THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Issued
July 30, 2025

In the Matter of:	:	
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MATHEW B. TULLY,	:	Board Docket No. 22-BD-025
	:	Disciplinary Docket No. 2017-D030
Respondent.	:	
	:	
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 491695)	:	
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	:	
GREGORY T. RINCKEY,	:	Board Docket No. 22-BD-025
	:	Disciplinary Docket No. 2016-D371
Respondent.	:	& 2018-D052
	:	
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 980732)	:	

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

I. INTRODUCTION

This matter arises principally out of Respondents' management of the D.C. office of Tully Rinckey PLLC. An Ad Hoc Hearing Committee concluded that Disciplinary Counsel proved by clear and convincing evidence that (i) Mr. Tully violated District of Columbia Rules of Professional Conduct ("Rules") 5.6(a), 8.4(a), 5.3(b), 5.1(b), 5.1(c)(1) and (2), and 8.4(d), and (ii) Mr. Rinckey violated Rules

* 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.

5.6(a), 8.4(a), 5.3(b), 5.1(b), 5.1(c)(1) and (2), and 8.4(d). The Hearing Committee further recommended that each Respondent be suspended for ninety days.

Respondents have taken exception to the Hearing Committee Report and Recommendation, arguing that the Hearing Committee applied the wrong jurisdiction's law to Respondents' conduct; that Rule 5.6(a) should be deemed void as impermissibly vague or should otherwise only be applied prospectively to certain conduct; that the Hearing Committee did not adequately analyze certain provisions of the employment contracts at issue; and, that imposing a period of suspension in this matter is unwarranted and would be punitive. Respondents do not directly contest the bulk of the Hearing Committee's findings of fact and conclusions of law. Disciplinary Counsel supports the Hearing Committee's Report and Recommendation.

We agree with the Hearing Committee's conclusions of law, except where discussed below, and recommend that each Respondent be suspended for 90 days.

II. FINDINGS OF FACT

A. Standard of Review

The Board "must accept the Hearing Committee's evidentiary findings, including credibility findings, if they are supported by substantial evidence in the record." *In re Klayman*, 228 A.3d 713, 717 (D.C. 2020) (per curiam) (quoting *In re Bradley*, 70 A.3d 1189, 1193 (D.C. 2013) (per curiam)); *see also In re Thompson*, 583 A.2d 1006, 1008 (D.C. 1990) (per curiam) (defining "substantial evidence" as "enough evidence for a reasonable mind to find sufficient to support the conclusion

reached"). The Board may make additional findings of fact where those findings are supported by clear and convincing evidence, *see* Board Rule 13.7.[1] Hearing Committee recommendations on questions of law are reviewed *de novo*. *In re Dobbie*, 305 A.3d 780, 792 (D.C. 2023). In this case, the Hearing Committee's factual findings are supported by substantial evidence.

B. Key Facts

(i) Opening of Tully Rinckey PLLC

Mr. Tully opened a solo law practice in Albany, New York in 2003. Mr. Rinckey joined him in forming Tully Rinckey PLLC (the "Firm" or "Tully Rinckey") in Albany around 2004 - 2005. From the founding of the Firm until 2020 (at the latest) Respondents were the Firm's only equity partners.[2] [3] At all times relevant to this matter, Mr. Tully or Mr. Rinckey served as the Firm's overall

[1] Where the Board makes such findings, they are supported by citations to the record.

[2] By 2019, both Respondents had given up managerial control of the Firm. Tr. 1351 (Rinckey); 1565-66 (Tully). Mr. Tully testified that he stepped down from his managerial role in the Firm, partly, in an effort to decrease the costs associated with this disciplinary matter. Tr. 1733-34. Respondents assert that the Hearing Committee failed to make this factual finding. Even so, as discussed in this Report, this fact has no relevance to either the conduct at issue or the sanctions.

[3] "FF" refers to the Hearing Committee's Findings of Fact. "Tr." refers to the transcript of the hearing held on March 20-23, 2023, March 27, 2023, April 4, 2023, and April 11, 2023. "HC Report" refers to the Hearing Committee's Report. "Resp. Br." refers to the Respondents' Brief to the Board. "Resp. Reply Br." refers to Respondents' Reply Brief to the Board. "ODC Br." refers to Disciplinary Counsel's Brief to the Board. "DCX" refers to Disciplinary Counsel's exhibits. "RX" refers to Respondents' exhibits.

managing partner. Mr. Tully generally held that role, but Mr. Rinckey would serve in the position when Mr. Tully was absent on military leave or otherwise. Respondents practiced principally in the Albany, New York office at all relevant times. Additionally, both Respondents were admitted to the D.C. Bar. Mr. Tully was admitted in 2005 and Mr. Rinckey was admitted in 2008.[4]

The Firm maintained detailed Standard Operating Procedures ("SOPs") governing, for example, matters such as client intake and case closure, managing partner responsibilities, personal use of office equipment, client complaints, the hiring of new attorneys, and restrictions on the use of client contact information. These were approved by whichever Respondent was serving as the overall managing partner of the Firm.

(ii) The D.C. Office of Tully Rinckey

Respondents opened Tully Rinckey's D.C. office in 2008 and later opened an office in Rosslyn, Virginia. A non-equity partner managed the D.C. Office, who at all times reported to the Firm's overall managing partner.

In June 2009, Tully Rinckey hired attorney Debra D'Agostino from one of its competitors, Passman & Kaplan. She was hired as an associate in Tully Rinckey's D.C. federal employment practice. Steven Herrick, the Tully Rinckey D.C. office managing partner at the time, encouraged Ms. D'Agostino to bring clients from the firm she was leaving; and in fact, a majority of her clients followed her to Tully

[4] Respondents do not contend that they were unaware of or that they did not approve of the actions by their subordinates that form the basis for the Rule violations in this matter.

Rinckey. Two months later, the Firm hired Eric Montalvo, who was a lawyer in the U.S. Marine Corps, to start a practice out of the D.C. office focusing on the legal issues military members face.

Mr. Tully and Mr. Rinckey maintained strict control and oversight over the operations of the D.C. office and over the lawyers in that office, which taken together was a factor that contributed to lawyers accepting the terms and conditions of the agreements that violated the Rules. Ms. D'Agostino described the oversight of the Firm's work environment as overwhelming and oppressive. For example, Respondents installed a video surveillance system to observe the public areas of the D.C. office from Albany. Respondents used the system to oversee its lawyers. In one instance, Mr. Tully phoned a lawyer in the D.C. office to advise the lawyer that his shirt was not tucked in and that he should tuck his shirt in. Tully Rinckey's Albany office also monitored closely the D.C. attorneys' use of their office computers. For example, on one occasion Ms. D'Agostino used her computer to order a personal item during her lunch break and later discovered that the website had since been blocked. Another associate used his Firm computer to send or receive emails about a personal trip to Europe. Mr. Tully later told him that he was aware of the upcoming trip. Mr. Tully threatened to immediately fire another lawyer who had forwarded an email about "firm vision" to her personal email account. Beyond this type of oversight, witnesses described management approaches that created the environment that Ms. D'Agostino described. For example, Mr. Tully threatened not to pay a

bonus to another lawyer when she questioned whether her participation in a promotional video was ethically permitted.

In addition to these types of operational oversight, Tully Rinckey had strict requirements related to billing time. The Hearing Committee found that there was incessant pressure to bill forty hours a week, and an attorney's hours were not counted as qualified billable hours if the client did not have sufficient funds on retainer to pay the Firm for the lawyer's time.

Tully Rinckey also required attorneys to attend a weekly Monday meeting to discuss client issues and operations. Discussions around taking legal actions against lawyers who left the Firm occurred during these meetings. Mr. Tully at one point laughed about ruining an employee's life and bankrupting her. Given this, Ms. D'Agostino "was terrified that they were going to ruin me, ruin my career, ruin my reputation." FF 19 (quoting Tr. 423 (D'Agostino)). "That," she said, "was part of the calculus in staying [at the Firm], is if you leave, they are going to sue you, and they are going to ruin you. I'm not going to say it came up every single Monday meeting, but it certainly came up frequently." *Id.* Numerous Firm lawyers and non-lawyers expressed similar concerns to her.

About six months after joining the Firm, Mr. Montalvo gave notice that he was planning to leave to join another law firm, Puckett & Faraj. The Firm proposed sending a joint letter to clients stating that Mr. Montalvo would be unable to continue to represent the clients or handle their legal matters at his new firm. Mr. Montalvo objected to this because he believed that it violated the D.C. Rules of Professional

Conduct. Mr. Tully asked that Mr. Montalvo agree that for any client who followed him to the new law firm, Tully Rinckey would be paid "referral" fees equaling twenty-five percent of the fees Mr. Montalvo collected from his clients at his new firm. The Firm did not discuss co-representation of the relevant clients. Mr. Tully threatened legal action if Mr. Montalvo were to "poach our clients" and asserted that "client lists" were trade secrets. FF 16 (quoting DCX 9 at 1). Mr. Montalvo and the Firm never reached an agreement about how clients would be notified of Mr. Montalvo's departure to another firm. After Mr. Montalvo arrived at his new firm, he notified the clients at issue about his move.

Eventually, in August 2010, because of the work environment, Ms. D'Agostino gave notice to the Firm that she was leaving even though she would leave without collecting a very large bonus she was otherwise due. Mr. Tully and Mr. Herrick told her that she could keep the clients she had brought from Passman & Kaplan, but any clients acquired after she had started working at Tully Rinckey had to remain with the Firm. After Ms. D'Agostino transferred all of the latter clients to other Firm lawyers, Mr. Herrick told her that she was free to go. Ms. D'Agostino joined Puckett & Faraj in September 2010. Tully Rinckey knew she was going to that firm. After she started at Puckett & Faraj, one of her former Tully Rinckey clients informed her that when he had called the Firm to speak with her, he was told that "they had no idea where I went, I just took off or something," and that he had to Google her to locate her. FF 21 (quoting Tr. 430-31 (D'Agostino)). Eventually Ms.

D'Agostino joined Mr. Montalvo in establishing a new law firm called the Federal Practice Group ("FPG").

(iii) Employment and Separation Agreements

As a result of losing Mr. Montalvo and Ms. D'Agostino, Tully Rinckey took steps to retain Firm attorneys through revised employment and separation agreements. These agreements are at the heart of the matter before us. Mr. Tully and Mr. Rinckey took the position that since their Firm paid above-market salary rates as an inducement to join the Firm, it asked its new hires to agree to a fixed-term commitment to work for the Firm. Tr. 1147-48 (Rinckey); 1587-88, 1591 (Tully); *see* Tr. 710-11 (Weiss); 952-53 (Friedman). Each of these revised agreements contained some combination of the provisions that Disciplinary Counsel contends violate the Rules.

As discussed in more detail below, the agreements at issue included obligations for a departing attorney to pay the Firm "liquidated damages" in the event that an attorney employee: (i) left the Firm prior to the expiration of the employment agreement; (ii) initiated contact with Firm clients after their departure; or, (iii) hired or worked with former employees of the Firm. Standard terms in some of these agreements also require the departing lawyer to pay Tully Rinckey so-called "referral fees" which was to be a portion of the amount the departing lawyer billed to the former client at the new firm if the former Firm client hired the departing lawyer. Some of these agreements also required that departing attorneys pay Tully Rinckey's attorney's fees and costs in connection with enforcing the agreements,

regardless of whether Tully Rinckey was successful in that endeavor. Further, some of these agreements prohibited departing lawyers from taking the names of clients they represented at the Firm to their new practices, and limited access to client files. Finally, the agreements also included provisions directing that the departing lawyer not voluntarily assist in any investigation of Tully Rinckey. Breaches of these provisions could trigger a departing lawyer's obligation to pay hundreds of thousands of dollars in liquidated damages to the Firm.

