THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

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

In the Matter of	:	
	:	
WAYNE R. ROHDE, ESQUIRE	:	Board Docket No. 15-BD-107
	:	Bar Docket No. 2013-D336
Respondent.	:	
	:	
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 421213)	:	

REPORT AND RECOMMENDATION

Disciplinary Counsel alleges that Respondent made false statements in connection with *pro hac vice* applications filed in federal courts in Virginia and New York, violating D.C. Rules of Professional Conduct 3.3(a)(1), 8.4(c) and 8.4(d), Virginia Rules of Professional Conduct 3.3(a)(1) and 8.4(c), and New York Rules of Professional Conduct 8.4(c) and 8.4(d).

The Hearing Committee finds that Disciplinary Counsel has proven, by clear and convincing evidence, that Respondent violated Virginia Rules 3.3(a)(1) and 8.4(c), but not the relevant D.C. and New York Rules. The Hearing Committee recommends that Respondent should be publicly censured.

I. PROCEDURAL HISTORY

Disciplinary Counsel filed charges on November 3, 2015. On February 19, 2016, the Board granted Respondent's motion to defer this matter pending resolution of another disciplinary matter involving Respondent (*In re Rohde*, Board Docket No.

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

D347-05 (*Rohde I*)). The Court of Appeals issued its decision in *Rohde I* on August 30, 2018. 191 A.3d 1124 (D.C. 2018). The Board lifted the deferral order on October 26, 2018, and directed its Executive Attorney to assign a new hearing committee.

This matter was assigned to this Ad Hoc Hearing Committee (Matthew K. Roskoski, Esquire, Chair; George Hager, Public Member; and, Arlus J. Stephens, Esquire, Attorney Member). On December 14, 2018, Respondent renewed his Motion Formally Invoking the Doctrine of Collateral Estoppel, which had been filed prior to the deferral. Disciplinary Counsel opposed Respondent's motion. On January 28, 2019, the Hearing Committee recommended denying Respondent's motion "for reasons that will be set forth in the Hearing Committee's Report and Recommendation."

An evidentiary hearing was held on February 4-5, 2019. Disciplinary Counsel presented three witnesses, Wayne R. Rohde, Esquire; Kathryn Ruth Yingling Schellenger, Esquire; and David Loh, Esquire. Respondent presented Marc Fink, Esquire. Both parties' exhibits were admitted without objection (DX A-D, DX 1-3, and RX 1-82). Tr. 8-10.[1] At the conclusion of the first phase of the hearing, the Hearing Committee reached a preliminary non-binding conclusion that Disciplinary Counsel had proven at least one Rule violation by clear and convincing evidence.

[1] "Tr.___," refers to the hearing transcript; "DX___" refers to Disciplinary Counsel's exhibits; "RX___" refers to Respondent's Exhibits, identifying the relevant page numbers; "Stips ____" refers to the Stipulations, filed on January 28, 2019.

Tr. 307; *see* Board Rule 11.11. Disciplinary Counsel noted Respondent's prior discipline (*Rohde I*) in aggravation of sanction. Tr. 353. In mitigation, Respondent offered character letters (RX 83-87). *See* Tr. 353-59. Those exhibits are admitted in evidence.

II. FINDINGS OF FACT

The following findings of fact are based on the testimony and documentary evidence admitted at the hearing, and these findings of fact are established by clear and convincing evidence. *See* Board Rule 11.6; *In re Cater*, 887 A.2d 1, 24 (D.C. 2005) ("clear and convincing evidence" is more than a preponderance of the evidence, it 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").

1. Wayne R. Rohde, Esquire, is a member of the District of Columbia Bar, having graduated *cum laude* from the Georgetown University Law Center, Tr. 89, and been admitted to the District of Columbia Bar on November 15, 1989. DX A (Registration Statement).

2. Wayne Rohde suffers from alcoholism. He has, however, been substantially rehabilitated – having completed treatment for alcoholism, been a long-term participant in Alcoholics Anonymous, and abstaining from alcohol since October 2004. RX 25 at 13-14, 28-29 (*Rohde I* Board Report); *Rohde I*, 191 A.3d at 1128.

3. From 1991 to September 2010, Mr. Rohde practiced law as an associate at the firm of Sher & Blackwell LLP. DX 3 at 10 (*Rohde I* Hearing Committee Report).

Sher & Blackwell specialized in international transportation, primarily maritime matters, with 12-15 lawyers (six of whom were partners). Tr. 184-85 (Fink); Tr. 62 (Rohde). Mark Fink served as its managing partner. Tr. 182, 210 (Fink).

4. On October 20, 2004, while employed at Sher & Blackwell, Mr. Rohde was involved in an automobile collision in Arlington County, Virginia. He did not remain at the scene of the collision, where the other driver was severely injured and trapped in her vehicle. Ten months later, on August 10, 2005, Mr. Rohde pleaded guilty to felony hit-and-run. The Circuit Court of Arlington County entered an order of felony conviction against him, and on November 18, 2005, suspended its sentence of two-years incarceration, placed him on supervised probation, and ordered him to pay costs of $405. DX 3 at 14-16; Stips 3-4.

5. Before pleading guilty, Rohde informed the partners at Sher & Blackwell of his accident, his alcoholism, and his intent to plead guilty to a felony that could result in his suspension from the practice of law. Rohde also advised the firm that he intended to report his conviction to the D.C. Court of Appeals and to request that the Court not immediately suspend him. At no point did Sher & Blackwell terminate, discipline, or take any adverse employment action against Rohde. Tr. 187-89, 190-91 (Fink).

6. By letter dated October 18, 2005, pursuant to D.C. Bar R. XI, § 10(a), Mr. Rohde's lawyer, Steven Tabackman, Esquire, notified the Court of Appeals of Mr. Rohde's felony conviction and simultaneously moved the Court to refrain from imposing the usual interim suspension of his D.C. Bar license. DX 1 at 13

(Tabackman's October 18, 2005 correspondence to Clerk of the Court), 16 (Rohde's "Motion to Have Felony Criminal Conviction in Virginia Treated as a 'Non-Serious' Crime or, in the Alternative, to Set Aside Order of Suspension in the Interest of Justice"); *see* Stips 5.

7. Disciplinary Counsel opposed the motion and Mr. Rohde replied, attaching an affidavit asserting that he was drunk at the time of his criminal conduct and had no memory of it. DX 1 at 50 (Bar Counsel's Response[2]), 63 (Rohde's Reply), 79 (Affidavit). On December 5, 2005, the Court granted Mr. Rohde's motion "without deciding whether [Rohde] committed a 'serious crime,'" and declined "to impose an immediate suspension . . . ." DX 1 at 82; *see* Stips 6.

8. On March 16, 2006, the Court ordered the "Board on Professional Responsibility [to] institute a formal proceeding to determine the nature of the final discipline to be imposed and to review the elements of the statute of which respondent was convicted to determine whether his conviction involved moral turpitude per se or on its facts." DX 1 at 84; *see* Stips 7.

9. On July 27, 2006, the Board determined that a violation of Virginia's hit-and-run statute "does not constitute moral turpitude per se" and referred Rohde's case to a Hearing Committee to explore the underlying facts. RX 8; *see* Stips 8.

10. On December 19, 2006, Disciplinary Counsel filed a petition instituting formal disciplinary proceedings and a specification of charges alleging, *inter alia*,

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[2] The D.C. Court of Appeals changed the title of "Bar Counsel" to "Disciplinary Counsel," effective December 19, 2015.

that Mr. Rohde's criminal conduct constituted a crime of moral turpitude on the facts. DX B at 2; Stips 9. Like other filings in the disciplinary case, including those by his own counsel, the petition and the specification of charges were captioned in the "District of Columbia Court of Appeals – Board on Professional Responsibility." *See, e.g.*, DX B at 2, 14; RX 11 at 1 (Rohde's submission to Hearing Committee Number Three on rehabilitation).

11. Hearing Committee Number Three heard evidence in *Rhode I* during December 2007 and January 2008, including evidence as to whether Mr. Rohde was entitled to mitigation of sanction under *In re Kersey*, 520 A.2d 321 (D.C. 1987), due to rehabilitation from alcoholism. Hearing Committee Number Three took the case under submission, and over five years later, on June 27, 2013, ordered the parties to submit "updated information" of Mr. Rohde's treatment and rehabilitation. *See* DX 3 at 7-8 (*Rohde I* Hearing Committee Report); Stips 10.

12. During the ongoing investigation, Disciplinary Counsel learned of the 2010 *pro hac vice* applications at issue in this case. DX 1 at 4-10 (Disciplinary Counsel's Submission); *see* Stips 11. Disciplinary Counsel submitted those *pro hac vice* applications, arguing that they rendered Mr. Rohde ineligible for *Kersey* mitigation. DX 1 at 4-10.

13. On January 16, 2015, Hearing Committee Number Three issued its Report and Recommendation, finding that Mr. Rohde had "violated Rule 8.4(b) and committed a 'serious crime' within the meaning of D.C. Bar R. XI, § 10(b)." DX 3 at 1, 58. The Committee recommended he be suspended for two years with a

requirement to prove fitness as a condition of reinstatement, but that the suspension be stayed and Mr. Rohde placed on three years of supervised probation. DX 3 at 58. The Board adopted the Hearing Committee's report and recommended the same sanction to the Court. DX 3 at 59, 91. The Board dismissed as irrelevant to *Kersey* mitigation Disciplinary Counsel's argument arising from the *pro hac vice* applications. DX 3 at 87. The Court adopted the Board's Report and Recommendation on August 30, 2018, and imposed the recommended sanction. DX 3 at 93; *Rohde I*, 191 A.3d at 1138.

