THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matters of:	:	
JOHN T. SZYMKOWICZ, (D.C. Bar No. 946079),	: :	Board Docket No. 09-BD-048 Bar Docket No. 2005-D179
JOHN P. SZYMKOWICZ, (D.C. Bar No. 462146),	: :	Board Docket No. 09-BD-049 Bar Docket No. 2007-D050
LESLIE SILVERMAN, (D.C. Bar No. 448188),	: :	Board Docket No. 09-BD-050 Bar Docket No. 2007-D214
ROBERT KING, (D.C. Bar No. 922575),	: :	Board Docket No. 09-BD-051 Bar Docket No. 2008-D420
Respondents.	:	
Members of the Bar of the District of Columbia Court of Appeals	:	

ORDER OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

I. PROCEDURAL BACKGROUND

This disciplinary matter arises out of an unfortunate dispute between a brother and sister over the assets of their elderly mother. The adult siblings' disagreement about their mother's estate plan and mental capacity led to a succession of lawsuits in which Respondents played meaningful roles. FF 16.[1] As the litigations played out, the sister complained to Bar Counsel who, in June 2009, filed a Specification of Charges against Respondents John T. Szymkowicz

[1] The following references are used in this report: "BX __," "RX __," and "Tr. __" refer respectively to Bar Counsel's and Respondents' exhibits and the hearing transcript. "HC __" refers to the Hearing Committee Number Seven report, and "FF__" to the Findings of Fact contained within it. "BC Br __" refers to Bar Counsel's Brief in Support of its Exceptions to Hearing Committee Number Seven's Report and Recommendation.

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

(hereinafter referred to as "Szymkowicz"), his son John P. Szymkowicz ("J.P. Szymkowicz"), Leslie Silverman ("Silverman"), and Robert King ("King"). Bar Counsel, alleging violations of D.C Rules of Professional Conduct ("Rules") 1.5(b), 1.6(a)(1), 1.7(b)(2), 1.7(b)(3), 1.7(b)(4), 1.16(a), 8.4(c) and 8.4(d), eventually sought to disbar all four Respondents. FF 1, 16; BX 129, 149, 160; BC Br 59.

A twelve-day disciplinary hearing before Hearing Committee Number Seven began on October 13, 2009 and concluded on March 10, 2010. The core factual issues confronting the Hearing Committee were the capacity of the mother, Genevieve Ackerman, to make considered decisions about her legal representation, and the Respondents' corresponding perception of her ability to do so.

The twelve witnesses who testified in Bar Counsel's case included: Mrs. Ackerman's daughter, Mary Frances Ackerman ("Fran") Abbott and her husband, Frank Abbott; a psychiatrist who evaluated Mrs. Ackerman; a lawyer who prepared Mrs. Ackerman's trust and estate planning documents; Mrs. Ackerman's three caregivers; a geriatric specialist; a social worker who worked with Mrs. Ackerman; the head of the home care agency that provided caregivers to her; a court-appointed visitor for Mrs. Ackerman; and an attorney who met with Mrs. Ackerman in connection with a guardianship matter. FF 4. All four Respondents also testified, as did their expert psychiatrist. FF 6.

The Hearing Committee rendered its exhaustive 219-page Report on September 28, 2012. After considering the voluminous record (including more than 3,800 transcript pages, almost 300 pages of briefs, and more than 3,300 pages of exhibits), and assessing the demeanor and credibility of the witnesses who had testified before it, the Hearing Committee rejected the opinions of Bar Counsel's witnesses and found that, at all relevant times, Mrs. Ackerman had the

capacity to make considered decisions concerning her legal representation. The Hearing Committee also found that none of the Respondents subjectively doubted her ability to do so. As a consequence, the Hearing Committee – with the exception of one charge conceded by one Respondent – concluded "that there was no credible evidence, much less clear and convincing evidence, supporting any of Bar Counsel's charges[.]" HC 155-57.

Bar Counsel has vigorously argued exceptions to the Hearing Committee's report. Those exceptions, however, quarrel almost entirely with the Hearing Committee's factual findings. Although Bar Counsel decries as "almost philosophical" some of the legal issues discussed by the Hearing Committee (BC Br 1), there is no meaningful challenge to the germane legal reasoning contained in the Committee's report.

Our review of the record, the parties' briefs, and oral argument in this matter confirms the Hearing Committee's conclusions. Its painstakingly detailed factual findings are principally based upon its evaluation of the credibility of the hearing testimony. The Board is obliged to accept those findings as long as they are "supported by substantial evidence on the record as a whole[.]" Board Rule 13.7; *In re Cleaver-Bascombe*, 892 A.2d 396, 401 (D.C. 2006). We adopt the Hearing Committee's findings of fact because we agree that they are supported by substantial evidence. Despite the *quantity* of evidence urged by Bar Counsel, when we account for the Hearing Committee's *qualitative* credibility determinations, we agree that Bar Counsel has not clearly and convincingly proved the charges against Respondents. The facts argued by Bar Counsel certainly do not "produce … a firm belief or conviction" that the Hearing Committee got it wrong. *In re Cater*, 887 A.2d 1, 24 (D.C. 2005) (citations omitted).

We summarize our findings in the discussion that follows. Where appropriate, we have supplemented the Hearing Committee's findings with additional factual findings, citing directly to the transcripts and exhibits. *See* Board Rule 13.7.

Based on the facts and upon the law as it applies to those facts, we agree that, as to Respondents Szymkowicz, J.P. Szymkowicz, and Silverman, all charges should be dismissed. As to Respondent King, we agree that he violated Rule 1.5(b) and direct that Bar Counsel issue an informal admonition on that basis; all other charges against him should be dismissed.

II. FINDINGS OF FACT

A. Respondents

Respondent Szymkowicz was admitted to the Bar of the District of Columbia Court of Appeals on March 6, 1978, and assigned Bar Number 946079. FF 109. Bar Counsel charged him with violating Rule 1.7(b)(2) (material limitation conflict) and 1.7(b)(3);[2] Rule 1.16(a) (failure to withdraw); Rule 8.4(c) (dishonesty, fraud, deceit and misrepresentation); and Rule 8.4(d) (serious interference with the administration of justice). His son, Respondent J.P. Szymkowicz, was admitted on February 1, 1999 and assigned Bar Number 462146. FF 178. Bar Counsel also charged J.P. Szymkowicz with violating Rules 1.7(b)(2), 1.7(b)(3), 1.16(a), 8.4(c) and 8.4(d). The Szymkowiczes practiced together in Szymkowicz & Szymkowicz, LLP. FF 111.

Respondent Silverman was admitted on October 2, 1995 and assigned Bar Number 448188. FF 217. She has been a sole practitioner since 1999. FF 220. Bar Counsel also

[2] Bar Counsel conceded a failure to prove a violation of Rule 1.7(b)(3) by Szymkowicz or by J.P. Szymkowicz. *See* Bar Counsel's Proposed Findings of Fact filed April 19, 2010 at 88 n. 29. The Hearing Committee agreed (HC 13 n. 8), as do we.

charged her with violating Rules 1.16(a), 8.4(c), and 8.4(d), as well as Rule 1.6(a)(1) (revealing client confidences or secrets) and Rule 1.7(b)(4) (personal interest conflict).

Respondent King was admitted on November 4, 1969 and assigned Bar Number 922575. FF 263. He has been a sole practitioner since the mid-1970's. FF 266. Bar Counsel charged him with violating Rule 1.5(b) (failure to provide an engagement letter), along with Rules 1.6(a)(1), 1.7(b)(4), 1.16(a), 8.4(c) and 8.4(d).

B. The Ackerman Family Trusts

Stephen Ackerman, Sr. (who died in 2005 and played no role in this matter) and his wife, Genevieve Ackerman, had two children: Stephen Ackerman, Jr. (hereinafter "Ackerman"), and Fran Abbott, who is married to Frank Abbott. FF 18.

Because of the parents' advanced age and deteriorating health, attorney Tas Coreonos was engaged to prepare an estate plan for them. Coreonos drafted revocable trusts for each of the senior Ackermans. FF 18. The primary purpose of Mrs. Ackerman's trust was to support her during her lifetime, and the secondary purpose was to support her son. BX 70 at 125. Genevieve Ackerman signed her trust documents in May 2002. No one contends that she lacked the capacity to do so. FF 95-96.

The assets of Mrs. Ackerman's trust included real property on Plymouth Street, N.W. and on North Carolina Avenue, S.E. in Washington, D.C. (where Ackerman lived), and in Sea Colony, Delaware. FF 18; BX 9 at 19. Stephen Ackerman and Fran Abbott were equal residual beneficiaries of the trust. The trust made monthly payments to Ackerman, which were treated as advances of his share of the residual estate. Frank Abbott was named trustee, with Fran Abbott as his successor. FF 18, 97.

Coroneos inserted a "no-contest" provision (also referred to as an "*in terrorem*" clause) into the trust agreement, to discourage subsequent challenges to it. Tr. 1342-43. The clause stated that anyone who challenged the trust would "be deemed to predecease" Mrs. Ackerman, and essentially be disinherited. BX 9 at 15. The no-contest provision was the subject of much of the controversy in this case. FF 97.

C. The Ackerman Lawsuits

1. *Stephen J. Ackerman, Jr. vs. Genevieve Ackerman Family Trust, Frank M. Abbott and Mary Frances Abbott* ("*Ackerman I*")

In the summer of 2002, Stephen Ackerman retained Respondents Szymkowicz and J.P. Szymkowicz because he disputed the terms of his mother's trust. FF 20. Ackerman asserted that his mother wanted him to have the Sea Colony real estate, so it should not have been included in the trust assets. FF 113. A year later, in August 2003, the Szymkowicz Respondents filed suit in Superior Court on behalf of Ackerman against the trust and the Abbotts, seeking to remove them as trustees and to reform the trust by transferring the Sea Colony property to Ackerman (hereinafter "*Ackerman I*"). FF 20, 113; BX 34.

In March 2004, in response to the *Ackerman I* defendants' summary judgment motion, Szymkowicz met with Mrs. Ackerman and secured an affidavit from her. BX 40. In the affidavit, Mrs. Ackerman stated that she did not understand that the Sea Colony property had been conveyed to her trust, and that she had actually intended to leave that property to her son. She also said she wanted to name her son as co-trustee, and to eliminate the no-contest clause of the trust because she had not intended to include it. FF 114.

The procurement of that affidavit, and Mrs. Ackerman's purportedly diminished cognitive state when she signed it, prompted many of the charges against Szymkowicz and J.P.

Szymkowicz. Bar Counsel alleged that Mrs. Ackerman was incompetent when she executed the document, and that the Szymkowiczes knew it.

The Hearing Committee, however, disagreed. It found that Szymkowicz met twice with Mrs. Ackerman to prepare the affidavit and, on both occasions, tested her to satisfy himself as to her competence. In doing so he asked her general background questions, and also asked specific questions about her trust. Her responses led him to believe that she understood the contents of the affidavit, as well as its purpose and effect. Indeed, because she was blind due to macular degeneration, he read the affidavit to her paragraph-by-paragraph, and confirmed that she both understood it and that it was true. FF 125, 132; Tr. 2272. The Hearing Committee considered and rejected the countervailing evidence proffered by Bar Counsel on this issue, finding that Bar Counsel failed to prove that Mrs. Ackerman lacked the capacity to execute the affidavit, and failed to prove that Szymkowicz knew, or should have known, that she lacked the capacity to do so. FF 127-30. Indeed, the Hearing Committee affirmatively found that Mrs. Ackerman understood the purpose and effect of the affidavit when she signed it, and that Szymkowicz reasonably believed as much. FF 132, 156-58.

Relying in part on the affidavit, the *Ackerman I* court denied summary judgment. BX 41. Trial before the court took place in early May 2005. BX 42. On May 17, 2005, however, the court dismissed Ackerman's claims and granted judgment in favor of the Abbotts, holding that the no-contest provision was valid and enforceable as against Ackerman because his mother had read and understood the provisions of her trust, including the no-contest clause. BX 43. On October 12, 2006, the Court of Appeals affirmed that decision. It agreed that the no-contest provision was valid and that Ackerman's "lawsuit to 'reform' the trust clearly violated it." *Ackerman v. Genevieve Ackerman Trust, et al.*, 908 A.2d 1200, 1204 (D.C. 2006). As a

consequence, Stephen Ackerman was disinherited from his mother's estate, and Mrs. Abbott became its sole residual beneficiary. FF 20.