(iv) Legal Ethics Opinion 368

After he left the Firm, Mr. Montalvo represented several lawyers who departed from Tully Rinckey's D.C. Office in negotiations with the Firm. In doing so, he argued to the Firm that Rule 5.6(a) – which generally prohibits lawyers from participating in offering or making agreements that restrict a lawyer's right to practice after termination of a relationship with a law firm – prohibited a number of the provisions used in the Firm's employment and separation agreements. Mr. Tully responded to Mr. Montalvo's claims on the Firm's behalf, contending that the D.C. Rules did not apply and that the Firm's agreements had been found to comply with New York law.

Mr. Montalvo then asked the D.C. Bar's Legal Ethics Committee for an opinion as to the application of Rule 5.6(a) to liquidated damages clauses for lawyers who departed before the expiration of their employment contracts; the provision in the Firm's employment agreements prohibiting departing lawyers from working with other former Tully Rinckey lawyers; and on the applicable Rules of

Professional Conduct. In response to that inquiry, the D.C. Ethics Committee ("the Committee") issued Legal Ethics Opinion 368 (2015) ("LEO 368") which provided that, among other things, Rule 5.6(a) prohibits agreements imposing liquidated damages on lawyers who, after departure, compete with their former law firm. The Committee further advised that a firm may not restrict lawyers' subsequent professional association with partners or employees of the firm. Finally, as discussed further below, the Committee explained that the applicable law would generally depend upon the location of the departing lawyer.

After LEO 368 issued, Respondents modified their employment agreement templates and informed their lawyers that they would no longer enforce the employment agreement provisions that forbade departing attorneys from practicing with former Firm lawyers. But Respondents did not void the other aforementioned provisions in the agreements, and actively continued to use them.[5]

(v) Litigation Against Departing Lawyers

As noted above, Respondents advised employees that they would take action against attorneys who announced their intention to depart the Firm. They placed departing lawyers on administrative leave, filed lawsuits, and initiated arbitration proceedings seeking, among other things, to recover liquidated damages pursuant to their agreements. For example, the Firm sought $40,000 in liquidated damages from

[5] The Firm discontinued use of the "referral fee" clauses by October 2015. Tr. 1167-1170, 1176 (Rinckey). The Firm removed all liquidated damages clauses from its templates in 2019 and implemented the new agreements in 2020. Tr. 1335-36 (Rinckey).

Raven Hall, a lawyer who departed from the D.C. office. In December 2014, an arbitrator denied the Firm's claim, having determined that the liquidated damages clause on which the Firm relied was an unenforceable penalty and was not reflective of actual damages suffered by the Firm. DCX 106.[6]

Another attorney, Meghan Peters, left the Firm to work for the federal government after becoming pregnant.[7] DCX 104 at 4. The Firm threatened to seek damages from her if she did not try a court martial that had been assigned to her before leaving. After gaining an acquittal in that proceeding, Ms. Peters filed an arbitration claim against the Firm seeking payment for her work. Tully Rinckey counterclaimed for $30,000 in liquidated damages for early departure, $250,000 in liquidated damages for twenty-five alleged violations of the Firm's SOPs, and their attorneys' fees and costs. In a lengthy reasoned award in November 2015, the arbitrator characterized the Firm's counterclaims as a "bombard[ment]." FF 122 (quoting DCX 104 at 21). He went further, finding that New York Rule 5.6 prohibited the liquidated damages sought. Notably, the arbitrator relied in part on LEO 368. He determined that Rule 5.6 "favors attorney mobility, no matter what the destination," and that "a liquidated damages clause that operates as a penalty would unduly limit [Ms. Peters's] freedom of movement, in violation of Rule 5.6." DCX

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[6] Mr. Tully and Mr. Rinckey testified that the Firm had secured an earlier summary judgment ruling in that case, which stated that the liquidated damages clause was not void under New York Rule 5.6 because the clause was competition neutral. Tr. 1436 (Rinckey); 1701-02 (Tully). However, this judgment was never entered into evidence.

[7] Meghan Peters worked in the Albany office.

104 at 19. He concluded that Ms. Peters was entitled to just as much protection under Rule 5.6 as an attorney who left to work for a rival firm. *See id.* Notwithstanding these rulings, Respondents continued to use template agreements that contained these liquidated damages provisions. Indeed, the Hearing Committee found that a 2018 Firm template agreement contained such a clause.

III. CONCLUSIONS OF LAW

A. Motions to Dismiss

Before the Hearing Committee, Respondents argued for the dismissal of all or specified portions of this matter on a number of grounds, including that D.C. was not the correct law to apply to Respondents' conduct and the agreements at issue included "savings clauses" that should be considered as evidence that Respondents did not violate ethics rules. Respondents raise these same arguments again before the Board. Respondents also filed a number of motions which the Hearing Committee, after hearing all the evidence, recommended in its Report to the Board should be dismissed. HC Report at 55-56; *see* Board Rule 7.16(a); *In re Ontell*, 593 A.2d 1038, 1040 (D.C. 1991). The Hearing Committee recommended the denial of all Respondents' arguments for dismissal. HC Report at 55-59.[8]

For the reasons discussed below, we decline to dismiss the pending charges against Respondents.

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[8] Respondents additionally argue that, since the Hearing Committee found no misconduct based on the Firm's representation of or relationship with client Everett Chatman, the associated disciplinary docket, 2016-D371, should be dismissed. Resp. Br. at 6 n.6. Disciplinary Counsel does not contest this assertion. And we find no Rule violations associated with this representation.

B. Choice of Law

The Hearing Committee applied the D.C. Rules to the alleged misconduct at issue in this case. D.C. Rule 8.5(b) provides that

> (1) For conduct in connection with a matter pending before a tribunal, the rules to be applied shall be the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise, and
>
> (2) For any other conduct,
>
> > (i) If the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and
> >
> > (ii) If the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

Respondents urge the Board to dismiss these matters because Disciplinary Counsel failed to prove by clear and convincing evidence that the D.C. Rules apply to their conduct. Resp. Br. at 18. In support of this position, they point out that Disciplinary Counsel could have charged Respondents with violating the New York or Virginia Rules of Professional Conduct but did not do so; and since Disciplinary Counsel did not charge violations of New York or Virginia Rules, Respondents did not defend against claims they violated New York or Virginia Rules. *Id.* at 18-19. Respondents next contend that by concluding that Rule 8.5(b)(1) does not apply to the conduct here, the Hearing Committee "improperly" absolved Disciplinary Counsel from having to meet its burden of proof; it "ignore[d]" the litigation work

of the Disciplinary Counsel witnesses who had worked in Respondents' D.C. offices; and, it failed to consider that when their former employees sued Respondents for actions related to the conduct, these lawsuits were not brought in a D.C. court. Resp. Br. at 19-20. Finally, they assert that the Hearing Committee's conclusion that the "predominant effect" of the conduct at issue was in the District of Columbia wrongly focused "only on the location of the employee's desk" and is contrary to both the plain language of Rule 8.5(b) as well as precedent which considered this Rule. Resp. Br. at 20-24.

For its part, Disciplinary Counsel supports the Hearing Committee's application of the D.C. Rules because the misconduct arose from how Respondents controlled their firm's D.C. office; how they managed the employees who worked in their D.C. office; and the misconduct impacted the D.C. office clients' right to an attorney of their choosing. ODC Br. at 18-19. More specifically, Disciplinary Counsel points out that the misconduct had nothing to do with how Respondents or their Firm's employees litigated cases so, there is no basis to turn to Rule 8.5(b)(1) to determine the jurisdiction whose rules should be applied. *Id.*

Disciplinary Counsel also argues that Respondents cannot credibly argue they were prejudiced by not having the opportunity to defend against accusations they violated New York Rules because even if the New York Rules applied to any of the conduct, the result would be the same since the New York Rules are identical to the D.C. Rules. ODC Br. at 19-22.

We agree with the Hearing Committee that the D.C. Rules apply to Respondents' misconduct pursuant to D.C. Rule 8.5(b). None of the *misconduct* that served as the basis for any of the Rule violations was directly related to a matter pending before a tribunal.[9] Therefore, Rule 8.5(b)(1) does not apply. Rule 8.5(b)(2)(i) does not apply because that Rule only applies to lawyers who are licensed in the District of Columbia and are not licensed in any other jurisdiction. Mr. Tully is admitted to the Bars of the District of Columbia, New York and Virginia. Mr. Rinckey is admitted to the Bars of the District of Columbia, New York and New Jersey. We turn then to Rule 8.5(b)(2)(ii).

We agree with the Hearing Committee that given the facts, Rule 8.5(b)(2)(ii) requires that we apply the D.C. Rules because the conduct at issue "clearly has its predominant effect" in D.C. where Respondents are licensed, even though Respondents principally practice law in New York and were licensed in other jurisdictions. *See* Resp. Br. at 1-2. We conclude that the New York Rules do not apply because the predominant effect of their conduct occurred in D.C., not in New York.

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[9] For this reason, Respondents' reliance on *In re Ponds*, Board Docket No. 17-BD-015 (BPR June 24, 2019), is misplaced. *See* Resp. Br. at 19. In that case, the respondent's alleged misconduct "unambiguously" involved a Virginia court proceeding. *Ponds*, Board Docket No. 17-BD-015, at 34. This matter does not "unambiguously" involve a matter before any tribunal. Simply because Respondents' lawyer-employees handled matters before tribunals does not mean that the conduct at issue here was before a tribunal.

As Respondents point out, the "predominant effect" exception is intended to be a narrow one. *See* Rule 8.5, Cmt. [4]. The D.C. Ethics Committee has opined that "the predominant effect exception properly will be invoked in the narrow set of cases where the factors relevant to the particular conduct in question clearly establish that State X manifestly has a substantially greater interest in the resolution of the question to that of the principal place of practice." D.C. Ethics Op. 311 (2002). In a subsequent opinion, the Committee considered the application of Rule 8.5 in the context of the very agreements at issue in these proceedings. The Committee noted that since Rule 5.6(a) seeks to protect lawyers' autonomy and the clients' right to choose a lawyer, "[t]he predominant effect of a provision penalizing such a lawyer for post-departure competition falls upon a lawyer who is located in D.C." LEO 368. Therefore, the D.C. Ethics Committee determined that "the predominant effect prong renders members of the D.C. Bar in the firm subject to the D.C. version of Rule 5.6(a) regardless of where they principally practice." *Id*.

Adopting that guidance, the Hearing Committee concluded that Respondents' conduct had its predominant effect in D.C. since the conduct concerned Respondents' treatment of personnel in their D.C. office and of clients who were being serviced by lawyers working in their D.C. office. HC Report at 58. That conclusion is well founded for myriad reasons. Respondents were the only equity partners in the firm. At all times relevant to these proceedings, either Mr. Tully or Mr. Rinckey served as the managing partner of the firm. And Respondents directly supervised the D.C. office.

Further, when Respondents opened their D.C. office in 2008, they did so with a managing partner who reported to either Mr. Tully or Mr. Rinckey. Respondents signed each of the agreements at issue in these proceedings. During the hearing, Mr. Tully confirmed that when he was the overall managing partner, he was "the person that really made the managerial decisions." Tr. 185-86. Multiple witnesses testified that all managerial directives came from the Firm's overall managing partner, Tr. 458-59 (Montalvo), and that office managing partners could make few decisions without clearance from the overall managing partner. Tr. 409-410 (D'Agostino); 649 (Quashie); 674-76 (Weiss); 883-84 (Friedman). Each of the former Firm lawyers who testified worked in the D.C. office for all or part of their employment with the Firm. Even the lawyers who did not testify – but whose employment agreements are at issue here – (Victoria Harrison, Robert Watkins, and Irvin Charles ("Chuck") McCullough) also worked in the D.C. office. Tr. 179 (Rinckey); 391 (Tully); 684 (Weiss); RX 84 at 10[10]; DCX 70 at 3 (recital requiring Mr. McCullough to seek D.C. Bar admission). According to Mr. Montalvo, Respondents maintained an apartment in D.C. where they would stay when they visited. Tr. 491.

Respondents also directly managed and controlled the employees of the D.C. office. They used video surveillance to monitor the office and would even directly speak to lawyers through that camera to direct the behavior in the D.C. office to include on one occasion where Mr. Tully instructed a lawyer to tuck in his shirt. Tr. 414-15 (D'Agostino); 459 (Montalvo). Respondents would read the emails of D.C.

