

been proven by clear and convincing evidence and that no sanction should be imposed.

As set forth below, the Hearing Committee finds that Disciplinary Counsel has not proven a violation of either Rule 8.4(b) or Rule 8.4(c) by clear and convincing evidence. We recommend that the charges be dismissed.

I. PROCEDURAL HISTORY

On September 20, 2017, Respondent was personally served with the Specification of Charges (“Specification”). The Specification alleges that Respondent, in connection with his submission of time sheets to Epiq, violated the following:

- Rule 8.4(b), by engaging in criminal conduct reflecting adversely on his fitness to practice law, specifically fraud (D.C. Code § 22-3221(a)); and
- Rule 8.4(c), by engaging in conduct involving dishonesty, fraud, deceit, and misrepresentation.

Specification ¶¶ 12(a)-(b).

On October 20, 2017, Respondent filed an Answer denying the charges. Respondent asserted, *inter alia*, that: (1) in his role as project manager, his duties required and included additional work beyond time spent logged onto the Relativity computer program;² (2) the Dickstein building log did not reflect all of the days Respondent spent working in the office; (3) Respondent’s time sheets were not false;

² Relativity is a document review software platform.

and (4) Epiq and Dickstein Shapiro never questioned Respondent's time sheets when they were submitted or prior to his being paid. Answer ¶¶ 4-6.

On February 7, 2018, the Chair of Hearing Committee Number Seven, Marcie R. Ziegler, Esquire, held a pre-hearing conference in which Assistant Disciplinary Counsel Joseph Perry, Esquire, represented the Office of Disciplinary Counsel and Respondent appeared *pro se*. During the pre-hearing conference, Respondent stated that he wished to challenge the completeness and authenticity of both the building logs and the Relativity computer logs that Disciplinary Counsel had provided in discovery. Preh. Tr. (Feb. 7, 2018) at 6-8.³

On February 20, 2018, Respondent filed a Motion to Authorize Discovery from Non-Parties and Compel Production of Documents, Depositions, and Other Evidence. Respondent requested, among other items: (1) Epiq documents related to Respondent's allegedly improper billing; (2) certification by knowledgeable persons that the Relativity summary log produced by Disciplinary Counsel was "accurate and complete"; (3) records of Relativity's "most recent relevant external test or audit" in order to "confirm[] that the system was both tested and was accurate during the period in question"; (4) a copy of the complete methodology, calculations, and detailed results of Epiq's or Dickstein Shapiro's investigation; (5) certification from the Dickstein building engineer or building management company that the security systems were functioning properly during the relevant time period, as well

³ The transcripts from the prehearing conferences and the evidentiary hearing are designated as "Preh. Tr. at ___" and "Tr. ___", respectively. Disciplinary Counsel's exhibits are designated "DX." Respondent did not submit exhibits. "HCX 1" refers to Hearing Committee Exhibit 1.

as verification that the building logs were accurate and complete; (6) “daily status reports” from the Relativity database which documented the number of documents reviewed by day, the number of documents left to review, the average pace, the hourly pace, and other relevant information; and (7) documents related to the investigation of “other reviewers.”

On March 20, 2018, the Chair held a second pre-hearing conference. The Chair directed Disciplinary Counsel to request and produce any emails that Respondent may have sent on days when Disciplinary Counsel alleges that Respondent failed to appear in the Dickstein offices and did no work on the Project. Preh. Tr. (Mar. 20, 2018) at 43. In addition, the Chair directed Disciplinary Counsel to obtain and produce additional Relativity records relating to Respondent, including Relativity daily activity reports, and to ensure that the Relativity records already provided were complete. *Id.* at 44.⁴ On April 9, 2018, the Chair issued an order

⁴ On January 11, 2017, Disciplinary Counsel issued a subpoena to Epiq’s custodian of records to “[p]rovide copies of all materials in your possession, custody or control, relating to Stephen M. Reid’s work for Epiq Systems from November 1, 2012 through August 31, 2013, including but not limited to Relativity Log-in and Activity Reports for the time period, employment agreements, payroll records, e-mails and other correspondence.” DX 64. On January 12, 2017, Mark Euler, Epiq’s Vice President of Global Litigation and Employment, informed Disciplinary Counsel that Epiq had no Relativity records beyond those which already had been produced. DX 65 (“Unfortunately, we have learned that no archive data still exists . . . which means we are unable to pull Mr. Reid’s Relativity logs for the project beyond what has already been provided to you.”).