2. *Genevieve Ackerman vs. Frank M. Abbott ("Ackerman II")*

When Mrs. Ackerman realized that the *Ackerman I* litigation could trigger the no-contest clause and disinherit her son, she became upset and wanted it removed from the trust provisions. FF 22, 133, 197. On the eve of trial in *Ackerman I*, Szymkowicz – now also representing Mrs. Ackerman – filed on her behalf a second Superior Court complaint against Frank Abbott as trustee ("*Ackerman II*").[3] BX 49. The new action sought to revoke the trust entirely, and to transfer its assets back to Mrs. Ackerman. FF 22, 133; BX 49 at 4. The dual representation by the Szymkowicz Respondents of both Ackerman and his mother underpins Bar Counsel's conflict of interest charges against them.

The purpose of the lawsuit was to revoke the trust and give control of its assets to Mrs. Ackerman. She also wanted to transfer property to her son and to provide for him financially. She did not want Frank Abbott or her daughter to control her assets. FF 116, 165, 197. Had the litigation been successful, the assets of Mrs. Ackerman's trust would have been reduced, and her son's assets may have been enhanced. To that extent, there was a *potential* conflict of interest between the clients of the Szymcowiczes.

Yet Bar Counsel's claim that there was an *actual* conflict of interest did not survive the fact-finding process. The Hearing Committee determined that Mrs. Ackerman's interests were aligned with those of her son, and that *Ackerman II* sought to achieve their joint objectives. FF 104, 108, 115. Mrs. Ackerman had an unwavering history of protecting her son and providing

[3] Mrs. Ackerman was initially represented in the matter by another attorney, who had a heart attack in December 2004 and was thereafter unable to continue in the representation. Tr. 2465-66. It was she who importuned Szymkowicz to represent her. Tr. 2291.

for him throughout his life. FF 98, 103. She trusted him, and relied upon his advice. FF 140. She supported the objectives of the litigation – to terminate the trust, to transfer control of her assets to herself and her son, and to prevent him from being disinherited – which were consistent with her value system. FF 140, 148-49. Despite her desire for peace in her family, Mrs. Ackerman no longer wanted the Abbotts to act as trustees, and was willing to achieve her objectives through litigation. *See infra*, p 24. For all of these reasons, and because Mrs. Ackerman wanted to provide financial security to her son, there was no *actual* conflict of interest between the two clients. FF 137-49; *see* p 23-26, *infra*.

Considering – and rejecting – the evidence urged by Bar Counsel, the Hearing Committee also found that when Mrs. Ackerman agreed to the joint representation, she had the capacity to do so, and that Szymkowicz took appropriate steps to ensure that she did. It correspondingly found that Szymkowicz reasonably believed she had the capacity to agree to a joint representation. FF 118, 134-36, 140, 151, 188, 193, 198-201; *see* p 14-20, *infra*.

In November 2005, as the *Ackerman II* litigation progressed, Mrs. Ackerman executed two powers of attorney in favor of her son. Szymkowicz drafted the documents and videotaped their execution. FF 117. The Hearing Committee again found that she had the capacity to understand and execute those documents, and that Szymkowicz reasonably believed as much. FF 143-46, 160. Our review of the videotape ratifies that conclusion. BX 16; FF 143.

When *Ackerman II* was called for non-jury trial in February 2007, defense counsel identified Szymkowicz as a witness. BX 60 at 5 - 8. The court was reluctant to proceed with the trial under those circumstances. *Id.* Mrs. Ackerman told the court that she wanted Szymkowicz to continue as her attorney, but eventually agreed that under the circumstances he should withdraw. *Id*. at 20 - 24. On March 7, 2007, Szymkowicz formally withdrew as attorney for

Mrs. Ackerman in *Ackerman II* because of the conflict posed by his potentially being called as a trial witness. FF 22; BX 61.[4]

Szymkowicz recommended to Mrs. Ackerman that Respondent Silverman replace him as counsel in *Ackerman II*. FF 23. To that end, Silverman also met with Mrs. Ackerman and discussed the litigation with her at length. Silverman too concluded that Mrs. Ackerman understood the litigation and the issues it presented. The next day, Silverman re-confirmed that Mrs. Ackerman wanted to retain her. FF 226.

Silverman entered her appearance in *Ackerman II* on March 7, 2007. FF 226; BX 62. In turn, Silverman asked Respondent King to assist her as trial counsel. FF 23. King also met with Mrs. Ackerman on multiple occasions to discuss the representation. FF 267. He too carefully questioned her, and was also convinced that Mrs. Ackerman both understood the *Ackerman II* litigation and had the capacity to make decisions concerning it. FF 270-73. He subsequently entered his appearance on her behalf. BX 65.

On May 30, 2007, Silverman and King filed a motion on behalf of Mrs. Ackerman for a temporary restraining order in *Ackerman II*. BX 66. The motion, which inspired some of Bar Counsel's charges against them, sought to prevent the trustee from selling the North Carolina Avenue property. FF 230, 274. Once again, the Hearing Committee found that Bar Counsel failed to prove that Mrs. Ackerman lacked capacity to approve the motion, or that Silverman and King doubted her capacity to do so. FF 231, 275.

[4] Bar Counsel claims that the trial court forced Szymkowicz to withdraw because of a conflict of interest between his clients. Specification of Charges at ¶ 65. The transcript, however, shows that the trial court was concerned with a different conflict, *i.e.*, Szymkowicz appearing in the proceeding as both witness and advocate. *See* Rule 3.7(a); BX 60 at 5-8; Tr. 2335, 2485-86.

The *Ackerman II* case was tried in July 2007. BX 69-70. The court held that although Mrs. Ackerman did want control of the trust assets, she had relinquished that right when she signed the trust documents. BX 70 at 131. The court found no basis upon which to remove Mr. Abbott as trustee or to order an accounting, and refused to consider whether Mrs. Ackerman had the capacity to file her lawsuit. *Id*. at 134–38.

3. *Frank M. Abbott, Trustee v. Genevieve Ackerman*

On September 11, 2007, Mr. Abbott filed a complaint for a declaratory judgment against Mrs. Ackerman in Superior Court, the purpose of which was to ensure that the entire interest in the real property on North Carolina Avenue was placed into Mrs. Ackerman's trust. BX 25. Silverman represented Mrs. Ackerman in the litigation, and the Szymkowicz Respondents intervened on behalf of Stephen Ackerman. FF 232; BX 86, 87.

During that period, Szymkowicz – who no longer represented Mrs. Ackerman - drafted for her eventual signature an assignment of the North Carolina Avenue property, along with a will that changed the beneficiary of her estate from the trust to her son and daughter. FF 120; BX 22, 23. Szymkowicz, however, did not discuss the terms of either document with Mrs. Ackerman, did not advise her to sign them, and was not present when she did so. Rather, he sent the documents to Ms. Silverman as "draft models from which to work." FF 119, 146. The execution of the will was witnessed by two third parties. BX 23. Bar Counsel pointed to Szymkowicz's role in drafting those documents to support the conflict charges lodged against him, but the Hearing Committee rejected the contention, concluding that when he did so, Szymkowicz did not act as Mrs. Ackerman's counsel. FF 166-68.

The court granted summary judgment in favor of Mr. Abbott. BX 97-98. Ackerman appealed, and the Court of Appeals affirmed. *Ackerman v. Abbott*, 978 A.2d 1250 (D.C. 2009);

FF 24; BX 99, 109. Silverman also noticed an appeal on behalf of Mrs. Ackerman, but never perfected it because her client neither authorized nor paid her to do so. BX 100. The Court of Appeals dismissed that appeal in October 2008. FF 233-35; BX 108.

4. *In re Genevieve S. Ackerman*

On November 28, 2007, Stephen Ackerman – without Respondents' involvement – filed a *pro se* petition with the Probate Court, seeking to be named guardian and conservator for his mother on the ground that she was incapacitated because "she was legally blind owing to macular degeneration." FF 25; BX 111; Tr. 2906.

Ackerman later withdrew the petition but, in March 2008, Mrs. Abbott filed her own petition requesting that *she* be appointed her mother's guardian and conservator. FF 26; BX 117. In April 2008, Ackerman (acting with his mother's Power of Attorney), retained Respondent King to represent his mother, but King never formally entered an appearance. FF 267, 277-78. Nevertheless, King's tenuous relationship with that case led to some of Bar Counsel's charges against him.

On June 24, 2008, the Probate Court found that Mrs. Ackerman "was not competent" after 2004.[5] Accordingly, the Court declared powers of attorney in favor of Stephen Ackerman invalid, and reinstated a February 11, 1999 power of attorney in Mrs. Abbott's favor. The Court found no need to appoint a guardian because, under that power of attorney, Mrs. Abbott had sufficient authority to control Mrs. Ackerman's financial and personal affairs. FF 26.

[5] The court premised its ruling on the testimony of four witnesses, three of whom testified at the hearing in this disciplinary matter. The Hearing Committee, however, found their testimony unpersuasive. Although it considered the court's ruling, the Committee properly concluded, based on principles of collateral estoppel, that the court's opinion was not legally binding upon it (*Franco v. District of Columbia*, 3 A.3d 300, 304-05 (D.C. 2010)), and rejected its factual holding because the record in this case is "substantially different" from that before the court. HC 12 n. 7, 123 n. 42; *see* Tr. 2483.

D. The Hearing Committee's Evidence Determinations

The Hearing Committee report contains a lengthy and thorough explication of three fundamental evidentiary issues that confronted it: the credibility of Bar Counsel's key witness; Mrs. Ackerman's capacity to make reasoned decisions concerning her legal representation; and Respondents' concomitant perception of her capacity. We address those issues in turn.

1. Mrs. Abbott's Credibility

Hearing Committees must assess the credibility of the witnesses who testify before them. *See In re Ukwu*, 926 A.2d 1106, 1115 (D.C. 2007). Indeed, the Hearing Committee is in the best position to judge credibility because it has "the opportunity to observe the witnesses and assess their demeanor…." *In re Ray*, 675 A.2d 1381, 1387 (D.C. 1996); FF 34. As a consequence, we must defer to a Hearing Committee's credibility determinations. *In re Micheel*, 610 A.2d 231, 234 (D.C. 1992). That principle, we believe, is of particular significance in this matter, where the testimony of the parties' witnesses on the central fact issues so starkly diverged.

The Hearing Committee devoted substantial attention to the credibility of Mrs. Abbott. Although it found that she cared deeply for her mother, the Hearing Committee noted her longstanding tension and disagreements with her brother, and concluded that her testimony with respect to him was unreliable. FF 38, 39. More significantly, it forcefully concluded that her "palpable anger at the Respondents, especially [Szymkowicz]" fatally undermined her credibility. FF 36. Assessing the content of her testimony in light of her demeanor, the Hearing Committee concluded that "her extreme anger and hostility toward Respondents" led her to press "substantially baseless and unwarranted charges of ethical misconduct" in this case. FF 36, 40-41. As a result, it concluded that Mrs. Abbott's testimony "cannot be accepted as reliable or even relevant evidence against Respondents." FF 42.

We have reviewed the factual record relied upon by the Hearing Committee, and cannot disagree with its conclusion that her testimony should be disregarded.

That credibility determination has paramount significance to our assessment of this case. In its Second Prehearing Order dated October 7, 2009, the Hearing Committee ordered Bar Counsel to identify the witnesses who would offer evidence in support of each allegation in the Specification of Charges. In response, Bar Counsel proffered Mrs. Abbott as the supporting witness for *every* operative assertion in this case. Specification of Charges (annotated) (filed Oct. 9, 2009). To the considerable extent, therefore, that Bar Counsel's fact-based exceptions to the Hearing Committee's opinion rely upon Mrs. Abbott's testimony, we reject them.

2. Mrs. Ackerman's Mental Capacity

The Hearing Committee appropriately phrased the central fact questions in this matter as whether Bar Counsel proved by clear and convincing evidence (a) that Mrs. Ackerman did not possess the capacity to make decisions concerning her representation, and (b) that Respondents realized that she did not.

Mrs. Ackerman's mental capacity, at the times when events meaningful to her representation by Respondents took place, is critical to our analysis. FF 121, 195, 225, 269. This is so because Bar Counsel charged that, during their representation of Mrs. Ackerman, Respondents engaged in conflicts of interest, dishonesty, and fraud. BX 2. Those charges fundamentally rest on the contention that Mrs. Ackerman was "incompetent" because she suffered from dementia, "cognitive impairment" and "memory problems;" was unable to understand or process the matters in which she was involved; and was therefore mentally incapable of hiring or directing her lawyers. FF 27. In essence, Bar Counsel adopted Mrs. Abbott's contention that Mrs. Ackerman was an unknowing party to litigation brought in her

name but against her interests, and that Respondents enabled Mrs. Ackerman's acquisitive and manipulative son to take advantage of her. FF 27.