[10] RX 84 is under seal.

lawyers as well. *See* FF 19. Indeed, Mr. Tully advised a lawyer that he had read his personal emails about an upcoming overseas trip. Tr. 415-16 (D'Agostino). Another lawyer reported having perused the J. Crew website during lunch, only to find the website blocked after she returned to the page. *Id*. Both Respondents regularly led virtual Firm meetings with employees of the D.C. office during which Respondents admonished or encouraged employees. Tr. 422-24 (D'Agostino); *see also* Tr. 491-92 (Montalvo); 729 (Weiss); 1065-66 (Rinckey). Respondents directed the Firm's marketing efforts in D.C. to include hiring a full-time marketing staff member in D.C. to attract clients. Tr. 420-21 (D'Agostino).

The charges at issue in this matter concern how Respondents managed their lawyer-employees in their D.C. office: not in a New York office, nor any other office where Respondents were licensed. The alleged misconduct relates to Respondents' (i) providing employment and separation agreements that penalized numerous Tully Rinckey lawyers who worked in their D.C. office and who left their D.C. office; (ii) failures to ensure that their employees in their D.C. office, not their New York office, complied with the Rules; and (iii) alleged attempts to deter witnesses from cooperating with D.C.'s Office of Disciplinary Counsel, not New York's disciplinary counsel. Given that this conduct occurred in D.C., the District of Columbia "manifestly has a substantially greater interest in the resolution" of this matter than New York or any other jurisdiction.[11] D.C. Ethics Op. 311. In other

[11] Respondents point to our decision in *In re Mance*, Bar Docket No. 241-04 (BPR July 28, 2006), for the proposition that our analysis should center itself upon the "client impacts." Resp. Br. at 21-22, 24. But *Mance* is readily distinguishable in that

words, this conduct did not relate to how Respondents treated or managed their employees in their New York offices, nor did it impede New York clients in working with a lawyer of their choosing.

The facts in this case provide clear and convincing evidence that the predominant effect of Respondents' conduct was in the District of Columbia. Accordingly, we agree with the Hearing Committee that the D.C. Rules apply to Respondent's conduct.[12]

C. Rules 5.6(a) and 8.4(a)

D.C. Rule 5.6(a) provides that "[a] lawyer shall not participate in offering or making . . . [a] partnership, shareholders, operating, employment, or other similar type of agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement." D.C. Rule 8.4(a) provides that "[i]t is professional misconduct for a lawyer to . . . [v]iolate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another."

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it directly involved an attorney's interaction with his client and his failure to safeguard his client's funds. *Mance*, Bar Docket No. 241-04, at 11-12.

[12] Respondents also contend that several of the attorneys were not present in D.C when they signed the agreements at issue and that most of those lawyers were not licensed in D.C. Resp. Br. at 21-22. They also argue that some of their employees worked out of offices other than their D.C. office and that Respondents notarized the agreements at issue in New York. *Id.* at 22-23; *see also id.* at 3, 12-13 (examples of the Firm's D.C. office employees working in Virginia or Pennsylvania). None of these contentions compels a different conclusion and Respondents cite no authority in support of their positions.

Comments to Rule 5.6(a) explain that agreements "restricting the right of partners or associates to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer." Cmt. [1]. Further, "[r]estrictions, other than those concerning retirement benefits, that impose a substantial financial penalty on a lawyer who competes after leaving the firm may violate [Rule 5.6] (a)." Cmt. [2].[13] "At the heart of Rule 5.6 is the fundamental premise that limitations on a lawyer's practice . . . are bad for lawyers and clients alike, since a smaller pool of available attorneys necessarily limits clients' choice of counsel." Erika Stillabower, *Speaking of Ethics: A Look at Employment Contracts for Lawyers*, Washington Lawyer, May 2015, at 14.[14]

Respondents participated in offering or making; attempted to offer; or offered both employment agreements and separation agreements to Firm employees that required departing lawyers to

(i) pay liquidated damages for early departure and/or for other reasons;
(ii) pay a percentage of fees earned after the lawyer departed on fees earned from Firm clients who followed the departing lawyers;
(iii) divide or attempt to divide clients with departing lawyers;

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[13] "'Substantial' when used in reference to degree or extent denotes a material matter of clear and weighty importance." Rule 1.0(m).

[14] The Court first considered the scope of Rule 5.6(a) in the context of a case wrestling with the Rule's retirement benefits exception in *Neuman v. Akman*, 715 A.2d 127, 128 (D.C. 1998) (holding that partnership agreement provision fell within the scope of the Rule's "benefits upon retirement") but it deemed it "unnecessary to consider whether or not the partnership agreement provisions withholding the benefit actually constitute a restriction on the right to practice law within the meaning of the rule." *Id.* at 132 n.8. It noted that "courts have often invalidated various types of financial disincentives as indirect restraints on the practice of law, finding them sufficiently opprobrious to be barred by the ethical rule." *Id.*

(iv) not work with other former Tully Rinckey lawyers for some period after their departure;
(v) be liable to the Firm for attorney's fees and costs in any post-employment arbitration or litigation, regardless of the outcome; and
(vi) not contact Firm clients who had worked with the departing lawyer after the lawyer left the Firm.

The Hearing Committee concluded that Respondents violated the Rules with respect to each of these provisions. *See* HC Report at 64-69. We agree with its conclusion.[15]

(i) Terms In Tully Rinckey Employment and Separation Agreements

1. Liquidated Damages for Early Departure

Each of the employment agreements at issue were signed by either Mr. Tully or Mr. Rinckey and the agreements required that Firm attorneys pay significant amounts to the Firm as liquidated damages as a result of the attorney prematurely terminating their employment with the Firm without "Good Reason." Yancey Ellis was such an example. His employment agreement, signed by Mr. Tully, had a three-year term and included the following provision:

[15] The Hearing Committee found that Firm agreements contained "prohibition[s] on the 'improper removal' of 'each name and/or contact information of a firm client.'" *See* FF 22-23, 32-33, 36-37, 38, 40, and 41. The body of the Hearing Committee report does not specifically recommend that the Board find that these provisions violated the Rules. For the apparent convenience of the reader, the Hearing Committee attached an Appendix to its report. That Appendix concludes that these provisions violate Rules 5.6(a) and 8.4(a) because they "limit[] the access of future clients to the lawyer of their choosing." HC Report at 88, 92-93, and 95. Here too, we agree with the Hearing Committee's conclusion.

7.6. Liquidated Damages for Early Termination.
The parties hereto agree that the attorney's execution of this Agreement is a material inducement for the firm's increase in marketing expenses to promote the Attorney and training the attorney and that the attorney's termination of employment by the firm for Cause or by the attorney without Good Reason prior to the completion of this agreement would result in material harm to the firm, the dollar value of which is uncertain. Therefore, the attorney agrees that in the event his employment hereunder is terminated by the Firm for Cause or by the attorney without Good Reason prior to the end of this agreement, the attorney shall pay the firm an amount as liquidated damages. "Liquidated Damages Amount" shall be calculated as follows:

(i) If attorney's employment terminates before October 24, 2011, the Liquidated Damages Amount shall be $30,000.00 (thirty thousand dollars).
(ii) If attorney's employment terminates after October 25, 2011 but before February 1, 2012 the Liquidated Damages Amount shall be $15,000.00 (fifteen thousand dollars).
(iii) If attorney's employment terminates after February l, 2012 but before the end of this agreement, the Liquidated Damages Amount shall be $10,000.00 (ten thousand dollars).

DCX 14 at 8, 12.[16]

Another example is the four-year employment agreement with Janice Gregerson that Mr. Rinckey signed that required Ms. Gregerson to pay liquidated

[16] The employment agreement defined "Good Reason" as: (i) failure by the Firm to pay the attorney's compensation or benefits; (ii) failure by the Firm to allow the attorney to participate in the Firm's employee benefit plans; (iii) relocation of the attorney's principal business location more than twenty-five miles from the attorney's current work location without consent; (iv) any change in title or material change in the attorney's duties without the attorney's consent; or (v) failure of a Firm successor to assume the employment agreement. DCX 14 at 8 (Ellis). Certain employment agreements also included (vi) "[t]he subjecting of the attorney to any unlawful or unethical conduct." *E.g.*, DCX 39 at 13 (Weiss); DCX 61 at 13 (Harrison); DCX 63 at 11 (Watkins).

damages if she departed the Firm before the end of the term specified in her agreement. Her agreement stated:

> 7.6 Liquidated Damages for Early Termination. The parties hereto agree that the attorney's execution of this Agreement is a material inducement for the firm's increase in marketing expenses to promote the Attorney and training the attorney and that the attorney's termination of employment by the firm for Cause or by the attorney without Good Reason prior to the completion of this agreement would result in material harm to the firm, the dollar value of which is uncertain. Therefore, the attorney agrees that in the event her employment hereunder is terminated by the Firm for Cause or by the attorney without Good Reason prior to the end of this agreement, the attorney shall pay the firm an amount as liquidated damages. "Liquidated Damages Amount" shall be: During Year 1 of the Contract Term: Fifty Thousand Dollars ($50,000.00); during Year 2 of the Contract Term: Forty Thousand Dollars ($40,000); during Year 3 of the Contract Term: $30,000; and during Year 4 of the Contract Term: Twenty-five Thousand Dollars ($25,000.00).

DCX 50 at 8-9 (Gregerson).

Mr. Tully and/or Mr. Rinckey proposed to other Firm attorneys or signed agreements with them which contained similar provisions, with varying liquidated damages amounts. *See* DCX 17 at 10, 15 (agreement with Joanna Friedman imposing liquidated damages ranging from $20,000 to $50,000); DCX 59 at 13, 18 (agreement with Christina Quashie imposing liquidated damages of $35,000); DCX 67 at 12, 17 (agreement with Bensy Benjamin imposing liquidated damages of $25,000 plus incurred expenses); DCX 35 at 11; Tr. 111-12 (Rinckey) (agreement with Rachelle Young imposing liquidated damages set at 10% of salary or between

$20,000 to $30,000)[17]; DCX 61 at 13, 18 (agreement with Victoria Harrison imposing liquidated damages of $35,000); DCX 63 at 11, 16 (agreement with Robert Watkins imposing liquidated damages of $30,000); DCX 70 at 13, 19 (agreement with Chuck McCullough imposing liquidated damages of $15,000 plus incurred expenses); DCX 39 at 3, 13 (proposed agreement with Corinna Weiss imposing liquidated damages of $50,000 plus incurred expenses).

2. Attorney's Fees and Costs in the Event of Post-Employment Arbitration or Litigation

In the event of post-employment arbitration or litigation, Firm agreements required the employee to pay attorney's fees and litigation costs to the Firm, regardless of the outcome. For example, Ms. Quashie's agreement, signed by Mr. Rinckey, provided that:

> 8.1. Attorney's Fees and Costs. If the Attorney terminates her employment voluntarily other than for Good Reason or if her employment is terminated by the Firm for cause, the Attorney will be liable for all attorney's fees and litigation costs to include witness fees incurred by the Firm related to the Firms enforcing its rights under this agreement.

[17] Ms. Young's agreement provided that she would owe varied amounts in liquidated damages for early termination depending on whether any clients subsequently became her clients. DCX 35 at 11. If any client terminated representation with the Firm and became her client, she would owe $30,000 in year one of the contract, $25,000 in year two, and $20,000 in year three. *Id.* If no client terminated representation with the Firm to become Ms. Young's client, her liquidated damages would be 10% of her salary at the time of termination (between $10,000-$12,000 depending on her year). *See id.* at 4, 11.

