THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Issued
July 27, 2022

In the Matter of:	:	
	:	
KENNETH L. BLACKWELL,	:	
	:	Board Docket No. 20-BD-019
Respondent.	:	Disciplinary Docket No. 2016-D396
	:	
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 441413)	:	

REPORT AND RECOMMENDATION OF THE BOARD ON PROFESSIONAL RESPONSIBILITY

This matter arises out of Respondent Kenneth L. Blackwell's failure to pay court-ordered child support, and his responses to Disciplinary Counsel's investigative inquiries. The Hearing Committee concluded that the failure to pay child support violated D.C. Rule of Professional Conduct 3.4(c) (knowingly disobeying the obligations under the rules of a tribunal), and that Respondent made knowingly false statements to Disciplinary Counsel, in violation of Rules 8.1(a) (knowingly false statement to Disciplinary Counsel), and 8.4(c) (dishonesty to Disciplinary Counsel).

Respondent agrees that he violated Rule 3.4(c). He argues that he did not violate Rule 8.1(a) or 8.4(c). Disciplinary Counsel acknowledges that it did not charge a Rule 8.4(c) violation based on Respondent's statements to Disciplinary

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

Counsel, and thus argues that the Board should affirm the Hearing Committee's recommendation that Respondent violated Rules 3.4(c) and 8.1(a).

The Hearing Committee recommended that Respondent be suspended for one year, with all but 90 days stayed in favor of three years of probation, with conditions. Disciplinary Counsel supports this recommendation. Respondent argues that he should receive an informal admonition, or at most, be suspended for 30 days.

The Hearing Committee's factual findings are supported by substantial evidence, and we adopt them as our own. Board Rule 13.7; *In re Cleaver-Bascombe*, 986 A.2d 1191, 1194 (D.C. 2010) (per curiam) ("'[T]he Board is oblig[ated] to accept the hearing committee's factual findings if those findings are supported by substantial evidence in the record, viewed as a whole.'" (quoting *In re Elgin*, 918 A.2d 362, 373 (D.C. 2007))).

We agree with Respondent that the Hearing Committee's analysis of the Rule 8.1(a) charge (alleged knowingly false statement to Disciplinary Counsel), did not make a direct finding as to whether *Respondent* knew that a written response he provided to a question posed in a letter from the Office of Disciplinary Counsel was false. Because this is a question of ultimate fact, the Board reviewed this question *de novo*. As discussed more fully in the Conclusions of Law section of this Report, following our *de novo* review, the Board affirmatively finds and concludes that Respondent knew the relevant response was false at the time he provided it in writing to Disciplinary Counsel.

Following our review of the parties' arguments and the record, we conclude that Respondent violated Rule 3.4(c) and Rule 8.1(a). Because, as both parties correctly observe, Respondent was not charged with violating Rule 8.4(c) in connection with his exchanges with Disciplinary Counsel, the Board cannot find that Rule violation. *In re Slattery*, 767 A.2d 203, 209 (D.C. 2001) ("[A]n attorney can be sanctioned only for those disciplinary violations enumerated in formal charges." (quoting *In re Smith,* 403 A.2d 296, 300 (D.C. 1979))).

The Board recommends that Respondent be suspended for six months, with all but 60 days stayed in favor of three years of probation, with conditions as described in the concluding paragraph of this Report.

I. FINDINGS OF FACT

Respondent and Cinzia Allen are the parents of D.B., who was born in 2004. HC FF 2. Respondent and Ms. Allen were not married; in August 2004, they executed a "Parenting Plan," which required Respondent to pay one-half of D.B.'s monthly expenses, not a specific dollar amount. The Parenting Plan was filed with the Prince William County Juvenile and Domestic Relations Court ("Virginia Court"), which "affirm[ed], ratifie[d] and adopt[ed]" the plan by Order dated August 13, 2004. HC FF 3, 6-8.

In September 2006, the Virginia Department of Child Support Enforcement ("VDCSE") requested that Maryland establish a child support order under the Uniform Interstate Family Support Act. The request stated that Respondent owed back support, but no amount was specified. On March 21, 2007, the Circuit Court

for Prince George's County Maryland ("Maryland Court") referred the VDCSE request to a Magistrate for a hearing, following which the Maryland Court entered a Consent Order requiring Respondent to pay Ms. Allen $156.00 per month in support, starting June 1, 2007. Payments were to be made to the Prince George's County Office of Child Support Enforcement ("MOCSE"). The monthly payment amount was increased to $250 in October 2007. On December 27, 2007, the Maryland Court entered a Consent Order requiring Respondent to pay $500 per month in support, as well as assessing arrearages of $5,000, requiring Respondent to pay an additional $50 per month until the arrearages were paid. HC FF 10-15.

In April 2009, Ms. Allen asked the Virginia Court to "register" the December 27, 2007, Maryland support order. She also filed a motion to hold Respondent in contempt for failure to pay child support, alleging that he was $12,500 in arrears. HC FF 20-21. In July 2009, the Virginia Court determined that it had jurisdiction and registered the Maryland support order, thus making the Maryland order enforceable in Virginia.[1] HC FF 23. The Virginia Court held a contempt hearing on December 9, 2009, and it held Respondent in contempt without allowing him to present evidence or witnesses. The court sentenced Respondent to ninety days in jail, and set a purge charge of $3,000. HC FF 26. On December 11, 2009, Respondent's brother paid the $3,000 purge charge to the VDCSE. Respondent was

[1] We take judicial notice of Va. Code § 20-88.68(B), which provides that "[a] registered support order issued in another state or in a foreign country is enforceable in the same manner and is subject to the same procedures as an order issued by a tribunal of the Commonwealth."

released from jail. The $3,000 was credited to Respondent's support obligations. HC FF 28.