14. In September 2010, after the hearing in *Rohde I*, but before the Committee issued its report, Sher & Blackwell merged with Cozen O'Connor, a large firm, then employing between 625 and 650 lawyers. Tr. 186, 194 (Fink); Stips 1.

15. Fink informed Cozen O'Connor management of the still-pending disciplinary proceeding against Rohde. In addition, when Rohde signed his offer letter from Cozen O'Connor, he included the notation: "As disclosed by Marc Fink and as disclosed in my lateral attorney questionnaire, there is a disciplinary proceeding pending against me." RX 76; Tr. 96 (Rohde); Tr. 192-93 (Fink).

16. Mr. Rohde became a Member of Cozen O'Connor in its Washington, D.C. office and continued practicing law there through the dates of the hearing in this matter. Stips 1.

17. Shortly after Sher & Blackwell's merger with Cozen O'Connor – and approximately five years after the Court declined to order Rohde's interim suspension – Fink was asked to handle a litigation matter between Damco USA, Inc.

("Damco") and Draft-Cargoways India (Pvt.) Ltd. ("Draft-Cargoways"), Case No. 1:10 cv 929, pending in the United States District Court for the Eastern District of Virginia. Tr. 46 (Rohde); Tr. 195-96, 210 (Fink); *see* RX 30 (Docket sheet). Mr. Fink was responsible for Damco becoming a client of Cozen O'Connor and for managing the firm's relationship with Damco. RX 78 at ¶¶ 4 a through e (Declaration of Marc J. Fink); Tr. 199-200 (Fink).

18. Mr. Fink asked Mr. Rohde to enter his appearance on behalf of Damco. RX 78 at ¶ 6 (Declaration of Marc J. Fink); Tr. 110-11 (Schellenger); Tr. 201 (Fink). Mr. Rohde had extensive experience in the subject matter of the litigation – transportation and trade law. Tr. 48 (Rohde: "The case involved transportation, so, in a sense, my career – most of my practice would have been somewhat relevant."). Mr. Rohde "only [did] this because Mr. Fink asked [him] to work on the case," as Mr. Rohde was "primarily a regulatory attorney" and did not like litigation. Tr. 80 (Rohde). Other lawyers at Cozen O'Connor also were competent to handle the Damco litigation. Tr. 201-02 (Fink: "There could have been half a dozen other lawyers who could have assisted me in connection with that matter. It was not a complicated issue.").

19. Neither Mr. Fink nor Mr. Rohde was admitted to practice in the United States District Court for the Eastern District of Virginia. Mr. Fink asked Ms. Schellenger, who was admitted there, to move his own and Mr. Rohde's admissions *pro hac vice* on behalf of Damco. DX 1 at 96 (Affidavit of Kathryn Ruth Yingling

Schellenger); Tr. 114 (Schellenger: "It was Marc Fink who asked me to do it."); Tr. 137-38 (Schellenger).

20. Ms. Schellenger obtained a copy of the Eastern District of Virginia's form Application to Qualify as a Foreign Attorney Under Local Civil Rule 83.1(D) and Local Criminal Rule 57.4. DX 1 at 96-97 (Schellenger Affidavit); DX 1 at 98 (completed and filed Application to Qualify as a Foreign Attorney Under Local Civil Rule 83.1(D) and Local Criminal Rule 57.4).

21. Just a month into his new tenure at Cozen O'Connor (and a few months after annotating his offer letter from the firm), Mr. Rohde noticed that the "Personal Statement" section of the application required him to certify by signature that he had "not been reprimanded in any court nor [had] there been any action in any court pertaining to [his] conduct or fitness as a member of the bar." DX 1 at 98; Tr. 49-53 (Rohde).

22. Mr. Rohde consulted on this issue with Mr. Fink, his long-time colleague in the transportation and trade practice at every firm where he had worked. Tr. 51-52 (Rohde). Meeting in Mr. Fink's office, Mr. Rohde told him, "I'm not sure I can sign this application." Tr. 50-51 (Rohde).

23. Mr. Fink and Mr. Rohde spent about 15-20 minutes discussing whether Mr. Rohde "needed to report anything to the court in connection with" his application. Tr. 209, 211 (Fink). They focused on the sentence reading "I have not been reprimanded in any court nor has there been any action in any court pertaining to my fitness as a member of the bar." Tr. 210 (Fink).

24. Mr. Fink "concluded" that Mr. Rohde "did not need to report anything to the court in connection with the submission of the application." Tr. 211 (Fink). He took the view that Mr. Rohde "had not been reprimanded." *Id.* He explained his advice on the ground that the disciplinary proceedings pending before a hearing committee and the Board on Professional Responsibility to decide "whether [Mr. Rohde] would be suspended, or worse," were not before a "court." Tr. 212 (Fink). Mr. Fink himself had submitted a declaration in Mr. Rohde's litigation in the Court of Appeals to avoid a temporary suspension following his criminal conviction, and "knew that there had been an action before the court, but [he] thought the court had simply referred the matter . . . to the Board for determination"; he advised Mr. Rohde to sign the Personal Statement. Tr. 211-12 (Fink).

25. Mr. Rohde testified that when deliberating over whether he could sign the application, he did not have the D.C. Court of Appeals proceedings "in [his] mind." Tr. 73 (Rohde). When pressed by a Hearing Committee member, Respondent said "five years later it just didn't occur to me," Tr. 99 (Rohde), and further that "my focus was just on" the Hearing Committee proceedings and not on "what the court had done before then." Tr. 100 (Rohde). He testified that he did not understand the word "reprimand" to cover the felony conviction for which he was sentenced in the Virginia court. Tr. 53 (Rohde).

26. Neither Mr. Rohde nor Mr. Fink informed Ms. Schellenger that Mr. Rohde had been convicted of a felony or that disciplinary proceedings were pending against him in the District of Columbia. Tr. 53-54 (Rohde); Tr. 112-17 (Schellenger). She

finalized the application and met with Mr. Rohde to obtain his signature on the Personal Statement. Tr. 114-16 (Schellenger). She handed the completed application to Mr. Rohde and asked him to "review it for accuracy." Tr. 116 (Schellenger: "When we met in his office I asked him to review it for accuracy and to confirm that he was comfortable with it, and he signed it in front of me."). Mr. Rohde read the application, then signed the Personal Statement, certifying that he had not been reprimanded in any court and that there had been no court proceeding pertaining to his conduct or fitness as member of the bar. *Id.*

27. Ms. Schellenger then endorsed the application, certifying: "the applicant . . . possesses all of the qualifications required for admission to the bar of this Court; that I have examined the applicant's personal statement. I affirm that his/her personal and professional character and standing are good, and petition the court to admit the applicant *pro hac vice*." DX 1 at 98 (Application). Ms. Schellenger filed the completed application with the United States District Court for the Eastern District of Virginia. DX 1 at 97, ¶ 5 (Schellenger Affidavit); Tr. 114 (Schellenger).

28. Ms. Schellenger testified that she would not have signed and filed the application with the Eastern District of Virginia if she had known about Mr. Rohde's felony conviction or the pending disciplinary proceedings. DX 1 at 97, ¶ 6 (Schellenger Affidavit); Tr. 117 (Schellenger). She viewed the information as relevant because she believed that the disciplinary proceedings pertained to his "conduct or fitness as a member of the bar." Tr. 116-17 (Schellenger).

29. Based on Mr. Rohde's certification and Ms. Schellenger's endorsement, the Eastern District of Virginia admitted Mr. Rohde *pro hac vice* on November 16, 2010. DX 1 at 98.

30. On December 6, 2010, the Damco matter was transferred from the Eastern District of Virginia to the United States District Court for the Southern District of New York. RX 56. Mr. Rohde was not admitted to practice in the Southern District of New York. He therefore asked David Loh, Esquire, a Cozen O'Connor lawyer practicing in the firm's New York office, to move his admission *pro hac vice*. Tr. 149-51 (Loh).

31. Pursuant to Mr. Rohde's request, on December 15, 2010, Mr. Loh filed a Motion to Admit Counsel Pro Hac Vice with the Southern District of New York. DX 2 at 1. In support of his motion to admit Mr. Rohde, Mr. Loh stated that "[t]here are no pending disciplinary proceeding[s] against Wayne Rohde in any State or Federal court." *Id.* In addition, Mr. Loh attached an affidavit averring, among other things, that "I have found Mr. Rohde to be a person of integrity and a skilled attorney. . . ." DX 2 at 3, ¶ 7 (Affidavit of David Y. Loh in Support of Motion to Admit Wayne Rohde Pro Hac Vice).

32. Mr. Rohde did not tell Mr. Loh that he had been convicted of a felony in Virginia, and that there were disciplinary proceedings pending against him. Tr. 152-54 (Loh). When asked by Disciplinary Counsel, Mr. Loh did not testify that he would have refused to sponsor Respondent's *pro hac vice* application had he been

so informed – instead, Mr. Loh testified that at most, it would have prompted him to consult ethics counsel. Tr. 151-54 (Loh).

33. The Southern District of New York admitted Mr. Rohde *pro hac vice* on January 5, 2011. RX 65 (S.D.N.Y. Order admitting Wayne Rohde *pro hac vice*).

III. CONCLUSIONS OF LAW

This Report will address first the question that was presented first – whether Respondent is entitled to invoke collateral estoppel regarding certain factual and legal propositions. The Report will then address choice of law. Having done so, the Report will address the violations alleged by Disciplinary Counsel in the order in which Disciplinary Counsel raises them – Rules 3.3(a)(1), 8.4(c), and 8.4(d).