On February 13, 2017, Disciplinary Counsel issued a subpoena to the Chief Liquidation Officer of the former Dickstein Shapiro law firm to produce and deliver “[c]opies of all documents pertaining to Dickstein Shapiro’s inquiry into overbilling by attorneys from Epiq Systems (including Stephen M. Reid, Esq.) for a project conducted from roughly November 2012 to August 2013, including but not limited to, any memorandum or summary of findings, building access logs, and ‘Relativity’ access records.” DX 66. Attorneys representing the former Dickstein Shapiro filed objections to the subpoena, noting that Dickstein limited its production to non-privileged

memorializing the second pre-hearing conference and requiring Disciplinary Counsel to file monthly status reports on the status of the supplemental document production. Disciplinary Counsel's May 30, 2018 Status Report stated that Epiq had no additional documents, but additional documents from the former Dickstein Shapiro were forthcoming. According to Disciplinary Counsel's June 28, 2018 Status Report, Dickstein produced additional documents to Disciplinary Counsel on May 30, 2018; Disciplinary Counsel produced those documents to Respondent by e-mail on June 4, 2018.

A hearing was held on August 13, 14, 17, and 31, 2018, before Hearing Committee Number Seven, composed of Ms. Ziegler, Esquire, Chair; Dr. Robin J. Bell, public member; and Matthew K. Roskoski, Esquire, attorney member. During the hearing, Disciplinary Counsel was represented by Assistant Disciplinary Counsel Perry, and Respondent, who was also present, was represented by Kristin Paulding, Esquire.

Disciplinary Counsel submitted exhibits DX 1 through DX 71 on March 9, 2018; DX 72 through DX 76 on August 3, 2018; and DX 77 through DX 80 on August 13, 2018. DX 1 through DX 80 were admitted into evidence on August 13 and 14, 2018. Tr. 32-34, 361-62, 365.⁵ On August 16, 2018, Disciplinary Counsel

documents, and took the position that "any memorandum or summary of findings prepared by [Dickstein Shapiro] is subject to privilege." DX 67 at 4 (Response and Objections to Subpoena).

⁵ DX 78 and 79 were mislabeled by Disciplinary Counsel. DX 78, which was added as an exhibit during the hearing, is a motion to authorize discovery from non-parties and compel the production of documents (filed on February 20, 2018). See Tr. 291. DX 79, which also was added as an exhibit during the hearing, is Disciplinary Counsel's Statement Regarding List of Dates (filed

filed a Notice and Supplemental Notice of additional exhibits, DX 81-86. Respondent objected to the late submission, noting that the exhibits had not been produced either by Disciplinary Counsel in discovery or by Epiq in response to the subpoena. Tr. 469-71. The Committee excluded DX 82-85 and all but the first four pages of DX 81. Tr. 481, 500-01.⁶ The Committee admitted DX 86 over Respondent's objection. Tr. 501, 553-54. Respondent submitted no exhibits.

During the hearing, Disciplinary Counsel called the following witnesses: Doreen L. Manchester, Esquire, formerly a counsel at Dickstein Shapiro; Andrew Abraham, Esquire, formerly an associate at Dickstein Shapiro; Andrew Paredes, Esquire, Epiq Senior Director; Mark Euler, Epiq Vice President of Global Litigation and Employment; Donna R. Cline, Esquire, formerly an Epiq employee, who worked with Respondent on the Project; and Respondent. Respondent called no witnesses. Disciplinary Counsel subsequently recalled Mr. Euler and also called Jason Catton, formerly a Senior Project Manager with Epiq.

Following the conclusion of the parties' presentation of evidence regarding the charged rule violations, the Hearing Committee issued an order on September 4, 2018, indicating that it had made a preliminary non-binding determination that Disciplinary Counsel had proven at least one of the ethical violations set forth in the

March 20, 2018), identifying 51 dates for which Respondent billed but on which he allegedly never came into work. *See, e.g.*, Tr. 291, 293.

⁶ At the close of the hearing on August 31, 2018, Respondent requested that the first four pages of DX 81 be admitted into evidence. Tr. 551-53. The Chair stated the Committee would confer and advise the parties of its decision. Tr. 553-54. Respondent's request is granted and DX 81 at 1-4 is admitted into evidence.

Specification of Charges. *See* Board Rule 11.11. The parties advised the Committee that they did not have additional evidence to present in aggravation or mitigation of sanction, and that they would rely on the evidence already admitted when addressing the issue of sanctions in their respective post-hearing briefing.