The operative standard applied by the Hearing Committee in assessing Mrs. Ackerman's capacity was "whether [she] possess[ed] a sufficient mind to understand, in a reasonable manner, the nature, extent, character, and effect of the particular transaction[s] in which she was engaged, . . . whether or not she [was] competent in transacting business generally." *Butler v. Harrison*, 578 A.2d 1098, 1100 (D.C. 1990) (internal citations omitted). Bar Counsel did not except to the Hearing Committee's reliance on *Butler* and, at oral argument, acknowledged its applicability to this case.

Under *Butler*, adults are presumed competent, "and the burden of proof is on the party asserting incompetency[.]" *Id.* at 1100-01; *accord, Uckele v. Jewett*, 642 A.2d 119, 122 (D.C. 1994). Although Mrs. Ackerman may have been "incapacitated" under the D.C. guardianship statute, that status does not constitute a finding of legal incompetence. Indeed, the presumption is to the contrary. D.C. Code § 21-2004 (2001). Bar Counsel was obligated to "show not merely that [Mrs. Ackerman] suffer[ed] from some mental disease or defect such as dementia, but that such mental infirmity rendered [her] incompetent to execute the particular transaction[s]" at issue. *Butler*, 578 A.2d at 1101.

Applying this standard, the Hearing Committee carefully analyzed whether Mrs. Ackerman had sufficient capacity at each of the discrete times she made decisions relevant to this case, because capacity is "situation-specific … depending on the particular event or transaction . . . ." ABA Commission on Law & Aging and American Psychological Ass'n, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* 5 (2005) (hereinafter "ABA Assessment"); *see Uckele*, 642 A.2d at 122-23. It found that despite her

dementia, Mrs. Ackerman understood the matters at issue, however complex they may have seemed. FF 28. It rejected Bar Counsel's claim, finding instead that the evidence:

> demonstrates clearly and convincingly that at all relevant times, Mrs. Ackerman had the capacity to contract, and thus, the capacity to retain counsel and direct Respondents in the cases giving rise to this disciplinary matter.

FF 29.

Though hotly disputed by Bar Counsel, that finding is amply supported in the record. Respondents offered – and the Hearing Committee believed – their own consistent testimony that Mrs. Ackerman was fully capable of determining her own interests. The testimony of a single attorney is sufficient to establish competence at the relevant time. *Butler*, 578 A.2d at 1101 (testimony of attorney that "nothing unusual happened" when her client executed a quitclaim deed was a sufficient basis upon which to find competency). Here, three Respondent attorneys all testified that Mrs. Ackerman was competent when they interacted with her, and the Hearing Committee credited their testimony.[6] We therefore credit it as well, and believe it to be central to the resolution of this question of fact. In this respect we differ from our concurring colleagues, who overlook the testimony of Respondents on this issue.[7]

The Hearing Committee, however, did not rely on the word of Respondents alone. It also credited the views of Dr. Richard Ratner, a psychiatrist who has in other cases testified as an expert witness for Bar Counsel. Dr. Ratner had met with Mrs. Ackerman multiple times and reviewed her medical records. He agreed with Respondents that Mrs. Ackerman was competent to participate in the legal proceedings, was capable of understanding their purpose and (although

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[6] Respondent J.P. Szymkowicz offered no relevant testimony on this issue because he never interacted personally with Mrs. Ackerman. Tr. 1935.

[7] *See* Concurring Statement of Theodore D. Frank ("Concurring Statement") at 6-11.

she had dementia) was "competent to participate" in her effort to regain control of her trust and have her property managed by her son. FF 63-71.

The videotape of Mrs. Ackerman executing documents lent further support to the Hearing Committee's competency conclusion (BX 16, FF 70), as did the report of a physician who evaluated Mrs. Ackerman (at Mrs. Abbott's request) and agreed that Mrs. Ackerman "maintains a good grasp on who she is and what she wants to have happen." Despite her blindness and memory problems, Mrs. Ackerman was "clearly capable of making decisions in her own best interest." FF 21, 62, 65, 70-71, 76-78, 94; BX 26. Finally, the Hearing Committee noted the consistent view of Mrs. Ackerman's personal physician, Dr. Robert Blee, who also felt she was competent. FF 65-66. To the same general effect was the observation of Judge Hamilton, who volunteered to Mrs. Ackerman in June 2007 that she didn't "seem to have any problem" with her mental state. BX 81 at 29.

None of the evidence tendered by Bar Counsel was sufficient to alter the Hearing Committee's conclusion. FF 75, 81, 84, 93, 94. Denigrating the Hearing Committee's rejection of its evidence, Bar Counsel aggressively criticizes its "failure to consider much, if not most, of the evidence" or "even to acknowledge it," and characterizes this purported failing as a "dereliction of [its] responsibility." BC Br 48-49. The *ad hominem* attack on the Hearing Committee's work product is unfortunate. The Hearing Committee did consider countervailing evidence (*see, e.g.*, FF 79-93). The fact that it did not swell its report beyond 219 pages, further to detail evidence it found unpersuasive, does not mean the Committee ignored it.

We have reviewed the extensive evidence of Mrs. Ackerman's capacity, pro and con. Unlike our concurring colleagues, we believe that it presents a quintessential question of fact. The Hearing Committee's resolution of that core factual issue – Mrs. Ackerman's competence to

instruct her attorneys in matters relating to their representation of her – is supported by substantial evidence in the record. The Hearing Committee evaluated the credibility of all the witnesses who testified on this issue during the lengthy hearing, and there is no basis upon which to disturb its conclusion on this issue. We therefore adopt it.

3. Respondents' Perception of Mrs. Ackerman's Capacity

In addition to finding that Mrs. Ackerman had the capacity to make considered decisions, the Hearing Committee concluded that Respondents reasonably believed that she did. FF 31, 132, 227, 270. The Hearing Committee appropriately reached that result using the analytical approach contained in Rule 1.14. FF 49, 57-61.

When a client's capacity to make considered decisions in connection with a representation is diminished, a lawyer must "as far as reasonably possible, maintain a typical client-lawyer relationship with the client." Rule 1.14(a). The lawyer must do so unless the lawyer reasonably believes that "the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken *and* cannot adequately act in the client's own interest." Rule 1.14(b) (emphasis added). This demanding standard applies because even a client with diminished capacity:

> often has the ability to understand, deliberate upon, and reach conclusions about matters affecting [her] own well-being . . . . Many people with intellectual disabilities, while lacking sufficient capacity to make binding decisions, have, and are capable of expressing, opinions about a wide range of matters that affect their lives.

Id. cmt. [1].[8] Even a poor or unwise decision does not compel a conclusion of incapacity if it

[8] The conduct in this case occurred both before and after the 2007 revisions to Rule 1.14(a). The former Rule referred to clients under a "disability" whose "ability" to make considered decisions was "impaired." The current Rule speaks of a client with "diminished capacity" whose "capacity" to make such decisions is "diminished." The change reflects the change in focus of

Footnote continued on next page

reasonably comports with a client's past values and patterns of conduct. *See* Rule 1.14 cmt. [6]; ABA Formal Op. 96-404 at 3 (1996).[9]

Lawyers may gather information about a client's historical values and patterns of decision-making by talking with a client's family or other interested persons. *Id*. at 3-4. They should also consider:

> such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind, ability to appreciate the consequences of a decision, the substantive fairness of a decision, [and] the consistency of a decision with the known long-term commitments and values of the client.

Rule 1.14 cmt. 6. Because mental capacity may change with time and circumstance, a lawyer should continually assess whether the client possesses the capacity to act in the particular situation confronting her. ABA Assessment at 5; ABA Formal Op. 96-404 at 2 n.3; *see* Rule 1.14 cmt. [6].

Finally, and perhaps most critically, the Rule "does not authorize the lawyer to take protective action because the client is not acting in what the lawyer believes to be the client's best interest, but only when the client 'cannot adequately act in the client's own interest.'" ABA Formal Op. 96-404 at 3 (emphasis omitted). "[T]he client's capacity must be judged against the standard set by that person's own habitual or considered standards of behavior and values, rather than against conventional standards held by others." *Id*. at n.5 (citation omitted). "[A] lawyer

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the Rule to the "continuum" of a client's capacity. ABA Ethics 2000 Commission's Report on the Model Rules of Professional Conduct, Rule 1.14 Reporter's Memo of Explanation of Changes 46 (submitted August 2001) ("ABA Ethics Report"). The terminology change does not affect the analysis in this case, because the pre-2007 version of Rule 1.14 also noted that "the law recognizes intermediate degrees of competence." *See* Rule 1.14 cmt. [1].

[9] Comment [6] was not appended to the pre-2007 Rule, but provides us "guidance on determining the extent of a client's diminished capacity." ABA Ethics Report 47.

must keep the client's interests foremost and . . . must look to the client, and not family members or others, to make decisions on the client's behalf." Rule 1.14 cmt. [3]. It is the lawyer's reasoned judgment on this issue that is controlling. *Id*.; FF 44.

The Hearing Committee findings demonstrate that Respondents adhered to these protocols in their dealings with Mrs. Ackerman, and that after doing so, Respondents reasonably believed that Mrs. Ackerman had the capacity to guide Respondents in their representation of her. *See* Tr. 2944-45. We have assessed the voluminous evidence on these points and, Bar Counsel's entreaties notwithstanding, find that the Hearing Committee's findings are supported by substantial evidence. At all relevant times, Respondents reasonably believed that Mrs. Ackerman had the capacity to make reasoned decisions in connection with their representation of her.

III. CONCLUSIONS OF LAW

A. Conflict of Interest

1. Rule 1.7(b)(2) (Szymkowicz and J.P. Szymkowicz)

Bar Counsel claims that Szymkowicz and J.P. Szymkowicz violated Rule 1.7(b)(2) because their simultaneous representation of Mrs. Ackerman and Stephen Ackerman constituted a conflict of interest:

> (b) Except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if: . . . (2) Such representation *will be or is likely to be adversely affected* by representation of another client…
>
> (c) A lawyer may represent a client with respect to a matter in the circumstances described in paragraph (b) above if each potentially affected client provides consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation.

Rule 1.7(b)(2)(emphasis added).

Clients frequently prefer to have one lawyer jointly represent their interests in litigation. That approach can enhance efficiency, save costs and facilitate the clients' presentation of a united front. The Rule permits joint representations unless the clients' interests differ so markedly that the representation of one will, or is likely to, adversely affect representation of the other.

In litigation, typical multiple representation conflicts include inconsistent positions to be taken in the case, discrepancies in the clients' material testimony, or different settlement positions. If plaintiff-clients jointly engage a lawyer, "[n]o conflict of interest is ordinarily presented . . ." Restatement of the Law Third, *The Law Governing Lawyers* §128 cmt. d, (i) ("Restatement"). On the other hand, defendant-clients more typically have at least a potential conflict, since all "would usually prefer to see the plaintiff defeated altogether, but if the plaintiff succeeds, each will often prefer to see liability deflected mainly or entirely upon the other defendants." *Id*. cmt. d, (ii).

A lawyer contemplating a joint representation must be mindful that "[n]o matter how consistent the apparent interests of clients in a joint representation may appear at the onset . . . such a relationship poses inherent risks of future conflicts of interest[,]" and that "if the common representation fails . . . the result can be additional cost, embarrassment and recrimination." D.C. Ethics Op. 296; *see* Rule 1.7 cmt. [14]. Thus, if a future conflict is likely to evolve, it is preferable to turn down – or at least circumscribe – the joint engagement. Rule 1.7 cmt. [22]; D.C. Ethics Op. 248.

"Multiple representations[,]" however, "do not always present a conflict of interest requiring client consent." Restatement § 130:

> [Rule 1.7] divide[s] potential conflict of interest situations into three categories: (1) cases in which representation is absolutely forbidden, (2) cases in which dual representation is permissible after informed consent of all affected clients is obtained, and (3) cases in which dual representation is permitted without client consent.

Griva v. Davison, 637 A.2d 830, 842 (D.C. 1994). "Unless there is risk that the lawyer's representation would be affected adversely, there is no conflict of interest." Restatement §121 cmt. c, (1). Whether the lawyer needs to seek consent from both clients depends on whether a current conflict exists or a future conflict is likely. "[I]f an objective observer can identify and describe concrete ways in which one representation may reasonably be anticipated to interfere with the other, . . . a cognizable conflict arises under our rules, and disclosure must be made and a waiver sought." D.C. Ethics Op. 265 (1996). On the other hand, if the clients are "are on the same side of the issue," *i.e*., "there is no present adversity of positions, and it seems unlikely that direct adversity will arise in the future," the law firm may accept the second representation without obtaining the consent of both clients." D.C. Ethics Op. 301.

