DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
MICHAEL L. AVERY, SR., ESQUIRE,	:	
	:	Board Docket No. 11-BD-088
Respondent.	:	Bar Docket No. 2006-D354
	:	
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 447083)	:	

REPORT AND RECOMMENDATION
OF THE BOARD ON PROFESSIONAL RESPONSIBILITY

Before the Board are Disciplinary Counsel's[1] charges that Respondent, Michael L. Avery, Sr., violated eleven of the District of Columbia Rules of Professional Conduct ("Rules") arising out his single representation of Ms. Mary Brown in 2004 and 2005. Specifically, on December 29, 2011, Disciplinary Counsel charged violations of the following Rules: 1.1(a) (lack of competence), 1.1(b) (lack of skill and care), 1.2(a) (failure to abide by client's decisions), 1.3(a) (lack of diligence and zeal), 1.3(c) (failure to act with reasonable promptness), 1.4(a) (failure to keep client reasonably informed), 1.4(b) (failure to explain matters to a client), 1.4(c) (failure to promptly notify client of settlement offer), 1.5(c) (failure to provide client with a closing statement reflecting recovery), 1.15(b) (failure to promptly

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

notify client of receipt of funds),[2] and 8.4(d) (engaging in conduct that seriously interfered with the administration of justice). The Hearing Committee found violations of most of the Rules, as charged, with the exception of Rules 1.5(c), 1.15(b), and 8.4(d). The Hearing Committee recommends that Respondent be suspended for forty-five (45) days and, as a condition of reinstatement, undergo an assessment by the Bar's Practice Management Advisory Services (PMAS) and agree to implement PMAS's recommended changes to his office practices and procedures.

Disciplinary Counsel did not pursue the Rule 8.4(d) violation at the hearing, and it did not file exception to the Hearing Committee's finding on 1.5(c); Disciplinary Counsel challenges only the Hearing Committee's finding that there was no 1.15(b) violation. Respondent filed exceptions to the entirety of the Hearing Committee's Report. The Board, having heard oral argument and reviewed the record and briefs of the parties, concurs with the Hearing Committee's factual findings as supported by substantial evidence in the record. With one exception, the Board concurs with the Hearing Committee's conclusions of law as supported by clear and convincing evidence. With the exception of the Hearing Committee's finding on Rule 1.15(b) and its recommended sanction, the Board adopts and incorporates by reference the Report and Recommendation of the Ad Hoc Hearing Committee. The key facts and legal conclusions are summarized below.

[2] Rule 1.15 has been revised during the pendency of this matter, so that Rule 1.15(b) is now Rule 1.15(c). We refer to the version of Rule 1.15 in effect at the time of the conduct in question.

I. PROCEDURAL BACKGROUND

On September 25, 2006, Ms. Brown filed with the Office of Disciplinary Counsel a complaint against Respondent. As noted, on December 27, 2011, Disciplinary Counsel filed a Petition and Specification of Charges against Respondent, charging the aforementioned violations. Disciplinary Counsel's attempts to consolidate this matter with the charges against Ms. Brown's successor counsel were denied by the Board on February 22, 2012.

On March 9, 2012, Respondent moved to dismiss the instant charges. The Hearing Committee deferred consideration of the motion, but provided the Board with a recommended disposition. *See* HC Rpt. at 31-34. The Board denies Respondent's motion, as discussed below.

Ms. Brown died before the hearing commenced, but after the parties had ample opportunity to interview her. The hearing began on March 28, 2012. Disciplinary Counsel introduced Ms. Brown's hearsay statements into evidence. Disciplinary Counsel also introduced hearsay statements of Ms. Dawn Seegars, a paralegal who handled Ms. Brown's case on Respondent's behalf, but who could not be located at the time of the hearing. At the conclusion of Disciplinary Counsel's case, the Hearing was continued to permit Respondent to present his case. On April 6, 2012, Disciplinary Counsel moved to reopen its case to permit its investigator to correct his testimony concerning the time of his conversation with Ms. Brown and to move into evidence additional exhibits. Respondent filed a second motion to dismiss for failure of proof. As discussed below, consistent with the Hearing

Committee's recommendation, the Board also denies this motion. *See* HC Rpt. at 34. The hearing resumed on April 19, 2012; Disciplinary Counsel's motion to reopen was granted, and Respondent's motion to dismiss was deferred. The Hearing Committee made its non-binding finding of a Rule violation and issued its report on October 12, 2016, from which the parties took exception.

This matter was argued before the Board on May 18, 2017.

II. KEY FACTUAL FINDINGS

The charges stem from a November 8, 2004 personal injury case involving Mary Brown. Two days after her accident, Ms. Brown met with one of Respondent's associates and retained Respondent's firm. Thereafter, Respondent delegated responsibility for the matter to paralegal Dawn Seegers. Respondent did not thoroughly evaluate Ms. Brown's claim or submit a fulsome list of damages to GEICO, Ms. Brown's insurer. Ms. Seegers made an uninsured-motorist settlement demand of GEICO in January 2005. Respondent's firm sent a letter to Ms. Brown two days after its January settlement demand, which evaluated her claim to be between $3,000 and $5,000, but there were no further communications between Respondent and Ms. Brown before Ms. Seegars later accepted GEICO's settlement offer in July.

Although Respondent's firm had a policy of not contacting a client to receive authorization to settle until a settlement offer had been made, Ms. Seegars, without adequate oversight, did just that. In July 2005, Ms. Seegars made a settlement

demand of $10,000. When GEICO countered with an offer of $8,800, Ms. Seegars immediately accepted the offer, and GEICO sent a settlement check to Respondent.

GEICO's settlement check was enclosed in a confirmation letter asking Respondent to "[k]indly hold this settlement check in escrow until we have the properly executed Release in our possession" and advising that "[a]ny negotiation or disbursement of our payment will be considered a release of all claims." BX F16. Nevertheless, in August 2005, Respondent's office manager endorsed, in Ms. Brown's name, the check and deposited it into Respondent's trust account. Respondent failed to advise Ms. Brown of the receipt of the funds in her name or the firm's acceptance of those funds, and also failed to so advise Kaiser-Permanente, Ms. Brown's medical provider, which had a lien on a portion of Ms. Brown's recovery due to unpaid medical expenses.[3]

In March 2006, Ms. Brown learned of the purported settlement of her case and rejected it as insufficient, later telling Respondent's firm to return the funds to GEICO and to file a lawsuit in her matter. In September 2006, Ms. Brown learned that the funds still had not been returned to GEICO, and she demanded to meet Respondent. Following their meeting, Ms. Brown demanded her file. She then filed her complaint with Disciplinary Counsel, and advised Respondent not to file a lawsuit on her behalf.

[3] Although Respondent's records indicate that on August 3, 2005, his receptionist contacted Ms. Brown, and that Ms. Brown stated she was "ok with settlement," it is undisputed that this purported communication occurred after Ms. Seegars had accepted GEICO's offer on July 28, 2005. *See* BX F16. At oral argument, Respondent admitted that he cannot unequivocally assert that Ms. Brown authorized settlement.

Respondent finally returned the funds in October 2006—after Ms. Brown filed a complaint with Disciplinary Counsel. At that time, Respondent also advised GEICO that Ms. Brown had rejected the settlement offer.

In February 2007, Ms. Brown hired new counsel to represent her in connection with the 2004 accident. In November 2007, after having notified Ms. Brown that the statute of limitations would expire, Respondent filed a lawsuit in connection with the accident. Ms. Brown's new counsel had already filed an action on October 18, 2007, unbeknownst to Respondent. On January 22, 2008, the lawsuit filed by Respondent was dismissed without prejudice, based on her failure to file proof of service.

The Hearing Committee concluded that, in response to Ms. Brown's complaint, Respondent made misleading statements to Disciplinary Counsel. Respondent prepared a "Chronology" of the Brown representation, which he submitted to Disciplinary Counsel during its investigation. The Chronology does not reference the February 2005 settlement negotiations between GEICO and Ms. Seegars, nor show whether settlement authority was requested or obtained from Ms. Brown. Moreover, Respondent did not inform Disciplinary Counsel that GEICO had made its final settlement offer on July 28, 2005, and that his conversation with Ms. Brown regarding settlement took place more than one year later, after his firm had cashed and deposited GEICO's check.

The Hearing Committee further concluded that Respondent testified falsely regarding Ms. Brown's authorization for his firm to settle her case and about his

communications with Ms. Brown's insurer. He admitted that he told GEICO that Ms. Brown did not authorize settlement, but claims that his statement to GEICO was not true, and that he made the statement to permit Ms. Brown to withdraw from the purported settlement. Respondent conceded that he had no personal knowledge of Ms. Brown's authorization and that he presumed that Ms. Seegars had obtained authorization to settle Ms. Brown's case because it was office policy to do so. Indeed, Respondent testified that "there's certainly evidence . . . that [Ms. Seegars] didn't follow office procedures. . . . And I'm guilty of that as well, you know." Tr. 152.

For the reasons stated below, the Board finds that the evidence clearly and convincingly establishes the charged violations of Rules 1.1(a), 1.1(b), 1.2(a), 1.3(a), 1.3(c), 1.4(a), 1.4(b), 1.4(c), and 1.15(b), as well as the misleading nature of Respondent's statements and testimony to Disciplinary Counsel and the Hearing Committee.

III. RESPONDENT'S MOTIONS

Respondent has moved to dismiss the Specification of Charges on two grounds: (1) Disciplinary Counsel's use of hearsay evidence; and (2) Disciplinary Counsel's delay violated due process because it substantially prejudiced Respondent's ability to mount a defense.

Hearsay evidence is generally admissible and is a basis to establish a violation of the disciplinary rules. *See In re Kennedy*, 605 A.2d 600, 603 (D.C. 1992) (per curiam); Board Rule 11.3 ("Evidence that is relevant, not privileged, and not merely

cumulative shall be received, and the Hearing Committee shall determine the weight and significance to be accorded all items of evidence upon which it relies."). Ms. Brown, the complainant, was deceased by the time of the hearing, and Ms. Seegers could not be located. However, as the use of hearsay is not a basis to dismiss, Respondent's motion is denied.

Delay is a concern in this case. The key underlying facts occurred in 2005, and Ms. Brown filed her complaint in 2006. But Disciplinary Counsel did not file charges until 2011, with the hearing occurring in 2012. Although due process must be respected in attorney-disciplinary proceedings, *see, e.g.*, *In re Williams*, 464 A.2d 115, 118-19 (D.C. 1983) (per curiam) and *In re Thorup*, 432 A.2d 1221, 1225 (D.C. 1981), "undue delay in prosecution [of a disciplinary case] is not in itself a proper ground for dismissal of charges of attorney misconduct." *In re Williams*, 513 A.2d 793, 796 (D.C. 1986) (per curiam) ("*Williams II*"). Due process is violated if Disciplinary Counsel's delay "substantially impair[s] the attorney's ability to defend against the charges." *In re Morrell*, 684 A.2d 361, 368 (D.C. 1996); *see Williams II*, 513 A.2d at 797.

Although Respondent was not able to confront two important witnesses, respondents are not afforded the Constitutional right to confront witnesses. *See In re Sibley*, 990 A.2d 483, 492 (D.C. 2010) (citing *In re Sibley*, 564 F.3d 1335, 1341 (D.C. Cir. 2009)). The Board agrees with the Hearing Committee's finding that Ms. Brown's claim that she did not authorize settlement was corroborated by substantial evidence, including Respondent's own statement to GEICO. The Board therefore

denies Respondent's motion. Respondent's renewed motion to dismiss based on failure of proof is similarly dismissed because there is clear and convincing evidence supporting the Rule violations found by the Board and Hearing Committee.

IV. CONCLUSIONS OF LAW

The Board agrees with the Hearing Committee that Disciplinary Counsel established that Respondent violated Rules 1.1(a), 1.1(b), 1.2(a), 1.3(a), 1.3(c), 1.4(a), 1.4(b), and 1.4(c). We adopt the Hearing Committee's report as to these charges and their related findings. As set forth below, the Board disagrees with the Hearing Committee's finding that Respondent did not violate Rule 1.15(b).

A. Rules 1.1(a) (Competence) and 1.1(b) (Skill and Care)

Rule 1.1(a) requires that a lawyer "provide competent representation to a client," which "requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Under Rule 1.1(a), "it is not sufficient that the lawyer has been a highly skilled and dedicated practitioner during the course of his career . . . . He must apply that skill and dedication to the particular case. . . ." *In re Shorter*, Bar Docket No. 194-96, at 6 (BPR Oct. 31, 1997), *recommendation adopted*, 707 A.2d 1305 (D.C. 1998) (per curiam); *see also, e.g.*, *In re Nwadike*, 905 A.2d 221, 228-29 (D.C. 2006); *In re Douglass*, 745 A.2d 307, 307 (D.C. 2000) (per curiam).

Rule 1.1(b) provides that "[a] lawyer shall serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters." Rule 1.1(b) is "better tailored [than Rule 1.1(a)] to address the situation in

which a lawyer capable to handle a representation walks away from it for reasons unrelated to his competence in that area of practice." *In re Lewis*, 689 A.2d 561, 564 (D.C. 1997) (per curiam) (appended Board Report).

But Rule 1.1 "applies only to failures that constitute a 'serious deficiency' in the attorney's representation of a client." *In re Yelverton*, 105 A.3d 413, 421-22 (D.C. 2014) (quoting *In re Evans*, 902 A.2d 56, 69 (D.C. 2006) (appended Board Report)). To prove a "serious deficiency," Disciplinary Counsel must prove that the conduct "prejudices or could have prejudiced a client." *Id.* at 422.

The Hearing Committee found that Disciplinary Counsel proved that Respondent violated Rules 1.1(a) and (b) when he delegated responsibility for Ms. Brown's case to his staff without maintaining familiarity with it and exercising proper oversight. *See In re Cater*, 887 A.2d 1, 16-17 (D.C. 2005). Respondent relied on informal policies for handling cases. His office files contained few notes and failed to record important developments, such as the GEICO offer of settlement. Respondent failed to monitor settlement negotiations and failed to review his office's July 14, 2005 letter to GEICO, which failed to state the full extent of Ms. Brown's damages. He remained disengaged despite telephone calls from GEICO. These errors culminated in his office's acceptance of a settlement without proper consultation or authorization, and they could have prejudiced Ms. Brown's claim. The Board adopts the Hearing Committee's finding that Respondent's lack of oversight of Ms. Brown's case constitutes a violation of Rules 1.1(a) and (b).

B. Rule 1.2(a) (Abiding by Client's Decisions), Rule 1.4(a) (Duty to Keep Client Reasonably Informed), Rule 1.4(b) (Duty to Explain a Matter to the Extent Reasonably Necessary to Permit the Client to Make Informed Decisions), and Rule 1.4(c) (Failing to Promptly Notify Client of Settlement Offer)

On the facts of this case, the conduct alleged to violate Rules 1.2(a), 1.4(a), 1.4(b), and 1.4(c) is closely related, constituting a failure to respect a client's wishes and adequately communicate with the client. Rule 1.2(a) provides that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation, . . . and shall consult with the client as to the means by which they are to be pursued." The Rule expressly states that "[a] lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter." *See In re Hager*, Bar Docket No. 031-98, at 22 (BPR July 21, 2001) ("Rule 1.2(a) requires that, at some point before the interests of clients are compromised in an agreement, they must be given the opportunity to make the decision."), *recommendation adopted*, 931 A.2d 1016 (D.C. 2007) (per curiam).

Rule 1.4(a) provides, "A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." "The guiding principle" for determining whether a violation has been established "is whether the lawyer fulfilled the client's 'reasonable . . . expectations for information.'" *In re Schoeneman*, 777 A.2d 259, 264 (D.C. 2001) (quoting Rule 1.4, cmt.). "To meet that expectation, a lawyer not only must respond to client inquiries but *also must initiate* communications to provide information when needed." *In re Hallmark*, 831 A.2d 366, 374 (D.C. 2003) (emphasis added).

Rule 1.4(b) provides that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Comment [2] explains that the attorney "must be particularly careful to ensure that decisions of the client are made only after the client has been informed of all relevant considerations. The lawyer must initiate and maintain the consultative and decision-making process if the client does not do so and must ensure that the ongoing process is thorough and complete." Rule 1.4, cmt. [2].