In September 2009, the MOCSE filed a Petition for Contempt with the Maryland Court. Respondent was ordered to appear on November 12, 2009, to explain why he should not be found in contempt and/or not be incarcerated. After several interim proceedings[2], a contempt hearing was held on May 26, 2010. During that hearing, Respondent told the Maryland Circuit Court that he had been making payments directly to Ms. Allen. The Court advised Respondent that he would get credit with the MOCSE or the VDCSE for payments made directly to Ms. Allen only if he submitted a notarized statement from Ms. Allen certifying the specific amounts paid. Over the following five months, Respondent made no child support payments to the MOCSE or the VDCSE. He made some payments to Ms. Allen during that period, although the amount is in dispute. Neither Respondent nor Ms. Allen has records of those payments. HC FF 29-34. As discussed below, some of the payments may have been recorded in a "visitation notebook" that Ms. Allen lost in 2018.

On October 8, 2010, Ms. Allen filed a Request for Case Closure form with the VDCSE, asserting that the parties had reached an "amicable resolution" of the support issues. On October 12, 2010, the VDCSE closed Ms. Allen's case and notified the MOCSE. It requested that Maryland not terminate the support order so

[2] These interim proceedings included a March 12, 2010 compliance hearing in the Circuit Court for Prince George's County, Maryland. Respondent's statements at this hearing are cited below in the "Conclusions of Law" section of this Report.

that Ms. Allen could reopen the case at a later date, if necessary. The VDCSE advised the MOCSE that Respondent owed $18,520 in child support. That figure did not reflect any payments Respondent made directly to Ms. Allen. *See* DX 39 at 4 (10/12/10 row, TOT BAL column); HC FF 35-36.

On November 17, 2010, Respondent and Ms. Allen filed a Joint Motion to Dismiss in the Maryland Circuit Court requesting that the matter be closed. They submitted copies of documents from the VDCSE showing it had closed the matter in Virginia. On December 7, 2010, the Maryland Court dismissed the contempt proceedings, required Respondent to make payments directly to Ms. Allen, left the child support order in effect (as the VDCSE requested), and closed the child support proceeding. *See* DX 36. After the Maryland and Virginia child support cases were dismissed in 2010, Respondent made periodic child support payments directly to Ms. Allen, but did not pay the full $550 per month. HC FF 37-39.

On May 29, 2014, Ms. Allen contacted the VDCSE to reactivate her child support case. On June 16, 2014, the VDCSE did so. Starting in June 2014, the VDCSE mailed "Change in Payee" notices to Respondent, directing him to send the child support payments to the VDCSE; however, the VDCSE never served these notices on Respondent by certified mail, as required by Va. Code, § 20-60.5(A)(2) ("[T]he notice of change in payment shall be served by certified mail, return receipt requested, and shall contain (i) the name of the payee . . . , (ii) the name of the obligor, (iii) the amount of the periodic support payment, [and] the due dates of such payments and arrearages . . . ."). A VDCSE employee spoke with Respondent on

October 20, 2014. Respondent told the VDCSE that he would begin making payments to them. No payments were made through the VDCSE after that call. HC FF 40-41, 45, 47.

Respondent paid only $3,100 directly to either the Maryland or Virginia agencies. He periodically gave cash to Ms. Allen when he could, but he did not keep his own records of these payments. HC FF 48-49. At least some of these direct payments may have been recorded in a "visitation notebook" that Respondent and Ms. Allen maintained. HC FF 18-19; HC Rpt. at 41 ("it is unclear whether those notebooks recorded his payments"). However, Ms. Allen lost the visitation notebook in 2018, when she lost the storage facility that housed her records. HC FF 19; Tr. 152-53, 179-80. Ms. Allen estimated that from June 2007 through December 14, 2020 (the date she testified at the disciplinary hearing), Respondent had made child support payments directly to her totaling $10,000. HC FF 51. On at least one occasion, Respondent's sister made a direct payment to Ms. Allen. HC FF 50.

Respondent's failure to pay the required child support adversely affected Ms. Allen and D.B. She had to replace her car after an accident and did not have the funds to make new car payments. She lost her apartment, and she and D.B. became homeless, "bouncing from friends to friends," until she was able to find transitional housing in 2019. HC FF 52.

Disciplinary Counsel's Investigation

In October 2016, Ms. Allen filed a disciplinary complaint alleging that Respondent had failed to make court-ordered child support payments, failed to appear in court, and was about $50,000 in arrears. Disciplinary Counsel forwarded the complaint to Respondent for his response. HC FF 66. On December 29, 2016, Respondent responded that he had "never 'evaded or ignored court orders,' failed to 'appear in court' or willfully failed to make child support payment [sic] pursuant to court order." DX 6 at 1; HC FF 67. Respondent also said that "[t]he allegations made by Ms. Allen are false, without legal foundation and meritless." HC FF 67. On February 9, 2017, Disciplinary Counsel sent a follow-up inquiry, asking, Respondent to respond to a series of questions:

1. You state that you never "willfully failed to make child support payment pursuant to any court order." If you have not "willfully" failed to make court-ordered child support payments, do you agree that you have failed, however, to make the court ordered support payments.