"A necessary predicate to a decision to undertake joint representation is an initial determination that the interests of the joint clients can be pursued without conflict." D.C. Ethics Op. 296. It is up to the lawyer to undertake an inquiry adequate to make that determination. Trial lawyers routinely fulfill that obligation by discussing the issue with their potential clients; in doing so, they necessarily rely principally upon their clients to tell them if their interests conflict.

Here, Szymkowicz did just that. He determined (and the Hearing Committee found) that Mrs. Ackerman and her son were both competent to determine whether their interests were aligned. Mother and son told him they both wanted the same thing. No conflict between their objectives existed, and no conflict waiver was necessary. FF 98-108.

In this respect, the Hearing Committee's unequivocal rejection of Mrs. Abbott's testimony takes on major significance. The theory of Bar Counsel's case reflected Mrs. Abbott's belief that transferring control of Mrs. Ackerman's assets from the Abbotts to her son was not in her personal interest. Bar Counsel's argument is premised on the claim that the Abbotts knew what was best for Mrs. Ackerman, so transferring control of her trust assets to her supposedly profligate son was not good for her. BC Br 28 (Mrs. Ackerman had a "life-long pattern of entrusting her financial affairs to" the Abbotts). Acknowledging that Mrs. Ackerman "trusted her son and would do what he said," Bar Counsel nevertheless theorizes that she was susceptible to "manipulation, particularly by her son." BC Br 28, 9. Our concurring colleagues take a similar approach, defining Mrs. Ackerman's interests as purely fiscal and concluding that "viewed objectively," they were "adverse to those of her son." Concurring Statement at 17. Yet there is no credible evidence that her son in any way abused or financially victimized his mother, that he would dissipate her assets, or that he did not have her best interests at heart. To the contrary, Respondents credibly testified that the interests of Mrs. Ackerman and her son were "100% aligned." Tr. 2919.

In assessing this issue, Szymkowicz undertook an inquiry adequate to assure himself that no conflict existed. The relationship between mother and son was close. He "was over at the house 3 or 4 times a week with his mother[,] took her every place she went. And I didn't see that he was in it for himself, he was in it for his mother." Tr. 3377. Ackerman "had a power of attorney and all his actions were such that they were showing his love for his mother." *Id.* According to Mrs. Ackerman, her son was "the kindest person [she'd] ever met." FF 107. She was concerned for her son, determined to take care of him, and wanted him to control her finances. FF 30; 98-106; Tr. 2053, 2534, 3100, 3143, 3147-49, 3377-78.

Their objectives were unified: both Mrs. Ackerman and her son "wanted the same thing." Tr. 1671. Indeed, "[t]he battle in this case was an alignment of Mrs. Ackerman and her son against Mr. Abbott and … his wife." Tr. 2914. Mrs. Ackerman wanted to help her son, even to her financial detriment. FF 30; *see* ABA Assessment at 38 (2005) (noting that it is common for elderly clients, especially those with limited life expectancies, to prioritize caring for family members above the preservation of their own financial assets). She "didn't like the trust in the beginning, and she had been arguing with her daughter over that trust almost through [*sic*] its inception." FF 100; Tr. 2308. Mrs. Ackerman disagreed with Mr. Abbott's actions and didn't want him to continue as trustee. FF 102; Tr. 2952-53, 3149. Mr. Abbott was perceived to be acting at the behest of his wife who, with "great animus for her brother" was attempting to "kick [Ackerman] out of the property," whereas Mrs. Ackerman trusted her son and wanted him to remain there. Tr. 3148-49. Thus, she understood and endorsed the litigation's objective – enhancing her son's well-being and removing control of her assets from the Abbotts – despite the fact that her assets could diminish were their objectives achieved. FF 149.

Mother and son also agreed on undertaking litigation to achieve their goals and, once again, Szymkowicz counseled with Mrs. Ackerman to make sure that is what she wanted. He pressed Mrs. Ackerman to determine whether she truly wanted to undertake litigation. He also told her "many times" that she could be represented by another attorney, but she refused to consider it and adamantly wanted to continue. Tr. 2463, 2366-67, 2370 ("you can discharge me, you can end the litigation, you can get other counsel").

He also explained the financial implications at stake. He reminded her that the trust was paying legal fees to defend the *Ackerman I* litigation, and told her that in the *Ackerman II* case he was "going to be charging her $350 an hour to sue the trustee, and the trustee's lawyer was going

to be billing or collecting his fee out of her trust assets." Tr. 2592-94. He warned her that the litigation could cost "tens of thousands of dollars," that she could be responsible to pay the fees of the trustee's lawyers as well as her own, and that the litigation could, in any event, fail (Tr. 2308-09, 2460-62, 2592-94), but when he asked her if she wanted to end the litigation her answer "was always no." Tr. 2681. After the adverse decision in *Ackerman I*, he "sat down and . . . explained to her that, if in fact she didn't want to proceed, [he] was obligated then to dismiss the case," but "she was even more adamant than before" about continuing with her claim. Tr. 2322.

Finally, he cautioned her that if her litigation were to succeed, she could be victimized by her son when he gained control of her assets ("Steve could take the money, fly to Monte Carlo [or] hire financial advisors who were incompetent"), but she was undeterred. Tr. 2307-09. Though "she was very gracious and she was very soft spoken[, she] was very firm in what she wanted to do." Tr. 2925. She wanted to continue with the lawsuit. Tr. 2921. She wanted peace in the family, but she wanted the Abbotts to capitulate in order to achieve it: "when she said that she wanted an end to the litigation she wanted Frank to give it up, to let her have control of that trust back." Tr. 2921.

As a consequence of the alignment of interests between Mrs. Ackerman and her son, and their mutual endorsement of litigation to achieve their objectives, the representation of Mrs. Ackerman by the Szymkowiczes was not, and was not likely to be, adversely affected by their representation of her son. The relevant interests – what the joint clients wanted and how they would seek to achieve them – were adequately vetted by Szymkowicz. Both clients were competent to assess their own interests, desires and objectives. The clients perceived no conflict of interest, and there was none.

The fact that Mrs. Abbott, or Bar Counsel, or even individual members of the Board might disagree with the wisdom of the litigation efforts undertaken on behalf of Mrs. Ackerman is beside the point. Mrs. Ackerman, whom the Hearing Committee determined to be competent, knew what she wanted and knew how she wanted to achieve it. She had the right to do so, and was entitled to instruct her attorneys accordingly. Rule 1.2(a) provides that lawyers must "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." To the same effect, Rule 1.3(b)(1) provides that a lawyer shall not intentionally "fail to seek the lawful objectives of a client through reasonably available means permitted by law and the disciplinary rules[.]" Third parties may second-guess the wisdom of her actions, but Respondents were not at liberty to disregard the expressed wishes of a client whom they believed in good faith to be competent and sincere in her wishes. Because Respondents understood and believed that their clients' interests were fully aligned, Bar Counsel did not prove that their representation of Mrs. Ackerman could have been adversely affected by their representation of her son. Szymkowicz and J.P. Szymkowicz did not violate Rule 1.7(b)(2). FF 148, 201.

Moreover, we reject Bar Counsel's claim that J.P. Szymkowicz violated Rule 1.7(b)(2), for an additional reason. Although he appeared on behalf of Mrs. Ackerman in the litigation, his role was entirely secondary to his father's. He never spoke to Mrs. Ackerman. Tr. 1935. He had no reason to discuss any conflict issues with her because his father had "satisfied any inquiry [he] had" about that. Tr. 1706. His father had a demonstrated history of being sensitive to, and vetting, conflicts in the past. J.P. Szymkowicz understood that his father would:

> not do anything on behalf of his clients unless they understand what's going on, [and] the ramifications of what they are going to do . . . [I]f there is a potential conflict, any potential conflict, . . .

> he's very, very thorough and takes sometimes hours discussing these kind of issues with clients, and that happens in every case.

Tr. 1911. J.P. Szymkowicz was entitled to rely on Szymkowicz's determination of Mrs. Ackerman's capacity. He neither knew of, nor ratified, any improper conduct of his father. As a consequence, he did not have disciplinary liability for any failure of his father in that regard. Rule 5.1 cmt. [6]; FF 192-94, 201.

Although we find no Rule 1.7(b) violation, we do note that Szymkowicz should have cautioned his clients about the generic risks inherent in a joint representation, including its effects on confidentiality and the attorney-client privilege. *See* D.C. Opinion 327 (Mar. 2005).

> The prudent course for a lawyer undertaking a joint representation is to address the issue of disclosure at the outset of the retention and to obtain written consent from both clients that the lawyer may divulge to each client all confidences received during the course of the retention that relate to the representation.

D.C. Ethics Op. 296.

The post-2007 comments make clear that a lawyer should "advise each client that information relevant to the common representation will be shared, and explain the circumstances in which the lawyer may have to withdraw from any or all representations if one client later objects to continued common representation or sharing of such information." Rule 1.7 cmt. [16]. We have discerned no evidence in the record that would establish whether or not Szymkowicz ever discussed those issues with his clients, and the parties have not addressed the matter in their extensive briefing. Certainly, the failure to make these particular disclosures has not been raised by Bar Counsel to support the charges against Respondents, and there is no evidence that Respondents breached Mrs. Ackerman's privilege. Thus, even had the issue been raised by Bar Counsel, there is no basis to find a violation.

2. Rule 1.7(b)(4) (Silverman and King)

The conflict of interest charge against Silverman and King is based upon Rule 1.7(b)(4):

> (b) Except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if:
> . . .
> (4) The lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests.

Bar Counsel alleges that Silverman and King violated Rule 1.7(b)(4) because their fealty to Ackerman trumped their duty to their client, his mother. Bar Counsel claims that *Ackerman II* was intended to benefit Ackerman at the expense of his mother. To support the claim, Bar Counsel asserted that Stephen Ackerman controlled his mother by attending her meetings with Silverman and King, paid legal fees on behalf of his mother, and arranged for her legal representation in the first instance. FF 240, 298.

But Stephen Ackerman did not meaningfully influence Silverman's initial meeting with Mrs. Ackerman, which he attended only as a comfort to his mother. Tr. at 2942. Although Ackerman held a power of attorney for his mother, he routinely left the room during his mother's meetings with Silverman because "he did not want it to appear that he was having any influence on anything his mother did." Tr. 3216-17. Throughout the representation, Silverman repeatedly confirmed with Mrs. Ackerman – whom she perceived to be competent – that her objectives had not changed, *i.e.*, that she wanted to go ahead with the *Ackerman II* litigation, wanted Frank Abbott removed as trustee, and wanted her son to remain in the property despite the dissipation of her assets. Tr. 3156. At all times, Mrs. Ackerman's objectives remained aligned with those of her son. FF 227-31.

The Hearing Committee found that Mrs. Ackerman had the capacity to guide Silverman and King, both of whom were thus obligated to "abide by [her] decisions concerning the objectives of [the] representation[.]" Rule 1.2(a). The circumscribed and professional interactions among Silverman, King, and Ackerman did not affect Respondents' representation of Mrs. Ackerman, and the Hearing Committee properly rejected Bar Counsel's conflict of interest claim against them. FF 227-31, 241-43, 298-301.

B. Dishonesty, Fraud, Deceit and Misrepresentation - Rule 8.4(c) (All Respondents)

Bar Counsel alleges that all Respondents engaged in conduct that comprehensively involved "dishonesty, fraud, deceit, and/or misrepresentation" and resulted in far-reaching Rule 8.4(c) violations. Specification of Charges at ¶¶ 121(D), 122(E), 123(D), 124(E).

Rule 8.4(c) provides that "it is professional misconduct for a lawyer "to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation[,]" and proscribes conduct evincing "[a] lack of fairness and straightforwardness." *In re Shorter*, 570 A.2d 760, 767-68 (D.C. 1990) (per curiam) (citation omitted); *see also Cleaver-Bascombe*, 892 A.2d at 404. The proscription in Rule 8.4(c) "is not to be accorded a hyper-technical or unduly restrictive construction." *Ukwu*, 926 A.2d at 1113. Conduct that "may not legally be characterized as an act of fraud, deceit or misrepresentation may still evince dishonesty." *Shorter*, 570 A.2d at 768.