Rule 1.4(c) provides that "[a] lawyer who receives an offer of settlement in a civil case . . . shall inform the client promptly of the substance of the communication." A communication triggers obligations under Rule 1.4(c) if it is "an offer to negotiate and arrive at terms upon which a matter in dispute may be resolved, rather than continuing the dispute." *In re Thyden*, Bar Docket No. 257-92, at 16 (BPR Feb. 7, 2002), *recommendation adopted*, 877 A.2d 129 (D.C. 2005).

The Hearing Committee found that Respondent violated Rule 1.2(a) when he and his staff: (1) failed to communicate GEICO's settlement offers to Ms. Brown and then accepted the offer without her knowledge or consent; (2) failed to comply with Ms. Brown's instruction to rescind the settlement and return the settlement funds until after Ms. Brown had filed a disciplinary complaint; and (3) filed a lawsuit on her behalf contrary to Ms. Brown's instructions and without her knowledge. The Hearing Committee found that Respondent violated Rules 1.4(a) and (b) when he and his staff failed to communicate with Ms. Brown and to respond to her calls and letters. Finally, the Hearing Committee found that Respondent violated Rule 1.4(c)

when he failed to communicate the settlement offers to Ms. Brown and when his staff deposited the check made pursuant to the offer. The Board agrees and adopts the Hearing Committee's report relating to these violations. *See In re Wright*, 885 A.2d 315, 315 (D.C. 2005) (finding violations of Rules 1.2 and 1.4, among others, for settling client's personal injury claims without the client's knowledge or consent).

C. Rules 1.3(a) (Diligence and Zeal) and 1.3(c) (Reasonable Promptness)

Rule 1.3(a) provides that an attorney "shall represent a client zealously and diligently within the bounds of the law." "Neglect has been defined as indifference and a consistent failure to carry out the obligations that the lawyer has assumed to the client or a conscious disregard of the responsibilities owed to the client." *In re Wright*, 702 A.2d 1251, 1255 (D.C. 1997) (per curiam) (appended Board Report) (citing *In re Reback*, 487 A.2d 235, 238 (D.C. 1985), *adopted in relevant part*, 513 A.2d 226 (D.C. 1986) (en banc) ("*Reback II*")). Rule 1.3(a) "does not require proof of intent, but only that the attorney has not taken action necessary to further the client's interests, *whether or not* legal prejudice arises from such inaction." *In re Bradley*, Bar Docket Nos. 2004-D240 & 2004-D302, at 17 (BPR July 31, 2012) (emphasis added), *recommendation adopted in relevant part*, 70 A.3d 1189, 1191 (D.C. 2013) (per curiam).

Rule 1.3(c) provides that an attorney "shall act with reasonable promptness in representing a client." Failure to take action for a significant time to further a client's cause, whether or not prejudice to the client results, violates Rule 1.3(c). *In re Dietz*,

633 A.2d 850, 850 (D.C. 1993) (per curiam). Comment [8] to Rule 1.3 provides, "Even when the client's interests are not affected in substance, . . . unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness." The Comment refers to this as being a "serious violation."

The Hearing Committee concluded that Respondent did not give Ms. Brown's case adequate attention—in terms of investigating Ms. Brown's claim, compiling a list of damages, preparing for litigation, returning telephone calls to GEICO, notifying Ms. Brown of the settlement offer, pursuing settlement authority from Ms. Brown, and complying with Ms. Brown's wishes after she learned of, and rejected, the settlement. Respondent and his staff also failed to act reasonably promptly following receipt of the settlement check from GEICO, apart from depositing the check into Respondent's trust account. Respondent and his staff failed to notify Ms. Brown of the receipt of the check, letting it sit in his account from its receipt on August 2, 2005 until October 10, 2006 following Ms. Brown's complaint to Disciplinary Counsel, all despite Ms. Brown's April 2006 instruction to return the check to GEICO. The Board agrees with the Hearing Committee's conclusion and adopts its report regarding violations of Rules 1.3(a) and 1.3(c).

D. Rule 1.15(b) (Failure to Promptly Notify Client of Receipt of Funds)

Rule 1.15(b) (now Rule 1.15(c)) states, "[u]pon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person." Disciplinary Counsel argues that Respondent violated Rule 1.15(b) when he failed to notify Ms. Brown and Kaiser Permanente, a

third party with an interest in the settlement funds, that he received a settlement check from GEICO, endorsed that check in Ms. Brown's name, deposited the check, and later failed to notify GEICO that Ms. Brown had rejected the settlement offer. But, in rejecting this charge, the Hearing Committee found that Respondent lacked authorization to settle Ms. Brown's case and, that the funds sent by GEICO belonged to GEICO until Ms. Brown agreed to the settlement, which never occurred. Therefore, the Hearing Committee concluded that Ms. Brown never had an interest in the GEICO funds, resulting in no need to notify her or Kaiser Permanente of their receipt. While the Board understands the Hearing Committee's logic, we disagree with its conclusion as to Ms. Brown.

The plain language of Rule 1.15(b) does not require that funds be received pursuant to a judgment or settlement received by a client. Instead, the funds must be ones in which the client "has an interest." The funds in question were sent by GEICO to Respondent for payment to Ms. Brown; they were made payable to Ms. Brown; the check was endorsed in Ms. Brown's name; and the check was deposited. Although the settlement was rejected, Ms. Brown had an interest in the funds, even if she ultimately rejected the settlement offer. As Respondent failed to notify her, he violated the plain terms of Rule 1.15(b).[4]

[4] As to Disciplinary Counsel's argument that Respondent had a duty to notify Kaiser Permanente of the receipt of the check, we agree with the Hearing Committee that there was no duty to notify Kaiser Permanente because it did not have an interest in the funds until Ms. Brown accepted the settlement funds since GEICO's funds did not constitute a "recovery" for purposes of the Lien and Assignment agreement until that point. *See* HC Rpt. at 41-42.

V. SANCTION

In determining the appropriate sanction, we consider the usual factors: (1) the seriousness of the misconduct, (2) the presence of misrepresentation or dishonesty, (3) Respondent's attitude toward the underlying conduct, (4) prior disciplinary violations, (5) mitigating circumstances, (6) whether counterpart provisions of the Rules of Professional Conduct were violated, and (7) prejudice to the client. *See, e.g.*, *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc); *In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013).

Seriousness: Respondent's misconduct was serious. He neglected Ms. Brown's case, delegating responsibility to others; he failed to investigate the accident and the precise nature of Ms. Brown's injuries; he failed to discuss the insurer's settlement offer with his client; he settled the case without Ms. Brown's authorization; and he failed to comply with Ms. Brown's instructions to rescind the settlement and return the settlement funds, doing so only after the client filed a disciplinary complaint.

Misrepresentation or Dishonesty: In his response to the disciplinary complaint, Respondent mischaracterized the $8,800 payment from GEICO as a settlement offer that he discussed with Ms. Brown soon after it was made. The Hearing Committee found that Respondent did not meet with Ms. Brown until a year and a half after his office accepted the settlement offer, after Ms. Brown demanded a meeting upon learning of GEICO's payment. The Hearing Committee further found that Respondent provided misleading testimony to the Hearing Committee, a

significant aggravating factor. *See Bradley*, 70 A.3d at 1195; *In re Cleaver-Bascombe*, 892 A.2d 396, 412-13 (D.C. 2006).

Attitude Towards Underlying Misconduct: The Hearing Committee found that, although Respondent maintained in the face of contrary evidence that he did not violate the charged Rules, his demeanor at the hearing reflected an understanding of the seriousness of the issues. Moreover, Respondent was contrite before the Board at oral argument, recognizing that his prior practices were problematic.

Prior Disciplinary Violations: Respondent has been censured for incompetence, neglect, and failure to communicate with a client. *In re Avery*, 926 A.2d 719 (D.C. 2007) (per curiam). The hearing in that case was held in 2006, after most of the events in the instant case, which reduces the aggravating nature of the instant misconduct.

Mitigating Circumstances: Respondent argues that the passage of time between the underlying events and the hearing is a mitigating circumstance. Mitigation for undue delay is warranted only when "the circumstances of the individual case [are] sufficiently *unique and compelling* to justify lessening what would otherwise be the sanction necessary to protect the public interest." *In re Ponds*, 888 A.2d 234, 243-44 (D.C. 2005) (emphasis in original) (quoting *In re Fowler*, 642 A.2d 1327, 1331 (D.C. 1994)). While it is true that Ms. Brown died prior to the hearing and Ms. Seegars was not available as a witness, for the reasons cited by the Hearing Committee, there are no unique and compelling circumstances that would justify mitigation of Respondent's sanction here.

That said, in February 2017, Respondent had the D.C. Bar's Practice Management Advisory Service ("PMAS") conduct an assessment of his firm.[5] He did this to ensure that mistakes that happened in the handling of Ms. Brown's case do not recur. The Assistant Director of PMAS wrote that Respondent is "operating a very effective law firm and employing excellent management tools." The Assistant Director also wrote, "It is apparent to me that the policies and procedures you have in place in your firm, the team approach [you] employ in handling cases, the lower volume and your direct involvement in each case make an occurrence like that which gave rise to the bar complaint in 2004 very unlikely." Further, he noted, "It goes without saying that the firm I assessed in 2017 is very different from the firm in 2004." At oral argument, Disciplinary Counsel acknowledged the review as undertaken by PMAS and agreed that such a review is no longer part of its requested sanction. Accordingly, we find the review, which was undertaken without compulsion, to be a significant mitigating factor.

Number of Rule Violations: Although Respondent violated multiple Rules of Professional Conduct, these violations arose out of a single representation.

[5] Respondent attached as Exhibit 1 to his brief to the Board a February 15, 2017 letter from Daniel M. Mills, Assistant Director for PMAS, detailing the results of his current assessment of Respondent's law firm. In its responsive brief to the Board, Disciplinary Counsel stated that, because Respondent had not signed the limited waiver form, it was unable to verify the information contained in Mr. Mills's letter. During oral argument, Disciplinary Counsel stated that Respondent had provided the necessary waiver and that Disciplinary Counsel had communicated with Mr. Mills; and Disciplinary Counsel recommended that the PMAS assessment should no longer be a condition of probation in this case. We accept Mr. Mills's February 15, 2017 letter into the record pursuant to Board Rule 13.7.

Prejudice to the Client: Although Ms. Brown was denied the opportunity to participate in settlement negotiations, she was not actually prejudiced by Respondent's conduct.

Recommendation

In its brief, Disciplinary Counsel seeks a ninety-day suspension, plus, as a condition of reinstatement, it had sought proof that Respondent has addressed the deficiencies in his practice by undergoing an assessment by the D.C. Bar Practice Management Advisory Service (PMAS), the recommendations of which he must implement. However, as noted above, during the oral argument Disciplinary Counsel conceded that the PMAS assessment is no longer necessary. Respondent argues for full mitigation of any possible sanction. The Hearing Committee recommends a forty-five-day suspension. Respondent acknowledges his mistakes and states that a public reprimand is appropriate.

For the reasons stated herein, the Board finds that the sanction in this case has been significantly mitigated. We recommend a forty-five (45) day suspension, stayed pending six months of probation.

The Board stresses that discipline is not intended to punish a lawyer, but to serve to maintain the integrity of the legal profession, protect the public and the courts, and deter future or similar misconduct, including by other lawyers. *See Hutchinson*, 534 A.2d at 924; *Reback II*, 513 A.2d at 231; *Martin*, 67 A.3d at 1053 (citing *In re Scanio*, 919 A.2d 1137, 1144 (D.C. 2007)). Here, Respondent's contrition, the lack of prejudice to his client, and his taking upon himself a review

by PMAS, lead the Board to conclude that a suspension in the first instance would not be anything but punishment. The legal profession can see the errors made by Respondent and his response to them, including his embarking on a course of self-improvement.

In *In re Ontell*, 593 A.2d 1038, 1041 (D.C. 1991), the Court stated, "[n]eglect and failure to seek the lawful objectives of a single client have supported suspensions of thirty days on occasion." Although the respondent in that case committed neglect and engaged in misrepresentation with regard to two clients, he received a mitigated thirty-day suspension due to his candor and credibility, the absence of prejudice to his clients, and his public contributions. *Id*. at 1042 & n.3. In *In re Cole*, 967 A.2d 1264, 1265, 1270 (D.C. 2009), the Court of Appeals imposed a thirty-day suspension for an attorney found to have committed neglect and dishonesty. In that case, the Court found that the respondent had made restitution to the client, shown remorse, and testified credibly and honestly about his failures in that case. *Cole*, 967 A.2d at 1266 & n.6.

In *In re Outlaw*, 917 A.2d 684, 688-89 (D.C. 2007) (per curiam), the Court imposed a sixty-day suspension where the respondent committed neglect and did not testify credibly before the hearing committee, but had no prior discipline. In *In re Douglass*, 859 A.2d 1069, 1071-73 (D.C. 2004) (per curiam), the respondent received a ninety-day suspension for incompetence and neglect, among other violations, coupled with prior discipline. In *In re Mitchell*, 822 A.2d 1106, 1107, 1111 (D.C. 2003) (per curiam), the Court imposed a ninety-day suspension for

prolonged failure to notify third-party medical provider of receipt of funds in which it had an interest. The Court also imposed a sixty-day suspension, with thirty days stayed in favor of probation, in *In re Chapman*, 962 A.2d 922, 926-27 (D.C. 2009) (per curiam), where the respondent neglected a single client's case, was dishonest in dealing with Disciplinary Counsel, lacked credibility at the hearing, and showed no remorse. In that case, unlike the instant one, the respondent caused actual significant prejudice to his client. The Court balanced this against that respondent's "minor disciplinary history." *Chapman*, 962 A.2d at 927.

Although the case against Respondent is most similar to those in which sixty-day suspensions were imposed, we adopt the Hearing Committee's recommendation of a forty-five-day suspension. But, in light of his contrition, the lack of prejudice to the client, and the efforts that Respondent has made to improve his practice, apparently with success, we recommend that that suspension be stayed in favor of six months of probation. During this probationary period, Respondent should continue to implement any changes to his office practices and procedures recommended by PMAS.

CONCLUSION

The Board adopts the Hearing Committee's proposed findings of fact and conclusions of law, except with regard to Rule 1.15(b). The Board recommends that Respondent be suspended for forty-five days, and that the entire suspension be stayed in favor of a six-month period of probation, during which Respondent shall continue to implement any changes to his office practices and procedures recommended by PMAS. We further recommend that Respondent's clients not be notified of his probation, in accordance with D.C. Bar Rule XI, § 3(a)(7).

BOARD ON PROFESSIONAL RESPONSIBILITY

By: /JEC/
Jason E. Carter, Esquire

Dated: July 31, 2017

All members of the Board concur in this Report and Recommendation, except Mr. Bernius and Ms. Soller, who have filed a separate statement dissenting in part, and Mr. Kaiser, who did not participate.

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

In the Matter of:	:	
	:	
MICHAEL L. AVERY, SR.,	:	
	:	Board Docket No. 11-BD-088
Respondent.	:	Bar Docket No. 2006-D354
	:	
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 447083)	:	

REPORT AND RECOMMENDATION OF THE AD HOC HEARING COMMITTEE

Disciplinary Counsel[1] charged Respondent, Michael L. Avery, with violating D.C. Rules of Professional Conduct ("Rules") 1.1(a) (competence), 1.1(b) (skill and care), 1.2(a) (abiding by client's decisions), 1.3(a) (diligence and zeal), 1.3(c) (duty of reasonable promptness), 1.4(a) (keeping client reasonably informed), 1.4(b) (explaining matters to a client), 1.4(c) (failure to promptly notify client of settlement offer), 1.5(c) (contingency fee requirements), 1.15(b) (failure to promptly notify client of receipt and to deliver settlement funds), and 8.4(d) (conduct that seriously interferes with the administration of justice). The charges stem from Respondent's acceptance of a client representation in a personal injury matter, and delegation of responsibility for that matter to an unsupervised paralegal, who accepted a settlement offer without the client's authorization.