A. The Preclusion Issue

Respondent, following the procedure spelled out in *In re Fastov*, Board Docket No. 10-BD-096, at 21-23 (BPR July 31, 2013), *vacated*, Order, (BPR Sept. 25, 2018)[3], filed a motion formally requesting that Disciplinary Counsel be collaterally estopped from disputing four facts Respondent believes to have been resolved in *Rohde I*, and one proposition of law Respondent believes to have been resolved in *In re Battle*, Board Docket No. 15-BD-061, at 13 (H.C. Rpt. Nov. 4, 2016).

[3] Although the *Fastov* Board Report was vacated, the Board recently adopted the same procedure regarding a hearing committee's resolution of collateral estoppel arguments. *See In re Wilde*, Board Docket No. 14-BD-067 (July 31, 2019) (Appendix).

The four facts Respondent sought to establish were:

1. Respondent consulted his senior partner, Marc Fink, prior to filing the Virginia *pro hac vice* application, and they jointly determined in good faith that Respondent was not required to disclose the *Rohde I* proceeding;

2. Respondent did not have any motive or intent to mislead the District Courts or to conceal the existence of the *Rohde I* proceedings in order to obtain *pro hac vice* admission;

3. Respondent's interpretation that the Board is not a court . . . resulted in answers in the Virginia and New York application that were technically true, but misleading;

4. Respondent did not intend to deceive his firm and did not act dishonestly for personal gain.

Respondent's Renewed Mot. Formally Invoking Doctrine Collateral Estoppel ("Resp. Mot. Collateral Estoppel") at 31. The proposition of law Respondent sought to establish was that "[a] hearing committee is not a court." *Id.*

As noted above, the Hearing Committee determined that estoppel was not appropriate for either the factual or legal propositions put forth by Respondent, and accordingly denied Respondent's motion. H.C. Order, Jan. 28, 2019.

1. Estoppel is Inappropriate as to Respondent's Four Factual Propositions

The parties agree that *Davis v. Davis*, 663 A.2d 499, 501 (D.C. 1995) sets out the four elements that must be met in order for factual determinations in *Rohde I* to have preclusive effect in *Rohde II*. *See* Resp. Mot. Collateral Estoppel at 16-17; Disciplinary Counsel's Opp'n to Resp. Mot. Collateral Estoppel at 3 (citing *In re Wilde*, 68 A.3d 749, 759 (D.C. 2013) (quoting *Modiri v. 1342 Rest. Group, Inc.*, 904

A.2d 391, 394 (D.C. 2006), which in turn relied on *Davis*)). Those elements require Respondent to prove that the issues as to which he seeks preclusion were:

1. actually litigated and,
2. determined by a valid, final judgment on the merits,
3. after a full and fair opportunity for litigation by the parties or their privies,
4. under circumstances where the determination was essential to the judgment, and not merely dictum.

Davis, 663 A.2d at 501.

Of the four *Davis* elements, the simplest resolution of this issue is to be found in the fourth – *i.e.*, whether the determinations made by the *Rohde I* Hearing Committee were "essential to the judgment." This Hearing Committee finds that they were not.

The *Rohde I* Hearing Committee considered the *pro hac vice* applications at issue in this case as part of its inquiry into whether Respondent had demonstrated rehabilitation under *Kersey*. Before considering the *pro hac vice* applications, the Hearing Committee found "clear and convincing evidence that [Respondent] is substantially rehabilitated from his alcoholism." *Rohde I*, H.C. Rpt. at 53. And "[Disciplinary] Counsel [did] not dispute the adequacy of Respondent's rehabilitation evidence." *Id.* at 54. Disciplinary Counsel's only argument against *Kersey* mitigation was its assertion that Respondent lied on his *pro hac vice* applications. Thus, if lying on *pro hac vice* applications was relevant to Respondent's eligibility for *Kersey* mitigation, then the *Rohde I* Hearing

Committee's disposition of these issues would have been "essential to the judgment," but if not, then the *Rohde I* Hearing Committee's disposition of these issues was "merely dictum."

The Board determined it was the latter. On review of the Hearing Committee's report, the Board held as a matter of law that the *pro hac vice* applications were irrelevant to the *Kersey* inquiry. The Board rejected the relevance of the *pro hac vice* applications, writing that

> the rehabilitation inquiry under Kersey centers on a respondent's rehabilitation from the condition that was a causal factor in the misconduct. . . . It does not include an inquiry into a respondent's 'unresolved character flaws' that neither qualify for Kersey mitigation nor were established as contributing to the misconduct. Here, there is no doubt that Respondent is substantially rehabilitated from alcoholism, and [Disciplinary] Counsel does not contend otherwise.

Rohde I, Board Rpt. at 29.[4]

That holding resolves the fourth *Davis* factor. Factual questions that are "not include[d]" in "the rehabilitation inquiry under *Kersey*," *id.*, cannot have been "essential to the judgment" that Respondent was eligible for *Kersey* mitigation.

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[4] As the Court of Appeals discussed in *Rohde I*, 191 A.3d at 1136-37, to be eligible for *Kersey* mitigation in *Rohde I*, Respondent was required to establish:

> (1) by clear and convincing evidence that he suffered from an alcoholism-related impairment at the time he left the scene of the Virginia accident; (2) by a preponderance of the evidence that his alcoholism substantially caused him to engage in that misconduct; and (3) by clear and convincing evidence that he is now substantially rehabilitated from the effects of the alcoholism.

Accordingly, the Hearing Committee finds that none of Respondent's four factual propositions warrant preclusive effect under *Davis*.[5]

2. Estoppel is Inappropriate as to Respondent's Legal Proposition

The legal question posed in *In re Battle* does not have sufficient identity with the legal question posed in this case to warrant preclusion. *In re Battle* concerned the meaning of "court" in District of Columbia Rule of Professional Conduct 1.6. *Battle*, Board Docket No. 15-BD-061, at 13 (H.C. Rpt. Nov. 4, 2016) (concluding that the exception in Rule 1.6(e)(2)(A) allowing disclosure of client confidences or secrets required by "court order," did not apply to a hearing committee order because a hearing committee is not a "court"), *recommendation adopted*, Order, Board Docket No. 15-BD-061, at 3-4 (BPR Apr. 21, 2017) (reprimanding the respondent). The issue in the current proceeding is the meaning of the word "court" in *pro hac vice* forms issued by the United States District Courts for the Eastern District of Virginia and the Southern District of New York. The federal district courts are not required to construe the word "court" on their own *pro hac vice* forms in the same way the Board and the Hearing Committee construed "court" when applying Rule 1.6(e)(2)(A) in *In re Battle*. It may be that a Hearing Committee is not a "court" as that word is used on the *pro hac vice* forms at issue in this case, but that question is not controlled by *In re Battle* – it would be controlled by the rules and cases of the

[5] Independently, Respondent's proposed fact #1 is drawn from the portion of the *Rohde I* Hearing Committee's report in which it recites the arguments of the parties – not from that Hearing Committee's actual findings of fact.

E.D. Va. and S.D.N.Y. respectively. Accordingly, the Hearing Committee determines that *In re Battle* does not preclude Disciplinary Counsel from arguing that a Hearing Committee is a "court" within the meaning of the relevant *pro hac vice* applications. That said, *In re Battle* remains relevant precedent. Respondent argues that the reasoning of *In re Battle* and the arguments made by Disciplinary Counsel in that case should apply equally here, and the Hearing Committee will consider those arguments on their merits.

B. The Choice of Law Issue

The choice of law issue in this matter concerns which jurisdiction's rules govern Respondent's conduct with regard to each *pro hac vice* application. D.C. Rule 8.5(b) governs choice of law and provides:

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

> which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

The premise of Rule 8.5(b)

> is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that *any particular conduct of an attorney shall be subject to only one set of rules of professional conduct*, and (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions.

D.C. Rule 8.5, cmt. [3] (emphasis added). As any given act of Respondent can be subject to only one set of rules, the Hearing Committee must determine which set of rules applies to which alleged misconduct.

Disciplinary Counsel argues that Respondent's alleged misconduct "implicates" the D.C. Rules as well as the Virginia and New York Rules "where the courts are located in which the misconduct took place." ODC Br. at 16.[6] Respondent argues that the D.C. Rules do not apply to this matter, and instead, the Virginia and New York Rules, respectively, apply to the alleged misconduct occurring before the tribunal in each jurisdiction. Resp. Br. at 24-25.

The Hearing Committee agrees with Respondent. Disciplinary Counsel alleges that Respondent "misled the United States District Court for the Eastern District of Virginia and the United States District Court for the Southern District of

[6] "ODC Br." refers to Disciplinary Counsel's Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction. "Resp. Br." refers to Respondent's Proposed Findings of Fact and Conclusions of Law. "ODC Reply Br." refers to Disciplinary Counsel's Reply Brief.

New York by concealing his criminal and disciplinary history in applications for *pro hac vice* admission to their bars." ODC Br. at 1. Each *pro hac vice* motion was filed in the *Damco* litigation then pending in each court. Thus, the alleged misconduct occurred "in connection with a matter pending before a tribunal," and Rule 8.5(b)(1) directs that the Hearing Committee "shall" apply "the rules of the jurisdiction in which the tribunal sits." *See also* Rule 8.5, cmt. [3] ("Paragraph (b) provides that as to a lawyer's conduct relating to a matter pending before a tribunal the lawyer shall be subject *only* to the rules of professional conduct of that tribunal." (emphasis added)); *In re Ponds*, 876 A.2d 636, 636-37 (D.C. 2005) (per curiam). The Virginia Rules of Professional Conduct apply in the Eastern District of Virginia. *See* E.D. Va. Local Civ. R. 83.1(I). The New York State Rules of Professional Conduct apply in the Southern District of New York. *See* S.D.N.Y. Local Civ. R. 1.5(b)(5).

