DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
TERRI Y. LEA,	:	
	:	Bar Docket No. 197-01
	:	
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 422762)	:	

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

This matter comes before the Board on Professional Responsibility (the "Board") on review of the Report of Hearing Committee Number Ten (the "Committee"). The Committee found that Respondent violated D.C. Bar. R. XI, § 2(b)(3) (failure to comply with Board order) and District of Columbia Rules of Professional Conduct ("Rules") 8.1(b) (failure to respond to Bar Counsel's lawful demand for information) and 8.4(d) (conduct that seriously interferes with the administration of justice). Based on these findings, the Committee recommended that Respondent be suspended for 30 days, with reinstatement conditioned on (1) her cooperation with Bar Counsel's investigation of the complaint underlying this matter, and (2) proof of her fitness to resume the practice of law. Neither Bar Counsel nor Respondent has taken exception to the Committee's report.

Having reviewed the record, we concur with the Committee's conclusion that Respondent violated Rules 8.1(b), 8.4(d), and D.C. Bar R. XI, § 2(b)(3), and we recommend that she be suspended for 30 days, with reinstatement conditioned upon her compliance with Bar Counsel's outstanding request for information and the Board's order directing her to comply with that

request. For the reasons set forth below, however, we do not recommend a requirement that Respondent demonstrate fitness as a condition for reinstatement.

FINDINGS OF FACT

The facts stated in the following paragraphs numbered 1 through 17 are adopted by the Board as either (1) established by clear and convincing evidence or (2) found by the Committee and supported by the substantial evidence in the record as a whole. *See* Board Rule 13.7. The Board's additional findings are noted by citations to the record.[1]

1. Respondent is a member of the Bar of the District of Columbia Court of Appeals (the "Court"), having been admitted by examination on February 14, 1990. She was assigned Bar number 422762. H.C. Rpt. ¶ 1.

Bar Counsel's Demands for Information

2. On January 24, 2000, the Civil Division of the Superior Court of the District of Columbia (the "Superior Court") entered an order imposing sanctions under Super. Ct. Civ. R. 11(b)(2), 11(b)(3) and 11(c)(2) (the "Rule 11 Order") on both Respondent and a lawyer who was representing her in a legal action in which Respondent was the plaintiff. More than a year later, the Superior Court sent a copy of that Rule 11 Order to the Office of Bar Counsel, which Bar Counsel received on April 20, 2001. HC Rpt. ¶ 3; BX 1.

[1] "HC Rpt." designates the Hearing Committee's Report and Recommendation of April 19, 2005. "Tr. I" designates the transcript of proceedings held on February 2, 2005. "BX" designates Bar Counsel's Exhibits.

3. After receiving the Superior Court's Rule 11 Order, Bar Counsel proceeded to mail successive letters to Respondent addressed to "4410 Massachusetts Avenue, N.W., Suite 140, Washington, D.C. 20016-5572."[2] Bar Counsel's initial letter, which was dated May 11, 2001, enclosed a copy of the Rule 11 Order (which was referred to in the testimony as a "copy of the complaint" (Tr. 21)) and demanded that Respondent "provide a substantive response . . . to each allegation of misconduct" therein.[3] HC Rpt. ¶ 4(a); BX 2.

4. Bar Counsel sent a second letter on June 6, 2001, requesting a response by June 11, 2001. This second letter was not returned, and Respondent did not submit a response. HC Rpt. ¶ 4(b); BX 3.

5. On June 19, 2001, about two weeks after sending the second letter, Bar Counsel's office received a faxed copy of the May 11, 2001 letter with the words "Wrong address, not

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[2] Bar Counsel presented testimony that "4410 Massachusetts Avenue, N.W., Washington, D.C." was the only address that Respondent had provided to the District of Columbia Bar. Tr. 44. One of the Committee members asked Respondent whether her "office [was] at 4410 Massachusetts Avenue, N.W., Suite 140, at one time." Tr. 49. Her answer, at first, was, "[y]es, it was." *Id*. She then went on to explain, in answer to the question whether "that [is] an office building," that "[i]t is a part of American University" where she was a professor for six years, but she then immediately corrected her testimony with the statement, "[i]t's really 4400 Mass Avenue, N.W." *Id.*

Whether "4410 Massachusetts Avenue" or "4400 Massachusetts Avenue" was the address that Respondent had on file with the District of Columbia Bar in May and June of 2001 is not material in this matter, however, because the evidence establishes that Bar Counsel, at Respondent's request during a subsequent telephone conversation, sent another copy of the "complaint" to Respondent at the address of Respondent's mother in Pennsylvania. *See* BX 7, 8. Respondent admitted at the hearing that she received Bar Counsel's Exhibit 7, in which Bar Counsel wrote that she "enclosed another copy of the complaint for your reference." Tr. 41; BX 7.

[3] The Superior Court's Rule 11 Order (BX 1), which prompted Bar Counsel's investigation in this matter, was described in the record by Bar Counsel's sole witness as "a document sent over from the [Superior] Court, which was used as the basis of our complaint." Tr. 20. The Rule 11 Order is thereafter often referred to during the hearing as "the complaint." *See* Tr. 21, 23, 27-29, 31, 39, 54. In its correspondence and filings with the Board, Bar Counsel consistently refers to the "complaint" or the "complaint filed against [Respondent]." *See, e.g.*, BX 3, 5, 9. Those references, of course, are to the Rule 11 Order, as Bar Counsel's witness explicitly stated in response to questions from one of the Committee members. Tr. 31.

Respondent, who participated in the hearing *pro se* and by telephone (Tr. 8-13), gave an opening statement and a closing argument, and testified on the merits of the charges as well as on factors in mitigation of her sanction. Tr. 37-56, 58-78. She had Bar Counsel's exhibits in front of her during the hearing. Tr. 43; *see also* Tr. 41. Her testimony and other statements during the hearing demonstrate that she well understood that Bar Counsel, although using the word "complaint" throughout its correspondence, was demanding that she "provide a substantive response . . . to each allegation of misconduct" (BX 2) in the Rule 11 Order entered in the litigation that Respondent called "the foundation case." *See, e.g.*, Tr. 74-76.

here" scribbled across it. The fax markings bear a notation that appears to read "Republic Gardens." HC Rpt. ¶ 4(c); BX 4.

6. At all events, Respondent, by September 18, 2001, had become aware that Bar Counsel had sent her an inquiry. On that day, she spoke by telephone with Assistant Bar Counsel Catherine L. Kello and told her the she "would prepare today a written response to the complaint filed against [her]" and that she "would file [her] response with [Bar Counsel's] office within the week." HC Rpt. ¶ 4(d); BX 5.

7. On the same day — September 18, 2001 — Bar Counsel sent a letter confirming that telephone conversation. This letter was addressed to Respondent at "1435 Graham Avenue, Monessen, PA 15062," which was the address of Respondent's mother. Respondent gave that address to Bar Counsel and "told [Bar Counsel] that [she] would accept any service that came to [her] at 1345 Graham Avenue, Monessen Pennsylvania, in [her] name, from Bar Counsel." The September 18, 2001 letter was not returned by the Postal Service, but Respondent did not respond to it. HC Rpt. ¶ 4(e); BX 5; Tr. 41-42; *see also* Tr. 23-24, 50-51.

8. Bar Counsel's next letter to Respondent was some nine months later, on June 21, 2002, when Bar Counsel sent identical letters, one by certified and the other by regular mail, to the Pennsylvania address that Respondent had directed Bar Counsel to use. Those letters recited that Respondent had "repeatedly promised" to send the required written response to the complaint filed against her, but noted that she had failed to do so.[4] Bar Counsel, in its letter, warned that –

> [i]f our office does not receive your response by July 15, 2002, we will seek further action through the Board on Professional

[4] Respondent admitted having made "promises" to provide "written responses," but said she was "unable" to do so "because [she] had no means to do that at that time." Tr. at 55. The Committee gave no credence to that proffered excuse. *See* HC Rpt. at 12-13.