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

The Hearing Committee finds clear and convincing evidence to support each of the alleged violations of the disciplinary rules, with the exception of Rules 1.5(c), 1.15(b), and 8.4(d).[2] Based on these violations, and the factors in aggravation established by Disciplinary Counsel, we recommend the sanction of a 45-day suspension, and that, as a condition of reinstatement, Respondent must undergo an assessment by the D.C. Bar's Assistant Director, Practice Management Advisory Services, or his designee, (and sign a limited waiver permitting that program to confirm compliance with this condition and cooperation with the assessment process), and must agree to implement the recommended changes to his office practices and procedures.

I. PROCEDURAL BACKGROUND

On September 25, 2006, Mary E. Brown filed a complaint against Respondent with the Office of Disciplinary Counsel. Disciplinary Counsel Exhibit ("BX") E1.[3] On December 29, 2011, Disciplinary Counsel filed a Petition Instituting Formal Disciplinary Proceedings and a Specification of Charges, which were served on Respondent on December 29, 2011. BX C. Respondent filed his Answer to the Specification of Charges on February 1, 2012, after being granted an extension of time in which to file. BX D.

On January 31, 2012, Disciplinary Counsel filed a motion to consolidate this matter with the Specification of Charges in *In re John M. Green*, Bar Docket No. 2009-D489. Respondent

[2] Disciplinary Counsel did not pursue the alleged violation of Rule 8.4(d) in its brief to the Hearing Committee. *See* Disciplinary Counsel's Brief ("ODC Brief") at 3 n.1. Disciplinary Counsel does not have the authority to unilaterally drop allegations of misconduct approved by a Contact Member. *See In re Reilly*, Bar Docket No. 102-94 at 4 (BPR July 7, 2003). Thus, we have reviewed the record to determine whether there is clear and convincing evidence to support a finding that Respondent violated Rule 8.4(d). We have concluded that there is not.

[3] Disciplinary Counsel's exhibits are marked as "BX" to conform to the previous title of "Bar Counsel." This report refers to the exhibits as originally marked.

opposed the motion, and it was denied by the Chair of the Board on Professional Responsibility on February 22, 2012.

On March 9, 2012, Respondent filed motions to dismiss the Specification of Charges based on delay, and to exclude the hearsay testimony of the complainant, Mary Brown, who was deceased by the time of the hearing. Disciplinary Counsel opposed the motions. In an order dated March 27, 2012, the Hearing Committee denied the evidentiary motion because hearsay is admissible in a disciplinary case under Board Rule 11.3, and directed the parties to address the weight it should be accorded in their post-hearing briefs. The Hearing Committee deferred consideration of the motion to dismiss under Board Rule 7.16(a), which requires that the Hearing Committee include a recommended disposition of the motion in its report and recommendation to the Board. *See In re Ontell*, 593 A.2d 1038, 1040 (D.C. 1991) (hearing committee properly declined to rule on motion to dismiss).

The first day of the hearing was held on March 28, 2012. The Office of Disciplinary Counsel was represented by Assistant Disciplinary Counsel Ross T. Dicker, Esquire. Respondent was represented by Jacob A. Stein, Esquire, and Kerrie C. Dent, Esquire. Disciplinary Counsel presented the testimony of seven witnesses: Respondent; Adam Katzen, Esquire; Ms. Joanna Monk, GEICO employee; Ms. Karla U. Makris and Ms. Cathy M. Smith, former employees of Respondent; expert witness Michael M. Ain, Esquire; and Kevin O'Connell, Disciplinary Counsel's investigator. In addition to Ms. Brown's hearsay statements, Disciplinary Counsel also relied on the hearsay statements of Dawn Seegars, the paralegal in charge of Ms. Brown's case, who Disciplinary Counsel was unable to locate by the time of the hearing. Tr. 306-07.[4]

[4] "Tr." is used to designate the transcript of the hearing.

Disciplinary Counsel's proposed exhibits were admitted into evidence without objection. Tr. 421. The hearing was continued until April 19, 2012, for the presentation of Respondent's case.

On April 6, 2012, Disciplinary Counsel moved to reopen its case-in-chief, to permit its investigator, Mr. O'Connell, to correct his testimony concerning the time of his conversation with Ms. Brown, and to move additional exhibits into evidence. Respondent opposed the motion to reopen and filed a second motion to dismiss the Specification of Charges for failure of proof, attaching an April 2012 letter from Lawrence Lapidus, Esquire, and an undated statement of Dwight Murray, Esquire, his proposed witnesses. Disciplinary Counsel moved to strike the second motion to dismiss and the attached documents, for failure to comply with Board Rule 7.17, which requires the filing of documentary evidence at least ten days in advance of the hearing date.

The hearing resumed on April 19, 2012. The Chair granted Disciplinary Counsel's motion to reopen Disciplinary Counsel's case to take Mr. O'Connell's testimony and to admit additional exhibits. Tr. 475. The Hearing Committee deferred ruling on Respondent's second motion to dismiss and the admissibility of the attachments to the motion. Tr. 481-82.[5] Disciplinary Counsel then recalled Mr. O'Connell to the stand, who corrected his previous testimony, and again rested its case. Tr. 485-86.

Respondent called Mr. Lapidus and Mr. Murray, who were qualified as expert witnesses, and then rested his case. Tr. 487, 572, 619.

Following closing statements, the violations phase of the hearing concluded and the Hearing Committee met in executive session. Tr. 652; *see* Board Rule 11.11. When the hearing resumed, the Hearing Committee announced its preliminary, non-binding determination of a rule

[5] The Hearing Committee admits the attachments to the motion "for what they are worth." *See* Board Rule 11.3.

violation pursuant. Tr. 652. Disciplinary Counsel then submitted evidence in aggravation of sanction, including an opinion of the D.C. Court of Appeals in which it publicly censured Respondent, as well as the underlying Board Report, which recommended a public censure. Tr. 652; *see In re Avery*, 926 A.2d 719 (D.C. 2007), Bar Docket No. 378-04 (BPR Mar. 7, 2007) (BX N24(a) & (b)). Respondent explained that his prior misconduct was unintentional and presented no evidence in mitigation of sanction. Tr. 653-65. The hearing then concluded. Tr. 661.

Following the close of the hearing, on April 25, 2012, Disciplinary Counsel filed a Second Supplemental List of Exhibits, with exhibits BX H18(a), BX N24(a), and BX N24(b).[6] That same day, the Hearing Committee directed briefing in accordance with Board Rule 12.1(a).

On May 31, 2012, Disciplinary Counsel filed a Third Supplemental List of Exhibits, with exhibits BX P1, BX P2, BX P3, BX P4, BX P5, BX T4, and BX T5.[7] After obtaining two extensions of time, Disciplinary Counsel filed its brief ("ODC Br.") on June 1, 2012, with a consent motion to file the brief out of time and to exceed the 50-page limit.[8] On June 11, 2012, Respondent filed his brief ("Resp. Br."), which was rejected for filing, because it exceeded the 50-page limit. *See* Board Rule 19.8(c). On June 14, 2012, Respondent refiled the brief, with a motion to exceed the 50-page limit. The Hearing Committee granted the motion and accepted the brief for filing. Disciplinary Counsel filed a reply ("ODC Reply Br.") on June 25, 2012.

[6] Disciplinary Counsel introduced the exhibits at the hearing on April 19, 2012, and filed them formally with the Board on April 25, 2012. They are admitted in evidence.

[7] Respondent did not object to the filing of Disciplinary Counsel's Third Supplemental List of Exhibits, and they are admitted in evidence.

[8] Disciplinary Counsel's brief is accepted for filing, *nunc pro tunc* to June 1, 2012, the date on which it was lodged.

II. FINDINGS OF FACT

Based on the testimony and documentary evidence introduced at the hearing, the Hearing Committee finds that there is clear and convincing evidence to support the following findings of fact:

A. Respondent's Law Practice

1. Respondent is a member of the Bar of the District of Columbia Court of Appeals, having been admitted by motion on June 5, 1995, and assigned Bar Number 447083. BX A.

2. Respondent has operated a private personal injury practice since 1998. Tr. 168 (Avery). Steven Witcher was Respondent's office manager from at least 2004 to the time of the hearing. BX E15. Mr. Witcher did bookkeeping for Respondent and handled checks coming in and out of the office. Tr. 381 (Makris).

3. In 2004, Respondent employed an associate, Adam Katzen, Esquire, who was then admitted to practice in New Jersey and Maryland, Tr. 180 (Avery), 256 (Katzen), and several paralegals, including Dawn Seegars and Karla Makris (formerly Karla Ulloa), and receptionist, Cathy Smith. Tr. 181 (Avery). Mr. Katzen was admitted to practice in the District of Columbia in May 2005, Tr. 265 (Katzen), and was responsible for intake, settlement negotiations, and working with clients through the claims process. Tr. 180-81 (Avery). Respondent and Mr. Katzen handled personal injury cases valued at over $25,000. Tr. 192 (Avery). Ms. Seegars handled "small settlements." Tr. 67 (Avery).

B. Respondent's Office Procedures and Policies

4. Respondent's staff was instructed not to engage in settlement discussions without first obtaining settlement authority from the client. Tr. 296 (Katzen); Tr. 391, 393 (Makris).

5. Respondent's office policy was to contact the client after the insurance company made an initial offer, in order to get a range of authority for further negotiations. Tr. 107-08 (Avery); Tr. 293-95 (Katzen). Respondent instructed his paralegals that they must have client approval before settling a case and to document that authority in the file. Tr. 392-93 (Makris).

6. Respondent had a high-volume personal injury practice. *See* Tr. 182 (Avery). His paralegals generally handled a caseload of 30 to 50 cases. Tr. 188 (Avery). Ms. Seegars, the paralegal assigned to Ms. Brown's case, told Disciplinary Counsel's investigator that she typically settled 60-80 cases per month. Respondent Michael Avery's Exhibit ("RX") III.E. Respondent testified that he thought her caseload was "half of that." Tr. 161 (Avery). We need not resolve this discrepancy, as it is not material to any of the issues before the Hearing Committee.

7. Respondent's office used a case management software program called "Needles," to track cases and document communications. Tr. 266-67 (Katzen). The system was new to the office during Respondent's representation of Ms. Brown. Tr. 269-70 (Katzen).

8. Once Respondent introduced the Needles program, all the staff, including paralegals, were directed to "put notes into the system." Tr. 266-67 (Katzen); Tr. 380 (Makris). They were told to input Needles notes "when you speak to the client. You record them to keep track of the case. And when you speak to the insurance companies, or any sort of activity that goes on in the case, you make notes." Tr. 380 (Makris). Respondent reminded his staff every Monday to "speak with the client before the case settled . . . [and] make sure the notes are inputted in Needles . . . [, and] it was something that had to be reinforced by [Respondent] every Monday." Tr. 393 (Makris). If Ms. Seegars had a discussion with the client about settlement authority, "she was supposed to have it documented in Needles, because that was one of the more important discussions the office had with a client." Tr. 270 (Katzen); Tr. 386-87 (Makris).

9. Notwithstanding the office policy, Respondent acknowledged that both he and his staff did not always record case activities in Needles. Tr. 151-53 (Avery). Respondent attributed the lack of documentation to "the dynamics of a small office" where it was "just not practical . . . to be making notes of everything." Tr. 188 (Avery). Respondent claimed that his office nonetheless was able to keep track of cases because, "[w]e had meetings. We talked to each other. We were just very comfortable in our routine . . . . We knew each other. We trusted each other." Tr. 190 (Avery). Mr. Katzen concurred that the office "didn't take advantage of [Needles] as much as they probably should have to keep track of notes" and that sometimes information was documented by "notes handwritten on the files" or by emails. Tr. 269-70 (Katzen).

10. Regardless of the Needles program, it was office policy to document settlement authority from a client. Tr. 298-300 (Katzen). "[I]t just as easily could have [been] written [as] a note on the file, you know, client authorizes X amount, instead of putting it in Needles . . . ." Tr. 299 (Katzen).

C. Mary E. Brown Retains Respondent

11. On November 8, 2004, Mary Brown was injured in an automobile accident in the District of Columbia. BX F16 at 66.

12. The day following the accident, Ms. Brown sought medical treatment for her injuries at the emergency room of the Washington Hospital Center. BX E6(a); BX F16 at 72; BX M23 at 160-62. While she was at the hospital, a representative of Respondent's law firm left a message on Ms. Brown's home telephone inviting her to call the office to discuss the accident. BX E5; BX E6(a).

13. Ms. Brown was treated for her injuries at AccuCare Rehab & Therapy Center in the District of Columbia, BX F16 at 91; BX I19(a) at 134-36, and later at Kaiser-Permanente. BX

G17(a) at 115; BX H18 at 129-33. She missed 20 days of work as a result of her injuries. BX G17(a) at 113.

14. On November 10, 2004, Ms. Brown retained Respondent to represent her in connection with her claim for damages arising out of the accident. She met with Respondent's associate, Mr. Katzen.[9] Tr. 260 (Katzen); BX D ¶ 8. Ms. Brown signed a retainer agreement with Respondent's law firm. BX F16 at 65. Mr. Katzen testified that he would have told Ms. Brown that by signing the retainer, she was agreeing to give Respondent a power of attorney to "endorse and negotiate any documents, checks, or drafts transmitted in the course of representation and the settlement of [her] claim." Tr. 263 (Katzen); BX F16 at 65. In addition, Mr. Katzen would have told Ms. Brown that the retainer gave Respondent the authority to "settle [her] case, take [his] fee and costs therefrom, and hold [her] settlement proceeds in trust" if he could not locate her for 160 days. Tr. 263 (Katzen); BX F16 at 65, ¶ 6.

D. Initial Negotiations with GEICO

15. At the time of the accident, Ms. Brown had uninsured motorist coverage with GEICO Insurance Company ("GEICO"). Tr. 167 (Avery); BX D ¶5. On November 29, 2004, Respondent's office notified GEICO that Ms. Brown intended to file a complaint under her policy for uninsured motorist coverage. Answer to Specification of Charges, ¶ 11 (Admitted); BX D ¶ 11; BX G17(a) at 106, 108; BX F16 at 77; RX II.8.

16. Respondent assigned his paralegal, Ms. Makris, to collect Ms. Brown's treatment records. Tr. 191 (Avery).

17. On January 25, 2005, Respondent sent a letter to Ms. Brown explaining how he intended to proceed. BX F16 at 89-90. In the letter, Respondent advised Ms. Brown that:

[9] At the time, Mr. Katzen was not a member of the District of Columbia Bar.

> . . . after you've [sic] taken time to thoroughly investigate the claim by gathering evidence, establishing who's responsible for the accident, determining what we believe your claim is worth, and planning good arguments, we write a formal demand letter and submit it to the insurance company. . . . From there, we will engage in informal negotiations with the insurance company until you agree on a settlement you can live with.

Id.

18. In the January 25, 2005 letter, Respondent assured Ms. Brown that because the demand letter "is a critical element of your claim negotiation process, . . . it is essential that we write it carefully and well . . . [and] set out your strongest arguments," including the nature of her injuries and related medical treatment, income loss, and other damages suffered. *Id*. Respondent also informed Ms. Brown that "if you've been injured[,] you can expect to be reimbursed for: medical care[,] lost income[,] temporary and permanent pain and other physical discomfort, and loss of family, social and educational experiences." BX F16 at 90.

19. Respondent did not personally handle Ms. Brown's claim. The matter was assigned to Ms. Seegars, the paralegal responsible for "small settlements." Tr. 67 (Avery); Tr. 268 (Katzen).

20. On January 25, 2005, the same day Respondent wrote his introductory letter, Ms. Seegars sent GEICO a "demand for settlement' including a "specials package" of medical bills, totaling $2,507, and asked the GEICO claims representative to "call me regarding settlement of this claim." BX G17(a) at 109.

21. On January 25, 2005, Ms. Seegars also sent a letter to Ms. Brown, advising her that she had submitted the "specials package" to GEICO, and advising Ms. Brown to "[p]lease allow approximately 8 weeks for the insurance company to review, evaluate and call me with an offer." BX F16 at 91. Ms. Seegars' letter concluded by asking Ms. Brown to "[c]ontact me at your earliest convenience to discuss settlement of your claim." BX F16 at 91. There is no evidence that

Respondent or any of his employees requested or obtained any settlement authority from Ms. Brown prior to Ms. Seegars' January 25, 2005 letter to GEICO.