On January 11, 2019, the Chair ordered that, absent any objection from the parties, Disciplinary Counsel was directed to file Dickstein Shapiro's original and supplemental productions (copies of which had been produced to Respondent in advance of the hearing), to assist the Hearing Committee in its deliberations. Neither party objected to the filing of the Dickstein Shapiro productions. The documents had been previously identified and offered for submission by Disciplinary Counsel during the hearing, but were not marked as an exhibit. *See* Tr. 262-63. On January 24, 2019, Disciplinary Counsel filed the Dickstein Shapiro documents (bates-numbered 1- 619) with the Office of the Executive Attorney. The Dickstein Shapiro documents, collectively, were marked as Hearing Committee Exhibit 1 ("HCX 1"), and are hereby admitted into evidence. *See* Board Rule 12.1(c) (permitting supplementation of the record by the Chair).

II. FINDINGS OF FACT

The following findings of fact are based on the testimony and documentary evidence admitted at the hearing, as well as HCX 1, and the Committee has determined that these findings of fact are established by clear and convincing evidence. *See* Board Rule 11.6.

Clear and convincing evidence requires a degree of persuasion higher than a mere 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.” *In re Cater*, 887 A.2d 1, 24 (D.C. 2005) (citation and internal quotation marks omitted). Clear and convincing evidence is evidence that is not equivocal. *See id.*

A. The Project.

1. Respondent is a member of the Bar of the District of Columbia Court of Appeals, having been admitted by motion on May 7, 2010 and assigned Bar Number 994567. DX 1; Stipulations of Fact (“Stip.”) ¶ 1. Respondent was employed by Epiq during the period at issue in this matter. DX 5; Tr. 132-33 (Abraham).

2. Epiq is a full-service e-discovery provider. DX 5, DX 59 at 1-2; Stip. ¶¶ 2-3; Tr. 113-15 (Paredes).

3. From November 2012 to August 2013, Respondent was assigned by Epiq to the Project. Stip. ¶ 3. The Project was performed for a Dickstein Shapiro client (“Client”) that was under investigation by multiple Attorneys General in a consumer protection matter. Tr. 20, 80 (Manchester); Tr. 132-33, 159 (Abraham) (“multiple state and federal investigations”). The Client retained Epiq for the Project. Tr. 134 (Abraham).

4. Andrew Abraham, an associate at Dickstein Shapiro with an e-discovery background, was the Dickstein attorney responsible for coordinating the document review and supervising the Epiq document review attorneys on the

Project. Tr. 20, 23, 48 (Manchester); Tr. 132-34 (Abraham). Mr. Abraham had “direct supervision” over the Epiq document review attorneys. Tr. 23 (Manchester).

5. Doreen Manchester, a counsel at Dickstein, supervised Mr. Abraham and had day-to-day contact with the Client. Tr. 20-23 (Manchester). Ms. Manchester expected Mr. Abraham to supervise the Epiq attorneys. Tr. 64 (Manchester). She was aware that Mr. Abraham interacted with the Epiq attorneys “quite a bit.” Tr. 105-06 (Manchester). Ms. Manchester knew that Mr. Abraham would go to the document reviewers’ room and talk to them, and she was aware of “a lot of email and telephone correspondence” between Mr. Abraham and the reviewers. *Id.* Ms. Manchester also understood that Mr. Abraham reviewed the Epiq attorneys’ time sheets. Tr. 62 (Manchester).

6. Ms. Manchester described the matter on which the Epiq attorneys were working as a “very busy case.” Tr. 92 (Manchester). Mr. Abraham worked weekends on the matter “[a]ll the time” and “[q]uite often,” and worked until 9:00 p.m. or 10:00 p.m. on the matter on daily basis. Tr. 158, 160 (Abraham). The other associates on the case also worked long hours. Tr. 160 (Abraham). Ms. Manchester’s hours on the matter were more limited than Mr. Abraham’s because she was working a reduced (80% schedule) and did not work on Fridays. Tr. 107 (Manchester).

7. There initially was a large team of Epiq document review attorneys on the Project. Tr. 21, 48 (Manchester); Tr. 135, 140-41 (Abraham); Tr. 201-02 (Cline) (“maybe two or three dozen people”). Mr. Abraham recommended that Respondent

serve as the project manager of the Epiq attorneys. DX 36 (November 23, 2012 email); HCX 1 at 63 (“I think he will work out well in that role. Please let me know if anyone thinks otherwise.”); Tr. 134-35 (Abraham). Mr. Abraham had been informed by an Epiq representative that Respondent had project management experience. DX 36 (November 23, 2012 email); Tr. 135 (Abraham).

8. Respondent was assigned to serve as project manager on the Project. DX 36 (November 23, 2012 email); Tr. 26-27 (Manchester), 134-35 (Abraham); Stip. ¶ 3.