DCX 59 at 14, 18; *see also* FF 34-35. Respondents proposed or executed agreements with other Firm attorneys that included substantially similar language. *See, e.g.*, DCX 14 at 9, 12; FF 24-25 (Ellis agreement signed by Mr. Tully); DCX 70 at 13, 19; FF 41 (McCullough agreement signed by Mr. Tully); DCX 39 at 14; FF 28-29 (Weiss agreement proposed by Mr. Tully); DCX 50 at 9; FF 32-33 (Gregerson agreement signed by Mr. Rinckey); DCX 67 at 12, 17; FF 36-37 (Benjamin agreement signed by Mr. Rinckey); DCX 61 at 14, 18; FF 39 (Harrison agreement signed by Mr. Rinckey); DCX 63 at 12, 16; FF 40 (Watkins agreement signed by Mr. Rinckey).

3. Restrictions on the Ability of Departing Lawyers to Take Client Contact Information

The Firm's employment agreements generally prevented attorneys from retaining the names and contact information of Firm clients or potential Firm clients whom they represented while at the Firm, and from taking such client files. This was another way a departing attorney could be subject to liquidated damages. The agreements often included language such as:

> 9.10. Confidentiality. . . . The disclosure or improper removal from the firm's control of each name and/or contact information of a firm client or potential client is a separate and distinct violation of this provision no matter if the information is contained in one document or in several, as is the removal of each document within a case file.

E.g., DCX 50 at 11-12 (Gregerson). Along with this requirement, the agreements included liquidated damages for materially breaching the agreement in the amount of $10,000 for each breach. DCX 50 at 9.

This language was included in the employment agreements, signed by Mr. Rinckey, for Ms. Gregerson (DCX 50 at 11-12; Tr. 535-39); Ms. Quashie (DCX 59 at 16-18); Ms. Benjamin (DCX 67 at 15, 17); Ms. Young (DCX 35 at 14; Tr. 111-12 (Rinckey)); Ms. Harrison (DCX 61 at 16, 18); and Mr. Watkins (DCX 63 at 14-16). It was also included in the proposed employment agreement for Ms. Weiss and the employment agreements signed by Mr. Tully for Ms. Friedman and Mr. McCullough. DCX 39 at 16-17; Tr. 687-89 (Weiss); DCX 17 at 13 (Friedman); Tr. 198-99 (Tully); DCX 70 at 16-17, 19 (McCullough). When read as a whole with the other challenged contract provisions, these clauses demonstrate the efforts Respondents took to control attorneys who chose to leave.

4. Prohibitions on Contacting Clients

The Firm agreements not only prohibited attorneys from taking client information but also prohibited departing attorneys from contacting Firm clients, again at the risk of incurring considerable amounts in liquidated damages. Ms. Weiss's separation agreement, signed by Mr. Tully, provided that:

> After May 1, 2015 the Attorney agrees not to initiate contact with any clients of the Firm without express permission by the Firm. However, if a client of the Firm initiates contact with the attorney without any interference or enticement by the attorney, the attorney may engage in direct contact with the client in support of the client's right to flexibility and freedom in choosing his or her counsel. In the event the attorney violates this paragraph by initiating contact with any current client of the Firm in an effort to interfere with the Firm's contractual relationship with the client, the Attorney shall be liable to the Firm for Liquidated Damages in the amount of $10,000 per violation.

DCX 42 at 4, 9-10. Mr. McCullough's separation agreement, signed by Mr. Rinckey, provided:

> The attorney agrees not to contact any clients of the Firm without the express written permission of the Firm. In the event that applicable ethical rules require the Attorney to contact any clients of the firm, such contact must be made jointly with the Firm, unless prohibited by applicable ethical rules. In the event the attorney violates this paragraph, s/he shall be liable to the Firm for Liquidated Damages in the amount of $100,000 per violation.

DCX 71 at 1, 4, 11. Ms. Harrison's separation agreement included this provision and Mr. Tully signed the agreement. DCX 62 at 1, 4, 11.[18] Substantially similar language was also included in the separation agreements Mr. Tully signed for Ms. Gregerson, Ms. Quashie, Ms. Benjamin, and Ms. Young. DCX 56 at 1, 4, 8-9 (Gregerson); DCX 60 at 1, 4, 11-12 (Quashie); DCX 68 at 1, 4, 10-11 (Benjamin); DCX 38 at 1, 4, 10-11 (Young).

5. Prohibition on Working with Firm Alumni After Departure

Firm agreements also prohibited departing lawyers from working with Firm alumni. Ms. Quashie's agreement provided that

> 9.14. No Interference. During the period of this agreement plus 36 months after he leaves the Firm, the attorney shall not, whether for her own account or for the account of any other individual, partnership, firm, corporation or other business organization, directly or indirectly solicit, endeavor to entice away from the firm or its subsidiaries, or

[18] The Hearing Committee Report found that Mr. Tully signed this separation agreement. FF 109. The signature block contained Mr. Tully's name. DCX 62 at 10. However, the notary public indicated that it was Mr. Rinckey who signed the agreement. DCX 62 at 11. Because both Respondents entered into agreements containing this prohibition, the resolution of this issue is not critical to our determination.

> otherwise directly interfere with the relationship of the firm or its subsidiaries with any person who, to the knowledge of the attorney, is employed by or otherwise engaged to perform services for the firm or its subsidiaries. Upon termination of her employment plus 24 months after he leaves the Firm, the attorney shall not enter into any business agreement, office sharing, partnership, collaboration, affiliation, or any such other arrangement with an attorney or employee who was employed in any manner with the firm or who was a member of the firm at any time in which the attorney was employed by or a member of the firm unless the express written permission of the firm is provided.

DCX 59 at 17. Further, a material breach of this agreement triggered the attorney to pay liquidated damages for each breach. DCX 59 at 14.

This language was included in the employment agreements, signed by Mr. Rinckey, of Ms. Young (DCX 35 at 3, 15 (dated August 24, 2011)); Tr. 111-12 (Rinckey)) (prohibiting collaboration with Firm alumni for 18 months after termination); Ms. Quashie (DCX 59 at 3, 17-18 (dated December 30, 2013)); Ms. Gregerson (DCX 50 at 2, 12-13 (dated October 29, 2012)); Tr. 535-39) (prohibiting collaboration with Firm alumni for 18 months after termination); Ms. Harrison (DCX 61 at 3, 17-18 (dated January 21, 2014)); Mr. Watkins (DCX 63 at 15-16 (dated March 14, 2014)); and Ms. Molnar (Tr. 161) (Rinckey). Ms. Friedman and Mr. Ellis's employment agreements, signed by Mr. Tully, and Ms. Weiss's proposed employment agreement[19] contained the same or a similar provision. DCX 17 at 14-

[19] After LEO 368 was issued, Respondents changed their employment agreement template and informed current attorneys at the Firm that they would no longer enforce these kinds of provisions. FF 117; Tr. 176-77 (Rinckey). However, Ms. Weiss's employment agreement was proposed by Mr. Tully after LEO 368, in March 2015. FF 117.

15; Tr. 198-99 (Friedman agreement, dated May 16, 2011) (prohibiting collaboration with Firm alumni for 18 months); DCX 14 at 3, 12 (Ellis agreement, dated October 15, 2010)[20]; DCX 39 at 3, 17 (Weiss agreement, dated March 2, 2015); Tr. 687-89 (proposed by Mr. Tully).[21]

6. Obligation to Pay "Referral Fees" After a Lawyer Departed

Firm agreements also included a provision for "referral fees" if any client followed an attorney after they left the Firm. Specifically, Ms. Quashie's agreement provided that

> 7.7 Referral Fees. If the Attorney departs the Firm at any time and any clients then represented by the Firm elect to be represented by the Attorney, those clients shall be deemed to have been referred to the Attorney by the Firm. In such event, the Firm shall be entitled to a Referral Fee in the amount of one-third (1/3) of the fees billed to such clients by the Attorney subsequent to her departure from the Firm. In the event that the amount of such Referral Fee is not allowed or exceeds the amount permitted by law, rule or regulation, the Firm's Referral Fee shall be in maximum amount permitted.

DCX 59 at 13. Substantially similar provisions were also contained in agreements with other Firm attorneys. Mr. Rinckey signed the employment agreements with Ms. Quashie, Ms. Harrison and Mr. Watkins that included this provision. DCX 59 at 18 (Quashie); DCX 61 at 13, 18 (Harrison); DCX 63 at 11, 16 (Watkins). The

[20] Section 9.14 of Mr. Ellis's employment agreement included only the first sentence quoted above. DCX 14 at 12.

[21] Certain separation agreements reiterated the language in the employment agreements, stating that Section 9.14 remained in effect after the lawyer left the firm and provided that the lawyer was subject to paying liquidated damages upon breach. *See, e.g.*, DCX 71 at 1-2 ¶ 2(b), 3 ¶ 10(a) (McCullough); DCX 68 at 1 ¶ 2(b), 3 ¶ 10(a) (Benjamin).

employment agreement that Mr. Tully proposed to Ms. Weiss also included this provision. DCX 39 at 13-14; Tr. 687-89 (Weiss).

Ms. Molnar's separation agreement, signed by Mr. Rinckey, included a similar provision, requiring that she "ethically provide the firm a 50% referral fee for all cases that originated with Tully Rinckey that may be transferred to her or her [sic] future law firm." DCX 45 at 4, 7-8. Ms. Gregerson's agreement required her to "provide the firm a 30% referral fee" in her separation agreement proposed by Mr. Tully, but she struck that provision. DCX 54 at 4; Tr. 553-55 (Gregerson).

7. Attempts to Divide Clients with Departing Lawyers

Respondents also attempted to direct the manner in which clients would be divided between the Firm and the departing lawyers. When Ms. D'Agostino gave her notice, Mr. Tully and Mr. Herrick (the Firm's then office manager) told her that she could keep only those clients that she had brought with her to the Firm; all other clients would have to remain with the Firm. FF 20. Upon giving notice, Ms. Friedman received a draft separation agreement that included a list of clients that the Firm had determined could depart with her. FF 49. The agreement provided that, if she contacted any other client outside of that list, she would be subject to $50,000 in liquidated damages for each contact. FF 49.

(ii) Respondents' Arguments

Respondents do not seem to dispute prior D.C. legal ethics opinions that have made clear that certain of the provisions from their employment and separation agreement described above violate Rule 5.6(a). Instead, Respondents raise a series

of challenges to the Hearing Committee's determinations that they violated Rules 5.6(a) and 8.4(a), to include arguing that Rule 5.6 is ambiguous.

Respondents assert that the liquidated damages imposed for attorneys who departed the Firm before the term as defined in their employment agreement had expired were, in fact, contract buy-outs that were simply described as liquidated damages. Respondents posit that these contract buy-outs were levied against the attorneys because the Firm had, in exchange for the attorneys' agreement to a fixed term of employment, paid them above market salaries. To support this, Respondents point to Mr. Tully's testimony that the liquidated damages amounts were actual calculations based upon a significant percentage of the attorney's projected annual discretionary bonus. *See* Resp. Br. at 33 n.3; Tr. 1641 (Tully).[22]

They argue that Rule 5.6(a) related charges, as applied to indirect restrictions on lawyer mobility, should be dismissed because the Rule was ambiguous at the time the agreements at issue were offered. They argue that it was not until 2021 that the Court issued a "clarifying interpretation" of the scope of Rule 5.6(a) in *Jacobson Holman, PLLC v. Gentner*, 244 A.3d 690 (D.C. 2021). Resp. Br. at 25-26, 29 (quoting *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048 (1991)). They argue that prior to that opinion, the law on restricting a lawyer's mobility was ambiguous so the *Gentner* holding should not be applied retroactively.

[22] Though Mr. Tully testified it was between 50-75% of the employee's bonus, tr. 1641, Respondents' brief states it was between 25-50%. Resp. Br. at 33 n.3. *See infra* note 22.

Respondents also contend that the Hearing Committee erred in determining that the liquidated damages clauses at issue violated Rule 5.6(a) since the amount of damages did not depend on whether the departing attorney intended to compete with the Firm post-departure. They point to the D.C. Circuit Court's decision in *Ashcraft & Gerel v. Coady*, 244 F.3d 948, 955 (D.C. Cir. 2001), that Rule 5.6(a) did not serve to invalidate a $400,000 in liquidated damages provision because the penalty was not linked to the attorney's decision not to compete with the firm. Resp. Br. at 28 n.20. They jettison the series of Legal Ethics Opinions issued prior to *Gentner* as "purely advisory until cited approvingly by the Court of Appeals." Resp. Br. at 26.