22. Two days later, on January 27, 2005, Respondent sent Ms. Brown a letter informing her that a "demand package" had been sent to GEICO, and that Respondent had evaluated her claim "to be between $3,000 and $5,000." BX F16 at 93. Respondent's letter asked Ms. Brown to "[k]indly contact me at your earliest convenience to discuss this case." *Id*. This letter was the last correspondence or communication between Respondent and Ms. Brown before July 28, 2005, when Ms. Seegars ultimately accepted GEICO's settlement offer on behalf of Ms. Brown.

23. In a letter dated January 27, 2005, Joanna Monk (now known as Joanna Gentry), a GEICO claims examiner, notified Respondent that he should direct future correspondence about Ms. Brown's claim to her. BX F16 at 92.

24. Ms. Monk called Ms. Seegars on February 24, 2005, to discuss settlement. BX G17(b) at 120 (2-24-05 entry). Ms. Seegars made a settlement demand of $7,500, rejected a counter-offer of $4,700, and reduced the settlement demand to $6,000. *Id.* After trading settlement numbers, Ms. Monk made her "top" settlement offer of $5,000 and urged Ms. Seegars to discuss the offer with Ms. Brown and to call her back. Tr. 234 (Gentry); BX G17(b) at 120 (2-24-05 entry).

25. Ms. Monk recorded her communications regarding the Brown claim in an electronic claim log, called the Activity Log, or "ALOG." Her ALOG entry documenting the February 24, 2005 telephone call with Ms. Seegars states as follows:

> Called Dawn at Atty's Office to discuss settlement. Their demand was $7500. Advs could not do that based on treatment, 17 visits, just over 1 month, made offer of $4700. She advs the lowest she could come down to is $6000. Advs. My top is $5,000 and asked her to discuss with client and get back to me. She will do that.

BX G17(b) at 120. This entry would have been made immediately after the call; Ms. Monk testified that it accurately reflected the substance of the conversation. Tr. 234 (Gentry).

26. Contrary to office policy, Ms. Seegars failed to record the GEICO offer in the Needles program or to otherwise document it. BX F16 at 77-78.

27. Neither Ms. Seegars (nor anyone at Respondent's firm) had requested or obtained settlement authority from Ms. Brown prior to her February 24, 2005 telephone conversation with Ms. Monk. Tr. 102-03 (Avery). According to Respondent, this was consistent with his office policy of waiting for the insurance company to make an offer before discussing settlement with the client. Tr. 124 (Avery) ("She would speak with the insurance company. Once an offer came in, then we would talk to the client on the phone, get an idea and a sense of what they wanted, and get their authority."). Respondent testified that whatever settlement authority his staff had obtained from Ms. Brown "had to be after the offer of $5,000 was made." Tr. 108 (Avery).

28. Ms. Monk called Ms. Seegars four times during March and April 2005 to discuss settlement, because Ms. Seegars had not responded to GEICO's settlement offer. BX G17(b) at 120-21 (calls on 3-4, 3-18, 4-1 and 4-14). Ms. Seegars did not return any of Ms. Monk's calls. Tr. 236 (Gentry); BX G17(b) at 121. Respondent's staff also failed to record Ms. Monk's calls in the Needles program. Tr. 104 (Avery); BX E13 at 46-47 (Respondent's Chronology); BX F16 at 77-78.

29. Respondent testified that the firm's failure to respond to GEICO's $5,000 settlement offer was because it had not received settlement authority from Ms. Brown. Tr. 100-01 (Avery) ("The reason there was no call back, we had to get authority from the client. . . . Until we talked to her, we can't know what our authority is.)."

30. Respondent prepared a "Chronology" of the Brown representation, which he submitted to Disciplinary Counsel during its investigation. BX E13 at 46-47. The Chronology does not reference the February 24, 2005 settlement negotiations between Ms. Monk and Ms. Seegars, or show whether settlement authority was requested or obtained from Ms. Brown. *Id.*

31. In March 2005, Ms. Brown, in response to Ms. Seegars' January 25 request for additional information, sent Respondent copies of her employment records to support her claim for lost wages. They included: (a) a "Wage Loss Verification" from the Agency for International Development showing that her average salary as an administrative assistant was $1,572.80 every two weeks and that she had missed 20 days of work, BX G17(a) at 113; (b) an "Itemization of the Dates and Hours Lost by Mary E. Brown" listing the actual dates she had missed work from November 9, 2004, up to and including February 4, 2005, *Id*. at 114; RX II.15-3; and (c) "Time and Attendance Supporting Documentation" for use in support of her insurance claim. RX II.15-4, 5, 6, 7, & 8. Respondent testified that the claimed lost wages "were exaggerated and not in relation to the accident and the injuries." Tr. 196 (Avery). He never shared this opinion with Ms. Brown. Tr. 195 & 197 (Avery).

32. On April 21, 2005, at the request of Kaiser, Ms. Brown signed (i) an "Acknowledgement of Lien and Assignment of Proceeds" form for medical services that Kaiser Permanente ("Kaiser") had provided as a result of the accident, BX H18 at 131; and (ii) a release authorizing Kaiser to send her treatment records to Respondent. RX II.22; BX H18 at 132-33. At the same time, Respondent reviewed and signed the "Lien and Assignment" form to acknowledge Kaiser's lien, and then returned the signed form to Kaiser. *Id*.

33. On April 22, 2005, Ms. Seegars sent Kaiser a request for documents and information regarding medical treatment provided to Ms. Brown in connection with the accident, with the release executed by Ms. Brown on April 21. RX II.22; BX H.

34. On May 12, 2005, Ms. Monk wrote to Respondent, because Ms. Seegars had not yet responded to her calls. Tr. 236 (Gentry); BX G17(a). She informed him of GEICO's $5,000 settlement offer and that her calls to his office had gone unreturned. Tr. 235-36 (Gentry); BX G17(a). Respondent did not respond to Ms. Monk's letter, but testified that he "would have told" Ms. Seegars to call GEICO or Ms. Seegars "would have taken care of it on her own." Tr. 105 (Avery). Respondent conceded that there were no notes in Needles to show that Ms. Seegars returned GEICO's calls or that she ever discussed the GEICO offer with Ms. Brown. Tr. 102, 106 (Avery).

35. On May 20, 2005, Rhonda Smith, Ms. Monk's supervisor, called Respondent's office and spoke with Ms. Seegars. BX G17(b) at 122 (5-20-05 entry). Ms. Seegars explained that she was waiting to receive the Kaiser medical records to submit to GEICO, and that she did not know how they would affect the value of Ms. Brown's claim. *Id.* Ms. Seegars did not record the conversation in Needles. BX F16; RX II.18 & 24.

36. On June 2, 2005, Kaiser's subrogation team notified Respondent of its $1,222.36 lien in the Brown matter. BX G17(a). Kaiser further advised Respondent that it "expect[s] you/your firm will contact us prior to settlement of any claim to ensure that you have a full and final itemization of our lien interest [and that Kaiser] is committed to the recovery of funds paid out on behalf of our subscribers. Only in extreme circumstances will consideration be given to accepting less than 100% reimbursement." *Id.* On June 8, 2005, Respondent's office received Kaiser's notice of its lien, but none of the Kaiser medical records. BX F16 at 78 (Case Note 8).

E. The July 2005 Settlement Discussions with GEICO

37. On July 14, 2005, Ms. Seegars sent GEICO a second settlement demand, stating that Ms. Brown's "special" damages now totaled $3,183 and asking Ms. Monk to contact her to discuss settlement. Ms. Seegars attached Ms. Brown's "Wage Loss Verification" and the lien letter from Kaiser. BX G17(a) at 112-15; RX II.25. This letter, characterized as a "demand for settlement" in the subject line, failed to notify GEICO of the full extent of Ms. Brown's damages; reported that Ms. Brown owed Kaiser $626, when she in fact owed $1,222.36, and failed to include claims for lost wages, a $535 emergency room bill, damages for temporary or permanent pain and suffering, or a demand for a lump sum settlement. *Id.* Respondent did not review the July 14 letter before it was sent to GEICO. Tr. 90-91 (Avery).

38. Neither Respondent nor Ms. Seegars discussed the settlement demand with Ms. Brown nor did they send Ms. Brown a copy of the July 14, 2005 demand letter. Tr. 95-96 (Avery); BX F16 at 78-79. They also failed to provide Ms. Brown an updated evaluation of her claim based on the documentation of her lost wages and notice of Kaiser's lien, including Kaiser's charges for related medical services. BX F16 at 93-96.

39. On July 22, 2005, Ms. Monk received Ms. Seegars' July 14 settlement demand letter and related documentation. BX G17(a). Ms. Monk valued Ms. Brown's claim at $5,983.48, based on the total of her medical bills of $3,467, including the $535 emergency room bill, which she discovered in her review of GEICO's records, and Ms. Brown's $2,516 claim for lost wages. Tr. 239 (Gentry).

40. On July 28, 2005, Ms. Monk called Ms. Seegars to discuss settlement. BX G17(b) at 123-24 (07-28-05 entry). During the call, Ms. Seegars made a demand of $10,000. *Id*. at 124. When Ms. Monk countered at $8,800, Ms. Seegars immediately accepted the offer. *Id*. Ms.

Seegars failed to document the discussion in Needles, or elsewhere in the file. *See* BX F16 at 78-79 (Case Notes 8 and 9).

41. GEICO's ALOG confirms that Ms. Seegars accepted the $8,800 offer during the call with Ms. Monk. The GEICO entry reads as follows:

> CALLED ATTY'S OFFICE TO DISCUSS SETTLEMENT. SPOKE TO DAWN. SHE ADVS CLIENT DEMAND $10,000. ADVS I COULD OFFER $8,800 TO SETTLE TODAY. SHE ACCEPTED THIS.

BX G17 at 123-24. The offer was accepted, notwithstanding Respondent's office policy to relate a settlement offer to the client and to obtain the client's authority before settling. Finding of Fact ("FF") 5.

42. There is no evidence that Respondent or Ms. Seegars contacted Ms. Brown at any time on July 28, 2005 to discuss GEICO's $8,800 settlement offer or to obtain her authority to settle. Respondent conceded there were no notes in Needles regarding the offer. Tr. 107 (Avery). The Chronology prepared by Respondent shows no discussions with Ms. Brown between the time of GEICO's initial $5,000 settlement offer on February 24, 2005 and its final offer of $8,800 on July 28, 2005. *Id.*; *see* BX F16 at 99. The evidence is thus clear and convincing that neither Respondent nor Ms. Seegars obtained Ms. Brown's consent to the July 28, 2005 settlement offer before it was accepted by Ms. Seegars. Tr. 108 (Avery).

43. On July 28, 2005, Ms. Monk sent Respondent written confirmation of the settlement of Ms. Brown's claims, along with an $8,800 settlement check, and a "Release for [Ms. Brown] to execute." Tr. 241-42 (Gentry); BX F16 at 96-98; BX J20(b) (GEICO check made payable to Mary E. Brown and Respondent); RX II.26-1, 2, & 3. The confirmation letter asked that Respondent "[k]indly hold this settlement check in escrow until we have the properly executed

Release in our possession" and advised that "[a]ny negotiation or disbursement of our payment will be considered a release of all claims." BX F16.

44. On July 29, 2005, Ms. Brown wrote Respondent to complain that she had provided him with information regarding her medical bills and lost earnings "months ago," but that "*as of today, I have not heard from you*." BX F16 at 99; RX II.27 (emphasis added). She sent her letter the next day by certified mail, and the Postal Service delivered it to Respondent's office on August 2, 2005. BX E6(b) at 12; RX II.27. Despite his claims that his office was small and his staff kept him informed about each case, Respondent testified that he never saw Ms. Brown's July 29 letter. Tr. 120-22 (Avery). He also testified that he had no recollection of ever asking Ms. Seegars if she had called Ms. Brown and received authority to settle the case. Tr. 145-46 (Avery).

45. Respondent received GEICO's settlement confirmation letter, proposed release form, and settlement check on August 2, 2005. Tr. 137 (Avery). That same day, Respondent's office manager, Steve Witcher, endorsed Ms. Brown's name on the settlement check and caused it to be deposited into Respondent's IOLTA account. BX E15 at 61 no. 1; BX J20(b) at 146 (GEICO check). Ms. Brown did not endorse GEICO's check. Tr. 110, 118 (Avery). Respondent claimed authority to endorse the check pursuant to the power of attorney clause in his retainer agreement. Tr. 110 (Avery); *see* BX F16.

46. Respondent's records show that on August 3, 2005, Cathy Smith called Ms. Brown. BX F16 at 79; RX II.28. Ms. Smith was a receptionist, not a paralegal. Tr. 396 (Smith). According to Respondent, Ms. Smith did "a lot of grunt work, opening mail, answering mail, returning clients' phone calls, pulling files, [and] copying files." Tr. 181-82 (Avery). Ms. Smith testified that she had no independent recollection of her call with Ms. Brown. Tr. 397-98 (Smith). The Needles note regarding the call states, in its entirety, that: "I called the client to give her status

of her claim. She's ok with settlement." BX F16 at 79; RX II.28. There is no other record evidence regarding the substance of that call. There is no evidence in the record to show whether this call was prompted by Respondent's office's receipt of the check from GEICO and/or Ms. Brown's July 29, 2005 letter complaining that she had heard nothing about her case for months. It is undisputed that Ms. Smith's communication with Ms. Brown occurred after Ms. Seegars had accepted GEICO's offer to settle the case on July 28, 2005.

47. Ms. Makris testified that it was standard office practice to call clients upon receipt of a settlement check and suggest an office meeting to review the proposed settlement disbursement sheet. Tr. 390 (Makris). During the meeting, the client could approve the proposed disbursement of the settlement funds. Tr. 389-90 (Makris). Respondent did not know whether Ms. Brown had been invited for such a meeting. Tr. 125 (Avery). It was not office practice to mail a proposed disbursement sheet to clients, and there is no letter in Ms. Brown's file "transmitting the release and proposed settlement to Ms. Brown." Tr. 389 (Makris); BX E11 at 3.

48. Respondent concedes that he never sent a settlement statement to Ms. Brown with the proposed distribution of settlement funds, including the amount that Ms. Brown would personally receive. Tr. 129 (Avery). His office files and the Needles program also show no contact with Ms. Brown from August 4, 2005 to March 14, 2006. Tr. 124-25 (Avery); BX F16. Nor did Respondent discuss the proposed disbursement of funds with Ms. Brown at any point before September 2006. *Id.*

49. Respondent also did not advise Kaiser that he had received the settlement funds, despite Kaiser's lien. He testified that consistent with his office practice, he would not notify Kaiser until after Ms. Brown signed the disbursement sheet. Tr. 132 (Avery). Respondent testified that he considered Kaiser's lien of $1,222.36 to be "in dispute," while acknowledging that Ms.

Brown owed at least $626, and without explaining the source of the dispute. Tr. 132-33, 136 (Avery).

50. On November 5, 2005, Ms. Brown reached Ms. Seegars by phone. BX E5. After searching for the file, Ms. Seegars told Ms. Brown that her case had settled, but could provide no details and said she would call Ms. Brown back. BX E5; BX E6(a); RX III.C.

51. Following her termination on November 16, 2005, Ms. Seegars left Respondent's firm without providing Ms. Brown information about her claims. Tr. 120 (Avery); RX III.E. When asked by Disciplinary Counsel whether Ms. Seegars left voluntarily or was discharged, Respondent testified that she left "for personal reasons. It had nothing to do with work. It was a personal issue." Tr. 120 (Avery). When later questioned by the Hearing Committee as to whether Ms. Seegars left voluntarily or was fired, Respondent stated that he "let her go but it was for personal reasons. There were issues unrelated to work performance." Tr. 149-150 (Avery). Ms. Seegars confirmed to Disciplinary Counsel's investigator that she was terminated by Respondent on November 16, 2005. RX III.E. She told the investigator that she was never given a reason for her firing, but thought an argument that she had with Mr. Witcher concerning the settlement and evaluation of cases may have led to her dismissal. RX III.E.