9. Edward Burke, Esquire, a Senior Vice President at Epiq, informed Mr. Abraham on November 24, 2012 that he would be monitoring the project manager on the matter. HCX 1 at 66-67 (November 24, 2012 email). Todd Purdy, an Epiq employee, also was involved in supervising Respondent. *Id.* at 68-69 (November 26, 2012 emails).

10. The Epiq attorneys’ primary job assignment was to review documents. *See* Tr. 204 (Cline) (“That was—basically all we were doing was reviewing documents on Relativity. So I would say 95 percent.”). In addition to reviewing documents, the Epiq attorneys met periodically with Mr. Abraham and engaged in other tasks such as reviewing a privilege protocol. Tr. 150-52, 161 (Abraham); DX 40.

11. The Epiq attorneys reviewed documents using “Relativity,” a document review software platform. Tr. 22-26 (Manchester), 116-117 (Paredes); Stip. ¶ 4.

12. Relativity generates a daily status report. Tr. 65, 68 (Manchester). The daily status report contained information concerning the work each Epiq document reviewer was doing and the pace of each reviewer's work. Tr. 65-66 (Manchester). Mr. Abraham had access to the daily Relativity status reports. Tr. 68 (Manchester). Mr. Abraham recalled that he stopped getting the daily status reports at a certain point because he did not need them, but he could not remember when he stopped receiving them. Tr. 146 (Abraham).

13. The document review for the Project commenced in an Epiq work space on the day after Thanksgiving in November 2012. Tr. 134, 156-57 (Abraham); Tr. 199-200 (Cline). The initial phase of the Project continued until the first or second week of January 2013. Tr. 198 (Cline).

14. Mr. Abraham had "fairly regular" contact with the Epiq document reviewers, and "would try [his] best to keep everyone informed and to keep everyone working." Tr. 143-44 (Abraham). He "would always try to check in and keep communication up." Tr. 143 (Abraham); *e.g.*, DX 47 (email from Respondent to Mr. Abraham thanking him for coffee). Respondent communicated with Mr. Abraham by email frequently. *See, e.g.*, HCX 1 at 64, 77-78, 82, 92-100, 102-03, 105-07, 110-12, 116-17, 124-25, 159, 166-67, 173-76, 304, 306, 308-313, 326-27, 331, 359-60, 362 366, 369, 393, 398, 402, 404-05, 411, 439-40, 445, 447, 458, 463, 465, 629, 659, 669, 672-74 (emails between Mr. Abraham and Respondent).

15. Mr. Abraham sometimes interacted with the Epiq document reviewers after 6:00 p.m. at night. Tr. 160 (Abraham).

16. Respondent communicated regularly with Mr. Abraham regarding the document reviewers' work hours. *E.g.*, HCX 1 at 447 (November 25, 2012 emails regarding weekend schedule); *id.* at 77-78 (December 2-3, 2012 emails between Respondent and Mr. Abraham regarding hours cap); *id.* at 366 (email from Respondent to Mr. Abraham and others regarding work schedule); *id.* at 98-99 (February 19-20, 2013 emails between Respondent and Mr. Abraham regarding work hours); *id.* at 102 (March 7, 2013 emails regarding work hours).

17. Epiq informed one of the document review attorneys, Donna Cline, that the Project was a 50 hour per week assignment, allowing for 40 hours of regular work and 10 hours of overtime per week. Tr. 213 (Cline). The 50-hour cap was lifted when certain deadlines had to be met. Tr. 213-14 (Cline).

18. On November 29, 2012, Epiq employee Jessica Cegelske sent an email notifying the document review team that the Project hours had been modified "to have available hours from 8 am until 8 pm, Monday through Sunday." HCX 1 at 70 (November 29, 2012 email). Ms. Cegelske further informed the reviewers that they could "bill up to 11.5 hours per day and 65 hours per week," but they were required to take a 30-minute unpaid break after working 8 hours. *Id.* Mr. Abraham was included in the email message. *Id.*

19. On November 30, 2012, Epiq Senior Vice President Edward Burke proposed a meeting with Mr. Abraham to discuss the role and responsibilities of the Epiq project manager. HCX 1 at 72 (November 30, 2012 email). Mr. Abraham agreed to the meeting. *Id.* at 71 (November 30, 2012 email).

20. On December 7, 2012, Mr. Abraham notified the document review attorneys that they would not be working on the weekend of December 8-9, 2012 because they did not have additional documents to review at that time. HCX 1 at 79 (December 7, 2012 email).

21. Mr. Abraham “would get invoices from Epiq” that “would have the time that was worked by” the Epiq attorneys. Tr. 136 (Abraham). He would “kind of glance at them” and “pass them along.” Tr. 136 (Abraham). On December 12, 2012, Mr. Abraham asked Epiq employee Heidy Ho-Chang for the daily time sheets of the Epiq document review attorneys, so that Mr. Abraham could review the time sheets. HCX 1 at 80 (December 12, 2012 email).