> Responsibility that may include filing disciplinary charges against you for your failure to cooperate in a Bar Counsel investigation.

HC Rpt. ¶ 4(f); BX 6, BX 7.

9. The certified letter of June 21, 2002, was returned to Bar Counsel by the United States Postal Service, marked "unclaimed." The letter sent to the same address by regular mail, however, was not returned. Respondent received Bar Counsel's letter dated June 21, 2002, but made no response. HC Rpt. ¶ 4(f); BX 7; Tr. 24-25, Tr. 41.

10. On July 31, 2002, Bar Counsel sent another copy of the June 21, 2002, letter to Respondent by certified mail at the Pennsylvania address. In August 2002, that certified letter was returned to Bar Counsel by the United States Postal Service with handwritten notations "refused" and "mail on hold." HC Rpt. ¶ 4(g); BX 8.

The Board Order Compelling a Response to Bar Counsel

11. On August 23, 2002, Bar Counsel filed a motion with the Board to compel a response to the disciplinary complaint. A copy of the motion was served on Respondent by mail addressed to her at "1435 Graham, Monessen, PA 15062." Bar Counsel's motion and the attached disciplinary complaint were not returned by the Postal Service, and Respondent did not file an opposition to the motion. HC Rpt. ¶ 4(h).

12. On September 19, 2002, the Board issued an order compelling Respondent to respond to the complaint within 10 days. The Board order was hand-delivered to Respondent's mother at 1435 Graham Avenue, Monessen, PA 15062, on October 7, 2002. Respondent received the Board's order. Respondent did not did not comply with that order. HC Rpt. ¶ 4(i).

Difficulties in Serving Respondent with Petition[5]

13. Bar Counsel filed the instant Specification of Charges and Petition in January 2003, and sent copies of them to Respondent at 1435 Graham Avenue, Monessen, PA 15062, via first-class mail on February 5, 2003. Although Respondent was aware that Bar Counsel was trying to serve her with these pleadings, Respondent proved difficult to serve. HC Rpt. ¶ 5.

14. On or about January 7, 2003, Bar Counsel hired process servers to hand-deliver the Specification of Charges to Respondent. On June 11, 2003, Bar Counsel received an affidavit of attempted service from the process servers, reflecting multiple unsuccessful attempts to serve Respondent. HC Rpt. ¶ 5(a).

15. On February 4, 2003, Bar Counsel spoke by telephone with Respondent to discuss service of the Specification of Charges and Petition in this matter. According to Bar Counsel's letter confirming this conversation, Respondent requested that a copy of the pleadings be sent to the Pennsylvania address. Bar Counsel's letter also notes that Respondent declined to provide to Bar Counsel the address at which she could be personally served and declined to pick up a copy of the papers at the Office at Bar Counsel. The copy sent by mail was not returned by the Postal Service. HC Rpt. ¶ 5(b).

16. On July 2, 2003, Bar Counsel filed a motion with the Court for leave to serve the Specification of Charges on Respondent by alternative means. A copy of the motion was sent to Respondent at the Pennsylvania address. The Court granted this motion. A copy of the Court

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[5] The findings stated in paragraphs 13 through 17 reproduce the Committee's proposed finding numbered 5. *See* HC Rpt. at 9-10. The Committee did not propose a finding that Respondent deliberately evaded service of process, but in its "Proposed Conclusions of Law" stated that Respondent "took affirmative steps that interfered with the disciplinary proceedings by repeatedly evading service." *Id.* at 24. We do not regard that statement as supported by the substantial evidence in the record as a whole. *See infra*, p. 24.

order directing service by publication was sent to Respondent at the Pennsylvania address. Notice of the Specification of Charges and Respondent's obligation to answer it appeared in:

- *The Daily Washington Law Reporter* on May 21 and 24, 2004;
- *The Washington Post* on May 20 and 21, 2004; and
- *The Washington Times* on July 16 and 17, 2004. [6]

HC Rpt. ¶ 5(c).

17. On July 30, 2004, Bar Counsel sent by certified mail the Court order directing service by publication with the Specification of Charges and Petition for Discipline to Respondent at the Pennsylvania address. The United States Postal Service returned the certified mail to the Office of Bar Counsel, marked "unclaimed." HC Rpt. ¶ 5(d).

Mitigation and Aggravation[7]

18. Conceding that she has not met her obligations, Respondent explains that she did not receive Bar Counsel's communications in timely fashion. She says that she was living outside the District of Columbia and had allowed her District of Columbia Bar membership to lapse for non-payment of dues. Because she was no longer practicing as a member of the D.C. Bar, she did not think it important to keep Bar authorities informed of her address. Further, she says she did not have a fixed address to give the Bar for much of this period because she was living an itinerant life. HC Rpt. ¶ 9.

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[6] Although the order directing service by publication was entered in mid-July 2003, publication was not completed until July 2004, a full year later. Nothing in the record accounts for this delay. HC Rpt. at 10 n.8.

[7] The Hearing Committee proposed the statements in the paragraphs 18 through 26 as findings relating to mitigation and aggravation. *See* HC Rpt. at 11-16. We include these statements substantially verbatim in this report for the convenience of the Court, but do not adopt them as findings of the Board. In general, the statements repeat, summarize or paraphrase testimony in the record, as to which the record itself is the controlling evidence, or contain statements of ultimate fact as to which the Board "owes no deference" to the Committee's finding. *In re Frank*, Bar Docket No. 212-98 at 13 (BPR June 13, 2005) (*citing In re Berryman*, 764 A.2d 760, 766 (D.C. 2000)). We address the pertinent statements in these paragraphs in the section of this report that discusses our recommendation against imposing a requirement that Respondent demonstrate her fitness to practice law as a condition to her reinstatement. *See infra*, pp. 21-32.

19. Respondent contends that once she learned that Bar Counsel was trying to contact her, she cooperated with Bar Counsel's attempts to communicate with her and to serve her. According to Respondent, it was gratuitous of Bar Counsel to serve her by publication in mid-2004. The evidence confirms that Respondent contacted Bar Counsel in September 2001, indicating that Bar Counsel could address mail to her at the Pennsylvania address. Beyond that, however, Respondent's contentions that she facilitated Bar Counsel's communications and cooperated with service are simply untenable. HC Rpt. ¶ 10.

a. It is not true that "after [Respondent] offered [her] mother's address and gave [her] mother direction as to receipt of any mail correspondence that came from the Bar Counsel in [her] mail, there were no more rejections or unclaimed documents regarding this matter from that address." To the contrary, Respondent failed to claim or refused to accept every document sent to her by certified mail long after she had told Bar Counsel to send material to the Pennsylvania address. HC Rpt. ¶ 10(a).[8]

b. The affidavit of attempted service reflects that process servers made at least six efforts to serve Respondent personally with the Petition and Specification of Charges. Respondent had declined to provide Bar Counsel with an address at which she could be personally served. HC Rpt. ¶ 10(b).