Disciplinary Counsel argues that D.C. Rule 8.4(d) should be applied to Respondent's conduct in Virginia, even while recognizing that "Virginia does not have a parallel rule." ODC Br. at 25. Disciplinary Counsel posits (i) that "[t]he absence of a parallel rule in Virginia does not excuse Mr. Rohde from conforming his conduct to D.C. Rule 8.4(d)," (ii) that D.C. Rule 8.4(d) is not inconsistent with the Virginia Rules, and (iii) that the absence of a conflict negates the need to make a choice of law. *Id.* This argument ignores the plain language of both Rule 8.5(b)(1) (which requires that the Virginia Rules be applied to alleged misconduct occurring before a tribunal in Virginia) and Comment [3] (which provides that only one set of Rules applies to a lawyer's conduct). Nothing in Rule 8.5(b) or its comments allow

the Hearing Committee to apply the D.C. Rules to fill what Disciplinary Counsel believes to be gaps in the Virginia Rules.

Disciplinary Counsel's argument that, pursuant to Rule 8.5(a), a D.C. lawyer "is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs," conflates the Court of Appeals' *authority* to impose discipline based on misconduct occurring elsewhere, with the *rules* to be applied in determining whether misconduct occurred. Rule 8.5(a) gives the Court jurisdiction to impose discipline for misconduct occurring in another jurisdiction: "A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs." Rule 8.5(b) sets forth the process for determining which set of Rules will be applied to the alleged misconduct. *See Ponds*, 876 A.2d at 637 (Rule 8.5 allows the Court to "impose a sanction upon a member of its own bar for violation of a Maryland rule."). The Hearing Committee declines to construe Rule 8.5(a) in a way that negates or undermines Rule 8.5(b).

C. The Charged Rule Violations

1. Disciplinary Counsel Has Proven by Clear and Convincing Evidence that Respondent Violated Virginia Rule 3.3(a)

Disciplinary Counsel has charged that Respondent violated Virginia Rule 3.3(a)(1) when he affirmed on the *pro hac vice* application filed in Virginia federal court that: "I have not been reprimanded in any court nor has there been any action

in any court pertaining to my conduct or fitness as a member of the bar."[7] *See* RX 49. Virginia Rule 3.3(a)(1) provides that "[a] lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal."

Respondent raises two defenses. First, Respondent argues that the statement in the *pro hac vice* form was literally accurate because the *Rohde I* Hearing Committee is not a "court." *See* Resp. Br. at 30, 34-35. Second, Respondent argues that he did not possess the required scienter for a violation of Virginia Rule 3.3(a)(1). *Id.* at 27-34.

The Hearing Committee first analyzes the required scienter under Virginia Rule 3.3(a)(1), and concludes that "intent to deceive" is not required. The Hearing Committee then concludes that Disciplinary Counsel has proven, by clear and convincing evidence, that Respondent violated Rule 3.3(a)(1) by signing the *pro hac vice* form without disclosing the disciplinary proceeding before the D.C. Court of Appeals.

a. The Required Scienter Under Virginia Rule 3.3(a)(1) Does Not Include "Intent to Deceive"

Again, Virginia Rule 3.3(a)(1) provides that "[a] lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal." Under the Virginia Rules, the modifier "[k]knowingly . . . denotes actual knowledge of the fact in question,"

[7] Disciplinary Counsel did not charge a Rule 3.3(a)(1) violation with respect to the *pro hac vice* application filed in New York federal court because Respondent "did not sign or otherwise endorse the motion he caused Mr. Loh to file," and thus "was not directly making a statement covered by the parallel New York rule." ODC Br. at 17.

though the Rules do acknowledge that "[a] person's knowledge may be inferred from circumstances." Virginia Rules of Professional Conduct (Terminology).

Respondent seeks to add an additional requirement, not found in the text of the Virginia Rules, contending that Virginia Rule 3.3(a)(1) requires Disciplinary Counsel prove that the statement at issue was made with "(1) knowledge of falsity and (2) intent to deceive." Resp. Br. at 27-28. While "knowledge of falsity" is supported by the text of the Rule (which prohibits "knowingly" making a false statement), the additional requirement of "intent to deceive" finds no basis in the plain language of the Rule.

And Respondent cites no Virginia cases supplementing the plain language of the Rule by adding an "intent to deceive" requirement. Indeed, Respondent cites no cases from *any* jurisdiction so doing. The closest Respondent comes is to cite Virginia criminal cases holding that "actual knowledge" requires specific intent. *Id.* These cases are unpersuasive. In the first place, they do not construe the text of Virginia Rule 3.3(a)(1), and so cannot support adding words that the Supreme Court of Virginia declined to write into the Rule. And moreover, Virginia holds lawyers to a higher standard than accused criminals. As the Preamble to the Virginia Rules of Professional Conduct notes, the self-regulating and autonomous nature of the legal profession "carries with it special responsibilities of self-government." Lawyers in Virginia are not just representatives of their clients, but also "officer[s] of the legal system and . . . public citizen[s]." Virginia Rules of Professional Conduct (Preamble). As such, they have a "special responsibility for the quality of

justice" and a special duty to ensure that their "conduct . . . conform[s] to the requirements of the law." *Id.* The criminal law in Virginia exists to prescribe minimum levels of conduct required of all citizens, not just those in special positions of trust. The Virginia Rules of Professional Conduct have a different purpose – they are meant to define the "special responsibilities of self-government" that lawyers bear. *See id.* Hence, the mere fact that Virginia adopts a permissive rule for ordinary citizens does not necessarily mean that Virginia would adopt the same permissive rule for lawyers accused of breaching their special responsibilities.

Better guidance comes from the D.C. Court of Appeals, which has recognized that Virginia Rule 3.3(a)(1) is one of several Virginia Rules that "are either identical to or not materially different from the corresponding District of Columbia rules." *In re Beattie*, 930 A.2d 972, 978 (D.C. 2007) (per curiam). "Intent to deceive" is not an element of a Rule 3.3(a)(1) violation in D.C. *See In re Ukwu*, 926 A.2d 1106, 1141 (D.C. 2007) (per curiam) (appended Board Report) (findings that the respondent's conduct was "knowing" and "false" are implicit in the Hearing Committee's recommendation that the respondent violated Rule 3.3(a)(1)). Accepting Respondent's argument that Disciplinary Counsel must prove intent to deceive would therefore fail to give full force and effect to the holding of *In re Beattie*.

The Hearing Committee is fortified in this conclusion by such other jurisdictions as have directly addressed this question. Other jurisdictions have concluded that intent to deceive is not an element of a Rule 3.3(a)(1) violation. *See,*

e.g., *Attorney Grievance Comm'n v. Steinhorn*, 198 A.3d 821, 827-28 (Md. 2018) (finding a Rule 3.3(a)(1) violation even though the respondent "acted with no intent to deceive anyone"); *Attorney Grievance Comm'n v. Dore*, 73 A.3d 161, 173-74 (Md. 2013) (finding a Rule 3.3(a)(1) violation even though there was not clear and convincing evidence that the respondent "intentionally misled anyone"); *In re Dodge*, 108 P.3d 362, 367 (Idaho 2005) ("To require an intent to deceive in Rule 3.3(a)(1) would be duplicative of Rule 8.4(c)."). Finally, the Hearing Committee notes that the phrase "intent to deceive" appears nowhere in Rule 3.3(a)(1) or its comments. The Hearing Committee therefore concludes that Disciplinary Counsel is not required to prove intent to deceive in order to prove a Virginia Rule 3.3(a)(1) violation.

For this reason, the Hearing Committee also concludes that the back and forth between Respondent and Disciplinary Counsel regarding whether Respondent was motivated to conceal his legal travails in order to earn more credit for the Damco litigation or otherwise increase or preserve his prestige at Cozen O'Connor, *see, e.g.*, Resp. Br. at 33; ODC Reply at 13, is not relevant to our consideration of this charged Rule violation. Rule 3.3(a) does not require a profit motive – it merely requires actual knowledge.

b. D.C. Court of Appeals Action No. 05-BG-1141 Also Rendered Respondent's Statements on the *Pro Hac Vice* Form Knowingly False

Disciplinary Counsel argues that Respondent knew that the *pro hac vice* application filed in Virginia federal court was misleading because he knew that there

had been proceedings in the D.C. Court of Appeals regarding Respondent's "conduct or fitness as a member of the bar." ODC Br. at 19-20.[8] Respondent argues he and Mr. Fink forgot that the Court had "issued a procedural ruling declining to suspend Rohde." Resp. Br. at 29. The Hearing Committee agrees with Disciplinary Counsel.

The Hearing Committee has no difficulty in concluding that D.C. Court of Appeals action No. 05-BG-1141, which resulted in a ruling on December 5, 2005, declining "to impose an immediate suspension . . . ," DX 1 at 82, was an "action in any court pertaining to" Respondent's "fitness as a member of the bar." If there were any doubt that case No. 05-BG-1141 pertained to Respondent's fitness, the Court of Appeals' order of March 16, 2005, referring the matter to the Board of Professional Responsibility to "determine the nature of the final discipline to be imposed" brought clarity. DX 1 at 84. Indeed, case No. 05-BG-1141 even satisfies

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[8] Disciplinary Counsel further argues that the proceedings before Hearing Committee Number Three in *Rohde I* rendered Respondent's statement knowingly false. ODC Br. at 19-20. Respondent replies that Hearing Committee Number Three was not a "court" within the meaning of the *pro hac vice* form. Resp. Br. at 30. Because this Hearing Committee finds that D.C. action No. 05-BG-1141was indisputably before a "court," and was independently sufficient to render Respondent's statement knowingly false, we decline to address the question of whether the *Rohde I* proceedings were as well.