22. On December 19, 2012, Respondent informed the Epiq document review attorneys (cc: Mr. Abraham and others) that the hours cap had been lifted again, and that they could work 11.5 hours per day through January 6, 2013. HCX 1 at 82 (December 19, 2012 email). Respondent also informed the reviewers of days on which the office would be closed or would be open for abbreviated hours. *Id.*

23. Respondent billed in excess of 11.5 hours on several days in November and December 2012. *See* DX 6 at 1-3.

24. On January 3, 2013, Mr. Abraham wrote to the Client regarding the Epiq invoices for three weeks of the Project. HCX 1 at 84 (January 3, 2013 email). Although Respondent had billed time in excess of the hours cap, Mr. Abraham informed the Client that, “As I am managing the review team, I have reviewed these

invoices along with a summary report of individual contract attorneys hours, and feel they accurately reflect the work completed during these three weeks.” *Id.*

25. Mr. Abraham had “a great respect” for Respondent. Tr. 65 (Manchester).

26. On January 9, 2013, Mr. Abraham wrote to the Client (and others) regarding his proposal for the next phase of the Project—a privilege review. He explained that approximately 16,000 documents required a privilege review, and proposed retaining the “best of the best” of the Epiq reviewers for the review. HCX 1 at 88-89 (January 9, 2013 email). Mr. Abraham recommended that Respondent work on the privilege review, explaining that Respondent had a good knowledge of the issues, had reviewed many documents, and had served as the liaison between Mr. Abraham and the Epiq document reviewers. *Id.* Mr. Abraham requested keeping Respondent and two or three other document reviewers on the team. *Id.*

27. Initially, the Epiq document reviewers worked at an Epiq workspace (or workspaces). Tr. 156-57 (Abraham), 199-200 (Cline). On or about January 22, 2013, the Project moved to Dickstein’s offices at 1825 Eye Street in Washington, D.C. for the privilege review and a final document review. HCX 1 at 431 (January 11, 2013 email from Mr. Abraham to Respondent regarding new phase of Project beginning in mid-January, 2013); *id.* at 532 (January 17, 2013 email from Mr. Abraham to Respondent regarding starting new phase of Project on or about January

22, 2013 (“next Tuesday”)); Tr. 21 (Manchester), 199-200 (Cline); DX 51 (building log entries starting on January 23, 2013); Stip. ¶ 5.

28. When the Project moved to Dickstein’s offices, the number of Epiq attorneys working on the Project declined from approximately twenty-seven to four. Tr. 202 (Cline); *see also* Tr. 48 (Manchester) (initially 27 attorneys); DX 53 (same).

29. As of January 2013, Ms. Cline worked part-time on the Project, generally on Mondays, Tuesdays, and Wednesdays. Tr. 201-03 (Cline) (noting that she began working part-time after the move to the Dickstein Shapiro offices). The other remaining Epiq document review attorneys, Respondent, Marcel Marcel, and Nichole Patterson, worked full-time. Tr. 202 (Cline); *see* Tr. 333 (Respondent).

30. By late March 2013, only three Epiq document review attorneys—Respondent, Mr. Marcel, and Ms. Cline—remained on the Project. Tr. 45 (Manchester), 202 (Cline); DX 42 (fourth Epiq attorney, Nichole Patterson, left project on March 22, 2013).

31. Mr. Marcel left the project at the end of May 2013. *See* DX 26 at 2 (forwarding time sheets for week ending June 8; “And then there were two”); DX 53 (hours summary for Epiq attorneys reflecting no work performed by Mr. Marcel in June 2013).

32. Ms. Cline remained on the Project with Respondent through its conclusion in August 2013. Tr. 202 (Cline).

33. At Dickstein, all of the Epiq attorneys worked in a single office on the 10th floor (and later on the 5th floor). DX 43 at 2 (Room 10E302); DX 70 (Room 05E330); Tr. 55 (Manchester); Tr. 137-38, 142 (Abraham).

34. The Client was very sensitive regarding the confidentiality of its documents; it did not want even its own attorneys at Dickstein who were working on the case to see certain documents. Tr. 21-22 (Manchester) (sensitivity was “to a very heightened level”).