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[8] The statements in this paragraph overstate the importance of Respondent's failure to claim letters sent to her mother's address by certified mail. The record reveals only two letters sent by certified mail to the Pennsylvania address of Respondent's mother and a copy of the Court's order authorizing service by publication. BX 7, 8 and C7. These delivery failures, however, had no significant consequence, because (1) identical copies of the letters, at the same time they were sent by certified mail, were also sent by regular mail that Respondent did not deny receiving and (2) the order was sent after service had been accomplished by publication. *See* BX C4-C6.

c. Although Respondent has been living in the District of Columbia for approximately one year prior to the hearing in this matter, she did not inform Bar Counsel that she had a local address and phone number until the midst of the hearing on February 2, 2005. HC Rpt. ¶ 10(c).[9]

20. Respondent also offers as an excuse for her failure to respond her lack of access to a computer. Here, too, [the Committee] do[es] not find Respondent credible. HC Rpt. ¶ 11.

a. Respondent was employed practicing law for a portion of the period covered by the Specification of Charges, indicating that her employer's business facilities were available to her. Moreover, she testified that she could have used someone else's computer had she made the effort to do so. The fact that Respondent has had a computer at her home in D. C. since November 2004 but has still failed to respond to this proceeding or to the underlying disciplinary complaint belies her testimony that the lack of computer access prevented her response. HC Rpt. ¶ 11(a).

b. While Respondent was told that she must respond to Bar Counsel's inquiries and the Board's order *in writing*, she was never told that her response must be typewritten. Respondent protests that she never considered submitting a handwritten response because that would appear unprofessional. [The Committee] find[s] it inherently incredible that Respondent could have believed that it was better to breach substantive professional and ethical duties, rather than risk an unprofessional appearance. Given Respondent's conduct in this matter

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[9] The length of time Respondent lived in the District of Columbia prior to the hearing is uncertain. The hearing was held on February 2, 2005. Respondent's testimony was that she had "been at this address in D.C." for "[a] year, a year-plus. I think I moved here in November of last year." Tr. 72. If she moved in November of last year (2004), she would only have lived in the District for three months prior to the hearing and would have moved to the District months after Bar Counsel had effected service by publication.

from start to finish, [the Committee] does not credit her explanation that she acted out of concern for her professional appearance. HC Rpt. ¶ 11(b).

21. Respondent contends that she was unable to respond in appropriate fashion due to the personal tragedy and trauma that she suffered after her initial conversation with Ms. Kello, arising from the violent death of her daughter's father, as well as financial difficulties and medical problems. She provided little factual detail concerning these events, characterizing her situation as follows:

> Over the past four years of my life, I have been very much displaced and suffering financial detriment, which was basically instigated by the foundation case that the Bar Counsel was investigating in this matter.
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> * * *
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> Shortly after speaking with Ms. Kello, I had an incident whereby my daughter's father was missing in the District and was a victim of violence and was killed, robbed and killed. We found him a week later, and, quite frankly — who was very, very much an active member of my daughter's life when we had a healthy household.
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> Basically, in dealing with that grief, which I still am coming to terms with, is one of the reasons that I left the District of Columbia. My daughter was three at the time, and very, very close to her father, and it was a tragedy and it still is.
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> And I'm finally bouncing back from that. I basically was not even in the mental position to prioritize things, and what was most important, I understand my obligations to the Bar Counsel and to the Board on Professional Responsibility and so on and so forth, but at that time and still yet, my obligation was to providing or attempting to provide a healthy environment for my child, which was difficult, to say the least, because I wasn't employed, and there were many, many, many mountains for me to climb.
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> * * *
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> And, in my case, I had financial judgments, first of all, and then a personal tragedy, which is ongoing, which I have overcome — well, I'm overcoming on a constant basis, but it required both my

> daughter and I to eventually go into counseling where I went and stayed with my best friend of 30 years in Philadelphia, and got help and so on and so forth.
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> I mean, basically, I did it for my daughter and I, and after being in Philadelphia for some time, I also had major medical problems where I have acquired a blood disease that's related to anemia, and it was severe; I was hospitalized with transfusions.

HC Rpt. ¶ 12.[10]

22. Respondent mentioned having undergone counseling and taking medication, again without detail, but proffered no *Kersey*[11] mitigation defense. HC Rpt. ¶ 12.

23. [The Committee] find[s] that Respondent lacks both contrition and an appreciation of the seriousness of her misconduct. She appears to consider the need to address the findings in the Rule 11 sanctions order as an inconvenience and an annoyance, not a serious professional matter that required her prompt attention:

> It is a sore spot for me, very disturbing, and then this was unbelievable to me that I was being brought before the Bar Counsel on this matter. Not to get into the foundation of the case or anything, but it was a case that I was a plaintiff in, that actually called for me to reassess my career choice, because I thought that it was a travesty of justice and basically am still in awe of the outcome of that case with respect to how I was handled in that matter.

HC Rpt. ¶ 13.

24. Taken together, Respondent's admission that she had done nothing to prepare for the hearing, failure to appear at either of the scheduled [hearing] times, [12] and statement that she had undertaken another scheduled commitment for the middle of the day cast substantial doubt

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[10] Respondent did not give the Committee documentation or dates for any of the events to which she referred. HC Rpt. at 14 n.10.

[11] *See In re Kersey*, 520 A.2d 321 (D.C. 1987).

[12] See discussion, infra, at n. 22.

on her assertion that she planned to attend the hearing and had simply overslept and confirms that she did not take the disciplinary process seriously. The following statement exemplifies the cavalier attitude that Respondent displayed towards the need to resolve this matter expeditiously:

> I think that when the base case is looked upon, it's not so severe that I think a day or even another month — if it has gone along for the last three years, I imagine it can go on for another day or week to give me a fair opportunity to be heard in front of this Board, which I find almost incredible to even be before you in the first place.

HC Rpt. ¶ 13.

25. Moreover, the fact that she had still not responded to Bar Counsel's inquiries, even after the initiation of disciplinary proceedings for that misconduct, demonstrates the hollowness of her protestations that she can be trusted to follow ethical norms. *See* Tr. at 63 ("I'm now fully prepared to devote whatever time is necessary to get this – to respond to any requests you might have regarding my profession as a lawyer, because I'm anxious to get back in the practice and become the lawyer that I know I am, which is a good one.").[13] *See also* Tr. at 65 ("[Y]ou know, this is not me, and, you know, you can depend on what I say, and I really live by that, and I'd like to prove that to you, if given the opportunity."). HC Rpt. ¶ 13.

26. In short, Respondent offered no credible or sufficient explanation for her *prolonged* failure to respond to Bar Counsel's repeated requests for a written response to the disciplinary complaint lodged against her, followed by the Board's Order to respond to Bar Counsel's inquiries. HC Rpt. ¶ 14.

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[13] The Committee's report contained the following footnote: Respondent's suggestion that "I should be or I'm asking for leniency, so that I can – am now given an ample opportunity to respond fairly, so that Ms. Kello can get the answers that she's looking for, and I can get a fair opportunity to present my defense in this matter" (Tr. at 56) demonstrates her remarkable belief that she deserved still more time to respond, notwithstanding the pendency of these proceedings. The Committee does not understand what she is waiting for. HC Rpt. at 16 n.12.

ANALYSIS

Rule 8.1(b)

The provision in Rule 8.1(b) involved in this case makes it a violation for "a lawyer in connection with . . . a disciplinary matter" to "knowingly fail to respond reasonably to a lawful demand for information from a . . . disciplinary authority." At least by September 18, 2001, Respondent was aware that Bar Counsel was seeking "a written response to the complaint filed against [her]." BX 5. In its letter dated June 21, 2002, which Respondent admitted she received (Tr. 41), Bar Counsel repeated that request and enclosed "another copy of the complaint for your reference." BX 7. Respondent, despite a succession of promises that she would send the requested response, failed to do so.

Respondent freely admitted that, despite the fact that she "did receive the notices" (Tr. 53), she had "not given a written response to any documents presented to [her] by Bar Counsel." Tr. 44. In her closing argument, Respondent insisted upon her awareness "of the obligations that [she] had in responding to correspondence presented to [her] by the Bar Counsel" and contended that her "respect for those rules and respect for [her] profession is evident in the numerous telephone conversations that [she] made to the Bar Counsel and spoke with Ms. Kello." Tr. 55. She tried to excuse her not having made "written responses" on the ground that, because of serious disruptions occurring in her personal life at the time of Bar Counsel's inquiry, she "had no means" to provide written responses. *Id.*; *see also id.* at 71-74. The Committee rightly rejected that excuse as contrary to the evidence. *See* HC Rpt. at 12-13. Moreover, even assuming that Respondent did respond orally to the statements of misconduct in the Superior

Court's Rule 11 Order in telephone conversations with Bar Counsel,[14] the inadequacy of such a response by an attorney in a formal disciplinary investigation hardly need be explained. Bar Counsel demanded, and was entitled to receive, a written response so that Respondent's answer to the allegations of misconduct would be definite, and could be verified, if necessary, without the need for Bar Counsel's testimony, and made a part of the written record of the investigation. Respondent's knowing failure to provide such a response was a violation of Rule 8.1(b).