Once again, the indispensable predicate for Bar Counsel's allegations of dishonesty, fraud, deceit and misrepresentation is the discredited assertion that Respondents acted in *Ackerman I*, *Ackerman II*, and the other litigated matters to abet Ackerman and disadvantage, if not defraud, his mother. The thesis is premised on Bar Counsel's assertion that Respondents knew that Mrs. Ackerman was incapable of understanding and deciding what was in her

interests. The Hearing Committee addressed the particulars of these claims and, principally for the reasons discussed above, flatly rejected Bar Counsel's claims of dishonesty as to Szymkowicz (FF 154–69), J.P Szymkowicz (FF 205-11), Silverman (FF 247-53) and King (FF 281-82). Because we have concluded that Bar Counsel failed to prove that there was a conflict of interest between Mrs. Ackerman and her son, failed to prove that Mrs. Ackerman lacked the capacity to direct her lawyers, and failed to prove that Respondents understood her to be incompetent, we find that the Hearing Committee's recommended dismissal of the Rule 8.4(c) charges is well-supported by substantial evidence, and we endorse it.

C. Serious Interference with the Administration of Justice – Rule 8.4(d) (All Respondents)

Rule 8.4(d) states that it is "professional misconduct for a lawyer to . . . [e]ngage in conduct that seriously interferes with the administration of justice." Bar Counsel charged all Respondents with violating this Rule.

Rule 8.4(d) is a "general rule that [was] purposely broad to encompass derelictions of attorney conduct considered reprehensible to the practice of law." *In re Hopkins*, 677 A.2d 55, 59 (D.C. 1996) (citations omitted). To prove a violation, Bar Counsel must demonstrate that: (i) each Respondent's conduct was improper, *i.e.*, that the Respondent either acted or failed to act when she should have; (ii) the Respondent's conduct bore directly upon the judicial process with respect to an identifiable case or tribunal; and (iii) the Respondent's conduct tainted the judicial process in more than a *de minimis* way, *i.e.*, it "potentially impact[ed] upon the process to a serious and adverse degree." *Id*. at 60-61.

Bar Counsel claimed that the Szymkowiczes violated the Rule by pursuing *Ackerman I* and *Ackerman II* and by intervening in the declaratory judgment action on behalf of Stephen Ackerman. The Hearing Committee disagreed. It concluded that the claims set forth in

Ackerman I were not "totally baseless" as Bar Counsel claimed, because they were verified by Ackerman and attested to by Mrs. Ackerman, and because Respondents subjectively believed them to be true. *See In re Hopkins*, 677 A.2d at 60-61; FF 172. Similarly, because Mrs. Ackerman had the capacity to authorize and direct *Ackerman II*, Respondents' conduct in that case was not improper and did not taint the judicial process. FF 173-74, 213. We agree with the Hearing Committee's analysis, as we do with its rejection of Bar Counsel's claims relating to the declaratory judgment action. FF 175, 214.

Similarly, Bar Counsel failed to sustain the Rule 8.4(d) allegation against Respondent Silverman in connection with her representation of Mrs. Ackerman in *Ackerman II*. FF 256-58. Moreover, although it would have been far better practice for Silverman to have withdrawn the protective Notice of Appeal she filed on behalf of her client (rather than allowing it to be dismissed *sua sponte* by the Court of Appeals), her passivity did not rise to the level of an ethical violation. *See, e.g., In re Uchendu*, 812 A.2d 933, 940 (D.C. 2002); FF 233-35, 259.

Finally, we agree with the reasoning set forth by the Hearing Committee when it rejected all of Bar Counsel's interference-with-justice claims against Respondent King. In particular, the evidence shows that the affidavit upon which Bar Counsel bases those claims contained incidental factual mistakes, not material, intentional misrepresentations. FF 285-89; Tr. 3275-77.

D. Engagement Letter – Rule 1.5(b) (King)

Bar Counsel alleges, and Respondent King acknowledges, that he did not provide Mrs. Ackerman with a written retainer agreement when he undertook to represent her as co-counsel to Silverman in *Ackerman II*. FF 267-68. We agree with the Hearing Committee that Bar Counsel proved a violation of Rule 1.5(b). FF 292-94. Although King asserted before the Hearing Committee that an engagement letter would have been futile because his client was functionally

blind, he has since conceded the violation and agrees with the Hearing Committee's recommended sanction. Respondents Silverman and King Reply Brief at 4.

E. Breach of Confidence – Rule 1.6(a)(1) (Silverman and King)

Bar Counsel alleges that Silverman and King violated Rule 1.6(a)(1) when they "knowingly [revealed] a confidence or secret" of Mrs. Ackerman.

In support of this claim, Bar Counsel alleged that Silverman communicated with Stephen Ackerman about matters relating to *Ackerman II* in a series of e-mail communications, and that King tendered his litigation file to Ackerman.

During the relevant time, however, Ackerman possessed his mother's facially valid powers of attorney and, because she was blind, it was especially appropriate for both Respondents to communicate directly with her through him.

Moreover, Silverman's e-mail messages to Ackerman (which for the most part were also directed to his attorney, Szymkowicz) were limited in number, and appropriately addressed tactical, logistical or administrative matters arising in the litigation in which they were all involved. In the aggregate, the messages make clear that Silverman was relying on Ackerman to relay information to his blind mother ("will you please read it to her"), and that she was, in fact, appropriately communicating directly with her client.[10] FF 223, 237-38.

In the same vein, the "file" King disclosed contained only the medical reports of two psychiatrists and the videotape of Mrs. Ackerman executing powers of attorney (BX 16), all of which were known to, or in the possession of, other parties. FF 296.

[10] Silverman's messages (BX 168) state, for example, that: "I will call your mom tomorrow and talk to her" (July 1, 2007); "If your mother wants me to proceed" (August 29, 2007); "I could stop by your mother's house" (October 9, 2007); "I am going to call her" (July 13, 2007); "If your mother wants..." (February 3, 2008).

Bar Counsel utterly failed to prove that any of these communications fell within the confidentiality scope of Rule 1.6(b). Because Bar Counsel failed to prove the improper disclosure of any client confidences or secrets, neither Silverman nor King violated Rule 1.6(a). FF 222, 237-38, 295-96.

F. Failure to Withdraw – Rule 1.16(a) (All Respondents)

Rule 1.16(a)(1) states:

> . . . a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if [the] representation will result in violation of the Rules of Professional Conduct or other law.

Bar Counsel charged all Respondents with violating this Rule.

A Rule 1.16(a) violation is derivative of a violation of another Rule. Because Bar Counsel failed to prove a conflict – and consequently failed to prove a predicate Rule violation – the Hearing Committee properly rejected the Rule 1.16(a) charges as to all Respondents. FF 176, 215, 187-98, 216, 261. Although we conclude that King violated Rule 1.5(b), Bar Counsel did not rely on that violation as a basis for a Rule 1.16(a) violation, and the Hearing Committee properly declined to consider it as such. FF 302.

IV. SANCTION

We have concluded that Respondent King violated Rule 1.5(b). 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. *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc); *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (en banc). 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). The factors properly considered when determining an appropriate sanction

include: (1) the nature and seriousness of the misconduct; (2) the presence of misrepresentation or dishonesty; (3) the respondent's attitude toward the underlying misconduct; (4) prior disciplinary violations; (5) mitigating or aggravating circumstances; and (6) prejudice to the client. *See In re Peek*, 565 A.2d 627, 632 (D.C. 1989) (citations omitted); *In re Jackson*, 650 A.2d 675, 678 (D.C. 1994) (per curiam); *In re Hill*, 619 A.2d 936, 939 (D.C. 1993) (per curiam); *In re Knox*, 441 A.2d 265 (D.C. 1982).

The single violation of Rule 1.5(b) by Mr. King is not a serious violation. There is no element of dishonesty in this case, nor was there any discernible prejudice to Mrs. Ackerman resulting from the absence of a written retainer agreement. Respondent has taken responsibility for his oversight, and in our view that outweighs any aggravation that might result from his prior minor discipline in Maryland. Finally, the informal admonition recommended by the Hearing Committee and conceded appropriate by Respondent is consistent with sanctions imposed in prior cases. We thus find it to be the appropriate sanction here. *See In re Williams*, 693 A.2d 327 (D.C. 1997) (informal admonition for violation of Rule 1.5 (b and c)); *In re Confidential (J.E.S.)*, 670 A.2d 1343 (D.C. 1996) (informal admonition for violation of Rule 1.5(b)(2)).

V. CONCLUSION

The Hearing Committee found that Bar Counsel failed to prove any charges lodged against Respondents, other than a Rule 1.5(b) violation by Robert King. We agree.

We consequently dismiss all charges against Respondents John T. Szymkowicz, John P. Szymkowicz, and Leslie Silverman. *See* D.C. Bar R. XI, §§ 4(g) and 9(f) (the Board has the authority to conclude cases by issuance of a reprimand, direction to Bar Counsel to issue an informal admonition, or dismissal of a petition).

We further dismiss the charges against Respondent Robert King based on Rules 1.6(a)(1), 1.7(b)(4), 1.16(a), 8.4(c) and 8.4(d). Finally, we find the charge against Mr. King based on Rule 1.5(b) to be sustained, and direct that Bar Counsel issue an informal admonition on that basis.

It is so ORDERED.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: /RCB/
Robert C. Bernius[11]

Dated: July 25, 2014

All members of the Board concur in this Order, except Mr. Frank, who has filed a Concurring Statement joined by Ms. Butler; Ms. Soller, Ms. Smith and Mr. Bundy did not participate.[12]

[11] Mr. Frank, as Chair of the Board, is responsible for signing Board orders but, in light of his Concurring Statement, has delegated this authority to Mr. Bernius, who prepared the Board's order in this case.

[12] Those Board members listed as non-participating were not members of the Board at the time of oral argument.

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matters of:	:	
	:	
JOHN T. SZYMKOWICZ,	:	Board Docket No. 09-BD-048
(D.C. Bar No. 946079),	:	Bar Docket No. 2005-D179
	:	
JOHN P. SZYMKOWICZ,	:	Board Docket No. 09-BD-049
(D.C. Bar No. 462146),	:	Bar Docket No. 2007-D050
	:	
LESLIE SILVERMAN,	:	Board Docket No. 09-BD-050
(D.C. Bar No. 448188),	:	Bar Docket No. 2007-D214
	:	
ROBERT KING,	:	Board Docket No. 09-BD-051
(D.C. Bar No. 922575),	:	Bar Docket No. 2008-D420
	:	
Respondents.	:	
	:	
Members of the Bar of the	:	
District of Columbia Court of Appeals	:	

CONCURRING STATEMENT OF
THEODORE D. FRANK

I. INTRODUCTION

I concur in the majority's conclusions that, except for the violation of Rule 1.5(b) with respect to Mr. King, Bar Counsel has not proven by clear and convincing evidence that Respondents Silverman, King and J.P. Szymkowciz[1] violated the Rules of Professional Conduct charged by Bar Counsel. While I have some question whether Ms. Silverman or Mr. King adequately explored with Mrs. Ackerman the alternatives to pursuing the litigation in *Ackerman II* or whether she fully understood the implications of proceeding with the litigation, I do not think that Bar Counsel proved by clear and convincing evidence that these Respondents jointly

[1] John P. Szymkowicz will be referred to as "J.P. Szymkowicz." The elder John T. Szymkowicz will be referred to as "Mr. Szymkowicz" or "John Szymkowicz."

represented Mrs. Ackerman and her son. Bar Counsel's allegations of a joint representation rest principally on the fact that Ms. Silverman and Mr. King communicated directly with Mrs. Ackerman's son, but that was not unreasonable in light of Mrs. Ackerman's limited eyesight and her advanced age. In the absence of more compelling proof that Ms. Silverman and Mr. King represented both Mrs. Ackerman and her son, Rule 1.7(b) and (c) are not applicable. It is arguable that at least Ms. Silverman violated Rule 1.4, but neither she nor Mr. King was charged with violating that rule.

I agree with the majority's conclusion that Bar Counsel has not shown by clear and convincing evidence that Mr. John Szymkowicz violated Rules 1.7(b) and (c), but on a different basis. I believe that, when the entire mosaic of the record is considered,[2] Bar Counsel established that Mrs. Ackerman lacked the ability to understand the implications of the course of action she purportedly authorized and thus lacked the capacity to consent to the potential conflict of interest, as required by Rule 1.7(c). I also disagree with the majority that, because Mrs. Ackerman's expressed views coincided with her son's interests, the potential conflict of interest never became a real conflict such that Mr. Szymkowicz was required to clear it. As the majority recognizes, there was a potential conflict of interest when Mr. Szymkowicz undertook to represent Mrs. Ackerman in *Ackerman II*.[3] The trust had been established to provide for Mrs. Ackerman and to protect her assets from not only potentially predatory actions by her children, but also from her own weaknesses. Nullifying the trust would eliminate those safeguards -- pursuing the litigation threatened to jeopardize the availability of the trust assets to meet the significant costs required to care for Mrs. Ackerman. Nullifying the trust was, as two judges

[2] *See In re Ukwu*, 926 A.2d 1106, 1116-18 (D.C. 2007).