35. The Epiq attorneys were not permitted to work from home or to log in remotely to review documents for the Project. Tr. 22 (Manchester) (“[T]here was no working from home or logging on remotely.”); Tr. 54 (Manchester) (“[T]he requirement was to review in-house so that there was no review going on remotely.”); Tr. 90 (Manchester) (“[T]hey could not log on from home onto Relativity for this particular matter.”); Tr. 146 (Abraham); Stip. ¶ 5. “You could only do the work and login to the system” in the Dickstein office where the Epiq reviewers worked. Tr. 146 (Abraham); *see also* Tr. 317 (Respondent) (“We weren’t given a Citrix or network password” and could not log into Relativity from home).

36. The Epiq attorneys working on the Project were each given Dickstein email addresses and had access to the Dickstein email system in the office. Tr. 58-59 (Manchester). Ms. Manchester testified that there also was “remote e-mail access” at Dickstein that allowed people to log into the email system from home. Tr. 22 (Manchester). Disciplinary Counsel failed to present clear and convincing evidence, however, that the Epiq document review attorneys, who (unlike Ms.

Manchester) were not Dickstein employees, had remote access to Dickstein's email. Ms. Manchester was "not sure" whether the Epiq document review attorneys had remote access to Dickstein's email system. Tr. 59 (Manchester). Ms. Cline also could not recall whether the Epiq document reviewers had remote access to Dickstein's email system. Tr. 217-18 (Cline). Respondent recalled that he could only use the Dickstein email system when he was in Dickstein's offices. Tr. 317 (Respondent). On at least three occasions after the Project had moved to Dickstein's offices, Respondent used his personal email to communicate with Mr. Abraham when Respondent was not in Dickstein's offices. *See* HCX 1 at 309 (January 28, 2013 email from Respondent to Epiq and Mr. Abraham notifying them that he would be late); *id.* at 673 (February 7, 2013 email from Respondent notifying Epiq, Mr. Abraham, and Mr. Marcel that he would be late); DX 74 (April 2, 2013 email from Respondent notifying Mr. Abraham and Mr. Marcel that he would not be in that day). Similarly, Ms. Cline used her personal email to notify Respondent and Epiq that she would be out of the office. *See* DX 12 at 2-3 (emails from Ms. Cline's personal email address notifying Respondent and Epiq that she would be out sick). The record does not establish by clear and convincing evidence that the Epiq attorneys had remote access to Dickstein's email system.

37. The offices at Dickstein where the Epiq attorneys worked on the Project were locked and required a physical metal key to unlock. Tr. 203-04 (Cline); Tr. 299 (Respondent). Respondent held the key and was expected to arrive by 8:30 a.m. to unlock the office door for the reviewers. Tr. 203-04 (Cline). If Respondent was

unable to unlock the document reviewers' office, he was responsible for making arrangements to have the door unlocked. Tr. 203-04 (Cline); *see also* HCX 1 at 95 (February 7, 2013 email from Respondent that he had overslept and needed someone to open the door for the reviewers); DX 74 (April 2, 2013 email from Respondent notifying Mr. Abraham and Mr. Marcel that he would not be in that day, and asking if security personnel could open the office door). Respondent also was responsible for making sure the document review office was locked at the end of the day. Tr. 205 (Cline).

38. The record reflects several instances in which Respondent notified Epiq and/or Mr. Abraham that he would be late or absent. For example, Respondent emailed Mr. Abraham on February 13, 2013 to inform him that Respondent would leave early on February 14, 2013, be away on President's Day weekend, and might not be present on Monday, February 18, 2013, but "Marcel [would] have the key, so that is taken care of." DX 41 (February 13, 2013 emails); *see also* HCX 1 at 309 (January 28, 2013 email from Respondent notifying Epiq and Mr. Abraham that Respondent would be late); HCX 1 at 673 (February 7, 2013 email from Respondent notifying Epiq, Mr. Abraham, and Mr. Marcel that Respondent would be late); DX 74 (April 2, 2013 email from Respondent notifying Mr. Abraham and Mr. Marcel that he would not be in that day).

39. The Epiq attorneys were provided Kastle cards to access the Dickstein Shapiro building elevators and to enter floors of the building. Tr. 35-36, 54 (Manchester), Tr. 200-01 (Cline); DX 70, 75; Stip. ¶ 5.

40. During normal business hours, “you did not have to swipe [a Kastle card] until you got to the first elevator on the lobby level. [In the elevator, a swipe] would let you select your floor,” and then you would need to swipe again to “get into the entrance of your level.” Tr. 36 (Manchester). If the firm was closed, additional swipes of the Kastle card were required to move about the building. Tr. 36-37 (Manchester). It was possible, however, to enter or move about the building without swiping a Kastle card, if a person entered a floor (or elevator) behind another person who had swiped his or her Kastle card. Tr. 55 (Manchester) (“You can piggyback on the back of someone as you’re walking in the building”); Tr. 106 (Manchester) (“[I]f you would come up the elevator with numerous people, we didn’t say you had to swipe your own card to get into the door.”); Tr. 201 (Cline) (“[I]f someone else was getting off [the elevator] at Dickstein Shapiro, you didn’t have to swipe in.”). It was not necessary to swipe a Kastle card to exit the building. Tr. 54 (Manchester).