D.C. Bar R. XI, § 2(b)(3)

An attorney's "[f]ailure to comply with any order of . . . the Board issued pursuant to" D.C. Bar. R. XI is "grounds for discipline" in the District of Columbia. *See, e.g., In re Artis*, 883 A.2d 85 (D.C. 2005); *In re Beaman*, 775 A.2d 1063 (D.C. 2001) (per curiam); *In re Giles*, 741 A.2d 1062 (D.C. 1999) (per curiam); *In re Lockie*, 649 A.2d 546 (D.C. 1994) (per curiam). The Board, in this matter, issued an order on September 19, 2002 that directed Respondent to "provide to Bar Counsel a response to Bar Counsel's written inquiries of May 11, 2001, June 6, 2001, September 18, 2001, and June 21, 2002, and to each allegation of the complaint within ten (10) days of the date of this Order." BX 10. Respondent received that order, a copy of which was personally handed to her mother at the Monessen, Pennsylvania, address that she gave to Bar Counsel. BX C (as reconstituted, see Record Item 12) at 17; BX 11; Tr. at 26-27. Respondent's failure to comply with that order was a violation of D.C. Bar R. XI, § 2(b)(3).

Rule 8.4(d)

Lawyers are prohibited, by Rule 8.4(d), from "engag[ing] in conduct that seriously interferes with the administration of justice." Bar Counsel explicitly warned Respondent, in two letters, "that the District of Columbia Court of Appeals has approved discipline based in part on

[14] There is no evidence in the record that Respondent did in fact provide an oral response to the statements of misconduct contained in the Rule 11 Order. *See* n.18, *infra*.

a violation of Rule 8.4(d) . . . where the attorney failed to comply with Bar Counsel's request for information." BX 5, 7. Respondent nonetheless did not provide Bar Counsel with the response that Bar Counsel first requested in a letter dated May 11, 2001.

The touchstone for violations of Rule 8.4(d) is the three-prong test in the Court's opinion in *In re Hopkins*, 677 A.2d 55 (D.C. 1996). To violate that rule, *Hopkins* holds, a lawyer's misconduct must (i) be "improper," (ii) "bear directly upon the judicial process (i.e., the 'administration of justice') with respect to an identifiable case or tribunal"; and (3) "taint the judicial process in more than a *de minimis* way." *Id.* at 60 61; *see also In re Spikes*, 881 A.2d 1118, 1126 (D.C. 2005); *In re Hallmark*, 831 A.2d 366, 374 (D.C. 2003); *In re Mason*, 736 A.2d 1019, 1023 (D.C. 1999). In deciding *Lockie*, a pre-*Hopkins* case in which the Court, for the first time, suspended a lawyer solely for his failure to respond to Bar Counsel and obey an order of the Board, the Court described the respondent's Rule 8.4(d) violation as "persistent and deliberate disregard of the repeated efforts of Bar Counsel and the orders of the Board" that had, in the words of the Court, "*prevented* Bar Counsel from completing the investigation of the two serious charges which prompted this disciplinary proceeding." 649 A.2d at 547 (emphasis added).

Since *Lockie*, the Board has frequently found Rule 8.4(d) violations in failure to respond cases and recommended short-term suspensions, which the Court has accepted. *See, e.g., In re Beller* ("*Beller I*"), 802 A.2d 340 (D.C 2002) (per curiam) (30-day suspension); *Beaman* (same); *In re Steinberg*, 761 A.2d 279, 280 (D.C. 2000) (per curiam) (same); *Giles* (same), *In re Wright*, 702 A.2d 1251 (D.C. 1997) (per curiam) (same); *In re Lilly*, 699 A.2d 1135 (D.C. 1997) (per curiam) (same). In its opinions in those cases, however, the Court rarely has referred in explicit terms to the effect of the attorney's failure to cooperate on Bar Counsel's investigation. The

opinion in *Giles* is the only post-*Lockie* opinion among the above cases in which the Court explicitly pointed to the fact that the respondents "impeded [Bar Counsel's] investigation and thus seriously interfered with the administration of justice." *Giles*, 741 A.2d at 1062.[15]

In contrast to the *Lockie* and *Giles* opinions, the Court's opinion in *Steinberg* held that the "essence" of the facts on which the Board found a Rule 8.4(d) violation was that "Steinberg was extremely dilatory in responding to Bar Counsel's requests for information on two separate but chronologically overlapping matters and failed to cooperate with the investigations." 761 A.2d at 280. The Court did not mention any impact of that conduct on Bar Counsel's investigation. And in *Lilly*, the Board's report, which the Court deemed "concise and well-reasoned" (699 A.2d at 1136) had found it "uncontroverted that Respondent violated Rule 8.4(d)," because he admitted that "he failed to respond to Bar Counsel's requests for information about the underlying complaint of misconduct" and did not comply with a Board order compelling him "to respond to Bar Counsel's questions about the charges of misconduct." *Id.* at 1137 (appended Board Report). Even though the Hearing Committee had explicitly found that Lilly's "failure to respond to Bar Counsel's requests 'prevented an investigation and resolution of a serious

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[15] The Board, in recent reports, has listed some or all of the above decisions for the proposition that "[s]everal decisions of the D.C. Court of Appeals under both the Code of Professional Responsibility and the Rules of Professional Conduct have sanctioned a lawyer's failure to comply with Bar Counsel's requests for information and orders issued by the Board in disciplinary matters pursuant to Rule 8.4(d)." *In re Scanlon*, Bar Docket No. 416-01 at 6 (BPR May 4, 2004), *adopted*, 865 A.2d 534 (D.C. 2005) (per curiam) (citing all the decisions listed above with the exception of *Wright*). *See also In re Mabry*, Bar Docket No. 228-00 at 9 (BPR Nov. 24, 2003), *adopted*, 851 A.2d 1276 (D.C. 2004) (per curiam):

> An attorney's failure to respond to Bar Counsel's inquiries concerning a client complaint filed against him and his failure to comply with a Board Order compelling him to respond has been held repeatedly to constitute conduct that seriously interferes with the administration of justice.

In support of its finding of an 8.4(d) violation in *Mabry*, the Board cited *Beller; Beaman; In re Nielsen*, 768 A.2d 41 (D.C. 2001) (per curiam); *Steinberg*; and *Giles*. *See also In re Miller*, Bar Docket No. 55-00 at 5-6 (BPR. June 26, 2003) (pending appeal) (citing same cases).

complaint of misconduct'" (*id*.), the Board neither adopted that finding nor, in its analysis of the violation, mentioned any effect of the respondent's conduct on Bar Counsel's investigation.

The teaching in the foregoing line of decisions was confirmed recently in *Artis*. As the Court wrote, "[t]he failure of a member of the Bar to respond to Bar Counsel's inquiries or an order of the Board during the course of a disciplinary investigation has been held to constitute conduct that interferes with the administration of justice under [Rule 8.4(d)]." 883 A.2d at 91. In accordance with this principle, we accept the Committee's conclusion that Respondent violated Rule 8.4(d), even though, as we discuss *infra*, pp. 22-23, the misconduct stated in the charges against Respondent, on the evidence in this matter, cannot be held responsible for more than a small fraction of the some 4 ½ years that have passed since Bar Counsel received the Superior Court's Rule 11 Order in April 2001.[16]

RECOMMENDED SANCTION

The Committee recommended a 30-day suspension, with reinstatement conditioned upon: (1) Respondent's cooperation with Bar Counsel's investigation of the underlying complaint and (2) a showing of fitness. We agree with the 30-day suspension and with a requirement that Respondent's reinstatement be conditioned upon her providing Bar Counsel with a written response to the statements of misconduct in the Superior Court's Rule 11 Order. Under the principles stated by the Court in *In re Cater*, 887 A.2d 1 (D.C. 2005), however, we do not agree that Respondent's misconduct provides an appropriate basis for imposition of a fitness requirement as part of the sanction.