2. Have you attempted to modify the amount ordered by the court? If yes, please submit any documents that support your response. If not, please explain.

3. The enclosed form from Virginia Social Services appears to show that you are $50,520.00 in arrears for child support payments. Please verify whether that is an accurate total of the funds you owe.

4. Please explain why Ms. Allen's allegation are "unfounded" and "meritless."

5. Please state why arrearages, as apparently significant as yours, are not a Rule 3.4(c) or 8.4(d) violation.

DX 7; HC FF 68. On February 21, 2017, Respondent replied with one word to Question 1: "No", and in response to Question 4, he reiterated his blanket denial without further explanation. HC FF 69.

II. CONCLUSIONS OF LAW

A. Respondent's Motions to Dismiss

The Initial Motion to Dismiss

On August 7, 2020, Respondent filed a Motion to Dismiss arguing, *inter alia*, that the Specification of Charges did not raise any justiciable disciplinary violation because the allegations did not relate to his fitness to practice law, and the Specification of Charges did not allege that he made a false statement or provide adequate notice of the underlying facts supporting the charges. The Hearing Committee recommended that the motion be denied. HC Rpt. at 30-31. We agree, and we deny the motion to dismiss for the reasons set forth below.

Respondent argued to the Hearing Committee that the case should be dismissed because his failure to pay child support did not involve his fitness to practice law. This argument relates only to the charge that he violated Rule 3.4(c) ("A lawyer shall not . . . knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.") Respondent argued that the Court has not yet held that a lawyer who fails to pay court-ordered child support has violated Rule 3.4(c); however, he acknowledges that Disciplinary Counsel issued an Informal Admonition finding a violation of Rule

3.4(c) for failure to comply with a court's child support order. *In re Richardson*, Bar Docket No. 2003-D259 (Letter of Informal Admonition Sept. 7, 2004).[3]

Before the Board, Respondent expands this argument to assert that the Court lacks jurisdiction to impose discipline for the violation of the child support order because D.C. Code § 46-225.01 "provides the mechanism for addressing matters involving child support and professional licenses in the District." Resp. Br. at 27. D.C. Code § 46-225.01 set forth sanctions (in the form of professional and other license suspensions) for failure to comply with child support orders. Subsection 225.01(f) provides that

> If the obligor under this subchapter is a member of the District of Columbia Bar, the Clerk of the Court shall send written notice to the Board of Professional Responsibility so that appropriate action may be taken.

Respondent correctly observes that this process did not occur here and then argues that the Court lacks jurisdiction as a result.

There are several flaws with Respondent's argument. We recognize that D.C. Rule of Professional Conduct 3 is entitled "Advocate," but nothing in the plain

[3] We note that the Court has imposed reciprocal discipline where a member of the D.C. Bar has been disciplined in a foreign jurisdiction for the failure to pay child support. *See In re Giacomazza*, 113 A.3d 1083 (D.C. 2015) (per curiam); *In re Sibley*, 990 A.2d 483 (D.C. 2010); *In re Ramacciotti*, 683 A.2d 139 (D.C. 1996) (appended Board Report). *Giacomazza* involved alleged violations of Rules 8.4(a) and 8.4(d); a Rule 3.4(c) violation was not charged. In *Ramacciotti*, the respondent was charged with a Rule 3.4(c) violation in addition to Rules 8.4(b) and 8.4(d). *Sibley* involved a charge based on Florida's rule which made a willful failure to pay child support misconduct. It also involved charges that the respondent engaged frivolous and vexatious litigation. Although none of these cases explicitly considered the argument advanced here, that the failure to comply with child support orders does not violate Rule 3.4(c), reciprocal discipline may not be imposed where the "misconduct elsewhere does not constitute misconduct in the District of Columbia." D.C. Bar R. XI, § 11(c)(5).

language of Rule 3.4(c) suggests that it only applies when a member of the Bar appears before a tribunal in a representative capacity. *Cf.* Rule 1.15(a) (the duty to safeguard property does not apply to all property held by a members of the Bar, but only to "property of clients or third persons that is in the lawyer's possession *in connection with a representation*") (emphasis added).

Second, D.C. Code § 46-225.01(f) contemplates that the Clerk of the Superior Court of the District of Columbia provide notice to the Board on Professional Responsibility. *See* D.C. Code § 46-201(4) (for the purposes of §§ 46-201-46-231, "'Court' means the Superior Court of the District of Columbia."). None of the child support proceedings relevant to this matter, however, were held in the Superior Court of the District of Columbia. Thus, there is no evidence that the Clerk of the Superior Court knew that Respondent was in arrears on the child support orders, such that notice could have been given to the Board. Finally, nothing in § 46-225.01(f) suggests that the Rules of Professional Conduct do not apply to members of the D.C. Bar who fail to comply with child support orders.

Respondent also argued that the Specification of Charges impermissibly alleged that he provided a false answer to an ambiguous question from Disciplinary Counsel. We agree with the Hearing Committee that this argument is a legal defense, that we address below. It is not a reason to dismiss the Specification of Charges.