Respondents next point to "savings clauses" contained in the agreements that they contend "should be read to cure" any violative clauses contained therein. Resp. Br. at 32. Respondents claim that the following two clauses "cured" any possible violations of the Rules of Professional Conduct:

- A clause stating that "[t]he invalidity or unenforceability of any provision or provisions of this Agreement shall not affect the other provisions, and this Agreement shall be construed in all respects as if any invalid or unenforceable provisions were omitted."

- A "blue pencil" clause providing that

  > [i]f an arbitrator or court determines that any part of this agreement is illegal, void as against public policy or otherwise unenforceable, then the relevant part will automatically be amended to the extent necessary to make it sufficiently narrow in scope, time, and geographic area to be legally enforceable.

Resp. Br. at 8-9.

In addition to arguing that the clauses cure any Rule violations, Respondents also argue that as Mr. Tully explained in testimony these two clauses are in the agreements to "make it crystal clear that the intent of the parties at the time of execution of the agreement was to be ethically compliant." Resp. Br. at 9 n.8 (quoting Tr. 1584). In other words, if they intended to violate the Rules, they would not have included these clauses. Tr. 1584-85 (Tully). They argue that, even if the savings clauses would not preclude a finding that Respondents violated Rule 5.6(a), they should save Respondents from any finding that they "attempt[ed] to violate the Rules of Professional Conduct," in violation of Rule 8.4(a). *See* Resp. Br. at 35-36. In their view, the savings clauses evince their desire not to violate the disciplinary rules.

Finally, Respondents take issue with the Hearing Committee's conclusion that they violated Rule 8.4(a). They assert that they could not have violated Rule 8.4(a) here because they lacked the *mens rea* required for the Rule – that they intended to violate Rule 5.6(a). As evidence thereof, they contend that they relied on outside counsel guidance, a D.C. based managing partner, and used savings clauses in their template agreements. *Id.*

(iii) Disciplinary Counsel's Arguments

Disciplinary Counsel disputes the argument that Rule 5.6(a) is vague. It points to *Cohen v. Lord, Day, & Lord*, 550 N.E.2d 410 (N.Y. 1989), a 1989 opinion issued by the Court of Appeals of New York – the jurisdiction in which Respondents principally practice – as the seminal case in the area and one on which the *Gentner*

Court expressly relied. ODC Br. at 21-23; *see Gentner*, 244 A.3d at 701-02, 701 n.12.[23] Disciplinary Counsel contends that the *Ashcraft* decision pre-dates the Court's adoption of Comment [2] in 2007 and notes that the decision did not involve and was not an opinion of the D.C. Court of Appeals. ODC Br. at 24, 32. It argues that the Rule itself, in tandem with the legal ethics opinions issued thereunder, provided sufficient guidance for Respondents to be aware that the liquidated damages clauses in its agreements violated Rule 5.6(a). ODC Br. at 25. It further argues that nothing in Rule 5.6(a) limits the scope of the Rule to agreements that restrict the right of a lawyer to compete with a firm post-departure. ODC Br. at 30-32. Even so, the liquidated damages would cover lawyers who would leave to compete with the Firm. Finally, it contends that the savings clauses contained in Respondents' agreements fail to cast doubt upon their *mens rea* in offering the agreements at issue. ODC Br. at 25-27.

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[23] *Cohen* held that a significant monetary penalty imposed on a departing lawyer constituted an indirect restriction on the lawyer's right to practice law in violation of New York's equivalent of Rule 5.6(a). 550 N.E.2d at 411. ("[W]hile the provision in question does not expressly or completely prohibit a withdrawing partner from engaging in the practice of law, the significant monetary penalty it exacts, if the withdrawing partner practices competitively with the former firm, constitutes an impermissible restriction on the practice of law. The forfeiture-for-competition provision would functionally and realistically discourage and foreclose a withdrawing partner from serving clients who might wish to continue to be represented by the withdrawing lawyer and would thus interfere with the client's choice of counsel.").

(iv) Analysis

1. Rule 5.6(a)

Respondents are correct that the Court first examined the broader scope of the Rule in its 2021 *Gentner* decision in which it held that "an implied, partial restriction on the practice of law, in the form of imposing a substantial financial penalty for representing clients previously represented by the firm, is invalid under Rule 5.6(a)." *Gentner*, 244 A.3d at 702. However, Respondents' position that Rule 5.6 was ambiguous before *Gentner* is not consistent with the law in D.C. Nor do we find that such claim of ambiguity erases the clear and convincing evidence that Respondents had liquidated damage provisions in their agreements that constituted "substantial financial penalties" in violation of the Rule.

LEO 368 directed the Bar's (and Respondents') attention to a 2003 Court opinion, *District Cablevision Ltd. Partnership v. Bassin*, 828 A.2d 714 (D.C. 2003), explaining that

> [l]iquidated damages, unlike actual damages, ... are viewed by the D.C. Court of Appeals "with a gimlet eye" and will be sustained [and not void as a penalty] only if "not . . . disproportionate to the level of [actual] damages reasonably foreseeable at the time of the making of the contract."

LEO 368 (quoting *Bassin*, 828 A.2d at 723-24). By 2007 – a year before Respondents opened their D.C. office – the Court had adopted the language in Comment [2] to the Rule making clear that agreement restrictions that "impose a substantial financial penalty" on a departing lawyer who "competes after leaving the firm may" violate Rule 5.6(a).

We next consider whether the liquidated damages clauses here were financial penalties for lawyers who wanted to leave the Firm, irrespective of how they are described. We find that they were and Respondents have failed to rebut Disciplinary Counsel's evidence on this issue. Although Respondents testified that the liquidated damages were calculated on an individual basis for each attorney and were tied to their marketing expenses and training, Respondents did not explain nor did they offer any financial assessment, with specificity, *how* they were calculated to compensate the Firm for foreseeable damages resulting from the lawyer's early departure. *See* Tr. 85-86 (Rinckey); 200-02 (Tully). In fact, as they argue before the Board, the liquidated damages for early departure were calculated so that the liquidated damages amount constituted some significant percentage of their projected annual discretionary bonus. *See* Resp. Br. at 33 n.23; *see supra* n.21.[24] But this is precisely the point.[25] The damage amounts are untethered to actual damages shouldered by the Firm from the departure of these lawyers.

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[24] *See also* Tr. 1641 (Tully) ("So we came up with a figure, after consultation with others, that we thought was fair. And then what we did is we would adjust that liquidated damages based off of what we thought was going to be the bonus of that attorney. So that we would strive to hit liquidated damages between 50 and 75 percent of their bonus.").

[25] We recognize that law firms commonly pay expenses for incoming lawyers such as relocation costs or expenses associated with preparation for the bar exam. We do not have before us in this matter facts related to a law firm paying incoming lawyer-employees relocation or bar exam preparation costs so, we do not address whether a firm may recoup such costs should the lawyer leave the firm prior to a particular period of time.

To violate Rule 5.6(a), it is not sufficient that the challenged agreements impose a financial penalty on departing lawyers. The financial penalty must serve to restrict the rights of the lawyer to practice, *i.e.* it must be "substantial." *See* D.C. Ethics Op. 325 (2004) ("[T]he simple existence of an economic cost to leave a firm does not necessarily mean that Rule 5.6(a) ha[d] been violated.[26] To constitute a violation, an agreement must effectively 'restrict the rights of a lawyer to practice after termination of the relationship.'").

Here the Tully Rinckey agreements required departing lawyers to pay liquidated damages of up to $50,000 for early departure, even in instances where this amount was more than half of their annual salary. In the case of Ms. Gregerson, in year one of her contract she was subjected to an early departure penalty of $50,000 with an annual salary of $70,000. *See* DCX 50 at 2-3, 8-9. Ms. Weiss was offered an agreement with an early departure penalty of $50,000 as well and an annual salary of $118,450. *See* DCX 39 at 3-4, 13. Given these facts, these financial penalties were sufficiently substantial to violate the Rule.

Despite Respondents' argument that the contours of Rule 5.6 were vague, a review of D.C. ethics opinions and case law suggest otherwise. As early as 1979, the D.C. Bar Legal Ethics Committee issued its Opinion 65, in which it determined that an employment agreement clause requiring that a departing lawyer who performed

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[26] The *Gentner* decision did not create a bright line rule concerning what constitutes a "substantial penalty" but concluded that "[w]hatever the outer limit is for a 'substantial penalty,' . . . a 50 percent forfeiture of a departing partner's earned equity interest for taking even one client with them falls well within its bounds." *Gentner*, 244 A.3d at 702.

any work for a firm client within two years of termination pay the firm 40% of the lawyer's net billings violated the predecessor to Rule 5.6(a). D.C. Ethics Op. 65 (1979). It reasoned that such provisions "impose a barrier to the creation of a lawyer/client relationship between the departing lawyer and clients of his former firm" and was "inconsistent with the concept of the practice of law as a profession and at least indirectly interferes with clients' choice of an attorney." *Id.*

As the Hearing Committee pointed out, the D.C. Legal Ethics Committee's Opinion 181, issued in 1987, addressed provisions similar to those at issue in this case. HC Report at 62-64. In that opinion, the Ethics Committee found several provisions in a firm's confidentiality agreement improper and in violation of the predecessor to Rule 5.6(a), including its prohibition on the ability of departing attorneys to send out new practice announcements; a restriction on departing lawyers hiring or working with other lawyers or employees still employed by the firm; and provisions that made "a vast amount of materials perpetually confidential." D.C. Ethics Op. 181 (1987). It also found a $150,000 liquidated damages clause to be "truly oppressive" and concluded that the "*in terrorem* effect of this sword of Damocles hanging over the head of a departing lawyer is not to be underestimated." *Id.* The Committee wrote that "[t]he effect of these provisions is seriously to reduce a departed attorney's ability to practice law." *Id.* With respect to Respondents' attempts to interfere with the ability of a departing lawyer to send announcements of his or her departure, the Legal Ethics Committee had issued guidance on this issue by 1981. In Ethics Opinion 97, it emphasized that Rule 5.6(a) requires that a firm

preserve a departing attorney's right to send announcements. D.C. Ethics Op. 97 (1981). Respondents' agreements did not comply with that guidance.

Respondents defend that certain of these provisions (*e.g.* the anti-cohabitation, anti-recruiting, and confidentiality clauses) were necessary because departing employees had been stealing the Firm's trade secrets and other confidential information.[27] But this defense finds no support in Rule 5.6(a). The Rule does not excuse otherwise violative conduct simply because a lawyer or law firm seeks to protect information that a lawyer has determined are the firm's or a lawyer's trade secrets or other confidential information.

Respondents' arguments that they relied on savings and blue pencil clauses are similarly unavailing. These provisions concern the enforceability of the remainder of the agreement if these provisions were *later* determined to be unenforceable. Because the agreement had already been made prior to any such determination, and the violation occurred at the time the agreement was offered or

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[27] On February 22, 2023, the Board issued an order placing certain categories of exhibits under seal during these proceedings, including Firm documents that had not been previously publicly disclosed. The Board did not resolve whether these documents would qualify as trade secrets in an action brought under either District or federal statutes since the protections afforded by D.C. Bar R. XI, § 17(d) are not limited to "trade secrets." Because such a determination is not germane to our decision, we see no need to resolve this question in this Report and Recommendation.