F. Subsequent Communications and Events

52. Ms. Brown called Respondent's firm and left messages for Mr. Katzen on February 23, March 13, March 15, and March 30, 2006. BX E5. On or about March 14, 2006, Mr. Katzen called Ms. Brown to inform her of the August 2005 settlement of her claims. Tr. 279 (Katzen); BX F16 at 81 (Case Note 11). After telling Ms. Brown that she would receive "around $2200 in her pocket" from the settlement, Mr. Katzen wrote in Needles that Ms. Brown was "very upset and said that wasn't even enough for her [lost] wages," and that she wanted more for the injuries and

damages she had suffered. *Id.* Mr. Katzen testified it was "more likely than not" that he would have brought his conversation with Ms. Brown to Respondent's attention. Tr. 282 (Katzen).

53. On April 25, 2006, Mr. Katzen met with Ms. Brown. Tr. 283 (Katzen); BX F16 at 84 (Case Note 13). Ms. Brown reiterated to Mr. Katzen that the settlement amount was unacceptable and that "she never approved [the] settlement." Tr. 285 (Katzen); BX F16 at 85 (Case Note 14). Mr. Katzen asked Ms. Brown "what she was looking for," and Ms. Brown replied "$25,000." BX F16 at 84 (Case Note 13). Mr. Katzen "told her that was not at all realistic" and that "based on [his] experience a jury was not likely to award her anything close to that amount." *Id.* Following this meeting, Mr. Katzen sent Mr. Witcher an e-mail stating that Ms. Brown was very upset and that she wanted the settlement check returned to GEICO and a lawsuit filed in her matter. BX F16 at 85 (Case Note 14).

54. Respondent testified that he did not review Mr. Katzen's note at that time. Tr. 69 (Avery). He also claimed that his office manager did not show him Mr. Katzen's April 25 note regarding the meeting with Ms. Brown.

55. Almost five months later, on September 12, 2006, Ms. Brown called Respondent's office, spoke with Ms. Makris, and asked whether the settlement check had been returned to GEICO. BX F16 at 85 (Case Note 15). Ms. Makris told Ms. Brown that Respondent's office was "in the process" of sending the check back to GEICO. *Id.* Ms. Brown became upset after learning that no one had returned the settlement check and demanded to meet with Respondent. *Id.* Ms. Makris' Needles note states that Ms. Brown "was going [sic] off on me because I told her I know [sic] that she did not approve the settlement" and yet the settlement check had not been returned to GEICO. *Id.* Ms. Brown was sufficiently upset that Ms. Makris "had to" make an appointment for her to meet with Respondent. *Id.*

56. Ms. Makris reported to Disciplinary Counsel's investigator that Mr. Katzen told her that Ms. Brown had never approved the settlement, and that both she and Mr. Katzen were "shocked" to learn this. RX III.F. She also told Disciplinary Counsel's investigator that Respondent said that he did not know what happened regarding the settlement of Ms. Brown's case. *Id*.

57. Respondent met with Ms. Brown for the first time on September 19, 2006, and attempted to persuade her to accept the GEICO settlement. Tr. 198-99 (Avery); BX E1; BX E5. He offered to reduce his legal fee and pay her a greater share of the funds. Tr. 143-44 (Avery); BX E5; BX E6(a); BX E15 at 64 (2nd Final Settlement Report). Ms. Brown again refused to accept any part of the settlement funds and instructed Respondent not to file suit. Tr. 163 (Avery); BX E3. Respondent interpreted this instruction to mean that he was put "on hold" and that the case was "in limbo." Tr. 163 (Avery). Respondent did not make notes or write a summary of the meeting in the Needles program. Tr. 71-73 (Avery); BX F16 at 85. After the meeting, Ms. Brown asked Respondent for her file. Tr. 61 (Avery); BX E1 at 2.

58. On September 26, 2006, Respondent wrote to Ms. Brown to confirm their meeting and her instruction not to file suit. Tr. 163 (Avery); BX F16 at 100; BX E3 at 6.

G. Events Surrounding Ms. Brown's Disciplinary Complaint against Respondent

59. On September 25, 2006, Ms. Brown filed a complaint against Respondent with the Office of Disciplinary Counsel. BX E1 at 1-2. Ms. Brown alleged that Respondent failed to communicate with her regarding the status of her case, settled her claims without authorization, and failed to provide her with a copy of her files after she twice requested them. *Id*.

60. On October 2, 2006, Ms. Brown wrote Respondent regarding their recent meeting and advised him that she felt that she "would be without a lawyer if you . . . represented me in

court . . . you have not helped me in almost two years . . . my case is not settled." BX F16 at 101. Respondent claims that he never saw Ms. Brown's letter. Tr. 75-76 (Avery).

61. On October 10, 2006, Respondent sent Ms. Brown a copy of her file. BX E2; RX III.B.

62. On October 11, 2006, Respondent sent Disciplinary Counsel his initial response to Ms. Brown's complaint, along with a copy of his September 26, 2006, letter to her. BX E3. In the letter, Respondent told Disciplinary Counsel that after he was retained, he assigned the *Brown* matter to two of his non-lawyer employees and one associate. He stated that GEICO had made a settlement offer in the amount of $8,800, that he then met with Ms. Brown and that she told him to "neither accept the last offer nor file suit." *Id*. Respondent did not inform Disciplinary Counsel that GEICO had made its final offer on July 28, 2005, that a paralegal had accepted the offer without Ms. Brown's authorization, or that Ms. Brown had informed his associate in March 2006 that she would not accept the settlement offer. *Id*. He did not inform Disciplinary Counsel that his conversation with Ms. Brown regarding settlement took place more than a year after GEICO made its offer, and after his firm had cashed and deposited her settlement check.

63. On October 12, 2006, Disciplinary Counsel sent Ms. Brown a copy of Respondent's response to her complaint. BX E4. In a reply to Disciplinary Counsel, Ms. Brown stated that she first learned of the settlement when she called Respondent's office and spoke to Ms. Seegars in November 2005. BX E5. She also reported that she called Respondent's office on September 12, 2006 to tell him that she was about to file a complaint, and that she was then given an appointment with Respondent, who later offered her $2,838.82 if she would settle the case. *Id*.

64. On October 10, 2006, Respondent sent checks to GEICO returning the $8,800 settlement payment of July 28, 2005, with a transmittal letter stating that "Ms. Brown has rejected

the settlement offer." RX II.36-1; BX F16 at 103-04. The check, dated September 19, 2006, was received by GEICO on October 19, 2006. BX G17(b) at 125. The receipt of the check prompted GEICO's claims examiner to call Respondent. BX G17(b) at 126.

65. On October 20, 2006, a GEICO representative, Ms. Satterfield, called Respondent's office to inquire if Respondent was representing Ms. Brown and to ask what he intended to do in the matter. BX G17(b) at 126.

66. Respondent spoke with Ms. Satterfield on October 23, 2006. The GEICO ALOG entry states, in pertinent part, as follows:

> CALL FROM ATTNY AVEY [SIC]. HE SAID APPARENTLY A PARALEGAL (WHO NO LONGER WORKS FOR HIM) SAID MR. [SIC] BROWN HAD ACCEPTED THE SETTLEMENT WHEN SHE HAD NOT. THEREFORE MS. BROWN REJECTED THE SETTLEMENT AND INSTRUCTED THE ATTNY TO SEND THE MONEY BACK TO GE. . . . HE SAID IF SHE RELEASE HIM FROM THE CASE AND HIRES ANOTHER ATTNY HE WILL NOT PUT A LIEN ON THE FILE AS IT APPEARS HIS FORMER PARALEGAL IS THE CAUSE FOR THE CONFUSION RE: SETTLEMENT. . . .

BX G17(b) at 127-28.

67. Respondent's statement to Ms. Satterfield, as reflected in the ALOG entry, is consistent with Ms. Brown's allegation that Respondent's firm accepted a settlement from GEICO without her authorization or consent. Respondent did not attempt to contact Ms. Brown again until almost a year later, on October 18, 2007. BX E13 at 50.

68. When questioned about the conversation with Ms. Satterfield at the hearing, Respondent admitted that the ALOG entry was accurate. However, he explained that his statement that Ms. Brown had rejected the settlement was false, and that he made the misrepresentation because he "was looking out for Ms. Brown." Mr. Avery testified as follows:

> I could neither settle the case nor file a lawsuit. If Ms. Brown wanted to go forward with the lawsuit, and I told GEICO she had in fact authorized the settlement, which she did, her interests would have been prejudiced because GEICO could then file a

> motion to enforce the settlement. I was looking out for Ms. Brown. She said she didn't want the money. I know that she approved the settlement because the case wouldn't have been settled without her authority. But in an effort to protect my client's interest, I made this statement. That's why I clearly remembered it because I've never had to, before nor since, say anything like that.

Tr. 85 (Avery).

69. Although Respondent testified that he "knew" Ms. Brown accepted the settlement, he conceded that he had no personal knowledge if Ms. Brown had in fact done so. Tr. 146 (Avery).

70. Respondent admitted that the only basis for his belief that Ms. Seegars had obtained settlement authority from Ms. Brown was his "office policy." It was not based on anything Ms. Brown or Ms. Seegars had told him. Tr. 149 (Avery). He did not recall ever asking Ms. Seegars whether she called Ms. Brown and received settlement authority from Ms. Brown. Tr. 145-46 (Avery). Respondent also admitted, in a response to a question from the Hearing Committee, that "there's certainly evidence . . . that [Ms. Seegars] didn't follow office procedures. . . . And I'm guilty of that as well, you know." Tr. 152 (Avery).

71. On October 20, 2006, Kevin O'Connell, Disciplinary Counsel's investigator, interviewed Ms. Brown and prepared a report of the interview. RX III.E. During the interview, Ms. Brown stated that in November 2005, she spoke with Ms. Seegars, who informed her of the settlement and stated that she had never authorized anyone to settle her case. *Id*.

72. On November 9, 2006, Mr. O'Connell interviewed Ms. Seegars. RX III.E. Ms. Seegars said that she worked for Respondent as a paralegal and that her job was to send demand packages and settle cases with the insurance companies. She reported that she settled 60-90 cases a month and was terminated on November 16, 2005. *Id*. Ms. Seegars had no recollection of Ms. Brown or the settlement of her case.

73. On November 20, 2006, Mr. O'Connell interviewed Ms. Makris, who was working in Respondent's Virginia law office. RX III.F. Ms. Makris told Mr. O'Connell that Mr. Katzen

took over Ms. Brown's file after Ms. Seegars left the firm in November 2005 and that according to Mr. Katzen, Ms. Brown had not approved the settlement. *Id*. Ms. Makris also reported that Respondent told her he did not know what had happened in the Brown case. *Id*.

H. The Lawsuit

74. Between November 2006 and June 2007, Respondent made no calls to Ms. Brown. Tr. 140 (Avery). He attempted to reach her by telephone between June 2007 and September 2007 to explain the expiration of the Statute of Limitations on her claim, but by then, Ms. Brown had "disappeared." Tr. 140-41 (Avery).

75. On or around February 9, 2007, Ms. Brown hired John Green, Esquire, to represent her in connection with the 2004 accident, and she subsequently moved to Georgia. Tr. 186 (Avery); BX G17(b)(2) at 128(b); RX II.38. On October 18, 2007, Respondent notified Ms. Brown that he intended to file a lawsuit on her behalf, because the Statute of Limitations was set to expire on November 8, 2007. BX E13 at 50; RX II.37. The letter was mailed to Ms. Brown at an address in Washington, D.C., where she no longer resided. Tr. 186 (Avery). That same date, and unbeknownst to Respondent, Mr. Green filed a civil complaint on Ms. Brown's behalf against the owner and driver of the car in D.C. Superior Court. Tr. 209 (Avery); BX K21(a).

76. On November 1, 2007, having received no response to his October 18 letter, Respondent filed a civil complaint in D.C. Superior Court, styled *Mary Brown v. Ahmed Abdelgadie, et al*, No. 2007 CA 007317, against both the owner and driver of the car and against GEICO. Tr. 140-41, 206 (Avery); BX K21 at 151-52. Respondent testified that he "felt that [his] obligation to [Ms. Brown] at that point was to protect the statute of limitations." Tr. 163-64 (Avery).

77. On November 5, 2007, Ms. Brown called Respondent and said that she no longer required his services because she had retained a new attorney. RX II.38. Respondent explained that he had filed the lawsuit to protect her claim from the expiration of the Statute of Limitations. *Id.* Respondent asked Ms. Brown for the contact information for her new attorney to assure that her claim was being taken care of. *Id.* Ms. Brown told Respondent that she would call back with the information. *Id*.

78. On November 13, 2007, Respondent sent a copy of the lawsuit to Ms. Brown, with a letter acknowledging that she had retained new counsel and requesting that she sign and return the letter to confirm her direction that the lawsuit be dismissed. BX E13 at 52.

79. That same day, Ms. Brown faxed a letter to Respondent concerning their recent telephone conversation, indicating that she had a new attorney and no longer needed his services. Tr. 210-11 (Avery); BX E13 at 53-54. Ms. Brown's letter did not instruct Respondent to dismiss the lawsuit. *See* BX E13 at 53-54.

80. Two days later, on November 15, 2007, Respondent sent another letter to Ms. Brown acknowledging receipt of her fax and reiterating his request that she sign and return the letter if she wanted him to dismiss the pending lawsuit. BX E13 at 55.

81. Ms. Brown never signed and returned the letter. Tr. 212 (Avery). Respondent did not move to withdraw from Ms. Brown's case until December 13, 2007. *See* BX E13 at 3. The motion to withdraw was granted on January 10, 2008. Tr. 212 (Avery); BX K21 at 151. Because he never received a letter from Ms. Brown confirming her intention to dismiss the case, Respondent "felt the best thing to do would be to withdraw so her case is still there and viable for her." Tr. 212 (Avery).

82. On January 22, 2008, the lawsuit filed by Respondent was dismissed without prejudice based on plaintiff's failure to file proof of service. BX K21.

I. Expert Testimony

83. Disciplinary Counsel presented the testimony of Michael Ain, Esquire, as an expert in personal injury law. He was qualified as an expert, over Respondent's objection, to offer his opinion as to the steps a competent attorney would take to investigate a personal injury claim arising from an automobile accident, and the information he would communicate to the client about developing a claim for damages. Tr. 321, 324 (Ain). The Hearing Committee also accepted Mr. Ain's opinion letter into evidence. Tr. 325-26 (Ain); BX L22.

84. After reviewing Ms. Brown's medical records, Mr. Ain confirmed the importance of a full investigation, including a review of Ms. Brown's medical and treatment records, prior to engaging in settlement discussions, particularly in light of Ms. Brown's "complicated medical history," which included a pre-existing medical condition. Tr. 327-28, 333 (Ain); BX L22 at 153. In his opinion, a competent attorney would have discussed the injuries with Ms. Brown, determined if she still had symptoms and, if so, would have sought her consent to contact her Kaiser physician to determine the cause. Tr. 333, 340 (Ain); BX L22 at 154. Mr. Ain testified that a competent lawyer would have discussed with the client the costs of having the treating doctor provide a report and the costs of an independent medical examination, which could help "dramatically" in settlement negotiations. Tr. 342-43 (Ain).

85. Mr. Ain opined that the July 14, 2005 letter from Ms. Seegars to Ms. Monk was not a demand for settlement but more an updated, but incomplete list of the special damages claim (which did not include the emergency room bill, Kaiser's lien on any settlement, and Ms. Brown's lost wages). Tr. 350 (Ain). Mr. Ain explained that a demand letter should outline the case in the

terms most favorable to the client, itemize all, and not some, of the special damages claims, including lost wages and how they were determined, and describe the impact of the injuries on the client. Tr. 352-53 (Ain). In addition, to the extent that Respondent relied on non-lawyers in the representation, a competent lawyer would have maintained familiarity with the case and reviewed substantive documents sent out on the client's behalf, such as demand letters. Tr. 338-39, 342, 347, 352-53 (Ain); BX L22 at 3-4.