[3] *See In re McMillan*, 940 A.2d 1027, 1036 (D.C. 2008) (conflict of interest where a lawyer represents a child and a mother dependent on a child's money).

found, more in the interests of the son than Mrs. Ackerman. Accordingly, Mr. Szymkowicz was required by Rules 1.7(b) and (c) to explain to Mrs. Ackerman the risks associated with *Ackerman II* and to obtain her "informed consent"[4] to the joint representation before he filed the lawsuit. However, Mrs. Ackerman was not capable of giving the informed consent required under the Rules. At the same time, I do not believe that Rule 1.7(b) imposes an absolute obligation to obtain consent such that Mr. Szymkowicz acted at his peril in proceeding where his client's competence was open to question.

The Rules of Professional Conduct, the related case law, legal ethics opinions, and the ethical literature provide little guidance to lawyers in this situation, particularly where the issue involves consent to a conflict. To the extent they do, they appear to apply a presumption of competence and require lawyers basically to treat clients with a disability as they would any other client. In general, the rules urge continued representation. *See* Rule 1.14(a) cmt. [1]. Mr. Szymkowicz took the steps suggested in the Rules and commentary, asking the questions suggested in the comments to Rule 1.14, in the ABA Formal Ethics Opinion 96-404, Client Under a Disability ("ABA Ethics Opinion"), and the ABA Comm'n on L. & Aging, Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers (2005) ("ABA Handbook"). While I believe that Mr. Szymkowicz pursued the interests of Dr. Ackerman[5] to the detriment of Mrs. Ackerman, he followed what guidance the Rules required. Sanctioning

[4] I recognize that under the Rules of Professional Conduct in effect at the time of the events underlying this case, Rule 1.7(c) literally required only consent, not "informed consent." However, the obligations under those rules were not materially different from the requirements of the current rule. *See* D.C. Bar Rules of Professional Conduct Review Committee, *Proposed Amendments to the District of Columbia Rules of Professional Conduct Report and Recommendations* 11 (2005). Accordingly, I believe that the Rules applicable in this case required Mr. Szymkowicz to obtain informed consent.

[5] Stephen Ackerman, Jr. will be referred to as "Dr. Ackerman."

him under these circumstances would raise due process notice issues. Accordingly, I concur in the majority's conclusion that Mr. Szymkowicz did not violate Rule 1.7(b) and (c), and that no sanction should be imposed here.

II. ANALYSIS

A. Mrs. Ackerman's Competence or Capacity

The Board's role in reviewing findings of fact and credibility determinations is typically limited. We are required to defer to the hearing committee's resolution of those matters where they are supported by substantial evidence on the record as a whole. Board Rule 13.7; *In re Micheel*, 610 A.2d 231, 234 (D.C. 1992). However, we are not required to accept "ultimate facts," which are really conclusions of law. *Micheel*, 610 A.2d at 234. Whether Mrs. Ackerman was competent to authorize the Respondents to pursue the litigation involved here is an ultimate fact, and we are free to address the question *de novo.*[6] It is a "determination [that] dictates a conclusion of law:"[7] whether Mrs. Ackerman could give informed consent, *i.e.*, rationally and intelligently decide that her interests were aligned with her son's, and whether she fully understood that she would lose the safeguards the trust afforded.

To the extent that the Hearing Committee's ultimate facts are based on its other factual findings, such as credibility determinations, the Court has noted "'there are certain times when a [reviewing body] must override . . . a [fact-finder's] determination by examining evidence in the record that detracts from the [trier of facts] finding.' *Eilers v. District of Columbia Bureau of Motor Vehicles Servs.*, 583 A.2d 677, 685 (D.C. 1990) (citation omitted)." *In re Bradley*, 70 A.3d 1189, 1194 (D.C. 2013) (affirming a Board finding that a respondent lied in testimony,

[6] *See* ABA Handbook at vi, 5-8.

[7] *Washington Chapter of the American Institute of Architects v. District of Columbia Department of Employment Services*, 594 A.2d 83, 87 (D.C. 1991).

notwithstanding the Hearing Committee's determination that she was credible.); *see also*, *In re Martin*, 67 A.3d 1032, 1050 (D.C. 2013) (per curiam) ("We do not give deference to a Hearing Committee's credibility determination where that determination is predicated upon a conclusion of law rather than the demeanor of testifying witnesses. *In re Anderson*, 778 A.2d 330, 341-42 (D.C. 2001).") This is such a case.

The Hearing Committee's Report and Recommendation accepts the views of those witnesses who asserted that Mrs. Ackerman was competent and ignores the preponderance of the contrary evidence indicating that Mrs. Ackerman was not competent to give informed consent to the matter in issue. The Hearing Committee found that Mrs. Ackerman "was mildly to moderately demented and therefore was not so impaired" that "she lacked the capacity to execute a power of attorney[.]" FF 71. I believe that the Hearing Committee's focus was too narrow and is inconsistent with the holdings in *Butler v. Harrison*, 578 A.2d 1098 (D.C. 1990) and *Uckele v. Jewett*, 642 A.2d 119 (D.C. 1994). As I read those decisions, the evaluation of competence turns on a holistic view of the individual's mental competence with respect to the transaction or matter involved, and not, as the Hearing Committee found, on whether the individual was capable of entering into a contract.

Under those decisions, the fact that an individual suffers from dementia is insufficient, by itself, to establish that the individual is not competent to authorize a matter. Rather, the determination of whether a client is competent to enter into a transaction or to authorize a lawyer to undertake or proceed with a matter depends on the complexity of the transaction involved and the individual's ability to understand and appreciate the consequences of the action taken.[8] *See generally*, *Hernandez v. Banks*, 65 A.3d 59, 71 (D.C. 2013) (en banc) (the competency of a

[8] *See also*, ABA Handbook at 6, 18-19.

person with diminished capacity to enter into a contract may depend "in a specific case . . . on the nature of the particular transaction at issue.") Here, litigation undertaken in Mrs. Ackerman's name involved far more than a simple contract. The trust was established primarily to provide for Mrs. Ackerman during her lifetime, with Dr. Ackerman as a secondary beneficiary during that period. Mrs. Ackerman signed the trust with both her children either physically present or on the telephone, after counsel explained the terms of the trust. BX 42 at 334-39; Tr. 1340. Both of her children had participated in the negotiations leading up to the drafting and execution of the trust. BX 42 at 250-51. The *in terrorem* clause was designed to assure that Mrs. Ackerman's interests were protected from improper conduct by either of her children. The requirement that both Mrs. Ackerman and the trustee consent to the transfer of assets was, as Judge Motley noted, intended to protect Mrs. Ackerman from her own weakness. BX 42 at 337. Nullifying the trust would eliminate those safeguards and, as Judge Motley also noted, would have given her son control of her assets. *Id*. By attempting to nullify the trust, Mrs. Ackerman was pursuing a course of action that threatened her well-being and financial security. She did not understand that risk.

The Hearing Committee did not focus on those issues, but concluded that Mrs. Ackerman was competent to authorize the litigation because she had the capacity to enter into a contract. In reaching that conclusion, the Hearing Committee relied on the testimony of Dr. Ratner and his conversations with Dr. Robert Blee, her personal physician. It ignored the testimony of Mrs. Abbott, Mrs. Ackerman's care givers and others who questioned her competence. It distinguished away the testimony and reports of medical experts other than Dr. Ratner, including Dr. Negro, and Dr. McConnell, Mrs. Ackerman's gerontologist. It rejected virtually all of Mrs. Abbott's testimony on the grounds that she bore serious animosity towards the Szymkowiczes,

the other Respondents, and her brother. That animus cannot be gainsaid. But that does not warrant the complete rejection of virtually all of Mrs. Abbott's testimony, particularly where the evidence of disinterested parties supported her views concerning Mrs. Ackerman's competence. As Bar Counsel notes, Mrs. Ackerman's caregivers all supported Mrs. Abbott's testimony that her mother suffered from severe memory loss, and did not understand the limits on her own ability or the facts surrounding her situation.[9]

Ms. Ashbennett Cannon, who attended to Mrs. Ackerman from October 2000 through the hearings in this case, Tr. 1131, testified that she could not make decisions, did not remember that lawyers had visited, Tr. 1153, did not understand that her husband could not return home after his hospitalization because he required a feeding tube, even though she visited him daily, Tr. 1151-52, did not remember that he had died when he passed away, Tr. 1167-68, and thought she was talking to her husband when she was talking to her son. Tr. 1168-69. Mrs. Ackerman did not remember giving money she drew from her checking account to her son, said that she did not have any money immediately after cashing a check, Tr. 1159-62, did not understand what Dr. Ackerman was attempting to achieve in *Ackerman I*, *id*., and did not remember why she was going to court when Ms. Cannon took her there. Tr. 1176-78. (She had to be prepared for the appearance prior thereto. Tr. 1176-77.) In Ms. Cannon's view, Mrs. Ackerman was not competent to take care of her business: "If a person can't remember from five minutes ago something, how can you take care of your business?" Tr. 1164.

Similarly, Ms. Ayo Temple, the night nurse who started taking care of Mrs. Ackerman in March 2000, Tr. 1422-24, reiterated Ms. Cannon's testimony concerning Mrs. Ackerman's

[9] Bar Counsel's Brief in Support of Exceptions to Hearing Committee Number Seven's Report and Recommendation at 13 ("BC Brief").

memory, that she did not know why she was going to court or remember that her husband was dead. She also testified that Mrs. Ackerman forgot that her sister had passed away, Tr. 1430-33, did not remember, once she returned home, that she and her husband had to move to an assisted living facility when a tree fell and destroyed portions of their house, Tr. 1435-36, and that she did not understand why Mrs. Abbott did not visit her more often, even though she knew that Mrs. Abbott lived in California. Tr. 1463.

Ms. Margi Helsel-Arnold, a clinical social worker specializing in geriatric care who had worked with Mrs. Ackerman since 1997, testified that Mrs. Ackerman did not fully appreciate her limitations, resisting care givers from attending to her husband's needs even though she was not capable of taking care of him, and insisting that she could cook for her husband, help him to shower and generally take care of him, notwithstanding her effective blindness. Tr. 782, 790-93. She also testified that Mrs. Ackerman did not have the capacity to make health care and personal decisions for herself, noting that Mrs. Ackerman would "say things like, 'I can take care of myself,'" and that she could take a bath or shower by herself, when Ms. Helsel-Arnold "knew that she really could not do that . . . ." Tr. 815-16.

Ms. Helsel-Arnold noted that Mrs. Ackerman's cognitive capacity was seriously limited in mid-2005 and that she was concerned whether "Mrs. Ackerman could remember to take her medicines." Tr. 818. In response to Bar Counsel's question whether Mrs. Ackerman could, in July 2004, exercise proper judgment, she answered: "No . . . . because of her inability to deal with the reality of the situation that faced her." Tr. 912.

These concerns as to Mrs. Ackerman's understanding or acceptance of the conditions under which she was suffering were echoed by Susan Rodgers, an RN and president of Capital City Nurses (a homecare agency), who was present at the second Care Plan Conference held at

Springhouse. BX 27 at 2. Fatmata Koker, another caregiver, testified that Mrs. Ackerman did not understand why her husband could not come home, Tr. 1520, forgot that her husband had died, Tr. 1525, and could not remember that she had been taken for a trip. Tr. 1524. Martha Gaston, a social worker who was employed by the Family & Child Services Agency and undertook a comprehensive geriatic evaluation of Mrs. Ackerman at Dr. Ackerman's request, Tr, 120, testified that Mrs. Ackerman was not oriented to time and place, Tr. 1219, could not make financial decisions, Tr. 1220, needed care and lacked the capacity to make decisions, Tr. 1228, and was unable to handle her affairs. Tr. 1229. Deborah Ahern, the court-appointed visitor hired in connection with Mrs. Abbott's 2007 guardianship petition, testified similarly. Tr. 1255-56. None of this testimony is credited or even discussed by the Hearing Committee.