On December 15, 2023, Tully Rinckey PLLC filed a Motion to Seal their December 14, 2023 Motion to Redact the Hearing Committee's Report and Recommendation. Disciplinary Counsel and Respondents consented to the relief sought. The Motion to Seal is granted and the December 14, 2023 Motion to Redact the Hearing Committee's Report and Recommendation shall remain under seal.

made, these provisions are not relevant to our analysis of whether they "participate[d] in offering or making [an] agreement that restricts the rights of a lawyer to practice after termination of the relationship." Additionally, as the Hearing Committee explained using these clauses to reform the terms and conditions of the agreement should only occur in situations where parts of a clause may be unenforceable on public policy grounds and where the party looking to reform the terms and conditions made the agreement in good faith and consistent with "reasonable standards of fair dealing." HC Report at 67-68 (quoting S*teiner v. Am. Friends of Lubavitch*, 177 A.3d 1246, 1258 (D.C. 2018) (quoting Restatement (Second) of Contracts § 184 & cmt. b. (A.L.I. 1981))). The Hearing Committee determined – and we agree – that the clauses violate the Rules and are injurious to the public. Accordingly, these savings clauses may not be used to reform the clauses that violated the Rules. These savings clauses do not support that Respondents intended to be compliant with the Rules, especially as we have noted, given their failure to revise their agreements consistent with LEO 368.

By February 15, 2015, Respondents had the benefit of not only the Rules of Professional Conduct and the Comments to those Rules but also LEO 368 to rely upon when drafting the challenged agreements. LEO 368, citing both established case law and earlier ethics opinions, stated plainly that:

> Because they limit a client's freedom in choosing a lawyer and a lawyer's professional autonomy, provisions in partnership, employment, and other agreements that expressly or impliedly restrict a lawyer's practice are prohibited. *Neuman v. Akman*, 715 A.2d 127, 130-31 (D.C. 1998) (citing D.C. Rule 5.6, cmt. [1]); *accord Cohen v. Lord, Day & Lord*, 550 N.E.2d 410, 411 (N.Y. 1989); *Stevens v. Rooks*

> *Pitts and Poust*, 682 N.E.2d 1125, 1132 (Ill. App. 1997); D.C. Legal Ethics Op. 325 (2004); D.C. Legal Ethics Op. 241 (1993); D.C. Legal Ethics Op. 122 (1983).

LEO 368 (footnotes omitted).

Here, as the Hearing Committee found based on clear and convincing evidence, Respondents crafted a number of employment and separation agreement terms and conditions that either expressly or impliedly restricted their lawyer-employees' or their former lawyer-employees' practice. Given that, we find that Respondents violated Rule 5.6(a) by attempting to restrict the legal practice of lawyers.

2. Rule 8.4(a)

Rule 8.4(a) states that "[i]t is professional misconduct for a lawyer to . . . [v]iolate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." The Hearing Committee concluded that the liquidated damages provisions at issue in this case "violate Rule 8.4(a) insofar as they constituted violations or attempts to violate the Rules of Professional Conduct." HC Report at 64.[28]

We agree with Respondents that Disciplinary Counsel needed to prove that they intended to "offer[] or mak[e]" an agreement that "restricts the rights of a lawyer to practice after termination of the relationship." We turn to criminal law precepts to analyze whether Respondents attempted to violate Rule 5.6(a). In

[28] The argument that Respondents attempted to violate a rule that already prohibits the attempt to enter into an agreement that restricts a lawyer's right to practice would seem to be redundant. We consider the charge nonetheless.

criminal law, for the prosecution to establish that a defendant violated the law by an attempt rather than by completing the challenged criminal act, the prosecution must prove that the defendant intended to commit the crime that they were attempting and that although the defendant did not complete the crime, they had undertaken an act or acts in furtherance of trying to commit the crime. The defendant's act or acts "must go beyond mere preparation and must carry the criminal venture forward to within dangerous proximity of the criminal end sought to be attained." *Taylor v. United States*, 267 A.3d 1051, 1059 (D.C. 2022) (quoting *Corbin v. United States*, 120 A.3d 588, 602 n.20 (D.C. 2015)); *see also Davis v. United States*, 873 A.2d 1101, 1107 (D.C. 2005) ("To prove an attempt, the government is not required to prove more than an overt act done with the intent to commit a crime, which, except for some interference, would have resulted in the commission of the crime." (internal quotations and alterations omitted) (quoting *Evans v. United States*, 779 A.2d 891, 894 (D.C. 2001))).

Applying this analysis to Respondents' challenged conduct, clear and convincing evidence establishes that they crafted, presented, and signed agreements to and with their Firm's lawyer-employees that contained the violative clauses discussed above. Respondents intended to and took overt and substantial steps to restrict the rights of their Firm's departing lawyers to practice law in myriad ways after leaving the Firm. Further, the language of Rule 5.6(a) itself makes it a violation to *participate in offering or making* a restrictive agreement. In other words, Rule 5.6(a) does not require that the offending agreement be executed. As a result, as

prohibited by Rule 8.4(a), Respondents engaged in professional misconduct by violating or attempting to violate the Rules of Professional Conduct. We therefore sustain the Hearing Committee's findings of the Rule 8.4(a) violations because Respondents attempted to – and in fact did – "participate in offering or making . . . employment, or other similar type of agreement[s] that restrict[ed] the rights of a lawyer to practice after termination of the relationship."

D. Rules 5.1 and 5.3

At all times relevant to these proceedings, Respondents were the only equity partners in the firm and one of the two served as its overall managing partner. Disciplinary Counsel charged that Respondents violated Rules 5.1(a)-(b), 5.3(a)-(b), and 5.1(c)(1)-(2), by failing to make reasonable efforts to ensure that their subordinates conformed to Rules 5.6, 1.4(b)[29], and 1.16(d)[30]. The Hearing Committee found violations of Rules 5.1(b), 5.3(b), and 5.1(c)(1)-(2) only.[31]

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[29] Rule 1.4(b) requires that an attorney "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

[30] Rule 1.16(d) provides that—

> In connection with any termination of representation, a lawyer shall take timely steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred.

[31] The Hearing Committee clearly stated its findings that "each Respondent has committed multiple violations of each Rule other than Rules 5.1(a) and 5.3(a)." HC Report at 55. The Appendix to the Hearing Committee report appears to have

(i) Rules 5.1(a) and 5.3(a)

Rules 5.1(a) and 5.3(a) require that lawyers with managerial authority in a law firm make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that lawyers and nonlawyers in the firm conform to the Rules. "[L]awyers with managerial authority within a firm [must] make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct." Rule 5.1, Cmt. [2].

The Hearing Committee determined that Disciplinary Counsel failed to meet its burden in proving that Respondents violated Rules 5.1(a) and 5.3(a). In its view, there was no clear and convincing evidence that the Firm lacked sufficient measures in place to ensure that Firm subordinates communicated with clients to provide information about their departing lawyer (*see* Rule 1.4(b)) and that client files and refunds were made to clients in a timely manner following termination (*see* Rule 1.16(d)). HC Report at 72-73. It reasoned that the Firm's staff had been instructed to provide clients with information concerning where the departing lawyers were going and that the SOPs required that joint letters concerning the lawyer's departure be sent to the clients. *Id.* It also found that the SOPs provided guidance with respect to the transfer of client property following termination. *Id.*

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inadvertently omitted references to the violations of Rules 5.1(b) and 5.1(c)(1)-(2) for Mr. Rinckey. The parties have not raised specific challenges concerning this issue.

Disciplinary Counsel does not challenge the Hearing Committee's conclusions and we see no reason to depart from its conclusion.

(ii) Rules 5.1(b), (c)(1) and (c)(2) and 5.3(b)

Rules 5.1(b) and 5.3(b) require supervising lawyers to make reasonable efforts to ensure that both lawyers and nonlawyers conform to the Rules. And, under Rule 5.1(c),

> [a] lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if: (1) [t]he lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or (2) [t]he lawyer has direct supervisory authority over the other lawyer or is a partner or has comparable managerial authority in the law firm or government agency in which the other lawyer practices, and knows or reasonably should know of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

The parties do not meaningfully challenge the Hearing Committee's conclusions and we agree with the Hearing Committee that Respondents violated these Rules.[32]

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[32] The Hearing Committee concluded that

> The Respondents were well aware of—and indeed, directed and ratified—repeated conduct of their lawyer and non-lawyer subordinates that violated the D.C. Rules of Professional Conduct. This conduct included the provisions in employment agreements and separation agreements that levied liquidated damages, mandated referral fees, prohibited client contact, and prohibited post-employment association with other Firm alumni. Indeed, the Respondents have not claimed that their subordinates acted without their knowledge, and the record amply demonstrates that during the period in question, micromanagement by whichever Respondent was serving as the Firm's overall managing partner was the order of the day at Tully Rinckey. This course of conduct by the Respondents violated Rules 5.1(b), 5.1(c)(1), 5.1(c)(2), and 5.3(b).

This case does not present the more typical scenario where the supervising lawyer failed to discover and prevent misconduct that violated the Rules. *See, e.g.*, *In re Cater*, 887 A.2d 1, 13-16 (D.C. 2005) (violation of Rule 5.3(b) when attorney failed to discover and prevent her secretary from committing misappropriation of estate funds); *In re Gregory*, 790 A.2d 573, 577-79 (D.C. 2002) (appended Board Report) (violation of Rule 5.3(b) when attorney failed to supervise assistant who depleted IOLTA account with checks written to herself). Rather, as discussed below, Respondents were often directly involved in the misconduct and supervised or directed their subordinates in violating the Rules.

Mr. Cortelyou (a nonlawyer professional under Respondents' supervision), who, among other responsibilities, would negotiate employment agreements on behalf of the Firm (Tr. 350 (Tully)), sent Ms. Weiss a proposed five-year employment agreement that, as discussed earlier, contained provisions which violated Rule 5.6(a). FF 28-29; DCX 39. Specifically, the provisions that violated Rule 5.6(a) included liquidated damages triggered by early departure, required payment to the Firm of a portion of fees billed to former Firm clients, liability for attorney's fees and costs related to the Firm's enforcement of the agreement, and a

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HC Report at 72. Though not specifically challenged before the Board, the extent to which Mr. Rinckey directed or ratified misconduct of a *lawyer* subordinate, in violation of Rules (c)(1) and (c)(2), was not delineated in the Hearing Committee Report. Because the parties do not challenge this conclusion, we do not depart from the Hearing Committee's recommendation.

prohibition against working with Firm alumni after her departure.[33] DCX 39 at 13-14, 17. That next month, Ms. Weiss received a separation agreement – signed by Mr. Tully, that included provisions prohibiting her from initiating contact with clients following her departure and assessing liquidated damages if she did so. FF 60; DCX 42 at 4, 9-10. Given this, Respondents failed to supervise Mr. Cortelyou to assure compliance with Rule 5.6(a) and therefore violated Rule 5.3(b).

After Ms. Gregerson gave notice to the Firm, either Larry Youngner (then managing partner in the D.C. office) or Cheri Cannon (successor managing partner in the D.C. office), directed Ms. Gregerson to have no further contact with her clients. No joint letter was proposed or sent to these clients. This conduct was inconsistent with the client communication required under Rule 1.4(b).

In connection with Ms. Friedman's departure, Mr. Cortelyou instructed Ms. Friedman not to discuss her departure with her clients. Ms. Friedman told both Mr. Cortelyou and Mr. Rinckey that she believed Rule 1.4(b) required her to communicate the news of her departure to her clients. In response, Mr. Rinckey told her to communicate solely with Mr. Cortelyou. Mr. Cortelyou then sent her a draft

[33] Respondents argue that Mr. Cortelyou sent a pre-LEO 368 template to Ms. Weiss and that, once Mr. Tully became aware that he had done so, he retracted that draft. Resp. Br. at 39 n.27. But the modified 2018 template removed only the agreement provisions restricting departing lawyers from practicing with other former Tully Rinckey lawyers and the referral fees. *See* DCX 72. There is no evidence to support the conclusion that the modified draft agreement would not have contained provisions assessing liquidated damages for early departure or the liability for attorney's fees. As we have already concluded, these provisions do not comply with Rule 5.6(a).

separation agreement that required that she not initiate contact with particular clients, subjecting her to $50,000 in liquidated damages for each such contact. FF 49; DCX 28 at 3. The agreement also reminded her that her employment agreement prohibited her from working with former Firm employees. As discussed above, these provisions violated Rule 5.6(a). Mr. Rinckey directly supervised Mr. Cortelyou during these negotiations, Tr. 1386 (Rinckey), and in doing so engaged in conduct that violated the Rules of Professional Conduct by failing to direct Mr. Cortelyou so his actions were consistent with the Rules.