Finally, Respondent argued that the Specification of Charges did not give him sufficient notice of the charges against him. The "specification of charges . . . [must]

fairly put [the] respondent on notice of the . . . charges against him." *In re Austin*, 858 A.2d 969, 976 (D.C. 2004) (citing *In re Hager*, 812 A.2d 904, 917 n. 14 (D.C. 2002)).

We agree with the Hearing Committee that the Specification of Charges provided adequate notice to Respondent. The Specification repeatedly alleged that Respondent had failed to pay court-ordered child support. Regarding the charge that Respondent made a knowingly false statement to Disciplinary Counsel, Respondent's motion to dismiss itself identified the alleged false statement and argued that it was not false. He knew the factual basis of both alleged Rule violations.

The Supplemental Motion to Dismiss

On March 8, 2021, Respondent filed a Supplemental Motion to Dismiss, arguing that he was prejudiced by the three-year delay between the filing of Ms. Allen's complaint and the Specification. He claims that, because of that delay, Ms. Allen's loss of the "visitation notebook" precluded him from establishing the total amount of child support he paid. HC Rpt. at 32. Before the Board, Respondent expands this argument, and asserts that Disciplinary Counsel had an obligation to obtain the visitation notebook from Ms. Allen and provide it to Respondent because it contained exculpatory information.

The delay in the filing of a Specification of Charges warrants dismissal only where the delay leads to "actual prejudice that results in a due process violation." *In re Saint-Louis*, 147 A.3d 1135, 1148 (D.C. 2016); *see also In re Ponds*, 888 A.2d

234, 244 (D.C. 2005); *In re Schneider*, 553 A.2d 206, 212 (D.C. 1989). Respondent has shown no deprivation of due process.

First, Respondent knew in 2016 that Ms. Allen alleged that he had not made the required child support payments. If the visitation notebook contained information to rebut that allegation, he could have requested that Ms. Allen provide him with the notebook then, before it was lost in 2018.

Second, even viewing the evidence in the light most favorable to Respondent, it shows at most that he made some payments directly to Ms. Allen. As Respondent concedes, these direct payments do not comply with the Maryland Court order, and thus are not a defense to the Rule 3.4(c) charge. In addition, Respondent does not contend that the visitation notebook would show that he made all of the payments due.

Respondent also argues that Disciplinary Counsel intentionally failed to pursue exculpatory evidence, the visitation notebook, in violation of Rule 3.8(d) and 3.8(e).[4] The sole basis for this argument is Disciplinary Counsel's statement that it did not know how much Respondent had not paid, just that he had not paid the full amount due. Resp. Reply Br. at 25-26. Respondent is "incredulous" that Disciplinary Counsel did not know the specific amount of his payment shortfall (*see id.* at 26), but the precise amount of the child support arrearage is not an element of the charged Rule 3.4(c) violation. Thus, Disciplinary Counsel's failure to search for

[4] We assume for the sake of considering this argument that these Rules, which apply to prosecutors in a *criminal* case, can be considered in determining whether Disciplinary Counsel's conduct during discovery did not comport with due process.

the notebook cannot be considered the intentional failure to pursue evidence that might aid Respondent.

In short, we agree with the Hearing Committee, and we deny Respondent's Supplemental Motion to Dismiss.

B. Respondent's Evidentiary Objections

Respondent argues that the Hearing Committee erred in admitting DX 37 and 38, which the Hearing Committee found to be VDCSE documents, because Disciplinary Counsel did not lay a sufficient foundation, the documents are prejudicial, and they contain hearsay. HC Rpt. at 34. We agree with the Hearing Committee's decision to admit these exhibits.

In deciding to admit these exhibits, the Hearing Committee correctly relied on Board Rule 11.3, which provides that

> Evidence that is relevant, not privileged, and not merely cumulative shall be received, and the Hearing Committee shall determine the weight and significance to be accorded all items of evidence upon which it relies. The Hearing Committee may be guided by, but shall not be bound by the provisions or rules of court practice, procedure, pleading, or evidence, except as outlined in these rules or the Rules Governing the Bar.

The Hearing Committee correctly recognized that a document's authenticity may be established by circumstantial evidence, and that hearsay is admissible in disciplinary proceedings. *See In re Slaughter*, 929 A.2d 433, 444 (D.C. 2007) (authenticity); *In re Shillaire*, 549 A.2d 336, 343 (D.C. 1988) (hearsay admissible). The Hearing Committee then carefully laid out the circumstantial evidence that supported

Disciplinary Counsel's contention that these documents were, in fact, VDCSE documents:

> Each of the documents bears the logo of the Virginia Department of Social Services, are consistent from one to the next, and reflect information relevant to Respondent's payment *vel non* of child support and VDCSE's efforts to obtain payment. His address and other apparently confidential information, such as telephone numbers, are redacted, but the material shows no signs that it was altered. Further, the notes are corroborated by other documentary evidence and testimony submitted in this disciplinary hearing. They accurately reflect the Maryland Court proceedings, including a statement in the transcript of the November 24, 2010 hearing in Maryland. *Compare* DX 38 at 143, 145, *with* DX 35 at 5.

HC Rpt. at 35. The Hearing Committee noted that the lack of a sponsoring witness and certain ambiguities with the exhibits themselves "bears on the weight to be accorded them." HC Rpt. at 36. This is exactly the analysis required by Board Rule 11.3.