Disciplinary Counsel further argues that Respondent knew that the *pro hac vice* application filed in Virginia federal court was misleading because he knew that "he had been convicted and sentenced ('reprimanded') for a felony by the Circuit Court for Arlington County, Virginia." ODC Br. at 19-20. Respondent argues that his criminal conviction was not a "reprimand" as that word is used in the *pro hac vice* application. Resp. Br. at 34-36. The Hearing Committee agrees. As Respondent correctly notes, *see* Resp. Br. at 35, a "reprimand" in this context is a formal disciplinary action taken specifically against an attorney. Respondent's felony hit-and-run conviction on August 10, 2005, in the Circuit Court of Arlington County does not meet this definition – both lawyers and non-lawyers may be convicted of felony hit-and-run.

Respondent's own test – it was an "attorney disciplinary action[]" in "any court." Resp. Br. at 37.

The Hearing Committee also finds clear and convincing evidence that Respondent knew in 2005 that there were proceedings against him before the D.C. Court of Appeals pertaining to his conduct and fitness as a member of the bar. His counsel filed two briefs on his behalf. RX 2; RX 4. Disciplinary Counsel's brief was served on Respondent himself, albeit care of his counsel. RX 3 at 12. And, of course, the question on the table was whether Respondent's license to practice law should be immediately suspended. *See, e.g.*, RX 3 at 2 (Disciplinary Counsel's brief asking the Court of Appeals "to immediately suspend Respondent"). It would beggar credibility to suggest that Respondent was not fully and completely aware in late 2005 that an "action pertaining to his conduct or fitness as a member of the bar" was then pending before the District of Columbia Court of Appeals.

The only question, therefore, is whether Respondent still possessed that knowledge in 2010, when he submitted the *pro hac vice* application. Respondent's testimony on this point was careful and precise. On direct and when speaking in his own words, Respondent never testified that he forgot that the 2005 Court of Appeals action took place. Instead, Respondent testified that he did not focus on the 2005 action but rather focused on the Hearing Committee proceeding. Respondent testified that when deliberating over whether he could sign the application, he did not have the D.C. Court of Appeals proceedings "in [his] mind." Tr. 73. When pressed by a Hearing Committee member, Respondent said, "five years later it just

didn't occur to me," Tr. 99, and further that "my focus was just on" the Hearing Committee's proceedings and not on "what the court had done before then." Tr. 100.[9]

Yet failing to focus on knowledge one nevertheless possessed is not sufficient to excuse one from Rule 3.3(a). The Virginia Rules require merely that Respondent have "actual knowledge," of a fact – they do not state that a lawyer must focus on his knowledge or bring it front-of-mind before a violation may be found. Comment 3 to Virginia Rule 3.3 provides that "an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry." To hold that a lawyer may freely make false statements as long as he later says that the truth "just didn't occur to" him would be to eviscerate that principle. What would be the point of requiring a lawyer to make "a reasonably diligent inquiry" if that same lawyer were absolved merely by failing to focus on or think about the outcome of such inquiry?

The Hearing Committee thus turns to the question of whether Respondent knew about action No. 05-BG-1141 when the E.D. Va. *pro hac vice* form was submitted. The Virginia Rules are clear that "[a] person's knowledge may be inferred from circumstances." Virginia Rules of Professional Conduct

[9] Mr. Fink's testimony was materially identical. In his undated affidavit submitted in *Rohde I* in response to Disciplinary Counsel's Submission Regarding Respondent's Rehabilitation, Mr. Fink testified that when considering Respondent's ability to sign the E.D. Va. *pro hac vice* application, "[m]y focus, and Mr. Rohde's, was on the status of the matter in 2010. We simply never considered the 2005 ruling of the D.C. Court of Appeals." RX 78 at ¶ 8.

(Terminology). The Hearing Committee perceives ample circumstances that clearly and convincingly establish that Respondent had actual knowledge of D.C. Court of Appeals action No. 05-BG-1141 when he made the false statement on the *pro hac vice* form. Respondent was clearly informed of action No. 05-BG-1141 in 2005. He is a well-trained and experienced lawyer, who graduated *cum laude* from the Georgetown University Law Center, Tr. 82, 89, and in whose legal judgment and abilities his partners have the "highest confidence." RX 77 at ¶¶ 3-4. No such qualified lawyer could have failed to understand the significance of action No. 05-BG-1141 or have forgotten having faced the prospect of immediate suspension of his or her license. And under Fed. R. Civ. P. 11(b), by presenting the *pro hac vice* application to the United States District Court for the Eastern District of Virginia, Respondent certified that he had conducted "an inquiry reasonable under the circumstances" to confirm that his denial of any actions pertaining to his conduct or fitness had evidentiary support. Virginia Code Section 8.01-271.1 is in accord. And Comment 3 to Virginia Rule 3.3 expressly incorporates Section 8.01-271.1's duty to conduct a reasonable inquiry.[10] Any reasonable inquiry would certainly have surfaced action No. 05-BG-1141.

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[10] Comment 3 to Virginia Rule 3.3 provides in relevant part that

> An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, Section 8.01-271.1 of the *Code of Virginia* states that a lawyer's signature on a pleading constitutes a certification that the lawyer believes, after

Moreover, the very proceeding Respondent and Mr. Fink say they did focus on at the time would have reminded them of action No. 05-BG-1141. The *Rohde I* Hearing Committee proceedings were instigated by a July 27, 2006, order of the Board on Professional Responsibility. *See* RX 8. That order began by reciting the procedural history of action No. 05-BG-1141. *Id.* at 1. And the BPR order responded directly to a March 16, 2006, order of the Court of Appeals issued in action No. 05-BG-1141. *See* RX 7. Thus, literally the first items on the pleading clip for *Rohde I* would have been direct references to action No. 05-BG-1141. And every pleading and order in the proceedings before the *Rohde I* Hearing Committee bore a three-line legend at the top of the page, the first line of which reads "DISTRICT OF COLUMBIA COURT OF APPEALS." *See, e.g.*, DX 3; RX 9. Each pleading and each order in *Rohde I* thus would have reminded Respondent of the involvement of the Court of Appeals – *i.e.*, of action No. 05-BG-1141.

The Hearing Committee therefore concludes that Respondent possessed actual knowledge of D.C. action No. 05-BG-1141 when he made the false statement on the *pro hac vice* form. In so concluding, the Hearing Committee does not believe that Respondent lied in his testimony in this matter. As noted *supra*, Respondent's testimony was careful and precise. When speaking in his own words, he never

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> reasonable inquiry, that there is a factual and legal basis for the pleading. Additionally, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.

claimed to have forgotten D.C. action No. 05-BG-1141 – he merely claimed not to have focused on it at the time he signed the *pro hac vice* form.

The only time Respondent arguably testified that he "forgot" D.C. action No. 05-BG-1141 was in response to a question on redirect from Disciplinary Counsel. When Disciplinary Counsel asked Respondent "It's your contention that you forgot about" action No. 05-BG-1141, Respondent replied "Yes." Tr. 93-94. In light of Respondent's otherwise precise and careful testimony, that is too slender a reed upon which to hang a determination that Respondent lied to the Hearing Committee. Indeed, the only other time the word "forgot" was used was in a question from the Hearing Committee itself. One member summarized Respondent's testimony as follows: "You say you 'forgot' what the Court of Appeals did in 2005." Tr. 98. But Respondent refused to endorse that characterization – instead, he testified that "it just didn't occur to me." Tr. 99. The Hearing Committee is of the opinion that the totality of Respondent's testimony was not untruthful – it was simply insufficient to rebut Disciplinary Counsel's clear and convincing evidence of his actual knowledge.

* * *

Accordingly, because Respondent certified that there were no actions pertaining to his conduct or fitness as a member of the bar despite the D.C. action No. 05-BG-1141, the Committee finds that Disciplinary Counsel has proven by clear and convincing evidence that Respondent violated Virginia Rule 3.3(a)(1). The Committee is fortified in that conclusion by *In re Small*, 760 A.2d 612 (D.C. 2000) (per curiam). While *Small* concerned the application of the D.C. Rules, Virginia

Rule 3.3(a) is one that the D.C. Court of Appeals has found materially identical to the corresponding D.C. rule – hence *Small* can provide at least persuasive guidance. In *Small*, the respondent was applying to the D.C. Bar and answered "no" to a supplemental question inquiring whether he had been "convicted of" or pled to a criminal charge since submitting his application. *Id.* at 613. That answer was literally true, but Small was at the time facing indictment on a charge of which he was shortly thereafter convicted. *Id.* The Court of Appeals found that his conduct violated D.C. Bar Rule 8.1(b) and exhibited a lack of candor. *Id.* at 613-14. Just as Respondent in this matter raises various technical arguments about why his statements were not knowingly false, so did Small. It would be incongruous indeed if Respondent were innocent of misconduct here, despite his statements being literally false, while Small was guilty of misconduct despite his statement being literally true.

2. Disciplinary Counsel Has Proven by Clear and Convincing Evidence that Respondent Violated Virginia Rule 8.4(c), but Not New York Rule 8.4(c)

Disciplinary Counsel relies on the same evidence supporting the alleged Rule 3.3(a)(1) violation, as well as evidence that Respondent was dishonest with his colleagues who sponsored his admission in New York and Virginia, to prove the alleged Rule 8.4(c) violations. The Hearing Committee will follow suit, and rely on much of its prior analysis. There are two salient differences between the material facts that control this issue and those that control the Rule 3.3(a)(1) issue, however. First, with respect to his statements to the E.D. Va., Respondent can (and has

attempted to) defend by parsing the language of the *pro hac vice* form and attempting to show how his prior court actions did not require a negative response. But even if that were technically true (and the Hearing Committee, as explained *supra*, is of the view that it is not), that would not be dispositive of the Rule 8.4(c) issue. One can deceive or be dishonest by omission, and if Respondent's colleagues would have wanted to know about his Virginia and D.C. court actions – so that, for example, they could form their own judgment about whether the relevant certifications were truthful or not – then failing to disclose them was dishonest and deceitful.