41. As project manager, Respondent was responsible for collecting time sheets from the Epiq attorneys, submitting time sheets to Epiq on Monday mornings, and acting as the main point of contact between the Epiq attorneys and the Dickstein attorneys. *See, e.g.*, DX 44 (email exchange between Respondent and Mr. Abraham); Tr. 135 (Abraham) (Respondent coordinated some “administrative aspects” of Epiq attorneys’ work); Tr. 205-07 (Cline) (Respondent “was the main point of contact between the Epiq team and [Mr. Abraham].”). Respondent’s job responsibilities also included answering questions for other reviewers, batching

documents for the Epiq attorneys to review, communicating with Epiq, and other administrative tasks. Tr. 205-07 (Cline).

42. Donna Cline was the only witness called by Disciplinary Counsel who worked directly with Respondent as a document reviewer on the Project, in the same office. The Committee finds Ms. Cline a credible witness and credits her testimony.

43. Respondent sat to Ms. Cline's left in the office used by the Epiq document reviewers at Dickstein. Tr. 208 (Cline). According to Ms. Cline, Respondent was on his computer "all the time," and "[h]e was definitely reviewing the documents with us too." Tr. 208-09 (Cline). Ms. Cline could see on Relativity the batches of documents that Respondent had reviewed. Tr. 209 (Cline).

44. Ms. Cline estimated that project management duties took up approximately 25% of Respondent's time. Tr. 207-08 (Cline).

45. After moving to the Dickstein offices, Respondent submitted his time sheets (and those of the other Epiq reviewers) to Epiq via e-mail. *See* Tr. 308-09 (Respondent), DX 6-30, DX 32-35 (time sheets and e-mails forwarding time sheets); *see also* DX 31; DX 63 (e-mail from Stacy Sacks regarding time sheet for week ending July 13, 2013); DX 76 (affidavit of Stacy Sacks).

46. During the period when the Epiq document reviewers worked in Dickstein's offices (late January 2013 through early August 2013), Respondent provided the Epiq reviewers' time sheets to Mr. Abraham's assistant on a weekly basis. HCX 1 at 92 (January 28, 2013 emails); Tr. 308-09 (Respondent). Mr. Abraham's assistant scanned the time sheets into PDF files and emailed the files to

Respondent, who then emailed the reviewers' time sheets to Epiq as PDF files. Tr. 205 (Cline); DX 7-35. Respondent emailed the time sheets to Epiq on Mondays. Tr. 205 (Donna Cline testimony regarding Respondent's collection and delivery of Epiq employee time sheets).

47. The time sheets in the record include the emails sent by Respondent to Epiq attaching the weekly time sheets, but omit the weekly time sheets submitted by the other Epiq reviewers. Only Respondent's weekly time sheets were attached to the exhibits. *See* DX 6-35.⁷

48. Respondent recalled that he signed his time sheets. Tr. 276 (Respondent). Many of Respondent's time sheets in the record, however, are unsigned. *See* DX 10; DX 14; DX 17-18; DX 20-35. Respondent's memory on this point is inaccurate, but the issue is not material. Respondent emailed his time sheets directly to Epiq and was paid (and sought bonuses) based on the time sheets. *See, e.g.,* DX 21 at 2 (requesting bonus). There is no evidence in the record that Epiq followed up with Respondent to obtain signed copies of his time sheets. The time sheets of the other Epiq reviewers are not in the record, and there is no other evidence in the record about whether the other Epiq reviewers signed their time sheets.

49. Because the time sheets of the other Epiq attorneys were not offered into evidence by Disciplinary Counsel, there is no record of the hours the other Epiq

⁷ During the hearing, Respondent noted Disciplinary Counsel's failure to provide the time records of the other Epic attorneys during the Project. *See* Tr. 85-88.

attorneys worked (apart from Ms. Cline's testimony that she generally worked Mondays through Wednesdays, *see* Tr. 202).