C. Disciplinary Counsel Proved by Clear and Convincing Evidence that Respondent Violated Rule 3.4(c)

Rule 3.4(c) provides that "[a] lawyer shall not . . . [k]nowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists." The Hearing Committee concluded that Disciplinary Counsel established by clear and convincing evidence that Respondent violated Rule 3.4(c). We agree.

The December 27, 2007 Maryland order required Respondent to make payments to the MOCSE of $500 per month in child support, plus $50 per month until the $5,000 arrearage was paid. Respondent did not do so, and thus, he violated

the December 27, 2007 order. Respondent does not dispute that his knowing failure to make child support payments directly to the MOCSE violated Rule 3.4(c). *See* Resp. Br. at 11 ("admitting that Respondent violated D.C. Rule 3.4(c) by not making child support payments to the Maryland child support agency").

Although he does not dispute the Rule 3.4(c) violation, Respondent argues that the Hearing Committee shifted the burden of proof to Respondent to show that he had not paid the required child support. Not so. The Hearing Committee concluded that Disciplinary Counsel had presented *prima facie* evidence showing that Respondent failed to comply with the Maryland child support order and observed that "it was up to Respondent to rebut it," but he did not do so. HC Rpt. at 39 n.40. The Hearing Committee accurately summarized the evidence presented at the hearing:

> Respondent did not make [the child support] payments on a regular basis to either the Maryland or Virginia child support agencies. Instead, he made limited payments on an irregular basis directly to Ms. Allen. Typically, they were made in cash, and as he admitted did not equal the amount required under the orders. While ODC may not have established the precise amount of the shortfall, it has shown that the payments did not equal to the amount he was obligated to pay, as he admitted.

HC Rpt. at 39. Respondent argues that he paid "substantially" what was owed, but he did not offer evidence of what he paid. Thus, even assuming that "substantial" compliance with a court order is a defense to a Rule 3.4(c) violation, there is no evidence in the record that Respondent substantially complied. To the contrary, the Hearing Committee concluded, and the Board agrees, that Disciplinary Counsel

established by clear and convincing evidence that Respondent substantially *did not* fulfill his court-imposed obligations. HC Rpt. at 40. Therefore, the Board also agrees that Respondent's violation of Rule 3.4(c) in this matter was proven by clear and convincing evidence.

D. Disciplinary Counsel Proved by Clear and Convincing Evidence that Respondent Violated Rule 8.1(a)

Rule 8.1(a) provides that "a lawyer . . . in connection with a disciplinary matter, shall not . . . knowingly make a false statement of fact[.]" The Rule requires Disciplinary Counsel to prove by clear and convincing evidence that Respondent "knowingly" made a false statement. The Terminology section of the Rules defines "knowingly" as "actual knowledge of the fact in question" which "may be inferred from the circumstances." Rule 1.0(f). Comment [1] to Rule 8.1 provides that "it is a separate professional offense for a lawyer knowingly to make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct." The "[l]ack of materiality does not excuse a knowingly false statement of fact." Rule 8.1, cmt. [1].

The Hearing Committee concluded that Disciplinary Counsel "established by clear and convincing evidence that Respondent knowingly provided a negative answer to its question [i.e., Question 1 in its February 9, 2017 letter to Respondent] whether he had . . . failed to pay child support as required by the court orders, and thus violated Rule 8.1(a)." HC Rpt. at 46.

Respondent argues that the Hearing Committee's Rule 8.1(a) analysis is flawed because

> 1) it is based on the Committee's own interpretation; 2) the Committee introduced new evidence in this case and at a lower standard of proof; 3) the Committee failed to consider Respondent's interpretation of the question; 4) the Committee failed to make factual findings regarding Respondent's *actual state of mind in the existing circumstances at the time he answered the question*; 5) the Committee failed to determine whether Respondent's explanation of his answer is true, and; 6) Disciplinary Counsel failed to show that Respondent consciously disregarded the risk created by his answer to ODC's question.

Resp. Br. at 17-18. We reject the notion that the Hearing Committee applied its own interpretation of Respondent's response. The Hearing Committee considered the entire context of the communication between Respondent and Disciplinary Counsel. HC Rpt. at 44-45. It considered and rejected Respondent's proffered interpretation of the question as unreasonable, and it correctly applied the clear and convincing burden of proof. However, we agree with Respondent that the Hearing Committee failed to "make factual findings regarding Respondent's *actual state of mind in the existing circumstances at the time he answered the question*."

The question of whether Respondent actually "knew" his answer to Question 1 of Disciplinary Counsel's letter of February 9, 2017 was false – which necessarily includes the question of what Respondent understood this question to mean – is one of ultimate fact. The Board, therefore, reviews this question *de novo*. *In re Luxenberg*, Board Docket No. 14-BD-083, at 12 (BPR July 6, 2017) (matter dismissed) (citing *In re Romansky*, 938 A.2d 733, 740 (D.C. 2007) (stating on remand that the Board correctly determined that Disciplinary Counsel failed to

present sufficient facts to meet its burden of proving that the respondent acted knowingly)). Based on this review and on the clear and convincing evidence in the record, the Board concludes that Respondent knowingly made a false statement to Disciplinary Counsel and, thus, violated Rule 8.1(a).