And second, Disciplinary Counsel did not charge a violation of New York's equivalent of Rule 3.3 – hence the S.D.N.Y. *pro hac vice* rules and form were not material to the Rule 3.3 analysis. They are material here, as Disciplinary Counsel has charged a violation of New York Rule 8.4(c). And the relevant language in the S.D.N.Y. *pro hac vice* rule and form is materially different from the parallel language in the E.D. Va.

This section of the Hearing Committee's report will focus, therefore, upon what Respondent should have told Kathryn Schellenger when she signed Respondent's *pro hac vice* application to the E.D. Va., and on the totality of the circumstances surrounding the submission of the *pro hac vice* form to the S.D.N.Y.

a. Respondent Misled Kathryn Schellenger By Omission

Virginia Rule 8.4(c) provides that "it is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation

which reflects adversely on the lawyer's fitness to practice law."[11] Respondent argues that Disciplinary Counsel must prove that Respondent made "knowing and intentional misrepresentations" in order to prove a violation of Virginia Rule 8.4(c).

Ms. Schellenger testified that when she signed the *pro hac vice* form, no one – not Respondent nor Mr. Fink – told her about either the Virginia criminal case or D.C. action No. 05-BG-1141. Tr. 114, 115, 121, 124. And she further testified clearly and unambiguously that the fact of both convictions would have been relevant to her. Tr. 116-17. When asked if the knowledge of Respondent's hit-and-run conviction would have been relevant to her, she answered "Yes. It would have been." Tr. 116. When asked whether his D.C. disciplinary proceedings would have been relevant to her, she answered "Yes." Tr. 117. In her affidavit, she stated that had she known about both proceedings, "I would not have signed and filed the application." DX 1 at 96-97 (Schellenger Affidavit); Tr. 141.

For Rule 8.4(c) to be violated, Respondent needed to know that Ms. Schellenger would have expected his prior conviction and disciplinary proceedings to be disclosed. Of course, she did not literally say "I would care if you have a felony conviction or pending disciplinary proceedings." Nor did she go through a list of hypothetical things he could have been concealing. But it is unreasonable to expect

[11] For the reasons set forth above, the Hearing Committee disagrees with Disciplinary Counsel that it should apply D.C. Rule 8.4(d) to Respondent's conduct in connection with the *Damco* matter pending in Virginia federal court because Virginia does not have Rule 8.4(d). Application of the D.C. Rule would mean that Respondent's conduct in the Virginia federal matter was governed by two sets of rules, and would thus be contrary to the plain language of Rule 8.5.

that she would have, and the law surely does not require her to. What she did do, and the Hearing Committee finds clear and convincing evidence to this effect, is make it clear to Respondent that she took the *pro hac vice* process seriously and cared about signing her name to the representations made in the form. This was not something done causally over email – Ms. Schellenger testified that she met in person with Respondent to "to review the application before [she] and he signed it." Tr. 115. She did not signal apathy or disinterest in the substance of the form. Very much to the contrary, she testified that she "asked him to review it for accuracy and to confirm that he was comfortable with it." Tr. 116, 141. And he "assured [her] that he possessed all of the qualifications required for admission to the bar of the Eastern District of Virginia." DX 1 at 96-97 (Schellenger Affidavit); Tr. 141. Moreover, Ms. Schellenger was the "lead local counsel" in the E.D. Va. matter, Tr. 129, and was "counsel of record . . . as far as the [E.D. Va.] was concerned." Tr. 128. Accordingly, as Respondent knew at the time, her name and credibility before the E.D. Va. was at stake with every filing in that matter. And Respondent knew, because he reviewed the application in her presence before signing it, that it attested not only to his lack of disciplinary history but also that his "personal and professional character and standing are good." Tr. 113; DX 1 at 98.

Against those facts, the Hearing Committee finds that Disciplinary Counsel has proven by clear and convincing evidence that Respondent understood that Ms. Schellenger wanted to know about his criminal and disciplinary history, and that he deliberately failed to disclose that fact in an effort to mislead her. Regardless of

what conclusion Respondent & Mr. Fink reached, as counsel of record and lead local counsel in the E.D. Va. matter, and as the person who was signing her name to the *pro hac vice* application, Ms. Schellenger was entitled to consider the facts for herself and form her own opinion. Certainly the E.D. Va. would have expected her so to do. Ms. Schellenger's testimony before the Hearing Committee was quite clear and quite emphatic on the point that she considered these facts to be highly material to her decision to sponsor Respondent, and we find that those sentiments were clear to Respondent at the time. The Hearing Committee finds her credible and credits her testimony as clear and convincing evidence of Respondent's knowledge that his criminal and disciplinary history was something she would have expected to be told before sponsoring him.

The sole remaining question, therefore, is whether those omissions were sufficient to render Respondent's conduct in connection with the E.D. Va. *pro hac vice* application dishonest or deceitful by omission. The Hearing Committee finds that they were. Ms. Schellenger testified that the fact of each of Respondent's prior court actions would have been relevant to her "decision to sign and file [his] application for *pro hac* admission to the Eastern District of Virginia." Tr. 116-17. She testified that she would have considered those actions relevant to his statement denying any reprimands or actions pertaining to his action and fitness. *Id.* As explained *supra*, the Hearing Committee agrees that the fact of Respondent's prior court actions was relevant to the *pro hac vice* application and made it impossible for Respondent to truthfully make the certification the form required. But even if

reasonable minds could differ as to that question, Ms. Schellenger – as Respondent's sponsor – was entitled to be given complete information and the opportunity to make her own judgment as to those issues. Respondent denied her that by withholding the fact of his two prior court actions, and in doing so he was dishonest and deceitful by omission.

Accordingly, the Hearing Committee finds that Disciplinary Counsel has proven by clear and convincing evidence that Respondent violated Virginia Rule 8.4(c).

b. Respondent Did Not Mislead David Loh, Even By Omission

Similar to its Virginia counterpart, New York Rule 8.4(c) provides that "[a] lawyer or law firm shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Respondent argues that Disciplinary Counsel must prove that he acted with "venal intent," that is, that he "deliberately and intentionally engaged in deception," or had an "intent to mislead." Resp. Br. at 40-41. New York law is not as clear as Respondent suggests. In *In re Liu*, 664 F.3d 367, 372, 372 n.4. (2d Cir. 2011), the Second Circuit recognized that while some New York cases require a showing of venal intent to find a Rule 8.4(c) violation, others find a violation where the Respondent "should have known" that he or she was making misrepresentations. The *Liu* court did not resolve the issue because it found no violation under either standard. *Id.* at 372-73. The Hearing Committee need not resolve this undecided question of New York law either, as it finds no violation of New York Rule 8.4(c).

Mr. Loh agreed that Respondent did not inform him of either of his prior court proceedings. Tr. 151-54. But unlike the Virginia form, the information called for in New York was fairly narrow. The Virginia form was backward looking, requiring certification that "I *have not been* reprimanded in any court nor *has there been* any action in any court pertaining to my conduct or fitness as a member of the bar." DX 1 at 98 (emphasis added). By contrast, the New York form was present- or forward-looking. It required certification that "[t]here *are no pending* disciplinary proceedings against WAYNE ROHDE in any State or Federal Court." DX 2 (emphasis added).

Moreover, the local rules then in force in the S.D.N.Y. suggest that that certification should be read narrowly.[12] In 2010, S.D.N.Y. Local Rule 1.3(c) stated that a foreign lawyer seeking *pro hac vice* admission need only show that he or she is a member of a state court bar and is a member in good standing. Thus, at that time, the Local Rule required nothing besides admission to a state court bar and current good standing in that bar. Effective December 19, 2016, the S.D.N.Y. amended Local Rule 1.3, and it now requires backward looking information – including "whether the applicant has ever been convicted of a felony" or "censured, suspended, disbarred or denied admission or readmission by any court," or whether "there are any disciplinary proceedings presently against the applicant." If the

[12] The Local Rules in effect for the S.D.N.Y. and E.D.N.Y. as of the date in question may be located at this link from the Eastern District's website:

https://img.nyed.uscourts.gov/files/local_rules/Local%20Rules%20Amendments%20thru%2007022009.pdf.

S.D.N.Y. understood its 2010 rule and form to require disclosure of past events, there would have been no need for the 2016 amendment. The Hearing Committee thus concludes that in 2010, the S.D.N.Y. was asking a strictly present- or forward-looking question that did not require disclosure of past events.

Given the very limited requirement of the S.D.N.Y. form and rule in 2010, the Hearing Committee cannot conclude that Disciplinary Counsel has proven by clear and convincing evidence that Respondent violated New York Rule 8.4(c).

3. Disciplinary Counsel Has Not Proven by Clear and Convincing Evidence that Respondent Violated New York Rule 8.4(d)

New York Rule 8.4(d) provides that "[a] lawyer or law firm shall not . . . engage in conduct that is prejudicial to the administration of justice." Relying on Comment [3] to Rule 8.4, Respondent argues that the conduct prohibited by Rule 8.4(d) "is akin to 'advising a client to testify falsely, paying a witness to be unavailable, altering documents, repeatedly disrupting a proceeding or failing to cooperate in an attorney disciplinary investigation or proceeding.'" Resp. Br. at 48 (quoting N.Y. Rule 8.4, cmt. [3]). Disciplinary Counsel does not seriously argue otherwise. The Hearing Committee notes that several New York cases find a Rule 8.4(d) violation for far less serious misconduct. *See, e.g.*, *In re Budnick*, 886 N.Y.S.2d 700, 701 (App. Div. 2d Dep't 2009) (per curiam) (knowingly filing a false instrument with a government agency); *In re Wisla*, 740 N.Y.S.2d 125, 126-27 (App. Div. 2d Dep't 2002) (repeatedly filing attorney registration forms that the respondent knew or should have known contained false information); *In re Cardenas*, 997

N.Y.S.2d 422, 423 (App. Div. 1st Dep't 2014) (false affirmations in attorney registration statements). It is not necessary to resolve that question, however, because the Hearing Committee does not find clear and convincing evidence that Respondent violated New York Rule 8.4(d).