[16] Bar Counsel's difficulties regarding service of the Specification of Charges and Petition in this matter undoubtedly caused of a good part of the delay. Even if Respondent's failure to "provide to Bar Counsel the address at which she could be personally served . . . [or] to pick up a copy of the papers at the Office of Bar Counsel" (HC Rpt. ¶ 5(b), contributed to those difficulties, however, that conduct (which occurred after Bar Counsel's Specification and Petition were filed with the Board) is not part of the misconduct that is charged as a violation of Rule 8.4(d), or any other rule, in this matter.

The 30-Day Suspension

From the outset of the investigation in this matter, Bar Counsel has demanded only one act on the part of Respondent. In its first letter to Respondent, dated May 11, 2001, Bar Counsel writes, "[p]lease provide a substantive response . . . to each allegation of misconduct." BX 2. Bar Counsel's letter does not explicitly state what "allegation[s] of misconduct" that Respondent is to respond to, but the context of that demand permits no question but that Bar Counsel was demanding that Respondent respond to the statements of misconduct in the Rule 11 Order. No evidence suggests that Respondent has ever had any question concerning the meaning of the term "each allegation of misconduct" in Bar Counsel's letter. Under the Court's recent holding in *Artis*, however, a "general denial" would have satisfied Respondent's obligation to respond to Bar Counsel's demand. *Artis,* 883 A.2d at 93. Because Respondent did not even send Bar Counsel a "general denial" in writing, she violated Rule 8.1(b). A suspension for thirty days, as urged by Bar Counsel, is appropriate for Respondent's knowing failure to comply with that demand and is in line with prior suspensions imposed in similar cases in which an attorney has failed to respond Board orders and Bar Counsel's repeated demands for his response to an ethical complaint. *See, e.g.*, *Scanlon*, 865 A.2d at 535 (30-day suspension); *Beller I*, 802 A.2d at 341 (same); *Steinberg*, 761 A.2d at 280 (same); *In re Mattingly* ("*Mattingly I*"), 723 A.2d 1219, 1219 (D.C. 1999) (per curiam) (same).

Cooperation with Bar Counsel

The Committee recommended that Respondent's reinstatement to resume the practice of law be "conditioned on cooperation with Bar Counsel's investigation." HC Rpt. at 30. We agree that one of the key objectives of the sanction in this matter should be to facilitate the disciplinary process that Bar Counsel has initiated based upon the Superior Court's Rule 11 Order. In lieu of a condition based upon Respondent's "cooperation," a potentially vague standard, however, we

prefer that the wording of the condition follow the form that the Court has used in previous cases. The sanction in *Lockie* imposed, as a condition of reinstatement, that the respondent "prove . . . that he has responded to the inquiries of Bar Counsel and the orders of the Board pertaining to the underlying disciplinary proceedings subject only to the limitations specified in D.C. Bar. R. XI, § 8(a)." 649 A.2d at 547. We recommend that a similarly-worded condition be included in the sanction imposed in this matter.

Fitness Requirement

The Court in its recent decision in *Cater* adopted a standard for deciding when a fitness condition should be included in a suspensory disciplinary sanction and laid down some of the governing principles to be followed in deciding whether a fitness condition should be imposed. Contrasting the "fixed period of suspension," which the Court held "is intended to serve as the commensurate response to the attorney's past ethical misconduct," with the "open-ended fitness requirement," the Court held that the latter "is intended to be an appropriate response to serious concerns about whether the attorney will act ethically and competently in the future, after the period of suspension has run." *Cater*, 887 A.2d at 52.

The Court emphasized that "proof of a violation of the Rules that merits even a substantial period of suspension is not necessarily sufficient to justify a fitness requirement." *Id.* at 54. Moreover, the test for "conditioning reinstatement on proof of rehabilitation . . . must take into account the consequences for respondent attorneys." *Id.* at 56. In support of this point, the Court quoted the following passage from the Board's report in *Cater*:

> No one can mistake the burdens attendant to a reinstatement proceeding. These proceedings take approximately eighteen months . . . but may take appreciably longer. . . . They involve three distinct proceedings before a Hearing Committee, the Board, and the Court of Appeals. Assistance of knowledgeable counsel is an obvious benefit and — equally obvious — it

> is costly. Represented or not, the petitioner will devote substantial time and energy to the process.

Id. at 57-58 (citations omitted).

The test for disciplinary fitness requirements is "whether there exists a 'serious doubt' of a respondent's fitness to practice law." *Id*. at 59. The "imposition of a fitness requirement must be justified by evidence in the record of the disciplinary proceeding that calls the respondent's fitness into question," and in that proceeding, the "burden of proof . . . belongs to the proponent of the sanction, i.e., Bar Counsel." *Id*. Bar Counsel must establish "a 'serious doubt' as to the respondent's fitness to practice law," and the "requisite 'serious doubt' must be generated by evidence that is 'clear and convincing.'" *Id*. at 38, 39. Clear and convincing evidence is "evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *Id*. at 59-60 (citing *In re Dortch*, 860 A.2d 346, 358 (D.C. 2004), in turn quoting *In re T.J.*, 666 A.2d 1, 16 n.17 (D.C. 1995)).

In a holding that is particularly pertinent to this matter, the Court elaborated on its test for imposition of a fitness requirement as follows:

> If the misconduct that is established by clear and convincing evidence is not grave enough by itself to evoke [serious] doubt [of a respondent's fitness to practice law], and Bar Counsel relies on other, aggravating facts to justify enhancing the sanction of suspension with a fitness requirement, we think the same standard of proof should apply to those aggravating facts as a matter of logic and fairness.

Id. at 61.

The Court in *Cater* regarded the *Rountree* factors, which are employed in reinstatement proceedings (*In re Roundtree*, 503 A.2d 1215 (D.C. 1985)), as continuing to be "useful in determining whether a serious doubt arises as to an attorney's fitness," but acknowledged "that

these factors are somewhat less useful where the attorney has failed to participate in the disciplinary inquiry." *Cater*, 887 A.2d at 62. In the Board's *Cater* report, we suggested that, in cases involving a respondent suspended for failing to respond to inquiries by Bar Counsel or orders of the Board, a serious doubt as to the Respondent's fitness to practice law can be determined by evaluating three factors. The first factor is the respondent's "level of cooperation" in the disciplinary proceeding. *Id*. at 63. Second, the "repetitive nature of the respondent's lack of cooperation in disciplinary proceedings" should be evaluated. *Id.* The third factor, referred to in the Court's *Cater* opinion as a "catchall . . . factor [that] ensures that any other relevant facts will be taken into account," is simply "other evidence that may reflect on fitness." *Id.* at 63-64. The Court approved the Board's use of these three factors. It deemed the Board's approach as "fully compatible" with the principle that an attorney who "has repeatedly evinced indifference (or worse) toward the disciplinary procedures by which the Bar regulates itself" (*In re Siegel*, 635 A.2d 345, 346) (D.C. 1993) (per curiam)) has engaged in behavior that, "[i]n and of itself . . . raises a serious question about the attorney's continuing capacity and willingness to fulfill his or her professional obligations." *Cater*, 887 A.2d at 63-64. We now examine each of the *Cater* factors in turn.