86. Respondent presented the testimony of Lawrence Lapidus, Esquire, as an expert in personal injury law. He testified that once a client's matter settles and the lawyer receives settlement funds, the lawyer must contact the client and invite her to sign a release of claims form and endorse the settlement check. Tr. 518, 524 (Lapidus). Mr. Lapidus stated that a lawyer can only sign the check with a power of attorney from the client. Tr. 524 (Lapidus). In addition, he testified that following the receipt of settlement funds, the lawyer must promptly prepare a "settlement sheet" and send it to the client in a timely manner. Tr. 527-28 (Lapidus). The lawyer need not notify third-party lien holders of the receipt of the check, but must do so promptly "when there's a disbursement." Tr. 525 (Lapidus). If the client does not respond to invitations to sign the release and approve the settlement sheet, the lawyer must notify the client of the settlement and receipt of settlement funds in writing. Tr. 532 (Lapidus). If the client still fails to respond, or if the client changes her mind regarding settlement, the lawyer should promptly return the settlement check to the insurance company. Tr. 532-34 (Lapidus).

87. Mr. Lapidus considered the letter Ms. Brown sent to Respondent on October 2, 2006, to be "a little ambiguous," but stated that it could be interpreted as a discharge letter. Tr. 539 (Lapidus). If the client then filed a complaint with Disciplinary Counsel, the client would be

in an adversary position with the lawyer and it would be "completely impossible" for the lawyer to continue the normal attorney-client relationship. Tr. 540 (Lapidus).

88. Dwight D. Murray, Esquire, also was qualified as an expert witness for Respondent. He testified about the challenges of presenting settlement figures to a client without the corresponding settlement sheet: "When a plaintiff's lawyer mentions a figure, when he settles for $8,800, the client sometimes think [sic] they are going to get a major portion of that $8,800 until they see the settlement sheet, until they see the breakdown." Tr. 590 (Murray). Mr. Murray testified that Ms. Brown's expectation of receiving $25,000 from the case was unreasonable and that an attorney's job was to explain why. Tr. 618 (Murray). Finally, Mr. Murray testified that he would have counseled Respondent to file the lawsuit on Ms. Brown's behalf, despite being unable to reach her, since the Statute of Limitations was approaching. *Id.*

J. Respondent's Credibility

89. We find that Respondent made misrepresentations to Disciplinary Counsel in his October 11, 2006, response to Ms. Brown's complaint. Respondent mischaracterized the $8,800 payment from GEICO as a settlement offer, when in fact his paralegal had accepted that amount in settlement, without Ms. Brown's consent, and had deposited it in trust, without Ms. Brown's endorsement. He gave the misleading impression that he met with Ms. Brown on receipt of the offer to discuss her claim, when he actually first met with her a year and a half later, and only after Ms. Brown demanded a meeting upon learning that the case had settled and that his office had ignored her instructions to return the settlement check to GEICO. BX E3.

90. We also find by clear and convincing evidence not credible Respondent's testimony that Ms. Brown approved the settlement prior to July 28, 2005. Tr. 84-86, 145-49 (Avery). His testimony is contradicted by numerous pieces of evidence, including: the lack of any

contemporaneous record of Ms. Brown having given such authority, whether in the Needles program or elsewhere; Ms. Brown's letter of July 29, 2005, in which she stated that since providing Respondent's office with information on medical bills and lost earnings "months ago," "as of today, I have not heard from you," BX F16; Mr. Katzen's testimony that when he met with Ms. Brown on April 25, 2006, she told him that "she never approved [the] settlement," Tr. 285; Ms. Makris's statement to Disciplinary Counsel's investigator that Mr. Katzen told her that Ms. Brown had never approved the settlement, RX III.F; Ms. Makris's Needles note concerning her conversation with Brown on Sept. 12, 2006, in which she indicated she told Ms. Brown that she, Ms. Makris, knew Ms. Brown had not approved the settlement, BX F16. at 85; and the lack of any entry for receipt of settlement authority from Ms. Brown in the chronology Respondent provided to Disciplinary Counsel, BX E13 at 46-47. Indeed, when pressed by the Hearing Committee, Respondent acknowledged that the only basis for his assertion that Ms. Brown has authorized the settlement was that his office policies would have required such approval. Tr. 148-49 (Avery).

91. As previously noted, when asked at the hearing about the explanation he had given GEICO, which included his acknowledging that Ms. Brown had *not* approved the settlement, Respondent essentially conceded that he had lied to GEICO "in an effort to protect [his] client's interest." Tr. 85 (Avery). As he testified, "[i]f Ms. Brown wanted to go forward with the lawsuit, and I told GEICO she had in fact authorized the settlement, which she did, her interests would have been prejudiced because GEICO could then file a motion to enforce the settlement." Tr. 85:10-86:1 (Avery).

92. Additionally, Respondent's answers to certain questions at the hearing also undermined his credibility; his initial answers occasionally conveyed an impression that gave way under further questioning. For example, Respondent testified that he "knew" Ms. Seegars had

obtained Ms. Brown's consent before accepting GEICO's July 25, 2005 offer, *e.g.*, Tr. 101, 144 (Avery), but he later conceded that he had no personal knowledge to that effect. *E.g.*, Tr. 149 (Avery).

K. Respondent's Prior Discipline for Similar Misconduct

93. The Court publicly censured Respondent in 2007 for failure to provide competent representation, neglect, and failure to communicate with a client. *See In re Avery*, 926 A.2d 719 (D.C. 2007) (per curiam); BX N24(a); BX N24(b). Specifically, Respondent was determined to have violated Rules 1.1(a) (competent representation), 1.3(a) (zealous and diligent representation), 1.3(c) (reasonable promptness), 1.4(a) (keeping client reasonably informed), 1.4(b) (explaining matter to the extent reasonably necessary), 1.5(c) (contingency fee requirements), 1.5(e) (requirements involving division of fees between lawyers), and 1.16(d) (termination of representation).

III. CONCLUSIONS OF LAW

A. Respondent's Dispositive Motions

Respondent has moved to dismiss the Specification of Charges on two ground grounds: that Disciplinary Counsel's delay in prosecuting this matter resulted in much of Disciplinary Counsel's case being based on hearsay, and that the delay violated his right to due process because it substantially prejudiced Respondent's ability to mount a defense.

We reject the first contention because it is well established that hearsay evidence is generally admissible and is a basis to establish a violation of the disciplinary rules. *See In re Kennedy*, 605 A.2d 600, 603 (D.C. 1992) (per curiam); see also Board Rule 11.2 ("Evidence that is relevant, not privileged, and not merely cumulative shall be received, and the Hearing Committee shall determine the weight and significance to be accorded all items of evidence upon which it relies."); *In re Shillaire*, 549 A.2d 336, 343 (D.C. 1988) (FBI agent's affidavit was

admissible hearsay evidence and the "only legitimate issue . . . [was the] weight that should be accorded to it.").

The second issue presents a more substantial question. It is well established that the guarantees of due process must be respected in attorney disciplinary proceedings. *See, e.g., In re Williams*, 464 A.2d 115, 118-19 (D.C. 1983). But the Court has explained that "[s]peedy trial principles, which in criminal cases are a constitutionally required curb on the abuse of government power, in the disciplinary system take second place to other societal interests." *In re Williams*, 513 A.2d 793, 796 (D.C. 1986) (per curiam) Thus, "undue delay in prosecution is not in itself a proper ground for dismissal of charges of attorney misconduct." *Id*. Rather, as Respondent acknowledges (Resp. Br. at 27), due process is violated only if Disciplinary Counsel's delay "substantially impairs the attorney's ability to defend the charges." *In re Morrell*, 684 A.2d at 368; *see Williams*, 513 A.2d at l

Respondent's principal ground for claiming prejudice is that he was unable to confront Ms. Brown, who had died during the course of Disciplinary Counsel's investigation. He also contends that the delay led to his being unable to confront his former paralegal, Ms. Seegars, who he claims would have testified concerning the settlement and her communications with Ms. Brown. Last, Respondent contends that the witnesses who did appear had diminished memories.

Disciplinary Counsel opposes the motion to dismiss, on the grounds that Respondent did not suffer prejudice as a result of the delay in prosecution and that there was substantial testimonial and documentary evidence to support the charged violations, which corroborate Ms. Brown's hearsay statements, contained in documents written contemporaneous to the events at issue. *See* ODC Reply at 8-12; Tr. 650-51 (Disciplinary Counsel Closing Argument). Although the

arguments raised by Respondent are not without some force, we ultimately agree with Disciplinary Counsel.

We first consider the significance of Ms. Brown's death. In his post-hearing brief, Respondent lists questions that he would have asked Ms. Brown if she were available to testify. Resp. Br. at 28-29. They are clearly intended to suggest that had Respondent been able to question Ms. Brown, she would have agreed that she was in periodic contact with Respondent and/or his staff, that she was apprised of the GEICO settlement offer, that she approved the settlement, that she knew the check had arrived, that she was invited in to the office to sign the release and the disbursement sheet, and that she later changed her mind about settlement. These points would support the version of the facts that Respondent argued in his defense.

We find these questions inadequate to establish prejudice from Ms. Brown's unavailability as a witness. First, the version of events suggested by the listed questions conflicts with the version Respondent provided to Disciplinary Counsel in 2006 in response to Ms. Brown's complaint, where he asserted that Ms. Brown rejected the GEICO settlement offer after he explained it to her.[10] If Ms. Brown had approved the settlement in 2005, Respondent would presumably have so informed Disciplinary Counsel when the complaint was made, not later. Moreover, the notion that Ms. Brown approved the settlement conflicts with Respondent's explanation to GEICO, that Ms. Seegars had erroneously accepted the settlement without the client's approval

Second, as outlined in the Findings of Fact above, there was significant corroboration of Ms. Brown's complaint, including Respondent's own admissions concerning his lack of involvement with Ms. Brown's case, substantial contemporary documentary evidence, the GEICO

[10] As noted above, we find that Respondent's letter to Disciplinary Counsel did not accurately describe the events, as it suggests that Respondent met with Ms. Brown near the time the offer was made, not over one year later.

representative's testimony that Respondent admitted that Ms. Brown's case was settled without her consent, and the testimony of his former employees. *See supra* summary in paragraph 90; *see also* ODC Reply Br. at 12-13.

On these facts, where there is no evidence to support the contention that Ms. Brown would have given exculpatory testimony, and that any purported exculpatory testimony would conflict with Respondent's initial explanation regarding this matter, we see no reason to find that Respondent's defense was "substantially impaired" because Ms. Brown had died by the time of the hearing.

Next, we consider the significance of Ms. Seegars' absence as a witness. Disciplinary Counsel's investigator interviewed Ms. Seegars on November 9, 2006, approximately six weeks after Ms. Brown's September 25, 2006 disciplinary complaint. According to Mr. O'Connell's interview report, Ms. Seegars had no memory of Ms. Brown or her case. RX III.E. Thus, there is no basis to conclude that her faulty memory was due to Disciplinary Counsel's delay in bringing this case. More likely it was the result of the high volume nature of Ms. Seegars' work for Respondent. Respondent, who apparently made no effort to interview Ms. Seegars while the matter was pending investigation, does not contend otherwise.

Finally, we reject Respondent's failure of proof argument based on our finding that Respondent violated several Rules of Professional Conduct.

B. Rules 1.1(a) (Competence) and 1.1(b) (Skill and Care)

Rule 1.1(a) requires that a lawyer "provide competent representation to a client," which "requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." "The competency of the lawyer must be evaluated in terms of the representation required and provided in the particular case, including the 'thoroughness and preparation'

reasonably necessary for competent representation in that case." *In re Shorter*, Bar Docket No. 194-96 at 6 (BPR Oct. 31, 1997), *adopted*, 707 A.2d 1305 (D.C. 1998) (per curiam); *see also In re Nwadike*, 905 A.2d 221, 228-29 (D.C. 2006); *In re Douglass*, 745 A.2d 307 (D.C. 2000) (per curiam). Comment [5] explains that the competent handling of a matter "includes adequate preparation and continuing attention to the needs of the representation to assure there is no neglect of such needs." Rule 1.1, cmt. [5]. Under Rule 1.1(a), "it is not sufficient that the lawyer has been a highly skilled and dedicated practitioner during the course of his career . . . . He must apply that skill and dedication to the particular case. . . ." *In re Shorter*, Bar Docket No. 194-96 at 6.

The Court has explained that Rule 1.1 "applies only to failures that constitute a 'serious deficiency' in the attorney's representation of a client." *In re Yelverton*, 105 A.3d 413, 421-22 (D.C. 2014) (quoting *In re Evans*, 902 A.2d 56, 69 (D.C. 2006) (appended Board Report)). To prove a "serious deficiency" within the meaning of Rule 1.1(b), Disciplinary Counsel must prove that the conduct "prejudices or could have prejudiced the client." *Id.* at 422. In *Evans*, the Court explained:

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

902 A.2d at 69-70 (citations omitted); *see also In re Ford*, 797 A2d 1231, 1231 (D.C. 2002) (per curiam) (Rule 1.1(a) violation requires proof of "serious deficiency" in attorney's competence).

Rule 1.1(b) provides that "[a] lawyer shall serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters." Rule 1.1(b) is "better tailored [than Rule 1.1(a)] to address the situation in which a lawyer capable to handle a

representation walks away from it for reasons unrelated to his competence in that area of practice." *In re Lewis*, 689 A.2d 561, 564 (D.C. 1997) (per curiam) (appended Board Report). A violation of Rule 1.1(b), like Rule 1.1(a), requires proof of a "serious deficiency" in the representation as well as prejudice. *See Yelverton*, 105 A.3d at 421-22. A violation of Rule 1.1(b) may be established through expert testimony or, without expert testimony when an attorney's "conduct is so obviously lacking that expert testimony showing what other lawyers generally would do is unnecessary." *In re Nwadike*, Bar Docket No. 371-00 at 28 (BPR July 30, 2004), *findings and recommendation adopted*, 905 A.2d 221, 227, 232 (D.C. 2006); *see In re Schlemmer*, Bar Docket Nos. 444-99 & 66-00 at 13 (BPR Dec. 27, 2002) (noting that Disciplinary Counsel need not "necessarily produce evidence of practices of other attorneys in order to establish a Rule 1.1(b) violation").

Disciplinary Counsel established that Respondent violated Rules 1.1(a) and (b) when he delegated day-to-day responsibility for Ms. Brown's case to his staff without maintaining familiarity with the matter and exercising proper oversight. He abdicated responsibility for his representation of his client, deferring to the staff's adherence to office procedures and "informal policies" for handling cases, even though they were honored in the breach. The files contained few notes, and failed to record important developments, including the GEICO offer of settlement. Respondent also failed to regularly review Ms. Brown's file, to monitor Ms. Seegars's negotiations with GEICO, her communications with Ms. Brown and correspondence in the case, including the July 14, 2005 letter to GEICO, which failed to state the full extent of Ms. Brown's damages. *See* FF 37. He remained disengaged, despite phone calls from Ms. Monk and her May 12, 2005 letter complaining of unreturned calls. Had he assumed responsibility for the representation and provided the proper oversight, he would have discovered that his office had failed to conduct

anadequate investigation of Ms. Brown's injuries, failed to discuss with Ms. Brown whether to obtain a report from her treating physician and/or an independent medical examination to determine the precise nature of her injuries, failed to convey GEICO's two settlement offers, and had agreed to a settlement without consulting Ms. Brown. Moreover, after he terminated Ms. Seegars in November 2005, a review of Ms. Brown's file would have shown that the GEICO settlement check had been deposited in his trust account on August 2, 2005, that Ms. Brown had not signed GEICO's release of claims, and that Ms. Seegars had not notified Ms. Brown of the receipt of the check or sent her a proposed settlement disbursement sheet.

Respondent's various lapses in the representation establish by clear and convincing evidence that he violated Rules 1.1(a) and (b).

C. Rule 1.2(a) (Abiding by Client's Decisions) and Rule 1.4(a) and (b) (Duty to Keep Client Reasonably Informed and to Explain a Matter to the Extent Reasonably Necessary to Permit the Client to Make Informed Decisions) and Rule 1.4(c) (Failing to Promptly Notify Client of Settlement Offer).