Other evidence indicated that Mrs. Ackerman did not understand the issues involved in *Ackerman II*, BX 54 at 10-11 (depo. 37-44), or that her son had filed suit to modify the trust. Her deposition testimony clearly indicated that she had only the vaguest understanding of what was involved: she did not remember if she had signed a retainer agreement, could not recall when she had met with Mr. Szymkowicz, and had only the vaguest recollection of having discussed a conflict of interest with Mr. Szymkowicz, but could not remember what was discussed.[10] She

[10] Her deposition testimony was as follows:

> Q When did he actually become your attorney?
> A Only he can answer that.
> Q Did you ever meet with Mr. Szymkowicz and your son before Mr. Szymkowicz became your attorney?
> A I don't know. I don't remember that.
> Q Did you have any conversations with Mr. Szymkowicz before he became your attorney about a conflict of interest in his representing you and your son at the same time?
> A The subject came up once. But Mr. Szymkowicz would know how to handle things like that better than I.
> Q When did the subject came up?

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did not remember that she had written a letter to the trustee asking to dissolve the trust, BX 70 at 4-7, or that she had signed multiple repetitive and inconsistent powers of attorney. BX 54 at 11-12 (depo. at 43-45). As one of the caregivers noted, she would sign anything put in front of her in the hopes it would resolve the squabbling between her children. Tr. 1160-61. There was universal agreement, including from Dr. Ratner, HC 35, that Mrs. Ackerman lacked the capacity to manage her own affairs, HC 69; Tr. 2005, 2043, 2310, 2665-66, and, most significantly, that she lacked the ability to understand complex subjects. BX 30 at 7. Both Judge Motley and Judge Burgess questioned her competence. BX 70 at 136; BX 122 at 1.[11]

Further, as Bar Counsel argued before the Board, the evidence of Mrs. Ackerman's actions demonstrate that she did not comprehend their import:

> Mrs. Ackerman's own actions and statements, demonstrated that she did not understand the "nature, extent, character, and effect of the particular transaction[s] in which she was engaged" - *i.e.*, retention of conflicted counsel or the numerous POAs and other legal documents Respondents prepared and . . . [she] sign[ed], and she did not understand the litigation in which she became [a] . . . party. *See, e.g.*, Tr. 212, 218-19, 228, 464-66, 476-87, 491, 519-20, 522, 525-26, 539, 542, 546-55, 580, 583, 764-68, 828-30, 917, 1056, 1063, 1081, 1159-60, 1165-66, 1176-78, 1445, 1461-62, 1469, 1483-86, 1505, 1522, 1526-27, 1557-58, 2028, 2038-39, 2157-58, 2675; BX 29 at 2-3; BX 54 at 11-12; BX 69 at 169-75; BX 70 at 4-9, 16-32; BX 121 at 18-32, 31; BX 130 at 3.

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> A I believe Mr. Szymkowicz brought it up. I'm not sure.
> Q What did he say?
> A I can't remember that well.

BX 54 at 12.

[11] My colleagues' reliance on Judge Hamilton's statement that she didn't "seem . . . [to] have any problem" (BX 81 at 29) is, I believe, misplaced. First, he expressly limited it to "what I see this morning[,]" which was a limited hearing in which her participation was nominal. Second, I do not think his statement is evidence of her competence. Telling an elderly individual who suffers from dementia that she is not competent serves no purpose, other than to offend and upset him or her. They know that their mental capacity is declining and there is nothing they can do to address the problem meaningfully.

BC Brief at 13 n.10 (conclusory allegations redacted).

There was also substantial expert testimony questioning Mrs. Ackerman's competence. Dr. Negro, who visited Mrs. Ackerman twice, once in 2004 and again in 2006, stated that

> Implications of cognitive impairment: this interviewer inquired Ms. Ackerman about her understanding of possible changes in her Durable Power of Attorney. She was unable to explain the reasons for disagreements between her son and daughter regarding her care. Ms. Ackerman indicated she was distressed regarding family conflicts. She was unable to explain the implications of possible-changes in her Durable Power of Attorney. She stated that "nobody forced me to do anything, but I don't know what I signed with [the attorney]. There were so many papers, but he surely read them to me."

BX 29 at 2.

Dr. Negro concluded that Mrs. Ackerman:

> meets criteria for dementia. Ms. Ackerman shows impairment of several cognitive domains. The cognitive impairment is more pronounced in her ability to process complex information and in her executive functioning (i.e. ability to plan and execute complex behaviors). She is easily overwhelmed by pressure of time and multiple tasking. During the interview she was unable to understand and explain the nature, scope and effect of changing her Power of Attorney. In fact, she stated that she did not even know which papers she had signed with her son's attorney. Her cognitive impairment is chronic. The underlying dementia will not improve.

Id.

Similarly, Dr. McConnell, Mrs. Ackerman's attending gerontologist, stated that she "has significant cognitive impairment[.]" FF 72; 130.

The Hearing Committee rejected this testimony. It held that Dr. Negro had not applied the applicable legal standard. FF 90-91. It discounted Dr. McConnell's assessment of Mrs. Ackerman's mental condition, because she addressed Mrs. Ackerman's capacity to be deposed and not her ability to enter into a contract. FF 75. The Hearing Committee similarly disregarded the findings of two judges that Mrs. Ackerman was not capable or competent to execute a power

of attorney. While Judge Burgess's finding may not have been binding on the Hearing Committee under a collateral estoppel theory, the Hearing Committee failed to give it any weight. It also dismissed Judge Motley's finding on the ground that the judge dealt with whether Mrs. Ackerman required the appointment of a guardian and not whether she had the capacity to enter into a transaction. However, all of these findings went to the issue of whether Mrs. Ackerman really understood what was going on, the impact of the litigation on her trust assets, and the consequences of giving control of her assets to her son.

While I recognize that there is a presumption of legal competence in the District of Columbia,[12] the evidence of Mrs. Ackerman's caregivers, and the medical evidence of Dr. Negro and Dr. McConnell is more than sufficient to rebut that presumption. Indeed, it establishes by clear and convincing evidence that Mrs. Ackerman lacked the ability to intelligently and knowingly authorize Mr. Szymkowicz to bring a lawsuit requesting that her trust be nullified.

Yet, the Hearing Committee rejected this evidence without even discussing it, relying on Dr. Ratner's report and testimony and the language in *Butler*, *supra*, and *Ukele*, *supra*, that "the party asserting incompetency must show not merely that the person suffers from some mental disease or defect such as dementia, but that such mental infirmity rendered the person incompetent to execute the particular transaction . . . . " *Butler*, *supra* at 1100. The Hearing Committee Report consistently references Mrs. Ackerman's capacity to enter into a contract to support its conclusion that she was competent to authorize the conduct in question here. FF 94, 108, 132, 140-46, 148, 151, 158, 162, 165, 167, 173, 196, 198, 200-201, 210, 214, 225, 229, 231-32, 241, 248-49, 251-52, 270-71, 273, 275, 286, 299. However, endlessly repeating that Mrs. Ackerman was competent to enter into a contract neither makes it true, nor does it establish that

[12] *See*, *e.g.*, *Frendak v. United States*, 408 A.2d 364, 379-80 n.28 (D.C. 1979).

she understood and could give informed consent to the course of conduct the Respondents were pursuing.

Nor do I believe that the Hearing Committee's reliance on Dr. Ratner's report and testimony warrants its complete rejection of the testimony of those who knew Mrs. Ackerman best and observed her from day-to-day. Dr. Ratner's findings were based on his meeting with her for a total of 4.5 hours, her statement concerning her unhappiness with Mr. Abbott's failure to respond to her letter and to consult with her concerning the sale of the Sea Colony property, and her ability to identify the President, the Mayor and other news matters, many of which occurred in the relatively distant past. BX 30 at 1, 5-6. Dr. Ratner's report does not indicate whether he discussed the implications of her desire to have the trust nullified. Moreover, he acknowledged that "her memory is problematic, and her ability to abstract has deteriorated . . . [and] that her ability to plan and execute complex behaviors is impaired[,]" BX 30 at 7, and testified that she was not competent to handle her own financial affairs. FF 65; Tr. 2042.

The Hearing Committee accepted his testimony because Dr. Ratner understood and applied the test for competence set forth in *Butler*, *supra*, and *Uckele*, *supra*:

> [t]he test of mental capacity to contract is whether the person in question possesses sufficient mind to understand, in a reasonable manner, the nature, extent, and effect of the particular transaction in which [she] is engaged, ... the party asserting incompetency [must show] not merely that the person suffers from some mental disease or defect such as dementia, but that such mental infirmity rendered the person incompetent to execute the particular transaction . . .[13]

FF 63.

[13] *Uckele*, *supra*, at 112 (internal citations and emphasis omitted).

As noted above, I do not understand that test as establishing the narrow standard employed by the Hearing Committee and the majority. Rather, I believe the *Butler/Uckele* decisions, when read in context, require a more holistic view of the individual's capacity to understand and consent to the course of conduct proposed. As the Court held in *Hernandez v. Banks*, *supra*, an individual's capacity to contract "in a specific case may depend on the nature of the particular transaction at issue." *Id.* at 71. *See also*, Restatement of the Law of Contracts, § 15(1)(a) (2014) (whether an individual is not competent to enter into a contract depends on if "he is unable to understand in a reasonable manner the nature and consequences of the transaction"). Indeed, in *Butler*, the Court held that "the test of mental capacity to contract is whether the person in question possesses sufficient mind to *understand*, in a reasonable manner, the *nature, extent, character, and effect* of the particular transaction in which she is engaged[.]" *Butler* at 1100 (emphasis added). That test required that Mrs. Ackerman understand the consequences of her executing the affidavit in *Ackerman I* and of success in *Ackerman II*. The evidence is undisputed that, as a result of her dementia, Mrs. Ackerman could not understand complex matters and did not understand the issues or implications of either *Ackerman I* or *Ackerman II*.

Further, in both *Uckele* and *Butler*, there was evidence that the elderly individuals clearly understood what they were doing. In *Uckele*, the trial court held that:

> The evidence . . . is that [Mr. Jewett] lived in filthy conditions, that he was not attentive to his health in the sense of making sure that the roaches stayed out of his food. That he had difficulty recognizing his grandchildren.
>
> There is no evidence . . . that [Harold Jewett] was unable to . . . recognize the nature and extent of his property. . . . he in fact was paying bills,

> negotiating with the District over disputed bills, tax bills, keeping track of minor amounts of money, making detailed notes. . . . [14]

The facts in *Butler* are closer to the facts here. But it involved the transfer by a wife to her husband of the title to the home as joint tenants with right of survivorship -- a decision consistent with a healthy marriage and with no apparent adverse impact on the wife. It was undisputed in that case that the wife's competence would "come and go," 578 A.2d at 1099, and the testimony of those who dealt with the wife when she executed the quit claim deed was that she was competent and fully understood the nature of the transaction. The Court concluded that "the trial judge could properly give greater credence to the testimony of lay persons who saw [the wife] at the relevant time than to medical testimony regarding her condition five months later." *Id*. at 1101. Finally, both cases involved relatively straight forward transactions that did not have the same negative implications for the elderly parent as those involved here.

The Hearing Committee's focus on whether Mrs. Ackerman had the capacity to enter into a contract is also inconsistent with the recommendations in the ABA Handbook. The ABA notes in the Handbook that factors to be considered in evaluating the competence of an elderly individual varies with the nature of the transaction, "if the act or business being transacted is highly complicated, a higher level of understanding may be needed to comprehend its nature and effect, in contrast to a very simple contractual arrangement." ABA Handbook at 6. Among the factors a lawyer must evaluate in determining whether an elderly client is capable of giving consent are not only the ability to articulate reasoning leading to a decision, but also the ability to

[14] *Uckele*, *supra* at 121.

appreciate the consequences of a decision, the substantive fairness of the decision, and understanding of the irreversibility of the decision. *Id.* at 18-19.[15]

In sum, consideration of the entire record here fails to support the Hearing Committee's conclusion that Mrs. Ackerman was competent to authorize the filing of *Ackerman II*. The weight of the evidence is to the contrary. Bar Counsel established by clear and convincing evidence that Mrs. Ackerman lacked the capacity to understand fully the implications of the actions she purportedly authorized the Szymkowiczes to pursue.