In its finding of a Rule 8.1(a) violation in this matter, it appears the Hearing Committee relied on the application of a "reasonable person" standard rather than on a finding of what Respondent actually knew (i.e., as to the falsity of his response to Disciplinary Counsel). The Hearing Committee's discussion and reasoning in support of its finding of a Rule 8.1(a) violation includes the following:

> At a minimum, Respondent's response was deceptive. A reasonable person in his position would have understood that, in posing the initial question and clearly in the follow-up question, ODC was not asking whether he never made any payments. It was clear, to a reasonable person, that ODC wanted to know whether he had failed to make the payments required under the court orders, as it was investigating Ms. Allen's complaint alleging that Respondent had ignored court orders to make child support payments, and that he owed approximately $50,000 in back support.

HC Rpt. at 45 (footnote omitted). The Hearing Committee Report does not include a direct statement, finding, or conclusion that Respondent actually knew his relevant responses to the Office of Disciplinary Counsel were false.[5]

[5] The Hearing Committee's conclusion, quoted above, that "ODC has established by clear and convincing evidence that Respondent knowingly provided a negative answer to its question," does not address the relevant knowledge requirement. What Disciplinary Counsel had to prove by clear and convincing evidence to establish a Rule 8.1(a) violation was *not* that Respondent "knowingly provided a *negative* answer to its question"; what Disciplinary Counsel had to establish was that, in providing a negative answer to its question, Respondent knowingly provided a *false* answer.

Although finding a Rule 8.1(a) violation, the Hearing Committee agreed with Respondent that Question 1 of Disciplinary Counsel's February 9, 2017 letter – the response to which, in Respondent's February 21, 2017 letter to Disciplinary Counsel, the Rule 8.1(a) violation is premised – was "subject to interpretation." HC Rpt. at 44. Question 1, again, was:

> You state that you never "willfully failed to make child support payment pursuant to any court order." If you have not "willfully" failed to make court-ordered child support payments, do you agree that you have failed, however, to make the court ordered support payments'[?]

DX 7 at 1. This question was awkwardly phrased, no doubt. When reading both sentences of Question 1 together and in the context of the prior communication between Disciplinary Counsel and Respondent, however, the meaning of the question to which Respondent provided a "No" answer is clear: Whether willfully or not, did you fail to make at least one, or more, of the court-ordered child support payments?[6]

The operative meaning of this question, as understood by Respondent at the time it was asked, is confirmed by reading it in the context of the broader correspondence between Respondent and Disciplinary Counsel, of which the latter's February 7, 2017 letter is part. The phrase "never . . . *willfully* failed to make child support payment pursuant to any court order" (emphasis added) is Respondent's own phrase, provided in his December 29, 2016 response to Complainant's allegation

[6] Inclusion of the phrase "do you agree" in Disciplinary Counsel's question does not change the basic meaning of the question, nor does it change the falsity of Respondent's "No" answer. Even if the question is read as "Do you agree with the statement that you failed to make at least some child support payments," there was no truthful basis for Respondent to disagree.

(forwarded to Respondent by Disciplinary Counsel on December 19, 2016) that Respondent "evaded/ignored court orders . . . to make payment on owed child support." *See* DX 6. If Respondent had understood this allegation at that time to assert that he had *never* paid *any* child support – as he later claimed he had understood it (*see, e.g.*, Resp. Reply Br. at 8-9, citing Tr. 104) – he could have then, as he later did, flatly denied the allegation. Instead, he voluntarily used the word "willfully" to qualify his failure "to make child support payment" – implying an acknowledgement that he had failed in *some* way to make at least *some* child support payment or payments, as required by court order. This was effectively an admission of the allegation by Respondent, and it was in his response to Disciplinary Counsel's effort (in Question 1 of its February 9, 2017 letter) to pin down this admission that, attempting to backpedal, Respondent then provided his flat "No" in denial of the allegation.

At the time he provided this "No" answer to Disciplinary Counsel's Question 1, however, Respondent knew that he had failed to make a court-ordered child support payment on at least one occasion or more. Therefore, his "No" answer to Question 1 was knowingly false, in violation of Rule 8.1(a).

What is the evidence in the record that Respondent knew his "No" answer to Disciplinary Counsel's question was false, that he knew he had failed to make one or more child support payments? Throughout the proceedings in this matter, including during the hearing and at oral argument before the Board, Respondent, when pressed, eventually acknowledged that he did not make each and every child

support payment as required. However, dispositive evidence that Respondent knew – when he answered Question 1 in February 2017 – that his "No" answer to Disciplinary Counsel was false is his repeated acknowledgement, during the March 12, 2010 compliance hearing before a magistrate in the Circuit Court for Prince George's County, Maryland, that he had not been making child support payments as ordered. The transcript of this hearing includes the following exchange between the court and Respondent:

> THE COURT: But it doesn't appear that there's ever been a payment made, other than when Virginia locked you up. And this case is now four years old, so what about the previous couple of years, why didn't you make any payments during that time?
>
> MR. BLACKWELL: When it was first issued, Your Honor, I was never working. And the Judge -- the Judge just imputed that amount and then she put on -- she put back time.
>
> THE COURT: Right. But that was in '06 and maybe you never did anything about that, but from that point forward you didn't pay anything until December when Virginia locked your butt up.
>
> MR. BLACKWELL: Yeah, I know. I didn't have a job.
>
> THE COURT: You look well fed.
>
> MR. BLACKWELL: Beg your pardon?
>
> THE COURT: You look well fed. How have you been feeding and clothing and taking care of your business? Not even $5 a month you could come up with?