1. Respondent's Level of Cooperation

With regard to the first *Cater* factor, the Committee viewed the circumstances in this matter as presenting "a truly egregious case, in which a Respondent has managed to stonewall the disciplinary system for 3 ½ years." HC Rpt. at 29. "Sidetracked" may be a more accurate term for what has happened to the investigation of the misconduct stated in the Superior Court's Rule 11 Order that Bar Counsel opened in April 2001. The Committee's assessment of the egregiousness of Respondent's misconduct, however, must be tempered by the consideration

that, if Bar Counsel's investigation has been sidetracked, it was only because Bar Counsel consciously allowed the investigation to be sidetracked.

In April 2001, Bar Counsel had the Rule 11 Order and the record of the proceedings that led the Superior Court to enter that order, or at least free access to that record. Bar Counsel, it seems, therefore, had at hand all the information needed to file a petition for disciplinary proceedings based on any misconduct stated in the Rule 11 Order and to proceed to a hearing on that petition. If a proceeding against Respondent were warranted, no reason suggests itself — and the record certainly reveals no reason — for Bar Counsel to refrain from initiating that proceeding solely because of Respondent's failure to provide a written general denial of the misconduct stated in the Rule 11 Order.[17] *Cf. Miller*, Board Report at 22 (Bar Counsel made no "showing that she needed Respondent's participation in order to investigate the underlying charges and petition the complaint").

Bar Counsel, of course, has every reason to offer the attorney against whom a complaint is filed the opportunity to respond to the charges before instituting a disciplinary proceeding. Once that offer has been extended, however, and a reasonable period has been allowed for the attorney to respond, the lack of response does not force Bar Counsel to put off filing a petition for a disciplinary proceeding in a case, such as the present matter, in which the attorney is not withholding evidence that Bar Counsel needs to evaluate the charged violation.

To be sure, Respondent's failure to respond to Bar Counsel's request is not excused by the fact that Bar Counsel could have chosen to proceed without the response it has unsuccessfully pursued for the past four years. But the seriousness of Respondent's misconduct

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[17] As the Court observed in *Artis*, "[t]he Board has stated in its case law that an attorney who is notified by Bar Counsel about a complaint is entitled to make a 'general denial' of the charges." 883 A.2d at 93.

must be evaluated in the overall circumstances in which it occurred, including the nature of the effect it necessarily had on the disciplinary process. The evidence in this matter compels the conclusion that, at most, Respondent's failure to provide Bar Counsel with a response could have delayed the disciplinary proceeding only briefly. It did not necessarily prevent the underlying proceeding, or even delay it for an inordinately long time. *Compare Lockie*, 649 A.2d at 547 (fitness requirement imposed where "respondent's persistent and deliberate disregard of the repeated efforts of Bar Counsel and the orders of the Board has . . . *prevented* Bar Counsel from completing the investigation of . . . two serious charges") (emphasis added)). That fact bears upon, and in our view, greatly reduces, the gravity of Respondent's violations in this matter.

The Committee, in its discussion of Respondent's "level of cooperation," referred to factors beyond Respondent's violations, which are all based upon Respondent's failure, despite repeated requests from Bar Counsel and an order of the Board, to provide Bar Counsel with a written response to the Rule 11 Order that was the predicate for Bar Counsel's investigation.[18] For example, the Committee noted that Respondent "did not submit an Answer to the Specification of Charges" and "refused to stipulate to facts that she was unable to contest." HC Rpt. at 24.[19] In addition, the Committee appears to have based its assessment of the level of Respondent's cooperation upon (i) the return to Bar Counsel of two certified letters marked "unclaimed" or "refused . . . mail on hold" and (ii) the failure of "[p]rocess servers engaged by

[18] There is no evidence that Respondent gave Bar Counsel an oral response to the statements in the Rule 11 Order during the telephone conversations, which Respondent characterized as "numerous" (Tr. 55), between Respondent and Bar Counsel. Respondent pointed to those conversations as showing her "respect for" what she described as "the obligations that [she] had in responding to correspondence presented to [her] by the Bar Counsel." *Id.* Neither Respondent nor Bar Counsel offered evidence of the content of those conversations, except for what appears in Bar Counsel's letters confirming the calls. *See, e.g.,* BX 5.

[19] The Committee's reference to Respondent's "refus[al] to stipulate" appears to refer to her refusal, in response to questions from the Committee Chair at the start of the hearing, to stipulate to allegations in the Specification of Charges as to which she had no personal knowledge." Tr. 16-19. We would not ordinarily regard as impermissibly uncooperative a respondent's decision to require Bar Counsel to prove allegations of which the respondent does not have sufficient knowledge to form an opinion as to the truth.

Bar Counsel to serve the Petition and Specification of Charges" by personal service upon Respondent, despite repeated attempts. *Id.* at 24-25. Each of the undelivered certified letters, however, was a copy of an identical letter sent by regular mail that Respondent did not deny having received.

Moreover, while the failure to personally serve Respondent with the Petition and Specification of Charges led Bar Counsel to obtain an order from the Court directing service by publication, the substantial evidence in the record as a whole does not support the Committee's statement that Respondent "took affirmative steps that interfered with the disciplinary proceedings by repeatedly evading service." *Id*. at 24. The process server attempted to serve Respondent at her mother's address in Pennsylvania and at a Baltimore address that the evidence nowhere identifies as Respondent's residence. *See* BX C1. Respondent, in fact, testified that she "never lived [in Baltimore] in her life." Tr. 48. Respondent had given Bar Counsel her mother's address in September 2001 as a place where mail to her could be sent, but there is no evidence that Respondent was living at her mother's house at the time service was attempted more than a year later.[20]

[20] There is some evidence concerning the Pennsylvania address of Respondent's mother in Bar Counsel's letter to Respondent, dated February 5, 2003, which states that Respondent "declined to provide Bar Counsel with a current address where we can serve you personally with papers" and "declined our invitation to pick up a copy of the papers at our office." Record Index Tab 12 at 17. Respondent was not questioned about the circumstances of that conversation, but she testified that she told Bar Counsel that she would accept any service that came to her at her mother's address in Pennsylvania. Tr. 42. The February 5, 2003 letter from Bar Counsel appears to corroborate that testimony, stating that Respondent "requested that [Bar Counsel] send [the Specification of Charges and Petition] to [her] at the . . . Monessen, PA address, even though [she] stated that [she does] not reside there." Record Index Tab 12 at 17. The Affidavit of Attempted Service/Non-service introduced by Bar Counsel (*id*. at 1) lists "several attempts" to serve Respondent at the Pennsylvania address, but does not give the dates of those attempts. The papers to be served appear to have been sent to the process server on January 7, 2003. *Id*. at 18. The substantial evidence thus shows that the attempts to serve Respondent were unsuccessful because Respondent did not reside at the Pennsylvania address and fails to show that any attempts were made after Respondent told Bar Counsel that she would accept service that came to that address.

During the hearing, Respondent freely acknowledged "the obligations that [she] had in responding to correspondence presented to [her] by the Bar Counsel." Tr. 55. She nevertheless had taken no steps to comply with those admitted obligations at the time of the hearing. The following statement, made by Respondent as she began her statement in mitigation, immediately after the Committee announced its "non-binding determination that at least one Rule has been violated here" (*Id.* at 57), provides perhaps the best insights the record has to offer regarding factors that might lie beneath Respondent's seemingly self-defeating conduct:

> Over the past fours years of my life, I have been very much displaced and suffering financial detriment, which was basically instigated by the base, the foundation case that the Bar Counsel was investigating in this matter.
>
> It is a sore spot for me, very disturbing, and then this was unbelievable to me that I was being brought before the Bar Counsel on this matter. Not to get into the foundation of the case or anything, but it was a case that I was a plaintiff in, that actually called for me to reassess my career choice, because I thought that it was a travesty of justice and basically am still in awe of the outcome of that case with respect to how I was handled in that matter.

Id. at 59.

Respondent went on in her testimony to tell of "an incident" that occurred "[s]hortly after speaking with [Bar Counsel]." *Id.* at 60.[21] Her "daughter's father was missing in the District and was a victim of violence and was killed, robbed and killed." *Id.* She testified that "[w]e found him a week later, and, quite frankly — who [*sic*] was very, very much an active member of my daughter's life when we had a healthy household." *Id.*

[21] We assume that testimony refers to Respondent's first telephone conversation with Bar Counsel on September 18, 2001. *See supra*, p. 4.