B. Mr. Szymkowicz Was Required to Obtain Mrs. Ackerman's Informed Consent to Represent Both Her and Her Son[16]

Bar Counsel has leveled a number of charges against Mr. Szymkowicz, all of which the Hearing Committee and the majority have rejected. I concur in those conclusions, except with respect to the finding that Mr. Szymkowicz was not required, under Rules 1.7(b) and (c), to obtain Mrs. Ackerman's informed consent to attempt to void the trust. As the majority recognizes, there was a potential conflict of interest when Mr. Szymkowicz undertook to represent both Mrs. Ackerman and her son because, to the degree *Ackerman II* was successful, "the assets of Mrs. Ackerman's trust would have been reduced, and her son's assets may have

[15] Interestingly, Mrs. Silverman testified that she was not sure that Mrs. Ackerman "fully understood the implications of undertaking legal action." She stated:

> "It's hard to say [she understood that]. We got in on this thing so late, just shortly before trial, and all of that had been done before. She understood that she did not want the trust anymore . . . She definitely understood that. Did she understand the other? We never questioned her about that. . . ."

Tr. 3367.

[16] While Mr. Szymkowicz withdrew as counsel for Mrs. Ackerman in *Ackerman II*, he did not cease serving as her lawyer. He only withdrew in that case because he might have to testify. Tr. 2693.

been enhanced."[17] The majority concludes that the potential conflict never materialized because Mrs. Ackerman's interests were congruent with her son's.[18] Thus, Mr. Szymkowicz was not required to clear it.

I disagree with that conclusion. Mrs. Ackerman's interests, viewed objectively,[19] were adverse to those of her son. *See In re McMillan*, 940 A.2d 1027, 1036 (D.C. 2008) (conflict of interest where a lawyer represents a child and a mother dependent on a child's money). She was dependent on the trust for financial support while her son's interest, after the decision in *Ackerman I*, was to secure control of those assets so that he wasn't disinherited. Rules 1.7(b) and (c) apply to both actual and potential conflicts, and lawyers are required to obtain waivers where there is no conflict, but one may arise. *See* Rule 1.7 cmt. [9].[20] Rule 1.7(c) provided "each potentially affected client [must] consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation. Comment [1] to Rule 1.4 provides that "[t]he client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued[.]" Comment [7] to the former version of Rule 1.7 provided "that disclosure and consent are required . . . if a client might reasonably consider the representation of its interests to be adversely affected by the lawyer's assumption of the other representation in question . . . . if an objective observer would have any

[17] Majority Opinion at 8, 22.

[18] *Id.* at 9.

[19] *See* Rule 1.7 cmt. [7] ("Although the lawyer must be satisfied that the representation can be wholeheartedly and zealously undertaken, *if an objective observer* would have any reasonable doubt on that issue, the client has a right to disclosure of all relevant considerations and the opportunity to be the judge of its own interests.") (emphasis added).

[20] *See Griva v. Davison*, 637 A.2d 830 (D.C. 1994); *cf.* D.C. Ethics Op. 356 (2010); D.C. Ethics Op. 309 (2001); Restatement of the Law Governing Lawyers, § 122.

reasonable doubt on that issue, the client has a right to disclosure of all relevant considerations and the opportunity to be the judge of its own interests." Comment [2] to the current version of Rule 1.4 provides that "[t]he lawyer must be particularly careful to ensure that decisions of the client are made only after the client has been informed of all relevant considerations." And, while the Rules may not expressly require that a lawyer obtain informed consent before undertaking a matter, that is implied in the language of Rule 1.7(b), which precludes a lawyer from undertaking a matter involving a waivable conflict unless the lawyer obtains informed consent. *See also* ABA Ethics Opinion at 1.

"Informed consent" is defined under the current version of Rule 1.0 as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Rule 1.0(e). To secure informed consent, the lawyer must consult with the client, which is defined as "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question . . ." D.C. Ethics Op. 317 (2002). And, "'[t]he Rules require that a client who is asked to waive an actual or potential conflict have an adequate appreciation of what protection she is giving up' and more explanation may be required where the client is unsophisticated than otherwise. D.C. Ethics Op. 309 (2001)." *Id.* Thus, even assuming *arguendo* that Mrs. Ackerman's interests coincided with her son's, Mr. Szymkowicz was required, under Rules 1.7(b) and (c), in both their current and prior form, to explain to Mrs. Ackerman the risks and downside of attempting to set aside the trust in

order to obtain her informed consent. For the reasons set forth above, I do not believe that she was capable of understanding those risks or of giving informed consent.[21]

At the same time, I do not believe that Rule 1.7(b) requires that a lawyer act at his peril when he or she undertakes a matter in the difficult situation where a client retains her social graces and her competence is debatable. The Rules of Professional Conduct provide little, if any, guidance as to a lawyer's ethical obligations in these circumstances.[22] Rule 1.14, which applies in these situations, describes the predicament more than setting forth rules of conduct. The Rule and associated comments discuss the difficulties lawyers face in dealing with clients with diminished capacity, and the need to test a client's competence. It suggests some questions which might be asked to determine whether a client is competent to authorize the lawyer to proceed with the matter. It does not provide clear guidance as to a lawyer's obligations. To the extent that Rule 1.14 offers specific guidance, it appears to urge accepting and continuing the representation. Thus, Rule 1.14(a) provides that "when a client's capacity to make adequately considered decisions in connection with a representation is diminished, ... the lawyer shall, as far as reasonably possible, maintain a typical client-lawyer relationship with the client." The ABA Ethics Opinion[23] and the ABA Ethics 2000 Commission's Report on the Model Rules of

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[21] Although Bar Counsel maintains that Mrs. Ackerman was not competent, it is not clear whether Bar Counsel maintains that Mr. Szymkowicz was required to withdraw, not undertake the representation, or that he was still required to obtain consent. Bar Counsel does not address what the Rules require of a lawyer in these circumstances.

[22] There is no Rule of Professional Conduct that expressly and clearly requires a lawyer to withdraw or not undertake a matter because of a client's lack of mental competency. However, it is generally understood that a lawyer may not proceed in these circumstances, without seeking appointment of a guardian. *See, e.g.*, ABA Ethics Opinion at 1-2 (1996); Restatement of the Law Governing Lawyers, § 122, *cf id.* at § 24.

[23] The Opinion provides that a lawyer dealing with a client whose "'ability to make adequately considered decisions in connection with the representation is impaired' . . . should continue to treat the client with attention and respect, attempt to communicate and discuss relevant matters,

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Professional Conduct, Rule 1.14 Reporter's Memo of Explanation of Changes 46 (submitted August 2001) contain similar language, although the Ethics Opinion notes that, "[b]ecause the relationship of client and lawyer is one of principal and agent, principles of agency law might operate to suspend or terminate the lawyer's authority to act when a client becomes incompetent." ABA Ethics Opinion at 2 (footnotes omitted). Similarly, the ABA Annotated Model Rules note that withdrawal in these circumstances is "not a favored alternative." ABA Annotated Model Rules of Professional Conduct at 230 (3rd Ed. 1996).

While there is substantial evidence that Mr. Szymkowicz ignored evidence that Mrs. Ackerman was not competent and favored evidence of her competence, Tr. 1191, Bar Counsel has not shown by clear and convincing evidence that he ignored the competency issue or that he did not follow what guidance the Rules provide. Mr. Szymkowicz testified that he asked Mrs. Ackerman the types of questions suggested in the ABA Ethic Opinion and Report. Tr. 2265-69.[24] Mrs. Silverman did the same, and reached the same conclusion. Tr. 2940-45. Mr. Szymkowicz also testified that he discussed with her the difficulties associated with representing two clients in the same matter and the risks associated with giving control of her funds to her son, Tr. 2306-07, repeatedly asked Mrs. Ackerman whether she wanted to continue with the litigation, Tr. 2369-70, and explained to her that continuing the litigation would reduce the

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and continued as far as reasonably possible to take action consistent with the client's directions and decisions." ABA Ethics Opinion at 2.

[24] I do not give significant weight to Mr. Szymkowicz's reliance on Dr. Ratner's report. The report was issued a year after Mr. Szymkowicz filed *Ackerman II.* Thus, Mr. Szymkowicz's decision that Mrs. Ackerman was competent to authorize the commencement of the lawsuit is dependent on his questioning of her at the commencement of the action. Indeed, that report was not issued until Mrs. Ackerman executed a durable power of attorney and a general power of attorney in favor of her son and purported to revoke the trust.

amount of money available to her for her wellbeing. Tr. 2593-95.[25] Bar Counsel did not rebut this testimony. Indeed, according to Mr. Szymkowicz's testimony, Dr. Ackerman was present at the meetings with his mother, yet Bar Counsel did not call him as a witness. We could infer that his testimony would have supported Mr. Szymkowicz. *Murphy v. McCloud*, 650 A.2d 202, 215-18 (D.C. 1994); *McPherson-Corder v. Chinkhota*, 835 A.2d 1081, 1085 (D.C. 2003) ("It has been recognized for almost a century that 'if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable.' *Harris v.United States*, 602 A.2d 154, 160 (D.C. 1992) (en banc)."

Although Mr. Szymkowicz clearly tilted in favor of Dr. Ackerman[26] and could have been more aggressive in assuring himself that Mrs. Ackerman understood the nature and complexity of the issues she was dealing with, Bar Counsel has not established by clear and convincing evidence that he did not discharge whatever obligations the Rules imposed in concluding that Mrs. Ackerman was competent to authorize him to commence and proceed with *Ackerman II*. Given the lack of guidance in the Rules of Professional Conduct and the ethical literature generally, sanctioning Mr. Szymkowicz in these circumstances would penalize him for failing to meet a standard not set forth in the rules.[27] That would raise substantial due process questions.

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[25] Because I conclude that Mrs. Ackerman was not capable of giving informed consent, I do not reach the question of whether Mr. Szymkowicz's testimony establishes that he discharged the obligations imposed under Rules 1.7(b) and (c).

[26] While my colleagues maintain that there is no evidence in the record that Dr. Ackerman took steps that were contrary to the interests of his mother, Majority Opinion at 23, he refused to transfer the North Carolina Avenue property to the trust as required. That required Mr. Abbott to sue as trustee to recover the assets, forcing it to incur added legal fees. BX 85. There is also evidence, rejected by the Hearing Committee largely on procedural grounds, that he failed to take care of her sister adequately, resulting in her hospitalization for malnutrition. HC 9 n.5.

[27] *Cf In re Mance*, 980 A.2d 1196, 1208 (D.C. 2009) (adopting an interpretation of a rule prospectively because of lack of notice).

While Rules 1.7(b) and (c) required Mr. Szymkowicz to obtain informed consent, they did not require him to be clairvoyant in determining whether his client had the capacity to consent. Mr. Szymkowicz testified that he attempted to confirm that Mrs. Ackerman was competent and discussed the issues relevant to consent with her. Bar Counsel has not established by clear and convincing evidence that his testimony was false. Accordingly, I agree with my colleagues that Bar Counsel has not made its case and that no sanction should be imposed.

III. CONCLUSION

This is a sad case. It involves an unnecessary and bitter dispute between a brother and sister, neither of whom distinguished him or herself, over the financial affairs of their mother. Mrs. Ackerman was visually impaired, suffered from dementia, and was distressed by the dispute between her children. The dispute resulted in extensive litigation that was funded by the trust established to provide for Mrs. Ackerman in her later years. The costs of that litigation contributed to the depletion of the trust assets such that questions were raised as to the sufficiency of the trust to support Mrs. Ackerman.

It is also a difficult case. Attorneys retained to handle matters in situations such as this face difficult decisions concerning the capacity of elderly clients to make informed and educated decisions. As noted, the Rules of Professional Conduct provide little guidance for when a lawyer must decline the representation, or withdraw from the representation of a client, who is suffering from dementia and other disabilities that impair her ability to function. That is particularly true in situations such as this where the client retains social graces, has an outward appearance of understanding, at some level, of what is happening, and where, as here, the client is relatively clear as to her wishes, even if she does not fully appreciate the consequences of her actions.

However, where there is clear evidence of dementia, I believe it is incumbent on lawyers to assure themselves that the elderly client fully understands the import of the assistance requested before undertaking a matter, particularly where the request, on its face, appears to be contrary to the elderly person's interests. And, while Ms. Silverman and Mr. King may not have represented Dr. Ackerman, they acted in concert with Mr. Szymkowicz, and it is unclear on the record whether they explored with Mrs. Ackerman whether she understood the risks associated with pursuing the litigation, including the loss of the safeguards in the trust and the depletion of the trust assets associated with continuing the litigation. Indeed, to the extent there is evidence, it indicates that they didn't. The better course would have been to retain independent counsel, brought in not on the eve of trial, but in time to truly represent Mrs. Abbott's interests. The Court would serve the interests of both the Bar and the public by providing lawyers with clear guidance as to their obligations in these situations.

Respectfully submitted,

/TDF/
Theodore D. Frank

Board Member Patricia G. Butler joins in this Separate Statement.

Dated: July 25, 2014