While the Hearing Committee is convinced that Respondent's backward-looking declaration in the E.D. Va. form was literally false, it is not convinced that the analogous declaration in the S.D.N.Y. form is similarly false. In December of 2010, when the S.D.N.Y. form was submitted, the only pending proceeding against Respondent was *Rohde I*, which was then before a Hearing Committee. And while there may be room to debate whether the E.D. Va. form really meant to exclude hearing committees when it asked about a "court," *see supra* n.8, the S.D.N.Y. form asked about "any State or Federal court." That latter formulation strikes the Hearing Committee as more specific.

Further, as explained previously, the relevant S.D.N.Y. local rule in effect in 2010 limited the legally relevant facts about a *pro hac vice* applicant to (1) whether he or she was admitted to a state-court bar and (2) whether he or she was in "good standing" with that bar at the time of application. Under the current S.D.N.Y. local rule, Respondent clearly would be required to disclose his Virginia conviction, the D.C. Court of Appeals proceedings against him, and the proceedings before Hearing Committee Three. But, of course, Respondent's conduct in 2010 is properly judged against the local rule then in place, which did not require such broad disclosures. Especially in light of the 2016 amendments that explicitly include backward-looking

considerations, the Hearing Committee is of the opinion that Respondent's submission to the S.D.N.Y. was not technically false or misleading.

Moreover, not all technically false (or even misleading) statements violate Rule 8.4(d). Only conduct that is "prejudicial to the administration of justice" will suffice. Disciplinary Counsel cites D.C. cases finding a violation if conduct "taint[s] the judicial process in 'more than a *de minimis* way; that is, at least potentially impact upon the process to a serious and adverse degree.'" ODC Br. at 26 (quoting *In re Hopkins*, 677 A.2d 55, 61 (D.C. 1996)). But, of course, the governing authority with respect to this charge is New York law, not D.C. law. Citing New York law, Respondent argues that the conduct prohibited by Rule 8.4(d) "is akin to 'advising a client to testify falsely, paying a witness to be unavailable, altering documents, repeatedly disrupting a proceeding or failing to cooperate in an attorney disciplinary investigation or proceeding.'" Resp. Br. at 48 (quoting N.Y. Rule 8.4, cmt. [3]). The Hearing Committee has identified New York cases finding a Rule 8.4(d) violation for less serious misconduct. *See, e.g.*, *In re Budnick*, 886 N.Y.S.2d at 701 (knowingly filing a false instrument with a government agency); *In re Wisla*, 740 N.Y.S.2d at 126-27 (repeatedly filing attorney registration forms that the respondent knew or should have known contained false information); *In re Cardenas*, 997 N.Y.S.2d at 423 (false affirmations in attorney registration statements). But neither party has cited, and the Hearing Committee cannot find, any authority holding that a technically true statement violates N.Y. Rule 8.4(d) even if the maker of the statement knew or should have known what the court really wanted to know.

Disciplinary Counsel concedes that Respondent's conduct here "did not taint the litigation in 'more than a *de minimis* way,'" ODC Br. at 26, and the Hearing Committee does not see clear and convincing evidence that it was "prejudicial to the administration of justice." Accordingly, the Hearing Committee finds that Disciplinary Counsel has not proven by clear and convincing evidence that Respondent violated N.Y. Rule 8.4(d).

IV. RECOMMENDED SANCTION

Disciplinary Counsel argues that Respondent should be suspended from the practice of law for one year. Respondent argues that he did not violate any Rules, and should not be sanctioned, but if a sanction is imposed, it should be no greater than a public censure by the Court. For the reasons described below, we agree with Respondent's alternative argument and recommend a public censure.

A. Standard of Review

The sanction imposed in an attorney disciplinary matter is one that is necessary to protect the public and the courts, maintain the integrity of the legal profession, and deter the respondent and other attorneys from engaging in similar misconduct. *See, e.g.*, *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc); *In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013); *In re Cater*, 887 A.2d 1, 17 (D.C. 2005). "In all cases, [the] purpose in imposing discipline is to serve the public and professional interests . . . rather than to visit punishment upon an attorney." *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (en banc) (citations omitted); *see also In re Goffe*, 641 A.2d 458, 464 (D.C. 1994) (per curiam).

The sanction also must not "foster a tendency toward inconsistent dispositions for comparable conduct or . . . otherwise be unwarranted." D.C. Bar R. XI, § 9(h)(1); *see, e.g.*, *Hutchinson*, 534 A.2d at 923-24; *In re Berryman*, 764 A.2d 760, 766 (D.C. 2000). In determining the appropriate sanction, the Court of Appeals considers a number of factors, including: (1) the seriousness of the conduct at issue; (2) the prejudice, if any, to the client which resulted from the conduct; (3) whether the conduct involved dishonesty; (4) the presence or absence of violations of other provisions of the disciplinary rules; (5) whether the attorney has a previous disciplinary history; (6) whether the attorney has acknowledged his wrongful conduct; and (7) circumstances in mitigation or aggravation. *See, e.g.*, *Martin*, 67 A.3d at 1053 (citing *In re Elgin*, 918 A.2d 362, 376 (D.C. 2007)). The Court also considers "'the moral fitness of the attorney' and 'the need to protect the public, the courts, and the legal profession . . . .'" *In re Rodriguez-Quesada*, 122 A.3d 913, 921 (D.C. 2015) (per curiam) (quoting *In re Howes*, 52 A.3d 1, 15 (D.C. 2012)).

B. Application of the Sanction Factors

1. The Seriousness of the Misconduct

Without diminishing the seriousness of Respondent's misconduct, the Hearing Committee notes that it was not extraordinarily heinous. Attorney dishonesty is always serious, and dishonesty to a tribunal even more so. But Respondent's dishonesty here was limited to two brief instances, and was not part of an overall scheme to mislead for personal gain. The victims of Respondent's conduct were Ms. Schellenger and the courts to which his *pro hac vice* applications

were submitted. Ms. Schellenger has sustained no material injury, save the distress of knowing she was involved in a misleading *pro hac vice* submission. And as Disciplinary Counsel concedes, Respondent's conduct here "did not taint the litigation in 'more than a *de minimis* way,'" ODC Br. at 26. If the judicial process was not tainted in any material way, then the courts were not materially injured either. Accordingly, this factor weighs in favor of a mild sanction.

2. Prejudice to the Client

Disciplinary Counsel presented no evidence of prejudice to any client as a result of Respondent's dishonesty on his *pro hac vice* applications. This factor weighs in favor of a mild sanction.

3. Dishonesty

Respondent's conduct involved dishonesty – indeed, dishonesty is the crux of the violations proven by clear and convincing evidence in this matter. This factor weighs in favor of a more severe sanction.

With that said, it bears noting that Respondent's dishonesty appears limited to the two *pro hac vice* motions. Respondent informed his firm of his disciplinary proceedings. Tr. 63. Respondent also informed the D.C. Bar of his felony conviction and disciplinary proceedings. Tr. 69-70. Without diminishing the seriousness of misleading courts, this matter does not reflect a pattern and practice of systemic dishonesty.

4. Violations of Other Disciplinary Rules

The Hearing Committee is unconvinced that Respondent's conduct violated disciplinary rules other than those charged. And as explained *supra*, the Hearing Committee is not even convinced that Respondent violated every rule charged by Disciplinary Counsel. This factor weighs in favor of a mild sanction.

The Hearing Committee is mindful of the issues litigated in *Rohde I*, but finds that factor #5 – previous disciplinary history – is the proper lens through which to view that conduct. Respondent's felony hit-and-run, and all the collateral injury it caused, was complete well before the conduct at issue in this matter. The *pro hac vice* applications in question were submitted after Respondent had been rehabilitated from alcoholism. Accordingly, the Hearing Committee considers the events of *Rohde I* as previous disciplinary history, and not as violation of other, uncharged, rules.

5. Previous Disciplinary History

Respondent has previous disciplinary history – to wit, his felony hit-and-run conviction at issue in *Rohde I*. The Hearing Committee is of the view that it would be inappropriate to enhance Respondent's sanction based on the conduct at issue in *Rohde I*, for two reasons.

First, to do so would undermine the application of *Kersey* mitigation. As the Board and the Court of Appeals determined, Respondent qualified for *Kersey* mitigation due to his substantial rehabilitation from alcoholism. *See* DX 3 at 59, 91 (Board Report); DX 3 at 93 (Court of Appeals opinion). To enhance Respondent's

sanction in this matter due to the events of *Rohde I* would, in essence, be to impose a sanction that the Board and the Court of Appeals found inappropriate under *Kersey*.