Rule 1.2(a) requires a lawyer to "abide by a client's decisions concerning the objectives of the representation," and to "consult with the client as to the means by which they are to be pursued." It specifically requires that "[a] lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter." *See In re Hager*, Bar Docket No. 031-98 at 22 (BPR July 21, 2001), *recommendation adopted*, 931 A.2d 1016 (D.C. 2007) (per curiam) ("Rule 1.2(a) requires that, at some point before the interests of clients are compromised in an agreement, they must be given the opportunity to make the decision.").

Rule 1.4(a) requires that "[a] lawyer . . . keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." "The guiding principle" for determining whether a violation has been established "is whether the lawyer fulfilled the client's 'reasonable . . . expectations for information.'" *In re Schoeneman*, 777 A.2d 259, 264

(D.C. 2001) (citations omitted). "To meet that expectation, a lawyer not only must respond to client inquiries but also must initiate communications to provide information when needed." *In re Hallmark*, 831 A.2d 366, 374 (D.C. 2003).

Under Rule 1.4(b), "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Comment [2] explains that the attorney "must be particularly careful to ensure that decisions of the client are made only after the client has been informed of all relevant considerations." The burden is on the attorney to "initiate and maintain the consultative and decision-making process if the client does not do so and [to] ensure that the ongoing process is thorough and complete." Rule 1.4, cmt. [2].

Rule 1.4(c) requires that "[a] lawyer who receives an offer of settlement in a civil case . . . inform the client promptly of the substance of the communication." A communication triggers obligations under Rule 1.4(c) if it is "an offer to negotiate and arrive at terms upon which a matter in dispute may be resolved, rather than continuing the dispute." *In re Wright*, Bar Docket Nos. 377-99, et al., at 16 (BPR Apr. 14, 2004), *recommendation adopted*, 885 A.2d 315 (D.C. 2005). "It need not include a specific set of settlement terms." *Id.*

Respondent violated Rule 1.2(a), when he and his staff: (1) failed to communicate GEICO's February 2005 and July 2005 settlement offers to Ms. Brown and then accepted the $8,800 offer without her knowledge or consent; (2) failed to comply with Ms. Brown's instruction to rescind the settlement and return the settlement funds to GEICO, until after she had filed a disciplinary complaint; and (3) filed a lawsuit on her behalf, again contrary to Ms. Brown's instructions and without her knowledge. The failure of Respondent and his staff to communicate with Ms. Brown and to respond to her calls and letters also violated Rules 1.4(a) and (b). Respondent and his staff failed to communicate meaningfully with Ms. Brown in a number of respects: they failed to explain to her the strengths and weaknesses of her case and Respondent's

evaluation of her claim and the available options, or to advise her of important developments, including the two GEICO settlement offers. Respondent's office instead accepted the second settlement offer of $8,800, and deposited the check, with an endorsement in Ms. Brown's name, without informing her. The failure to communicate the settlement offers to Ms. Brown, as well as the tender of the check made pursuant to the offer, also violated Rule 1.4(c). *See In re Wright*, 885 A.2d 315 (D.C. 2005) (violations of Rules 1.2 and 1.4 for settling client's personal injury claims without their knowledge or consent).

D. Rules 1.3(a) (Diligence and Zeal) and 1.3(c) (Reasonable Promptness)

Rule 1.3(a) provides that an attorney "shall represent a client zealously and diligently within the bounds of the law." "Neglect has been defined as indifference and a consistent failure to carry out the obligations that the lawyer has assumed to the client or a conscious disregard of the responsibilities owed to the client." *In re Wright*, 702 A.2d 1251, 1254 (D.C. 1997) (quoting *In re Reback*, 487 A.2d 235, 238 (D.C. 1985), *adopted in relevant part*, 513 A.2d 226 (D.C. 1986) (en banc) ("*Reback II*")). Rule 1.3(a) "does not require proof of intent, but only that the attorney has not taken action necessary to further the client's interests, whether or not legal prejudice arises from such inaction." *In re Bradley*, Bar Docket Nos. 2004-D240 & 2004-D302 at 17 (BPR July 31, 2012), *adopted in relevant part*, 70 A.3d 1189, 1191 (D.C. 2013) (per curiam).

Rule 1.3(c) provides that an attorney "shall act with reasonable promptness in representing a client." The Court has held that failure to take action for a significant time to further a client's cause, whether or not prejudice to the client results, violates Rule 1.3(c). *In re Dietz*, 633 A.2d 850 (D.C. 1993). With respect to Rule 1.3(c), Comment [8] to Rule 1.3 provides that "[e]ven when the client's interests are not affected in substance, . . . unreasonable delay can cause a client

needless anxiety and undermine confidence in the lawyer's trustworthiness," making it a "very serious violation."

This case became adrift in Respondent's office, not as a result of Ms. Brown's indecision, as Respondent claims, but because of Respondent's lack of attention to the case. As discussed above, Respondent and his staff failed to adequately investigate Ms. Brown's claim or compile a comprehensive list of her damages for submission to GEICO. He did nothing to prepare to actually litigate against the driver of the other car in the accident. After Ms. Seegars's initial phone call with Ms. Monk from GEICO on February 24, 2005, Ms. Seegars failed to return four of Ms. Monk's phone calls. FF 28. Respondent did not respond to a May 21, 2005 letter from Ms. Monk informing him of GEICO's settlement offer and the fact that her calls to his office had gone unreturned. FF 34. Neither Respondent nor Ms. Seegars received settlement authority from Ms. Brown, but Ms. Seegars accepted GEICO settlement offer anyway. FF 40-42.

Respondent and his staff also failed to act with reasonable promptness following receipt of the settlement check from GEICO, apart from depositing the check into his trust account. He failed to notify Ms. Brown of the receipt of the check, and let it sit in his account from its receipt in August 2005, until October 2006 following Ms. Brown's complaint to Disciplinary Counsel, and notwithstanding her direction to return the check to GEICO in April 2006.

We thus find that Disciplinary Counsel has proven by clear and convincing evidence that Respondent violated Rules 1.3(a) and 1.3(c).

E. Rule 1.5(c)

Rule 1.5(c) provides that upon conclusion of a contingent fee matter, a lawyer must provide his client with a "written statement stating the outcome of the matter, and if there is a recovery, showing the remittance to the client and the method of its determination." The rule is violated by

a lawyer's "failure to provide his [client] with an accurate and complete closing statement." *In re Wright*, Bar Docket Nos. 377-99, et al., at 27, *recommendation adopted*, 885 A.2d 315 (D.C. 2005). Disciplinary Counsel argues that Respondent violated Rule 1.5(c) when he failed to provide Ms. Brown with a settlement statement showing the proposed distribution of the settlement amount received from GEICO. This argument assumes that Respondent actually settled the case for Ms. Brown, and thus, was in a position to distribute the "settlement funds" to her. However, we have found that he did not settle the case because Ms. Brown never consented to the settlement, and thus, there was no recovery. If there was no recovery, Respondent had no obligation to prepare a settlement statement, as there was nothing to distribute. We thus find that Disciplinary Counsel failed to prove a violation of Rule 1.5(c).[11]

F. Rule 1.15(b)

Rule 1.15(b) (now Rule 1.15(c)) requires a lawyer to promptly notify a client or third-party of the receipt of funds in which the client or third-party has an interest and to provide a full accounting regarding such funds when requested. Disciplinary Counsel argues that Respondent violated Rule 1.15(b) when he failed to notify Ms. Brown and Kaiser (a third party with a "just claim" to the settlement funds) that he had received the settlement check from GEICO, and when he failed to notify GEICO that Ms. Brown had rejected the settlement offer.

We find that Respondent did not have an obligation under Rule 1.15(b) to notify Ms. Brown of the receipt of the funds from GEICO because Ms. Brown never accepted the settlement offer. Rule 1.15(b) applies only to funds in which the client or a third party "has an interest." Under the unique facts of this case, the funds sent by GEICO belonged to GEICO until Ms. Brown agreed to

[11] As discussed above, Respondent had a separate obligation under Rules 1.2 and 1.4(c) to notify Mrs. Brown that GEICO had made a settlement offer, and to notify her that GEICO had sent a check as part of the settlement offer.

the settlement, which she never did; she thus never had an interest in the GEICO funds, and Respondent did not have the consequent obligation under Rule 1.15(b) to notify her of their receipt. Similarly, Respondent also had no obligation to notify Kaiser of the receipt of the settlement check. Ms. Brown had assigned the settlement proceeds to Kaiser, but because she never accepted the settlement, neither she nor Kaiser had an interest in the proceeds of the GEICO check.

Disciplinary Counsel also argues that Respondent violated Rule 1.15(b) when he delayed in returning the check to GEICO after Ms. Brown refused to accept the settlement offer. Disciplinary Counsel maintains that Respondent knew that Ms. Brown had rejected the settlement offer by March 14, 2006 (when Ms. Brown told Mr. Katzen that she wanted more than the GEICO offer), and certainly by April 25, 2006 (when she again told Mr. Katzen that she wanted more money, and said that she had never approved the settlement). However, this is not clear and convincing evidence of what *Respondent* knew in March and April. Instead, the evidence shows that on September 12, 2006, Ms. Brown learned that the GEICO check had not been returned, and demanded to meet with Respondent because she had not approved the settlement, which she did on September 19, 2006. Thus, Respondent knew by September 19 if not as early as September 12 (when Ms. Brown demanded the meeting) that she had rejected the settlement. The check was returned to GEICO on October 10, 2006. We do not find that this short delay violates Rule 1.15(b).

IV. RECOMMENDED SANCTION

A. Factors to Be Considered

The appropriate sanction is one that is necessary to protect the public and the courts, maintain the integrity of the profession, and deter other attorneys from engaging in similar misconduct. *See In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013) (citing *In re Scanio*, 919 A.2d 1137, 1144 (D.C. 2007)). The sanction imposed must be consistent with sanctions for comparable

misconduct. *See* D.C. Bar R. XI, § 9(h)(1); *In re Elgin*, 918 A.2d 362, 373 (D.C. 2007); *In re Berryman*, 764 A.2d 760, 766 (D.C. 2000). In determining the appropriate sanction, the factors to be considered include: (1) the seriousness of the misconduct, (2) the presence of misrepresentation or dishonesty, (3) Respondent's attitude toward the underlying conduct, (4) prior disciplinary violations, (5) mitigating circumstances, (6) whether counterpart provisions of the Rules of Professional Conduct were violated and (7) prejudice to the client. *See, e.g., Martin*, 67 A.3d at 1053; *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc).

The Court of Appeals has further instructed that the discipline imposed, although not intended to punish a lawyer, should serve to maintain the integrity of the legal profession, protect the public and the courts, and deter future or similar misconduct by the respondent-lawyer and other lawyers. *Hutchinson*, 534 A.2d at 924; *Reback II*, 513 A.2d at 231. Additionally, the sanction imposed must not "foster a tendency toward inconsistent dispositions for comparable conduct or . . . otherwise be unwarranted." D.C. Bar R. XI, § 9(h)(1).

Disciplinary Counsel argues that Respondent should be suspended for 90 days and should be required to consult with the D.C. Bar's Practice Management Advisory Service and implement any procedures recommended. Respondent argues that in the event a violation is found, no sanction should be imposed based on mitigating circumstances, including the delay in prosecuting this matter.

1. Seriousness of the Misconduct

Respondent's misconduct was serious. Respondent neglected Ms. Brown's matter by failing to maintain familiarity with the case (after delegating day-to-day responsibility to others in his office), failing adequately to investigate the accident and the precise nature of her injuries, failing to discuss GEICO's settlement demand with Ms. Brown or explain what she would receive

from the settlement, and then settling the case, without Ms. Brown's authorization. Making matters worse, Respondent failed to comply with Ms. Brown's instructions to rescind the settlement and return the settlement funds to GEICO, and instead followed his client's instruction only after she had filed a disciplinary complaint against him.

2. Misrepresentation or Dishonesty

We have found that Respondent made misrepresentations to Disciplinary Counsel in his response to Ms. Brown's disciplinary complaint by mischaracterizing the $8,800 payment from GEICO as a settlement offer and by giving the misleading impression that he had met with Ms. Brown to discuss the offer soon after it was made. In fact, Respondent he did not meet with Ms. Brown until a year and a half later, and only after Ms. Brown demanded a meeting upon learning that the case had settled without her authorization and that his office had ignored her instructions to return the settlement check to GEICO. FF 88.

In addition, Respondent falsely testified that the explanation he gave to GEICO—that Ms. Seegars had erroneously accepted the settlement on Ms. Brown's behalf—was itself a lie told to protect Ms. Brown. Dishonest testimony to a Hearing Committee is a significant aggravating factor. *See In re Bradley,* 70 A.3d 1189, 1195 (D.C. 2013); *In re Cleaver-Bascombe,* 892 A.2d 396, 412-13 (D.C. 2006). "Deliberately dishonest testimony receives great weight in sanctioning determinations because a respondent's truthfulness or mendacity while testifying on his own behalf, almost without exception, is probative of his attitudes toward society and prospects of rehabilitation." *In re Chapman,* 962 A.2d 922, 925 (D.C. 2009) (citations omitted); *In re Goffe,* 641 A.2d 458, 466 (D.C. 1994) (a respondent's decision to testify falsely demonstrated his failure to appreciate the impropriety of his conduct).

3. Respondent's Attitude Towards Underlying Misconduct

Respondent's demeanor at the hearing indicated that he understood the seriousness of the issues. But, as noted above, we are troubled by his less than fully forthcoming response to Disciplinary Counsel's initial inquiry about Ms. Brown's complaint and his testimony at the hearing that Ms. Brown authorized settlement, despite all evidence pointing to the contrary conclusion.

4. Prior Disciplinary Violations

Respondent was previously censured for incompetence, neglect and failure to communicate with a client. *In re Avery,* 926 A.2d 719 (D.C. 2007). The hearing in the previous case was held in 2006, after most of the events that give rise to this matter had already occurred. Thus, although Respondent's prior discipline is an aggravating factor, it is not as aggravating as if the conduct had taken placed after he had already been through a disciplinary proceeding.

5. Mitigating Circumstances

Respondent argues that the passage of time between the underlying events and the hearing should mitigate any sanction imposed. We disagree. Mitigation of a sanction for undue delay is warranted only when "the circumstances of the individual case [are] sufficiently unique and compelling to justify lessening what would otherwise be the sanction necessary to protect the public interest." *In re Ponds*, 888 A.2d 234, 243-44 (D.C. 2005) (emphasis added), (quoting *In re Fowler*, 642 A.2d 1327, 1331 (D.C. 1994)). Here, Respondent argues that he was prejudiced by delay because Ms. Brown died and Ms. Seegar was unavailable. However, as he acknowledges in his brief, the absence of Ms. Brown and Ms. Seegar hampered Disciplinary Counsel's ability to prove parts of its case by clear and convincing evidence. As discussed in part III.A *supra*, the

record does not support the contention that their absence actually prejudiced Respondent's ability to defend himself.

6. Number of Rules Violations

The Hearing Committee has found that Respondent violated Rules 1.1(a), 1.1(b), 1.2(a), 1.3(a), 1.3(c), 1.4(a), 1.4(b), and 1.4(c). We note that all of these violations arise out of the single representation of Ms. Brown, and all relate generally to Respondent's complete failure to advance her interests in any meaningful way.

7. Prejudice to the Client

Disciplinary Counsel does not allege that Ms. Brown was actually prejudiced by Respondent's misconduct, but that she "was not consulted in a meaningful and timely manner about the offers that Respondent's firm made (which were inadequate), and was denied the opportunity to participate in the negotiation of her claims with the insurer." ODC Br. at 49.

B. Recommended Sanction

Disciplinary Counsel argues that a 90-day suspension is consistent with sanctions imposed in cases of comparable misconduct involving neglect. ODC Br. at 51

Respondent argues that if a sanction is imposed, it should be minimal and "fully mitigated by the unfair delay and prejudiced caused by [Disciplinary] Counsel." Resp. Br. at 50 (citing *In re Bland,* 714 A.2d 787 (D.C. 1998) (public censure for violations of Rule 1.1(a), 1.1(b), and 1.3(a)) and *In re Boykins,* 748 A.2d 413 (D.C. 2000) (30-day suspension stayed in favor of probation for violations of Rules 1.1(a), 1.1(b), 1.3(a), 1.3(c), 1.7(b), and 8.4(d)). As discussed above in our recommendation regarding Respondent's motion to dismiss, we find that Respondent was not prejudiced by Disciplinary Counsel's delay in bringing this matter, and thus, there is no reason to mitigate the sanction on that ground.