MR. BLACKWELL: Well, I can do that, but, you know, let me tell you –

DX 31 at 11-12.[7]

Respondent knew, and acknowledged, in March 2010 that he had failed to make at least some court-ordered child support payments. He knew this, too, in February 2017 when, understanding that Disciplinary Counsel was asking whether he had failed to make at least one or more payments, he answered "No." That answer by Respondent was knowingly false, and in giving that answer to Disciplinary Counsel, Respondent violated Rule 8.1(a).

III. SANCTION

Disciplinary Counsel supports the Hearing Committee's recommendation that Respondent be suspended from the practice of law for a period of one year, with all but 90 days stayed in favor of three years of probation, during which time Respondent shall be required to (1) submit either a certificate from VDCSE showing that over a three-month period he is complying with court-ordered child support and arrearage payments, or, if VDCSE will not provide the certificate, Respondent shall file an affidavit with ODC attaching evidence demonstrating compliance with this condition, and (2) not violate any Rules of Professional Conduct. ODC Br. at 33.

[7] Respondent stipulated on the record at a July 30, 2020 pre-hearing conference that he did not intend to assert an inability to make the payment as a defense in this disciplinary proceedings. HC Rept. at 42. He reiterated that position in a reply brief filed on August 21, 2020: "Respondent's intention not to raise inability to pay as a defense was made abundantly clear and has not changed." *Id.*

Respondent argues that he should receive an Informal Admonition, or at most, a thirty-day suspension. He acknowledges that he disobeyed the Maryland Court child support orders requiring him to make payments to the MOCSE and that he made payments directly to Ms. Allen, albeit not the $550 monthly payment required. He acknowledges that he should have paid what he could to the MOCSE, Resp. Br. at 45, but paid the funds to Ms. Allen because he hoped by paying when he visited D.B. he could maintain a relationship with her. *Id.* at 46. He also notes that he lost his mother during this period while he was engaged in extensive litigation with Ms. Allen. *Id.* at 45-46. Finally, "he accepts responsibility for his actions and regrets this outcome." *Id.* at 46.

In recommending a sanction in this case, we recognize that "the purpose of imposing attorney discipline is not to punish the attorney, but rather to serve the interests of the public and of the profession." *In re Askew*, 225 A.3d 388, 397 (D.C. 2020) (per curiam); *In re Cleaver-Bascombe*, 986 A.2d 1191, 1195 (D.C. 2010) (per curiam) (citations omitted). Like the Hearing Committee, we consider the following in recommending a sanction that is consistent with sanctions imposed in prior cases involving comparable misconduct:

> (1) the seriousness of the conduct at issue; (2) the prejudice, if any, to the client which resulted from the conduct; (3) whether the conduct involved dishonesty and/or misrepresentation; (4) the presence or absence of violations of other provisions of the disciplinary rules[;] (5) whether the attorney had a previous disciplinary history; (6) whether or

> not the attorney acknowledged his or her wrongful conduct; and (7) circumstances in mitigation of the misconduct.

In re Pelkey, 962 A.2d 268, 281 (D.C. 2008) (alteration in original) (citation omitted).

Failure to comply with court orders is undeniably serious misconduct, especially where, as here, the knowing failure to make the child support payments prejudiced the complainant and Respondent's daughter. In addition, Respondent made a knowingly false statement to Disciplinary Counsel in the initial stages of its investigation. However, Respondent's underlying conduct did not involve dishonesty, he has no prior discipline, he acknowledged that he violated Rule 3.4(c), and there is extensive evidence in mitigation of sanction, including that Respondent made some payments directly to the Complainant and tried to maintain a relationship with his daughter.

The Court has not yet imposed a sanction against a respondent who has violated Rule 3.4(c) by failing to pay child support. We have reviewed cases involving Rule 3.4(c) violations, most of which involve the failure to timely comply with court deadlines while representing clients, and often involve violations of Rule 1.1, and 1.3, among other Rules. *See, e.g.*, *In re Adams*, 191 A.3d 1114 (D.C. 2018) (imposing a six-month suspension, with all but ninety days stayed in favor of an eighteen-month probation period, where the respondent neglected criminal cases and failed to file briefs); *In re Machado*, 187 A.3d 558, 559 (D.C. 2018) (imposing a ninety-day suspension, stayed in favor a two-year probation period, where the respondent neglected a criminal case and disregarded court orders); *In re Untalan*,

174 A.3d 259, 259-60 (D.C. 2017) (imposing a six-month suspension, with all but sixty days stayed in favor of a one-year probation period, where the respondent neglected seven criminal or juvenile matters, and ignored multiple orders to file briefs); *In re Murdter*, 131 A.3d 355, 357-58 (D.C. 2016) (imposing a six-month suspension with sixty days stayed in favor of one year of probation, where the respondent accepted and then ignored appointment in five CJA appeals, and was convicted of two counts of criminal contempt); *In re Askew*, 96 A.3d 52, 59-62 (D.C. 2014) (imposing a six-month suspension with all but sixty days stayed in favor of probation for one year, where the respondent consciously disregarded one CJA appeal and failed to transfer case files promptly to successor counsel).