At this point in her testimony, Respondent went into a lengthy statement:

> Basically, in dealing with that grief, which I still am coming to terms with, is one of the reasons I left the District of Columbia. My daughter was three at the time, and very, very close to her father, and it was a tragedy and it still is.
>
> And I'm finally bouncing back from that. I basically was not even in the mental position to prioritize things, and what was most important, I understand my obligations to the Bar Counsel and to the Board on Professional Responsibility and so on and so forth, but at that time and still yet, my obligation was to providing or attempting to provide a healthy environment for my child, which was difficult, to say the least, because I wasn't employed, and there were many, many, many mountains for me to climb.

Id. at 60-61.

Respondent then spoke about the inquiries from Bar Counsel in the context of her circumstances:

> And in addition to those mountains, I was confronted with that which was presented to me by the Bar Counsel. While my response was, indeed, not appropriate, I did respond, and there were many things that I did not do during that time.
>
> I'd like to say that now — and if my history is looked at prior to this case and any notice by the Bar Counsel, I was not — I was not unavailable. I served my profession well, I believe, having put myself through law school and having achieved my goals through my own initiative. I mean, I wanted to be a lawyer and I became one on my own, and I respected that and held to — held firmly to the laws and the rules and things that guide us as lawyers and I believe in them.

Id. at 61-62.

Respondent added her belief that "things happen in life, and even though we try to, you know, stay the course, things veer us off." *Id.* at 62. She then appeared to go on with an explanation of the "things" that had happened in her life that caused her to "veer off" course.

> And, in my case, I had financial judgments, first of all, and then a personal tragedy, which is ongoing, which I have overcome — well, I'm overcoming on a constant basis, but it required both my daughter and I to eventually go into counseling where I went and stayed with my best friend of 30 years in Philadelphia, and got help and so on and so forth.
>
> I mean, basically, I did it for my daughter and I, and after being in Philadelphia for some time, I also had major medical problems where I have acquired a blood disease that's related to anemia, and it was severe; I was hospitalized with transfusions.

Id.

The Committee was largely unmoved by Respondent's testimony. The weight and credibility of Respondent's narration of "a series of personal and family difficulties" (HC Rpt. at 21) were discounted because Respondent had not shown "the chronological relationship between these unfortunate events and her non-cooperation" and because of the length of her "period of non-cooperation." *Id*. The Committee's ultimate conclusions were that "Respondent lacks both contrition and an appreciation of the seriousness of her misconduct" (*id*. at 15),[22] that she "regards the need to respond to serious allegations about her prior conduct as a nuisance and is

[22] In its report, the Committee depicted "Respondent's egregious disregard for the disciplinary process" as "plain." HC Rpt. at 26. As discussed *supra* at n.12, one set of circumstances the Committee cites for that conclusion is the fact that Respondent did not appear on the day of the hearing, but called the Board office that morning requesting that the hearing be recessed until 11:00 a.m., a request to which the Committee acceded. Tr. 2-3. When the hearing was reconvened (at 11:00 a.m.) and commenced without Respondent, a telephone call came from Respondent in which she requested a continuance "because [her] whole day [was] thrown off" as a result of oversleeping and taking her daughter to school. *Id.* at 8-9. The Committee, in its report, expressed its "grave doubts as to whether Respondent in fact intended to attend the hearing or merely called to use her lateness as a pretext for a continuance." HC Rpt. at 26. We do not consider the Committee's expression of its "grave doubts" as amounting to a finding, based upon clear and convincing evidence, that Respondent in fact harbored the intent postulated by the Committee.

annoyed that Bar Counsel has insisted on written responses" and that "she is not prepared to treat her obligations to the disciplinary system as serious priorities." HC Rpt. at 27.

The only misconduct established by clear and convincing evidence in this matter, however, is Respondent's failure to respond to Bar Counsel's demand for a written response to the Rule 11 Order and a Board order to enforce that demand. That misconduct warrants a substantial sanction, to be sure, but prior disciplinary sanctions for similar misconduct have not involved suspensions for a period any longer than 30 days. In these circumstances, we do not regard conclusions about feelings Respondent may have toward the disciplinary system, which by their nature must always be influenced by a considerable measure of subjectivity and speculation, as the kind of "facts" that call for a fitness requirement the probable consequence of which would be to extend Respondent's "30-day" suspension for several years.

2. Repetitive Nature of Respondent's Misconduct

The evidence, in some cases, may point to a serious doubt as to the fitness of a respondent based solely on misconduct and attendant failure to cooperate in a single disciplinary matter. The circumstances in *Siegel* provide an instructive example of such a case. In that case, the Court accepted the Board's recommendation of a suspension for six months — six times the suspension that Bar Counsel has urged as appropriate in this matter — together with the requirement that the respondent prove fitness prior to reinstatement. Two "unrelated but consolidated disciplinary matters" were involved. 635 A.2d at 345. The Court accepted Board findings that the respondent, in one of the matters, had "sought to avoid his responsibilities by *deliberate evasion* of Bar Counsel and his agents" and that his "failure to cooperate *at any level* with Bar Counsel's investigation of the underlying complaint and his failure to respond to the orders of this Board and the court *resulted in a substantial waste of resources and seriously*

interfered with the efficient administration of the disciplinary system." *Id*. at 346 (emphasis added).

The evidence in this matter, as we discuss *supra*, p. 24, does not establish a "deliberate evasion" on the part of Respondent. And although Respondent's level of cooperation certainly was not adequate, there is in this matter no "failure to cooperate at *any* level with Bar Counsel's investigation of the underlying complaint" as there was in *Siegel*. Respondent, in fact, was in touch with Bar Counsel by telephone at various times throughout the investigation and provided Bar Counsel with a Pennsylvania address for sending her correspondence and serving formal filings. As the Board reasoned in rejecting a Hearing Committee proposal that a fitness requirement be included in the sanction in *Miller*, this is not a case in which Bar Counsel has made a "showing that she needed Respondent's participation in order to investigate the underlying charges and petition the complaint." *Miller*, Board Report at 22. Thus, if any "substantial waste of resources" occurred in this matter, as in *Siegel*, we cannot conclude, on the evidence in this matter, that the waste should all be attributed to Respondent's violation of Rules 8.1(b) and 8.4(d) and D.C. Bar R. XI, § 2(b)(3) or any other misconduct established by clear and convincing evidence in the record.

It is true that Bar Counsel repeated its demand several times, and Respondent failed to respond to those repeated demands, as well as to the Board's order that she comply with the demand. Respondent, however, did not evince the kind of "indifference (or worse) toward the disciplinary procedures by which the Bar regulates itself," as the Court had before it in *Siegel*.

635 A.2d at 346.[23] Respondent's conduct is more akin to the conduct for which a 30-day suspension without a fitness requirement has been deemed appropriate. *See, e.g., Beller I* (30-day suspension without fitness); *Beaman* (same); *Steinberg* (same); *Miller* (Board recommended 30-day suspension without fitness).

3. Other Evidence

A final consideration militates against a fitness requirement. The record in this matter, including the reasoning upon which the Committee based its recommendation, suggests that Respondent's fitness to practice law has much to do with what appears to be her reluctance, amounting perhaps to a psychological inability, to take meaningful steps toward resolving her own emotions regarding the Rule 11 Order entered against her and the lawyer who represented her in what she calls the "foundation case." Although that Rule 11 Order was entered more than five years ago, Respondent, without prompting of any kind, adverted to that order as a "sore spot for [her], very disturbing." Tr. 59. She still finds it "unbelievable . . . that [she] was being brought before the Bar Counsel on this matter" (*id.*) and describes her Superior Court experience in 2000 as "a travesty of justice," the outcome of which she "basically [is] still in awe" and that "actually called for [her] to reassess [her] career choice." *Id.*

A disciplinary hearing is not a psychological analysis, but the question of an attorney's fitness to practice law has a psychological dimension, along with its obvious moral and intellectual aspects. To the extent Respondent's history is revealed in this record, there is no

[23] The facts in *Siegel* give context and meaning to the Court's dictum that "In circumstances where the respondent has repeatedly evinced indifference (or worse) toward the disciplinary procedures by which the Bar regulates itself, a requirement that the attorney prove fitness to resume practice is entirely reasonable." *Siegel*, 635 A.2d at 346.