The "first instance of neglect of a single client matter [generally] warrants a reprimand or public censure." *Chapman*, 962 A.2d at 926; *see In re Sumner*, 665 A.2d 986, 990 (D.C. 1995). But the Court has "imposed greater punishment in neglect cases where there were significant aggravating factors—such as deliberate dishonesty, a pattern of neglect, or an extensive disciplinary history." *Chapman*, 962 A.2d at 926.

This case bears some similarities to cases in which 30-day suspensions have been imposed and some similarities to ones in which 60-day suspensions have been imposed.

In *In re Cole*, 967 A.2d 1264 (D.C. 2009), for example, the Court of Appeals approved a 30-day suspension for an attorney guilty of neglect and dishonesty to a client resulting in a failure to file an application for asylum. Comparing the misconduct there with four cases in which similar misconduct had resulted in 60-day suspensions, the Court found 30 days more appropriate because of several aspects of Mr. Cole's conduct and record: he had made restitution to the client, he had shown remorse for his conduct, and he had testified credibly and honestly about his failure with respect to the client who had brought the complaint against him.

In *In re Ontell*, 593 A.2d 1038 (D.C. 1991), the Court observed that "[n]eglect and failure to seek the lawful objectives of a single client have supported suspensions of 30 days." *Id*. at 1041. "We have imposed longer suspensions when the neglect has been more extreme or coupled with several other violations," the Court noted, and "[w]e have also imposed longer suspensions when the misconduct involved more than one client." *Id*. The sanction approved in *Ontell* itself was also 30 days. Although the respondent was found guilty of neglect and misrepresentation with respect to two clients, the Board and the Court accepted as mitigating factors his candor and credibility, the lack of prejudice to his clients, his very substantial pro bono contributions. *Id*. at 1042 & n.3.

In *In re Outlaw*, 917 A.2d 684 (D.C. 2007), the Court imposed a 60-day suspension on a respondent found guilty of neglect and misrepresentation in part because, as here, the Hearing Committee found that the respondent had not testified credibly in denying one of her failures in handling the matter at issue. *Id*. at 688.

In *Chapman*, the respondent neglected a client's employment discrimination case, causing significant prejudice to his client. *Chapman* "was found to be deliberately dishonest in his dealings with [Disciplinary] Counsel and not credible in his testimony before the Committee[,]" and "refused to take responsibility or show any remorse for his misconduct." *Id.* at 926-27. The Court imposed a 60-day suspension, with 30 days stayed in favor of probation, based on "the range of sanctions for single neglect matters involving deliberate dishonesty with the disciplinary system's investigative or hearing process[,]" the respondent's "lack of candor at the hearing, his lack of remorse, and the prejudice he caused his client balanced against his minor disciplinary history." *Id.* at 927.

As in *Chapman*, Respondent here also neglected a single client matter. The actual prejudice to the client's legal rights present in *Chapman* and in some of the other cases just reviewed is not present here. On the other hand, Respondent's misconduct is aggravated by his prior discipline and by his misrepresentations to Disciplinary Counsel, and his false testimony at the hearing. On balance, we conclude that a 45-day suspension satisfies the requirements of D.C. Bar R. XI, § 9(h).

Disciplinary Counsel also recommends that as a condition of reinstatement, Respondent should be required to prove that he has submitted to an assessment by the D.C. Bar Practice Management Advisory Service ("PMAS") and implemented the recommended changes to his office practices and procedures. DC Br. at 51. Disciplinary Counsel asserts that the PMAS

requirement is necessary to address the deficiencies in Respondent's practice that contributed to the misconduct. We agree.

V. CONCLUSION

For the reasons set forth above, the Hearing Committee finds that Disciplinary Counsel established that Respondent violated Rules 1.1(a), 1.1(b), 1.2(a), 1.3(a), 1.3(c), 1.4(a), 1.4(b), and 1.4(c), and recommends to the Board that he be suspended for 45 days, and that, as a condition of reinstatement, Respondent must undergo an assessment by the D.C. Bar's Assistant Director, Practice Management Advisory Services, or his designee, (and sign a limited waiver permitting that program to confirm compliance with this condition and cooperation with the assessment process), and must agree to implement the recommended changes to his office practices and procedures.

AD HOC HEARING COMMITTEE

/JGC/
Jonathan G. Cedarbaum, Chair

/NE/
Nicole Evers, Public Member

/WAC/
Wallace A. Christensen, Attorney Member

Dated: October 12, 2016

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
MICHAEL L. AVERY, SR., ESQUIRE,	:	
	:	Board Docket No. 11-BD-088
Respondent.	:	Bar Docket No. 2006-D354
	:	
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 447083)	:	

SEPARATE STATEMENT OF ROBERT C. BERNIUS

I join the Board's Report and Recommendation, except for the conclusion that Respondent's conduct violated Rule 1.15(b), and the recommendation that his suspension be stayed in its entirety.

A. Rule 1.15(b)

The Hearing Committee and the majority of the Board appropriately conclude that Respondent was required to give Ms. Brown notice that he had received the settlement offer and check from GEICO. That obligation arose under Rule 1.2 (requiring consultation with the client as to the means to be used to pursue the client's objective) and Rule 1.4(c) (requiring prompt communication of settlement offers). Respondent violated both of those rules.

I disagree, however, with the majority's conclusion that Respondent's failure to notify Ms. Brown that he had received a check from GEICO violated Rule 1.15(b) (now Rule 1.15(c)). The majority's Rule 1.15(b) analysis incorrectly

expands the scope of the Rule, and will create ambiguity and uncertainty in its application to the safekeeping of entrusted funds—an area where clarity and certainty should be paramount. *See* BPR Report ("Maj. Rpt.") at 14-15.

The relevant facts are straightforward. On July 28, 2005, the GEICO claims representative and Respondent's legal assistant believed they had settled Ms. Brown's claim for $8,800. GEICO sent a confirming letter that provided, in part:

> To finalize our agreement, please find enclosed a settlement check and Release for your client to execute. *Kindly hold this settlement check in escrow until we have the properly executed Release in our possession.* It is understood that this settlement is clean and clear herewith and there are no further entities or individuals that have interest in same. Should we be mistaken in any way, do not negotiate this check and contact our office immediately. Any negotiation or disbursement of our payment will be considered a release of all claims.

See Disciplinary Counsel's Exhibit ("BX") G17(a) (emphasis added). The GEICO check was made payable to Ms. Brown and Respondent. As the Hearing Committee found, and the Board agrees, Ms. Brown never approved the settlement and never signed a release. Thus, she was never entitled to receive any of the settlement funds tendered by GEICO (which funds were returned to it more than a year later).

Disciplinary Counsel argued to the Hearing Committee that Respondent violated Rule 1.15(b) when he failed to notify Ms. Brown and Kaiser (a third party with a purported "just claim" to the settlement funds) that he had received the GEICO check. The Hearing Committee disagreed, finding that (i) Respondent

had no obligation under Rule 1.15(b) to notify Ms. Brown of the GEICO check because, since she never accepted the settlement offer, she had no "interest" in the funds, and (ii) he had no duty to notify Kaiser because Kaiser's interest derived from that of Ms. Brown.

Disciplinary Counsel argues to the Board that the Hearing Committee erred because Ms. Brown's "status as a payee on the check, by itself, gave her an interest in the funds." Brief of Disciplinary Counsel in Support of its Exceptions and Response to Respondent's Exceptions to the Hearing Committee's Report and Recommendation at 24. Disciplinary Counsel supports this argument by citing to *In re Lee*, 95 A.3d 66, 75-76 (D.C. 2014), but that case involved different facts and addressed a different legal issue.[1]

Relying only on the "plain language" of the Rule, the majority agrees with Disciplinary Counsel that Rule 1.15(b) required Respondent to notify Ms. Brown that he had received the GEICO check. Maj. Rpt. at 14-15. The majority reasons that Ms. Brown had an interest in the check because "the funds in question were sent by GEICO to Respondent for payment to Ms. Brown; they were made payable to Ms. Brown; the check was endorsed in Ms. Brown's name; and the check was deposited. Although the settlement was rejected, Ms. Brown had an

[1] In *Lee*, the client instructed the respondent to deposit the insurance check, and thus, there was no issue as to whether she accepted the check to settle her insurance claim. Moreover, *Lee* analyzed whether a third-party payee whose name was on a settlement check (accepted and endorsed by the client) had a "just claim" pursuant to Rule 1.15(c), such that the respondent was required to safeguard the check proceeds pending resolution of a dispute as to who was entitled to those proceeds. *Lee* does not address the issue presented here.

interest in the funds, even if she ultimately rejected the settlement offer." *Id.* at 15. The majority concludes that Respondent was not required to notify Kaiser because "it did not have an interest in the funds until Ms. Brown accepted the settlement funds." *Id.* at 15 n.4.

I agree with the majority's conclusion that there was no duty to notify Kaiser, because it had no interest in the GEICO check until Ms. Brown accepted the settlement. However, the same was true for Ms. Brown herself: Ms. Brown clearly would have been *interested* in knowing about the proposed settlement payment, but she did not *have an interest in* the funds until she met the condition on GEICO's offer and executed a release.

Ms. Brown's interest in knowing about the GEICO check was fully protected by Rule 1.4 (Communication) and Rule 1.2 (Scope of Representation).[2] Rule 1.15, on the other hand, is entitled "Safekeeping Property." Its purpose is not to ensure that clients are timely informed about the status of their matters; rather, it is intended to guide lawyers who hold the money or property of others in connection with a representation. The Rule does not define the term "interest," but in *In re Bailey*, 883 A.2d 106, 116 (D.C. 2005), the Court analyzed the meaning of "interest," "property," and other terms used in Rule 1.15(b). Although the Court primarily addressed the claims of third parties, its analysis is instructive.

[2] Rule 1.4 provides that "(a) A lawyer shall keep a client reasonably informed about the status of a matter" and "(c) A lawyer who receives an offer of settlement in a civil case . . . shall inform the client promptly of the substance of the communication." Rule 1.2(a) requires a lawyer to "abide by a client's decisions concerning the objectives of representation," and to "consult with the client as to the means by which they are to be pursued."

The Court noted in *Bailey* that the term "interest" "is embraced within the concept 'right,'" quoting The Restatement of the Law of Property § 5 that "interest" is used "both generically to include varying aggregates of rights, privilege, powers and immunities and distributively to mean any one of them." 833 A.2d at 116 n.20. The Court further found that the Restatement uses the word "property" "to denote legal relations between persons with respect to a thing" and the term "right" as "a legally enforceable claim of one person against another, that the other shall do a given act or shall not do a given act"—and that these terms are "embodied in Rule 1.15." *Id.* at 116 (quoting Restatement, Introductory Note and § 1).

Neither Ms. Brown nor Kaiser had any right to the GEICO funds unless and until Ms. Brown accepted GEICO's settlement offer and executed a release. They therefore did not have an interest in those funds within the meaning of Rule 1.15(b), and that Rule, unlike Rules 1.2 and 1.4(c), did not require Respondent to inform either Ms. Brown or Kaiser that he had received the GEICO check.

Of course, by the terms of its transmittal letter, GEICO could have taken the position that Respondent's negotiation of its check constituted a settlement of the case and the release of all Ms. Brown's claims. If the case had settled—either because Ms. Brown agreed to the settlement or because GEICO enforced it—both Ms. Brown and Kaiser then would have had an interest in the settlement funds. But those are not the facts of this case.

Instead, GEICO did not claim there had been a settlement, but allowed Respondent to return the proposed settlement funds to it. Under the majority's construction of Rule 1.15(b), however, Respondent could not freely have done so. If Ms. Brown had an "interest" in the funds, Respondent would have needed Ms. Brown's explicit permission to return them to GEICO. Otherwise, Respondent would be "in possession of property in which interests are claimed by . . . two or more persons [Ms. Brown and GEICO] to each of whom the lawyer may have an obligation." Rule 1.15(d). Respondent would have been obligated to keep the funds "separate . . . until there [was] an accounting and severance of interests in the property." *Id.* Such a complicated, confusing, and unintended consequence is not mandated by Rule 1.15(b). Ms. Brown did not have an "interest" in the proposed settlement funds, and Respondent did not violate Rule 1.15(b).

B. Sanction

Respondent argues that no sanction should be imposed because of the delay in prosecuting this matter. I agree with the majority and the Hearing Committee that mitigation of a sanction for undue delay is warranted only in unique and compelling circumstances, which are not found here. *See In re Ponds*, 888 A.2d 234, 240 (D.C. 2005); Hearing Committee Report ("HC Rpt.") at 45; Maj. Rpt. at 17.

I also agree with the majority's recognition that it is relevant to consider Respondent's conduct during the period after the misconduct occurred, and that a respondent's ability to demonstrate positive change in himself and his practice

over the course of a long period of time after a representation that brought him into the disciplinary system may be a mitigating factor. *See* Maj. Rpt. at 18.

And, I agree that Respondent appeared contrite at oral argument before the Board and that he accepted responsibility for "failings in his representation" of Ms. Brown, while arguing that the mistakes he made did not give rise to findings of misconduct.

I disagree, however, with the majority's recommendation that Respondent's suspension be stayed in its entirety as a result of Respondent's contrition, the lack of prejudice to the client, and the review by PMAS, which Respondent claims to have undertaken voluntarily. The majority's reliance on Respondent's statements at oral argument regarding corrective action, which were not under oath or subject to cross-examination, are not dispositive evidence that should be considered in mitigation of sanction.

The Board may not readily accept statements at oral argument as established historical fact unless they are conceded by Disciplinary Counsel or have been subjected to fact-finding before the Hearing Committee. To do so is beyond the proper scope of an oral argument. *See In re Battle*, Board Docket No. 2013-D253, at 2 n.4 (BPR Apr. 21, 2017) (declining to increase sanction based on the alleged disclosure of client secrets to the Board because there had been no finding that the facts disclosed were client secrets). This case confirms the prudence of that principle

Respondent asserted at oral argument that he made changes to his practice after 2006, which were evaluated, and found to be positive, by PMAS in 2017—three months before oral argument before the Board. *See* Ex. 1 to Respondent's Brief. I note, however, that Respondent's brief to the Hearing Committee (filed in June 2012, years after the events at issue), did not proffer those changes in its discussion of mitigating factors. There is thus no evidence in the record how, when, or why Respondent changed his practices. Indeed, Respondent did not request the assessment from PMAS until after the Hearing Committee recommended that he do so. As a consequence, I cannot conclude that this was a "significant mitigating factor" that was "undertaken without compulsion" and supports a stay of his period of suspension. Maj. Rpt. at 18.

To the contrary, the Hearing Committee's conclusions about Respondent's credibility are determinative as to sanction. Specifically, the Hearing Committee found that Respondent made misrepresentations to Disciplinary Counsel during its investigation and testified falsely during the hearing. HC Rpt. at 44. The majority agrees that these "are particularly aggravating factors," recognizing the holdings in *In re Bradley*, 70 A.3d 1189, 1195 (D.C. 2013) (per curiam) and *In re Cleaver-Bascombe*, 892 A.2d 396, 412-13 (D.C. 2006), but finds that they are outweighed by Respondent's more recent statements of contrition and changes in his law practice. Maj. Rpt. at 16-18. I do not agree that Respondent's misrepresentations and false testimony can be so easily overcome. I am unaware of any "non-*Kersey*" case in which there was no suspension imposed when a respondent was

found to have been dishonest before the hearing committee. I do not believe that a substantial suspension is appropriate, but I also do not believe that the Board is free to recommend that there be no suspension period.

On the facts found by the Hearing Committee, I agree with the forty-five-day suspension recommended by the Hearing Committee, but disagree that the suspension should be stayed in its entirety.

By: /RCB/
Robert C. Bernius
Chair

Dated: July 31, 2017

Ms. Soller concurs with this Separate Statement.