting from her trial testimony, a district court must review the evidence and make independent findings necessary to establish a willful

> impediment to, or obstruction of, justice, or an attempt to do the same, under the perjury definition we have set out.

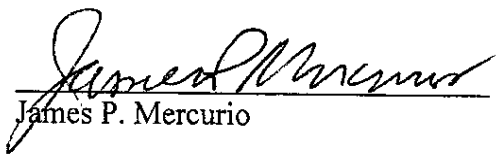
Id. at 96.

The perjury definition set forth in the Court's opinion states that "[a] witness testifying under oath . . . violates [the perjury statute] if she gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory" (*Id*. at 94), and the Court expressly held that "the trial court must make findings to support *all* the elements of a perjury violation in the specific case." *Id.* at 97 (emphasis added).

The majority in this matter, by basing its sanction recommendation on its own finding that "Respondent perjured herself" during the hearing in this matter (supra at 6), thus fails to accord Respondent the benefit of a trial level finding that she would have as a matter of law, if this were a federal criminal case. *See United States v. Dominguez*, 992 F.2d at 685 (Supreme Court required "independent findings" by trial judge "[t]o guard against sentence enhancement as a matter of course for every testifying defendant who is convicted[.]"). The Hearing Committee in this matter made no finding that Respondent gave "false testimony concerning a material matter with the willful intent to provide false testimony," although pressed by Bar Counsel to do so. *United States v. Dunnigan*, 507 U.S. at 94. I do not believe that, with respect to Respondent or any other member of the District of Columbia Bar, we should make a sanction recommendation that is based upon our belief that the respondent perjured himself or herself at the hearing, unless (1) the Committee has followed the precautionary hearing level procedures that criminal defendants in federal courts are accorded by law and (2) the Committee expressly has found all the elements of perjury on the part of the respondent.

Since, for the reasons stated, I would not make a finding that Respondent testified falsely during the hearing, with willful intent to do so, I have a different view concerning the sanction. The Board's initial report accepted the Hearing Committee's finding that Respondent submitted a voucher that she knew was false. That finding supplies a necessary element in Respondent's violation of Rule 3.3(a)(1) (knowingly making a false statement of fact or law to a tribunal), a charge that the Hearing Committee, on other grounds, found not established. On further reflection, I would recommend a longer suspension than the Hearing Committee recommended. But I think any suspension longer than six months would be excessive. As the majority points out, there is good reason to believe that Respondent did not overcharge the Court for her representation of Mr. Whitley. Supplemental Bd. Report at 3-4. This matter appears to be the first disciplinary case involving a false submission of a CJA voucher. There thus seems no substantial problem of abuse in that field that needs to be counteracted with a sanction that cannot be supported by reference to other cases involving billing fraud. And while I recognize the public interest in deterring fraudulent practices in the CJA program and the difficulty of detecting such fraud, I think that a six-month suspension of Respondent, a sole practitioner taking CJA cases, would provide all the deterrence needed.

Respectfully submitted,



James P. Mercurio

Dated: JUL 2 1 2006

Ms. Williams joins in this dissenting statement.

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
KAREN P. CLEAVER-BASCOMBE,	:	
	:	Bar Docket No. 183-02
Respondent.	:	
	:	
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 458922)	:	

DISSENTING STATEMENT OF MS. HELFRICH

For the reasons set forth by Associate Judge Glickman, I dissent.

Respectfully submitted,

Lee Ellen Helfrich

Dated: JUL 21 2006