Mr. Ellis, an attorney with the Firm, advised the Firm he was departing. After receiving Mr. Ellis's notice of departure, Steve Herrick, the Firm's D.C. managing partner at the time, demanded Mr. Ellis pay $30,000 in liquidated damages. FF 55. After some negotiation, Mr. Tully authorized Mr. Herrick to instead accept unused vacation time owed to Mr. Ellis as liquidated damages. *Id.* Mr. Ellis and Mr. Herrick then memorialized that in a separation agreement, which also prohibited Mr. Ellis from practicing with any other lawyer who had ever been employed by the Firm for the following thirty-six months. FF 56-57; DCX 15. By directing Mr. Herrick to engage in conduct that violated Rule 5.6(a) and failing to take timely remedial action, Mr. Tully violated Rules 5.1(c)(1) and (2).

Following Ms. Gregerson's notice of her intent to leave the firm, Larry Youngner, who was the Firm's D.C. managing partner at the time, sent her a separation agreement that contained a provision restricting her from contacting clients of the Firm, punishable by $100,000 in liquidated damages. FF 67-68; DCX

54. It also required that she pay a 30% fee for any matters transferred to her future firm. Ms. Gregerson replied with a marked-up draft of the agreement, striking the liquidated damages clause and the clause requiring that she pay the 30% fee. Mr. Tully replied by email, rejecting her changes and attaching an arbitration notice. Ultimately, Mr. Youngner or Ms. Cannon (who was to succeed as the D.C. managing partner) sent Ms. Gregerson a revised separation agreement – signed by Mr. Tully – with a provision subjecting her to $100,000 in liquidated damages for contacting any client of the Firm. FF 72-73. There was no discussion of sending a joint letter to her clients about her departure. Mr. Tully ratified both Mr. Youngner's and/or Ms. Cannon's conduct that was inconsistent with the mandates of Rules 5.6(a) and 1.4(b). And, though he knew of the conduct at a time when its consequences can be avoided or mitigated, he failed to take timely remedial action.

E. Rules 8.4(a) and 8.4(d)

Disciplinary Counsel alleges that Respondents attempted to interfere with its investigation of the Firm, in violation of Rules 8.4(a) and 8.4(d). As evidence of the same, it points to a provision in the Firm's separation agreements that precludes departing lawyers from "assist[ing] or otherwise participat[ing] willingly or voluntarily in . . . any investigation."[34]

[34] For example, Ms. Weiss's separation agreement contained the following language:

> The Attorney agrees not to assist or otherwise participate willingly or voluntarily in any claim, arbitration, suit, action, investigation, or other proceeding of any kind that relates to any matter that involves the Firm in any way, shape or form, the Firm owners, Firm employees to include prior, current or applicants, Affiliates of the firm's owners

As discussed above, Rule 8.4(a) deems violative any "attempt to violate the Rules of Professional Conduct." Rule 8.4(d), in turn, provides that it is professional misconduct for a lawyer to "[e]ngage in conduct that seriously interferes with the administration of justice." Conduct that violates this Rule includes "acts by a lawyer such as: failure to cooperate with Disciplinary Counsel [and] failure to respond to Disciplinary Counsel's inquiries or subpoenas . . . ." Cmt. [2]. Rule 8.4(d) "is to be interpreted flexibly and includes any improper behavior of an analogous nature to these examples." *Id.*

As precedent, Disciplinary Counsel directs the Board's attention to *In re Martin*, 67 A.3d 1032, 1051 (D.C. 2013). ODC Br. at 36. In *Martin*, the Court held that an attorney violated Rule 8.4(d) by entering into a settlement agreement requiring that a complainant withdraw its bar complaint. 67 A.3d at 1051-52. The

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> (Schenectady SPCA, CVETS, etc), Firm clients, and/or Firm vendors unless required to do so by Court order, subpoena, or other compulsory lawful means. Within 24 hours of being notified of any request to willingly or voluntarily cooperate you must notify the firm's managing partner by phone, email, and fax and continue to attempt to contact the managing partner until you speak with him/her. Within 24 hours of being served with a legal process compelling your involvement in any complaint, investigation, arbitration or the like you must also notify the firm's managing partner by phone, email and fax and continue to attempt contact until you speak with the managing partner.

DCX 42 at 7, 9 (signed by Mr. Tully); *see also* FF 62. Mr. Tully signed at least five other separation agreements containing substantially similar language. *See* FF 75 and DCX 56 at 6, 8 (Gregerson agreement); FF 83 and DCX 60 at 9, 11 (Quashie agreement); FF 92 and DCX 68 at 8, 10 (Benjamin agreement); FF 93 and DCX 38 at 8, 10 (Young agreement); FF 109 and DCX 62 at 8, 10 (Harrison agreement). Mr. Rinckey also signed an agreement with Mr. McCullough containing this provision. *See* FF 110 and DCX 71 at 8, 10-11.

Martin Court reminded the Bar that "[i]t is well-settled that an attorney who enters into an agreement with a client which requires the client either to refrain from filing or to seek dismissal of a bar complaint violates Rule 8.4(d)." *Id.*

For their part, Respondents argue that there is no precedent to support Disciplinary Counsel's assertion that the agreement provisions at issue violate Rule 8.4(d). They contend that, unlike the respondent in *Martin*, there is no record evidence that either Respondent actually interfered with Disciplinary Counsel's investigation. *See* Resp. Br. at 46-50. They assert that the language contained in the agreements is "generic in nature" and has "no direct reference to a disciplinary investigation." Resp. Br. at 47. Respondents argue further that the Firm's employment agreements contain clauses requiring that Firm attorneys cooperate with "ethical investigations." Resp. Br. at 10-11; *see id.* at 47. This, in their view, demonstrates that the Firm's agreements did not prohibit an attorney from cooperating in a disciplinary investigation because the agreements specifically referenced disciplinary investigations by name when it was their intent to include disciplinary investigations; and, by not specifically listing "ethical investigations" it shows they did not intend for attorneys to not cooperate in such an investigation. *Id.* at 10-11. With respect to the Rule 8.4(a) charge, they insist that the Rule requires a finding that they have intended that the agreement provisions operate to violate Rule 8.4(d) and that such a finding is necessarily belied by their own cooperation with Disciplinary Counsel's investigation. Resp. Br. at 48-50.

We conclude that Disciplinary Counsel has met its burden in proving that the agreement provisions violated Rules 8.4(a) and (d). The expansive language contained in the Firm's separation agreements evidenced Respondents' intent that Firm employees not voluntarily cooperate with investigations, including investigations by disciplinary authorities. And, as the Hearing Committee found, three attorneys (Benjamin, Weiss and Gregerson) expressed concerns about their ability to cooperate with Disciplinary Counsel because of this language. *See* FF 62-63, 75, 92. Additionally, the fact that Respondents' agreements included a number of other provisions that violated the Rules of Professional Conduct even after LEO 368 was penned demonstrates that Respondents, although now arguing they had no intent to discourage cooperation with Disciplinary Counsel, undertook no such detailed and specific consideration of the terms and conditions of their employment and separation agreements, particularly as it relates to assuring that those agreements comply with the Rules of Professional Conduct.

The "cooperation" provision language upon which Respondents rely on demonstrates this lack of concern for the Rules and does not serve to advance their cause either. It explicitly requires only that the attorney cooperate with "*the Firm* and its attorneys" in connection with an ethical investigation. *E.g.*, DCX 61 at 15 (emphasis added).[35] Thus, the fact that Respondents made specific reference to

[35] The cooperation provision reads as follows:

> 9.5. Cooperate. The Attorney agrees to cooperate with the Firm and its attorneys, both during and after the termination of the Attorney's employment, in connection with any litigation or other proceeding (to

"ethical" investigations here for their own benefit shows that they could have *exempted* disciplinary investigations from the ambit of the provisions at issue. They did not.

Irrespective whether they were successful in interfering with Disciplinary Counsel's investigation, they intended to do so and, by including these provisions in their agreements, they committed acts to consummate that interference. *See Taylor v. United States*, 267 A.3d at 1059.

Accordingly, we conclude, as did the Hearing Committee, that Respondents' agreements violated Rules 8.4(a) and (d) by attempting to deter witnesses from cooperating with Disciplinary Counsel's investigation. While we agree that there is no evidence that Respondents directed any witness to refrain from cooperating with inquiries from Disciplinary Counsel, given the provisions in the separation agreements permitted cooperation only when required, and thus "impliedly

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> include but not limited to: collecting firm billings, ethical investigations, and malpractice allegations) arising out of or relating to matters of which the Attorney was involved prior to the termination of the Attorney's employment. The Attorney's cooperation shall include, without limitation, providing assistance to the Firm's counsel, experts and consultants, and providing truthful testimony in pretrial and trial or hearing proceedings. In the event that the Attorney's cooperation is requested after the termination of the Attorney's employment, the Firm will (x) seek to minimize interruptions to the Attorney's schedule to the extent consistent with its interests in the matter; and (y) reimburse the Attorney for all reasonable and appropriate out-of-pocket expenses actually incurred by the Attorney in connection with such cooperation upon reasonable substantiation of such expenses.

DCX 61 at 15 (Harrison agreement).

prohibit[ed] voluntary reporting of lawyer misconduct to Disciplinary Counsel," in violation of the Rules, we need not find that they directed witnesses to refrain from cooperation in order to find by clear and convincing evidence they violated the Rules. HC Report at 75.

IV. SANCTION

The Hearing Committee recommended that each Respondent be suspended for a period of ninety days. Disciplinary Counsel supports the Hearing Committee's recommended sanction. Respondents contend that, if all the violations found by the Hearing Committee are upheld by the Board, a period of probation would be a reasonable sanction, but they argue that the maximum sanction appropriate here is a reprimand.

Analysis

The sanction imposed in an attorney disciplinary matter must 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); *Cater*, 887 A.2d at 17; *Martin*, 67 A.3d at 1053. "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 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; *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 *In re Elgin*, 918 A.2d 362, 376 (D.C. 2007)). The Court also considers "'the moral fitness of the attorney' and 'the need to protect the public, the courts, and the legal profession [. . .] .'" *In re Rodriguez-Quesada*, 122 A.3d 913, 921 (D.C. 2015) (per curiam) (quoting *In re Howes*, 52 A.3d 1, 15 (D.C. 2012)). We address those factors below.

1. The Seriousness of the Conduct at Issue

Respondents' conduct was serious, pervasive, and struck directly at the public's interest in the right to their preferred counsel.

> [L]awyer restrictions are injurious to the public interest. A client is always entitled to be represented by counsel of his own choosing. (footnote and citation omitted) The attorney-client relationship is consensual, highly fiduciary on the part of counsel, and he may do nothing which restricts the right of the client to repose confidence in any counsel of his choice. (citation omitted) No concept of the practice of law is more deeply rooted. The lawyer's function is to serve, but serve he must with fidelity, devotion and erudition in the highest traditions of his noble profession.

Dwyer v. Jung, 336 A.2d 498, 500 (N.J. Super. Ct. Ch. Div. 1975), *appeal granted, cause remanded*, 343 A.2d 464 (N.J. 1975), and *aff'd*, 348 A.2d 208 (N.J. Super. Ct. App. Div. 1975). Respondents acted in contravention of this important principle. Highlighting that their conduct was aggravating, is the fact that an arbitrator ruled against Respondents finding that they were engaged in "bombard[ment]" for, among other things, seeking $250,000 in liquidated damages from Ms. Peters for twenty-five alleged violations of the Firm's SOPs. DCX 104 at 18, 21. This factor weighs in aggravation of sanction.

2. Prejudice to the Client

Respondents' misconduct prejudiced clients in that their behavior directly and indirectly impeded clients from working with the lawyer of their choice.

3. Whether the Conduct Involved Dishonesty

Respondents' misconduct did not involve dishonesty or misrepresentation.