We do not regard the circumstances in this matter, which involve only Respondent's failure to comply with Bar Counsel's repeated demands for information that is not shown to be necessary for Bar Counsel to proceed and no "deliberate evasion of Bar Counsel and his agents," (*id.*) as falling to the level of "repeatedly evinc[ing] indifference (or worse) toward the disciplinary procedures by which the Bar regulates itself." *Id.*

reason to believe that Respondent is inherently incapable of functioning as a practicing lawyer. She has been a member of the Bar of this Court for more than 15 years and of the Pennsylvania Bar since January 1988. BX A. She has no disciplinary history. Tr. 57-58. Her District of Columbia Bar registration discloses that she became a member of the Bar of this Court by passing the Bar examination. BX A. She has taught for a number of years at one of Washington's leading universities. Tr. 49. Respondent would certainly not be the first lawyer who develops a "mental block" in dealing with charges of his or her own misconduct. *See, e.g.*, *Steinberg*, 761 A.2d at 284 (appended Board report) (fitness not imposed in a case where respondent "could not 'bring [himself] to sit down in front of the computer and respond to [Bar Counsel's requests].'") Respondent in this case could not bring herself to write a response to the Rule 11 Order entered against her, but there is no evidence that she would have a similar difficulty in dealing with client work. As we wrote in *Cater*, "responding to a disciplinary proceeding in which the respondent's conduct is the focus is fundamentally different than addressing the legal needs of a client." *Cater*, Board Report at 29.

Were a fitness condition imposed in this matter, Respondent's apparent failure adequately to deal with her psychological and emotional reactions to the Superior Court's Rule 11 Order would have to be a part of any reinstatement hearing. But a reinstatement hearing in Respondent's case would either have to be conducted in the shadow of Bar Counsel's pending and thus unresolved investigation of the Rule 11 Order misconduct or be deferred until that investigation is completed and any charges that might result from the investigation are resolved. Imposition of a fitness condition in these circumstances aptly illustrates how, as the Court put it in *Cater*, "[t]he fitness requirement can be a tail that wags the disciplinary dog." *Cater*, 887 A.2d at 56.

In these circumstances, we deem the better course to condition Respondent's reinstatement only on her compliance with Bar Counsel's pending demand, which is, after all, the principal focus of this proceeding, and to await a subsequent proceeding on the underlying charges, should there be one, for any conclusion about her fitness to practice law. The Board and Hearing Committee in that proceeding can then take Respondent's conduct in this matter into account, with the added benefit of being able to evaluate the seriousness of underlying charges, if established, and whatever light they might shed on Respondent's fitness to practice law.

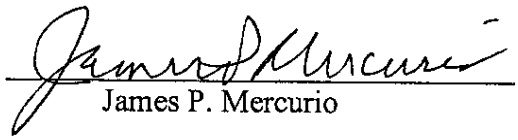
Taking this course leaves open the obvious possibility that, if Bar Counsel completes the Rule 11 Order investigation without pursuing charges or the Board finds that the charges cannot be sustained by clear and convincing evidence, Respondent would not be required to demonstrate her fitness to practice law at any time. With such a resolution of the Rule 11 Order charges, however, we do not believe that a viable question about Respondent's fitness to practice law would be posed. It seems quite unlikely that, taking all the circumstances of this matter into account, Respondent's failure to respond to allegations that, in the end, were deemed unproven or unworthy of further proceeding would be thought to render her unfit to practice law.

CONCLUSION

The Board finds that Respondent Terri Y. Lea violated D.C. Bar. R. XI, § 2(b)(3) and Rules 8.1(b) and 8.4(d) of the District of Columbia Rules of Professional Conduct. We recommend that she be suspended from the practice of law in the District of Columbia for a period of 30 days and required, as a condition of her reinstatement, to provide Bar Counsel with a substantive written response to each statement of misconduct in the Order of the Superior

Court of the District of Columbia, entered on January 24, 2000, which imposes sanctions upon her under Super. Ct. Civ. R. 11(b)(2), 11(b)(3) and 11(c)(2).

BOARD ON PROFESSIONAL RESPONSIBILITY

By: 
James P. Mercurio

Dated: MAR - 3 2006

All members of the Board concur in this Report and Recommendation. Mr. Baach has filed a separate concurring statement.

CONCURRING STATEMENT OF
BOARD CHAIRMAN MARTIN R. BAACH

I concur entirely with the thorough analysis and conclusions of Board Member Mercurio and add this concurring statement solely to focus on a larger concern as to which the instant case is illustrative, namely the Office of Bar Counsel's all too frequent practice of pursuing failure to cooperate charges in lieu of devoting the necessary prosecutorial resources to investigating and, if appropriate prosecuting, the underlying ethical complaint. In my view, this practice does not adequately advance the goals of the disciplinary system.

Here, the Superior Court imposed sanctions against Respondent under Super. Ct. Civ. R. 11 for seeking a default judgment against a former client for recovery of legal fees in an amount for which the court found there was no evidentiary support and which the court concluded reasonable inquiry by Respondent would have shown to be unjustifiable. The Superior Court entered its Rule 11 sanctions after an evidentiary hearing on the matter in which Respondent participated and testified. Its January 24, 2000 Order is public record. It is this Order that the Superior Court referred to Bar Counsel.

Bar Counsel notified Respondent of its receipt of the Rule 11 Order and asked for her response. Respondent should have made a timely response, even if it was to make a general denial, and her failure to do so properly formed the basis for failure to cooperate charges. What the failure to respond should not have done, in my opinion, was to derail the Office of Bar Counsel's investigation and prosecution of the underlying ethical

charges based on the substance of the Rule 11 Order. Yet that is what appears to have happened.

From the record before us it does not appear that the absence of Respondent's version of events was essential to the investigation and preparation of charges against the Respondent. Respondent had already testified before the Superior Court on the matters in issue, and the court had weighed and rejected her testimony. At minimum, the record of those proceedings provided evidence of an ethical violation and perhaps was sufficient to establish a prima facie case unless and until Respondent delivered a better explanation of her conduct than she gave the Superior Court. Nonetheless, the Office of Bar Counsel abandoned pursuit of charges based on the substance of the Superior Court's Rule 11 Order and instead of bringing the matter to conclusion placed it on hold while it spent four and a half years perfecting the failure to cooperate charges.

As the Board's Report and Recommendation details, Respondent's failure to respond to Bar Counsel's initial inquiry might have been a mere bump in the road had Bar Counsel simply elected to move forward with substantive charges. But Bar Counsel appears to have set those charges aside and instead taken time-consuming and extraordinary steps – sending multiple letters by certified mail, engaging special process servers, and petitioning for an order permitting notice by publication – in order to set up the failure to cooperate charges before us today.

The Board addressed a related concern in *In re Miller*, Bar Docket No. 55-00 (BPR June 26, 2003), when we criticized Bar Counsel for not pursuing an investigation of the underlying charge of misconduct and using failure to cooperate charges coupled with a request for imposition of a fitness condition as the sole basis for prosecution. The

instant case demonstrates that this practice persists. In my view, this practice does not allow the disciplinary system to achieve its primary objective – the resolution of all disciplinary complaints at the earliest possible time and on their merits.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: _____
Martin R. Baach
Chair

Dated: MAR – 3 2006