Some Rule 3.4(c) cases involve more serious sanctions, but the conduct is far different than that proven here. *See, e.g.*, *In re McClure*, 144 A.3d 570, 572 (D.C. 2016) (imposing disbarment for the respondent's repeated and protracted dishonesty and lack of remorse); *In re Howes*, 52 A.3d 1, 4 (D.C. 2012) (imposing disbarment where the respondent violated Rules 3.4(c), 3.8(e) and other Rules following his distribution of more than $42,000 of witness vouchers in several felony prosecutions to individuals who were ineligible to receive them, compounded by failing to disclose the voucher payments to either the court or opposing counsel, resulting in substantially reduced sentences to criminal defendants); *In re Padharia*, 235 A.3d 747, 748-49 (D.C. 2020) (per curiam) (imposing a six-month suspension, with fitness, where the respondent failed to file briefs, ignored briefing orders in thirty cases, requiring the Fourth Circuit to issue dozens of unnecessary orders, and failed

to timely file responses to Disciplinary Counsel's written inquiries, violating Rules 3.4(c), 8.1(b), and 8.4(d)); *In re Samad*, 51 A.3d 486, 500 (D.C. 2012) (imposing a three-year suspension, with fitness, arising out of the respondent's extensive misconduct, resulting in forty violations of fourteen Rules in six matters, and exhibiting a consistent pattern of neglect that in some instances prejudiced his clients, and in nearly every instance prejudiced the administration of justice).

Similarly, cases involving violations of Rule 8.1(a) typically involve additional misconduct, including misconduct more serious than found here. *See, e.g.*, *In re O'Neill*, No. 20-BG-673, slip op. at 22-24 (D.C. June 16, 2022) (respondent engaged in intentional misappropriation and flagrant dishonesty, and was disbarred); *In re Adkins*, 219 A.3d 524 (D.C. 2019) (per curiam) (three-year suspension with fitness where "respondent's omissions and false statements [on his bar application] precluded the Committee on Admissions from properly scrutinizing his fitness, resulting in his admission to the bar of this court" and the respondent gave false hearing testimony); *In re Mardis*, 174 A.3d 868 (D.C. 2017) (respondent disbarred for misconduct that included conspiring with others in a fraudulent scheme to unlawfully obtain the title to a property that was subject to a tax sale); *In re Scott*, 19 A.3d 774, 782-83 (D.C. 2011) (three-year suspension with fitness in a consolidated original and reciprocal case based on respondent's failure to respond to client fee disputes, dishonesty in an application for admission to the D.C. Bar, false statements to Disciplinary Counsel during the investigation, and dishonest testimony to the Hearing Committee).

This case bears important similarities to *In re Chapman*, where the respondent neglected a matter and then made deliberately false statements to Disciplinary Counsel during its investigation. 962 A.2d 922, 926 (D.C. 2008). The Court observed that the underlying misconduct might have resulted in a non-suspensory sanction, by itself; however, the respondent's "deliberate dishonesty in his dealings with [Disciplinary] Counsel, in conjunction with his lack of remorse for the harm he caused" the client, warranted a sixty-day suspension, with thirty days stayed in favor of one year of probation. *Id.* at 927. Respondent's underlying misconduct, his knowing failure to comply with Court orders, was more serious than Chapman's neglect; however, unlike Chapman, Respondent has shown remorse and has not challenged his failure to make the required payments.

After reviewing the foregoing cases, we recommend that the Court suspend Respondent for a period of six months, with all but sixty days stayed, in favor of three years of probation subject to the following conditions: (1) that Respondent shall not violate any Rules of Professional Conduct; (2) that no later than 30 days after entry of the Court's order, Respondent shall begin making monthly payments pursuant to a schedule and in an amount sufficient to fully satisfy his child support obligations (including any current arrearage) by the end of the probationary period;[8] and (3) that Respondent shall provide Disciplinary Counsel with the payment schedule, and every three months shall provide Disciplinary Counsel with a

[8] This condition is without prejudice to Respondent seeking a modification of his child support obligations, in which case he must comply with the modified order by the completion of the probationary period.

statement from the VDCSE showing his compliance with the payment schedule, or evidence showing that he has made the payments required under the schedule.[9] If Respondent has not satisfied his child support obligations by the end of the probation, he will be required to serve the stayed portion of the suspension, and will be required to fully satisfy his child support obligations prior to reinstatement. We recommend these probation terms as "a practical and meaningful way to encourage a lawyer who is in arrears on child support to make a good-faith effort to satisfy those obligations." *See In re Green*, 982 P.2d 838, 839 (Colo. 1999).

BOARD ON PROFESSIONAL RESPONSIBILITY

By: Robert L. Walker
Robert L. Walker

All members of the Board concur in this Report and Recommendation, except Ms. Pittman, who is recused.

[9] We acknowledge the Hearing Committee's recognition that Respondent's income is periodic and meeting the monthly requirement on a regular basis may be difficult. We share the Hearing Committee's concern Respondent may not be able to meet the financial terms of the probation every month, and thus, we recommend that proof of compliance with the payment schedule should be based on a three-month period, that is, that Respondent prove every three months that he has made the payments required during that three-month period.