Second, Respondent's conduct in this matter is not a repetition of the misconduct at issue in *Rohde I*. It cannot be said that Respondent's conduct in this matter is unrelated to the events of *Rohde I* – to the contrary, the various proceedings in *Rohde I* were the facts that rendered Respondent's statements on his *pro hac vice* applications misleading. At the same time, however, the Board noted in *Rohde I* that the conduct at issue in this matter was irrelevant to Respondent's hit-and-run – indeed, the Board characterized the conduct at issue in this matter as "'unresolved character flaws' that . . . [did not] contribut[e] to the misconduct." Had Respondent previously been found to have been dishonest his partners or to courts, this factor would weigh in favor of a more severe sanction. But as Respondent's prior misconduct was completely different from the misconduct Respondent committed in this matter, and as the *Rohde I* misconduct was mitigated by Respondent's rehabilitation, this factor weighs in favor of a mild sanction.

6. Acknowledgement of Wrongful Conduct

Respondent maintains his innocence in this matter, alleging that he lacked the requisite scienter. Accordingly, he did not acknowledge his wrongful conduct. Respondent's demeanor during the hearing was neutral – neither actively acknowledging his wrongful conduct nor aggressively insisting that he had done nothing wrong. On balance, this factor weighs in favor of a more severe sanction.

7. Other Circumstances in Aggravation and Mitigation

The Hearing Committee perceives no circumstances in aggravation save only those mentioned above – to wit, Respondent's dishonesty and failure to acknowledge his wrongful conduct. In mitigation, the Hearing Committee notes that Respondent consulted with a senior partner at his firm, Mr. Fink, and arrived at the conclusion that he could make the needed representations based on that consultation. While such consultation does not exonerate Respondent, it does somewhat mitigate his culpability – the consultation demonstrates at least some effort to comply with the Rules. Accordingly, this factor weighs in favor of a less severe sanction.

C. Sanctions Imposed for Comparable Misconduct

The cases cited by Disciplinary Counsel in support of a one-year suspension appear to be a thorough survey of comparable misconduct.

At the outset, the Hearing Committee dismisses four of Disciplinary Counsel's citations as inapposite. Three concern attorneys disbarred for conduct so far beyond that at issue in this case as to be entirely unhelpful in fixing an appropriate sanction here. *In re Goffe*, 651 A.2d 458 (D.C. 1994) involved two separate instances of misconduct, one in which the attorney fabricated documentary evidence (forged a check), lied to IRS counsel, and lied under oath to the Tax Court, and one in which he forged a notarization on a document he forgot to file timely and then submitted his forgery to a registrar of deeds, forged a letter from the registrar to conceal his misconduct, and then lied to the Hearing Committee about his campaign of deceits. *Id.* at 461-63. Similarly, *In re Corizzi*, 803 A.2d 438 (D.C. 2002) also

involved two separate instances of misconduct, in one the attorney instructed two clients to lie under oath, lied to Bar Counsel about doing so, and concealed a settlement offer from those clients, and in the other, when a client alleged that he had engaged in sexual misconduct, he informed both Bar Counsel and a Virginia court that his client had committed perjury in a prior matter. *Id.* at 439-41. The conduct in this case is not even remotely comparable to either *Goffe* or *Corizzi*. Disciplinary Counsel's third disbarment case is *In re Cleaver-Bascombe*, 986 A.2d 1191 (D.C. 2010) (per curiam), and while it does not feature the same laundry list of lurid misconduct, its facts remain appreciably more heinous than those in this case. The attorney in *Cleaver-Bascombe* submitted a fraudulent CJA voucher. *Id.* at 1194. She then lied about it at her disciplinary hearing. *Id.* at 198-99. An essential fact underlying the Court's decision to impose disbarment was that Cleaver-Bascombe's deception was in service of her theft of CJA funds – not only did she lie, she lied in order to steal. *Id.* at 1199. Since disbarment would be "virtually automatic" for theft of funds – whether from a client, a third party, or the government – the court concluded that disbarment was warranted for Cleaver-Bascombe's deception in service of theft. *Id.* Respondent in this case did not steal – whether he should have been admitted *pro hac vice* or not, there is no dispute that he actually performed the legal work for which he billed. Hence, the disbarment sanction in *Cleaver-Bascombe* is not informative here.

The fourth case the Hearing Committee finds unhelpful is *In re Greenspan*, 578 A.2d 1156 (D.C. 1990). In that case, the attorney ignored a special master's

orders and requests from Bar Counsel. *Id.* at 1158-59. But as the Court noted, the Maryland Court of Appeals had previously suspended the attorney for six months for engaging in dishonesty. *Id.* at 1159 (the respondent received a six-month suspension in D.C. as reciprocal discipline for the prior misconduct). *Greenspan* considered the Maryland dishonesty – "making false statements to a bank on behalf of a client, . . . falsely denying that he had written a letter that bore his proven signature, and . . . falsely testifying before a judicial inquiry panel about the matter" – as an aggravating factor that precluded a censure for D.C. misconduct of ignoring the special master and Bar Counsel. *Id.* Greenspan's conduct was appreciably worse than Respondent's – Greenspan's deceits were far more protracted, including a second round of lies designed to conceal the first.

More helpful is *In re Waller*, 573 A.2d 780 (D.C. 1990) (per curiam). In *Waller*, the attorney represented a client in a medical malpractice matter and sued a broad range of defendants, except that he did not sue the surgeon who performed the allegedly deficient operation. *Id.* at 781. When challenged on this by a mediator, the attorney asserted he had previously represented the surgeon. *Id.* When the court then directed the attorney to show cause why he should not be disqualified for a conflict of interest, the attorney denied having represented the surgeon and claimed to have lied to the mediator to test the mediator's commitment to confidentiality. *Id.* Then, when challenged by Bar Counsel, the attorney claimed that when he said he represented the surgeon, that was a mere slip of the tongue. *Id.* at 782. In actuality,

the attorney had previously represented the surgeon. *Id.* Thus, like Respondent in this case, Waller misled a court.

The sanction imposed was a 60-day suspension. But the Board in that case found substantial prior discipline evidencing a persistent disregard of the disciplinary rules, actual prejudice to Waller's client, an uncharged violation of the conflict of interest rules, willful denial of responsibility including a dramatic claim that "I have been misused and abused by the system," and an aggravating factor in the form of Waller's attempt to persuade his client not to sue the surgeon. *Id.* at 784-85. This case features none of those aggravating factors, hence a sanction less severe than a 60-day suspension seems appropriate.

The Hearing Committee is fortified in that conclusion by *In re Reback*, 513 A.2d 226 (D.C. 1986) (en banc). The attorneys in question first neglected their client's case and then forged documents to conceal their neglect, *id.* at 228-29, for which the court suspended them for six months. Respondent in this case did not neglect his client's matters. And while Respondent made a false statement in a document filed with a court, he did not forge signatures on that document, deceive a notary into notarizing it, and then use his forgery to materially affect the disposition of a case before the court. *Compare id.*, *with* ODC Br. at 26 (Respondent's conduct "did not taint the litigation in 'more than a *de minimis* way'"). *Reback* thus indicates that *Waller* is not an outlier in imposing a relatively short period of suspension for the offense of dishonesty to a tribunal accompanied by other aggravating facts.

Other cases cited by Disciplinary Counsel concerned dishonesty to someone other than a court, but for base pecuniary motives. In *In re Hutchinson*, 534 A.2d 919 (D.C. 1987), the attorney accepted an insider stock tip and traded in violation of SEC Rule 10(b)(5) and the Exchange Act, and then lied in testimony under oath before the SEC about his insider trading. *Id.* at 920-21. Moreover, both the original dishonesty (insider trading) and the subsequent cover-up were not merely unethical, they were both federal felonies. *Id.* at 924. This case presents no such double-dishonesty, nor is the misconduct alleged in this case criminal in nature. Since Hutchinson received a one-year suspension for multiple layers of criminal dishonesty, it seems appropriate to impose a lesser sanction for significantly less egregious dishonesty.

Similarly, in *In re Kennedy*, 542 A.2d 1225 (D.C. 1998), the respondent continued to practice law even while suspended, embezzled from his firm by stealing retainer money and remittances from firm clients, and lied about his salary to a loan officer at a bank. *Id.* at 1226. For all those offenses, the Court of Appeals imposed a 90-day suspension. *Id.* Respondent here did not practice without a license, he did not steal money from his firm, and his dishonest conduct was less egregious because it was not motivated by base financial interests. Hence, a sanction less than a 90-day suspension seems appropriate.

Having concluded that a sanction of less than a 60-day suspension is appropriate, the Hearing Committee must then determine what lesser sanction to choose. Disciplinary Counsel cites *In re Hadzi-Antich*, 497 A.2d 1062 (D.C. 1985).

In that case, the attorney submitted a resume as part of his application for a teaching position, which falsely claimed various academic honors – valedictorian of his law school class, Editor-in-Chief of the Law Review, and *summa cum laude* honors at his undergraduate institution. *Id.* at 1063. All three appear to have been complete fabrications, with no foundation in truth and no even vaguely plausible explanation of why the attorney thought they might be truthful statements. *Id.* at 1065 (noting that the attorney clearly knew they were false as he corrected them on an amended resume). Here, Respondent had a basis for his statements – an incorrect and overly technical basis, but a basis nonetheless. Moreover, the attorney in *Hadzi-Antich* injured others with his false statements – other candidates whose truthfully recounted credentials could not compete with Hadzi-Antich's fabricated ones were directly injured by his conduct. *Id.* In this case, no attorney who sought *pro hac vice* application was in any way crowded out by Respondent, nor was Respondent's client injured in any way. The court ordered a public censure for Hadzi-Antich, *id.* at 1063, and the Hearing Committee believes a comparable sanction is appropriate here.

V. CONCLUSION

For the foregoing reasons, the Committee finds that Respondent violated Virginia Rules 3.3(a) and 8.4(c), and should receive the sanction of a public censure.

AD HOC HEARING COMMITTEE

Matthew K. Roskoski, Esquire, Chair

George Hager, Public Member

Arlus J. Stephens, Esquire, Attorney Member