4. Violations of Other Provisions of the Disciplinary Rules

"The 'violation of other disciplinary rules' prong of the analysis considers how many rules were violated." *Dobbie*, 305 A.3d at 812. Respondents violated seven Rules: 5.6(a), 8.4(a), 5.3(b), 5.1(b), 5.1(c)(1) and (2), and 8.4(d). Although all of the violations in this case arose out of essentially the same duplicative misconduct, we still find this to be an aggravating factor because the conduct was ongoing, impacted a number of lawyers; and, Respondents not only themselves violated these Rules but also directed their employees to violate these rules.

5. Previous Disciplinary History

Neither Respondent has any disciplinary history.

6. Whether the Attorney Acknowledges His Misconduct

As a general matter, Respondents do not acknowledge that their conduct was wrongful.[36] Like the Hearing Committee, we consider this factor in aggravation of sanction. *See In re Carter*, 333 A.3d 558, 567 (D.C. 2025) (failure to accept responsibility constitutes an aggravating factor).

7. Circumstances in Aggravation or Mitigation

Respondents performed honorable military and *pro bono* service and have served on bar association committees. And Respondents cooperated with Disciplinary Counsel's investigation. We agree that these factors should be considered in mitigation of sanction. *See In re Krame*, 284 A.3d 745, 769 (D.C. 2022) (considering, in mitigation, respondent's "otherwise unblemished record; his cooperation with Disciplinary Counsel's investigation; his long history of serving

[36] At best, Respondents concede that if the Board finds their series of defenses unconvincing, their conduct may merit some level of sanction. Resp. Br. at 51. We also note, at the Hearing Committee, Respondents generally took the position that their behavior was permitted to protect their business interests to include information they asserted was "trade secrets" or confidential of their Firm. Respondents have resurrected this argument before the Board, and we have rejected it.

the disabled and elderly communities; the significant time [he] has devoted to the profession, including his service on the [Bar's] steering committee").[37] [38]

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[37] We do not agree with Respondents that the fact that they discontinued use of the offensive agreements eight years after their inception or that they no longer serve in managing roles should serve as mitigating factors.

[38] In arguing that their sanction should be mitigated, Respondents complain that their due process rights were violated because they were "potentially deprive[d] . . . of evidence further justifying the restrictive covenants . . . or evidence in mitigation" because Disciplinary Counsel declined to investigate a complaint. Resp. Br. at 53. Though Respondents note only that they were *potentially deprived* of evidence, they were entitled solely to reasonable discovery in accordance with the Board rules. *See* D.C. Bar R. XI, § 8(g). Board Rule 3.1 provides that Respondents were entitled to "all material in the files of Disciplinary Counsel pertaining to the pending charges that are neither privileged nor the work product of the Office of Disciplinary Counsel." If Respondents "ha[d] a compelling need for the additional discovery in the preparation of [their] defense," Board Rule 3.2 permitted them to move the Hearing Committee Chair for an order authorizing discovery from a non-party. Respondents point to no authority for the contention that they were entitled to discovery in connection with a disciplinary matter unrelated to these proceedings and we find no due process violation on these grounds.

Respondents also challenge the prosecution of this matter on grounds that it presents an Equal Protection Clause issue. They assert that, as private lawyers, they are being treated differently than members of the Board staff and its volunteers who are restricted from representing respondents, complainants or witnesses in disciplinary proceedings in the District of Columbia during their tenure and for one year thereafter. *See* Board Rule 19.6. We discern no such violation. *See In re Dulansey*, 606 A.2d 189, 190 (D.C. 1992) (where attorney does not allege that discipline "involves a suspect class[,] . . . we apply to his claim the traditional rational basis standard of review, under which the challenged classification is presumed to be valid and will be sustained if it is rationally related to a legitimate state interest" (internal quotation marks omitted) (citation omitted)). Board Rule 19.6 does not implicate the client protection concerns that undergird Rule 5.6(a). Rather, Rule 19.6 serves to protect the integrity of disciplinary proceedings by avoiding potential conflicts of interest and the appearance of impropriety. There is a rational basis for treating these members of the Bar differently.

However, we find it an aggravating circumstance that even after the D.C. Legal Ethics Opinion was issued regarding their conduct, Respondents continued to use employment related agreements that defied the Rules of Professional Conduct and the Legal Ethics Opinion.

8. Sanctions in Cases Involving Comparable Misconduct

D.C. Bar R. XI, § 9(h)(1) requires that the Board recommend a sanction that is consistent with that imposed in cases involving comparable misconduct. *In re Omwenga*, 49 A.3d 1235, 1244 (D.C. 2012) (appended Board Report). However, there are no disciplinary cases involving violations of Rule 5.6(a) in the District of Columbia.[39]

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[39] Although this matter involves violations of Rules 8.4(a), 5.3(b), 5.1(b), 5.1(c)(1) and (2), and 8.4(d), the misconduct at issue here stems from the use of agreement provisions that violated Rule 5.6(a). However, it is worth noting that violations of the foregoing Rules have resulted in sanctions ranging from informal admonition to periods of suspension.

Violations of Rules 5.1(b) and (c), and 5.3(b) have resulted in sanctions ranging from informal admonitions to lengthy periods of suspension. *See In re Draper*, Bar Docket No. 2005-D299 (Letter of Informal Admonition Aug. 3, 2007) (informal admonition for violations of Rules 5.1, 5.3, and 8.4(d)); *In re Kirk*, Bar Docket No. 108-00 (Letter of Informal Admonition May 5, 2006) (informal admonition for violations of Rules 5.3(a), 5.3(b), and 1.15(b)); *Cater*, 887 A.2d at 5 (180-day suspension with conditions where respondent violated Rule 5.3(b), along with Rules 1.1(a) (competent representation); 8.1(b) (failure to cooperate with Disciplinary Counsel); 8.4(d) (serious interference with administration of justice); and D.C. Bar R. XI, § 2(b)(3) (failure to comply with Board order)); *In re Cohen*, 847 A.2d 1162, 1163 (D.C. 2004) (thirty day suspension where the respondent violated both Rules 5.1(a) and 5.1(c)(2)); *In re Roxborough*, 675 A.2d 950, 951 n.4, 952 (D.C. 1996) (per curiam) (thirty day suspension with reinstatement conditioned upon proof of fitness where the respondent violated Rule 5.1(b), along with Rules 1.3(c) (failure to act

Respondents direct the Board's attention to decisions in our sister jurisdictions in which respondents were sanctioned for violating that jurisdiction's version of Rule 5.6(a). *See* Resp. Br. at 57-59; Resp. Reply Br. at 22 n.19. In each such case, the respondent received either an informal admonition or a reprimand for their violations of the Rule. *See, e.g.*, *In re Confidential Respondent*, Pa. Disciplinary Bd., Case Rsch. Collection (Aug. 16, 2019) (private informal admonition); *Kentucky Bar Ass'n v. Truman*, 457 S.W.3d 325, 328 (Ky. 2015) (reciprocal public reprimand); *In re Truman*, 7 N.E.3d 260, 261-62 (Ind. 2014) (public reprimand); *In re Hanley*, 19 N.E.3d 756, 756-57 (Ind. 2014) (public reprimand); *In re Weigel*, 817 N.W.2d 835, 846 (Wis. 2012) (public reprimand); *Cincinnati Bar Ass'n v. Hackett*, 950 N.E.2d

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with reasonable promptness), 1.4(a) (failure to keep client reasonably informed), and 1.1(a) (failure to provide competent representation)).

Violations of Rules 8.4(a) and 8.4(d) have also resulted in a wide range of sanctions, from informal admonition to lengthy periods of suspension, depending on the underlying misconduct and accompanying Rule violations. *See, e.g.*, *In re Bernabei*, Board Docket No. 14-BD-061, at 38 (BPR Aug. 30, 2017) (directing Disciplinary Counsel to issue an informal admonition for violation of Rule 8.4(a) where the respondent knowingly assisted co-respondent in revealing client confidences and secrets); *In re Nwaneri*, Disc. Docket No. 2017-D059 (Letter of Informal Admonition Sept. 12, 2018) (informal admonition for violation of Rule 8.4(d) where the respondent attempted to obstruct Disciplinary Counsel's investigation); *In re Crawford*, 290 A.3d 934, 935 (D.C. 2023) (per curiam) (six-month suspension with reinstatement conditioned upon proof of fitness for violations of Rules 8.4(a) and 8.4(d), along with Rules 3.1 (defending a proceeding, and asserting or controverting an issue therein, although there was no basis in law for doing so that was not frivolous); 3.3(a) (knowingly making false statements of fact to a tribunal or failing to correct false statements of material fact previously made to the tribunal); 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists); and 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation)).

969, 971-72 (Ohio 2011) (public reprimand). In their reply brief, Respondents also cite to a Maryland case, *Attorney Grievance Commission of Maryland v. Hyatt*, 490 A.2d 1224, 1226-27 (Md. 1985), to support their argument for a lesser sanction. Resp. Reply Br. at 22 n.19, 25-26.

We agree with Disciplinary Counsel that none of these cases involve misconduct comparable to that at issue here. They did not involve the number of violative agreement provisions or departing lawyers affected by such provisions. They did not involve provisions attempting to impede any investigation of the law firm. Further, most of the decisions Respondents cite did not arise from contested matters. And, finally, in none of these cases did the state's disciplinary authority issue an ethics opinion on a respondent's conduct only to have the respondent continue to engage in the wrongdoing as in this case. *Hyatt* is also distinguishable from the facts in Respondents' case because the respondents in *Hyatt* agreed to rewrite the offending agreements so that the agreements conformed to the Maryland Code of Professional Responsibility; and, the court noted that the "parties demonstrated a desire to adapt the agreements to all provisions of the Code." *Hyatt*, 490 A.2d at 1226-27. Further, the respondent in the case never attempted to enforce the agreements that violated the Maryland Rules of Professional Conduct unlike Respondents. *Id.*

Distinct from the referenced cases, Respondents' misconduct spanned a period of roughly eight years, and involved nearly a dozen lawyers and a host of agreement provisions that violated our Rules. Respondents were alerted by a D.C.

Legal Ethics Opinion that provisions contained within the agreements did not comply with the Rules but they remained undeterred in their actions. Further, the agreements Respondents had crafted included provisions intended to prevent complete and thorough investigation into the Firm's misconduct.

As the Court advised the Bar in *Neuman v. Akman*,

> Rule 5.6(a) is designed, in part, to protect lawyers, particularly young lawyers, from bargaining away their right to open their own offices after they end an association with a firm or other legal employer. It also protects future clients against having only a restricted pool of attorneys from which to choose. . . . Clients are not merchandise. Lawyers are not tradesmen. They have nothing to sell but personal service. An attempt, therefore, to barter in clients, would appear to be inconsistent with the best concepts of our professional status.

715 A.2d at 130-31 (citations omitted). Here the facts support that Respondents' actions were inconsistent with the "best concepts" of the legal profession. Over a period of years they engaged in behavior that violated the Rules of Professional Conduct and directed their employees to do the same, even with a Legal Ethics Opinion that advised their behavior was inconsistent with the Rules of Professional Conduct. Given this, we agree with the Hearing Committee's recommended sanction of a ninety-day suspension.[40] We further recommend that Respondents' attention be

[40] In the context of raising challenges concerning the negotiated discipline process in the District of Columbia, Respondents note that Disciplinary Counsel offered Respondents a "probation-only sanction" during discussions of a potential negotiated discipline. Resp. Br. at 52 n.33. We are aware of no authority under which negotiations between Disciplinary Counsel and respondents, prior to the filing of a Specification of Charges, would be relevant to the Board's considerations of a matter pending before it.

directed to the requirements of D.C. Bar R. XI, § 14, and their effect on eligibility for reinstatement. *See* D.C. Bar R. XI, § 16(c).

BOARD ON PROFESSIONAL RESPONSIBILITY

By: Margaret M. Cassidy
Margaret M. Cassidy, Esq.

All members of the Board concur in this Report and Recommendation except Michael Tigar, who is recused and Leslie Spiegel, who did not participate.