50. Mr. Abraham testified that no one at Dickstein reviewed the Epiq reviewers' weekly time sheets for accuracy and that it was not his job responsibility to review the time sheets. Tr. 157-58 (Abraham). But Mr. Abraham acknowledged that he received and looked at Epiq's invoices before passing them on. Tr. 136 (Abraham). The documentary record reflects that Mr. Abraham reviewed the Epiq attorneys' time sheets for accuracy on at least one occasion. *See* FF 21, 24; HCX 1 at 80 (December 12, 2012 email from Mr. Abraham requesting daily time sheets); HCX 1 at 84 (January 3, 2013 email from Mr. Abraham to Client concerning Mr. Abraham's review of Epiq time sheets for a three-week period).⁸ Further, Ms. Manchester, who was Mr. Abraham's supervisor, testified that it was her understanding that Mr. Abraham reviewed the Epiq attorneys' time sheets. Tr. 62 (Manchester). Because the record contradicts Mr. Abraham's testimony, the Hearing Committee does not credit Mr. Abraham's testimony on this point.

51. Respondent testified that he believed that Mr. Abraham reviewed and approved his time sheets. *E.g.*, Tr. 310 (Respondent) ("I believe Andrew [Abraham] reviewed and approved all the times sheet [sic], yes."). Disciplinary Counsel asserts

⁸ Several of Respondent's time sheets from the Dickstein document production contain check marks next to each day's total hours, and the total hours for the week are also initialed. HCX 1 at 32-61.

that this testimony was false. *See, e.g.*, ODC Br. at ¶ 58.⁹ The Committee, however, credits Respondent’s testimony about his belief concerning Mr. Abraham’s review of the time sheets. As discussed above, the record reflects that Mr. Abraham reviewed the Epiq attorneys’ daily time sheets for accuracy on at least one occasion. *See, e.g.*, FF 21, 24; HCX 1 at 80 (December 12, 2012 email from Mr. Abraham requesting daily time sheets); HCX 1 at 84 (January 3, 2013 email from Mr. Abraham to Client concerning his review of three weeks of time sheets). Further, Ms. Manchester, who was Mr. Abraham’s supervisor, shared Respondent’s belief that Mr. Abraham reviewed the Epiq attorneys’ time sheets. Tr. 62 (Manchester). Indeed, Ms. Manchester expected Mr. Abraham to raise an issue if there were a problem with the time sheets. Tr. 64-65 (Manchester). Based on our review of the record, there is no clear and convincing evidence that Respondent testified falsely about his belief that Mr. Abraham reviewed the Epiq attorneys’ time sheets, and we find Respondent’s (and Ms. Manchester’s) recollection more credible than that of Mr. Abraham.

52. At times, the Epiq document reviewers encountered problems with the Relativity document review platform. *E.g.*, HCX 1 at 506 (December 17, 2012 email from Respondent to Mr. Abraham and others regarding problem opening documents on Relativity); *id.* at 166 (January 5, 2013 email from Respondent to Epiq and Mr. Abraham stating that reviewers could not access batches on Relativity); *id.* at 98

⁹ “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 Response. “ODC Reply Br.” refers to Disciplinary Counsel’s Reply Brief.

(February 19, 2013 email regarding problem with batches); *id.* at 101 (February 20, 2013 email from Mr. Abraham regarding Relativity “glitch” that had affected review). Technical problems with the Relativity platform that caused delays were referenced during the hearing. *See, e.g.*, Tr. 205-06 (Cline testimony regarding Relativity problems: “it was running a little slow, and so [Respondent] would report that and say, Okay guys, Andy [Abraham] said to logout, like everybody logout for like 15 minutes”).

53. The Epiq document review attorneys’ workload ebbed and flowed, and, at times, there were no documents to review. The record reflects that Respondent was told by Mr. Abraham on several occasions to “hold tight” or to pass the time when there was no work to do. *E.g.*, HCX 1 at 166 (January 5, 2013 email from Respondent to Epiq and Mr. Abraham stating that the reviewers would be done that day because there were batches they could not access); HCX 1 at 93 (January 31, 2013 emails between Mr. Abraham and Respondent asking Respondent to “hold tight” after Respondent informed him the reviewers were running out of documents to review); DX 40 (February 6, 2013 email from Mr. Abraham to Respondent regarding lack of documents to review on February 8, 2013: “If anything, I will just have you guys review the privilege protocol and what not Friday to pass the time”); HCX 1 at 105-06 (March 25, 2013 emails in which Respondent notifies Mr. Abraham at 11:30 a.m. that the reviewers have only 30 batches left and Mr. Abraham responds, “Make them last!”); DX 44 (April 10, 2013 email exchange between Respondent and Mr. Abraham, in which Respondent reports at 11:55 a.m. that the

existing work has been completed and Mr. Abraham instructs the reviewers to “take a long lunch to enjoy the weather” because “[t]he next steps may not be ready until tomorrow.” Respondent replies that the reviewers will leave around 5 p.m. “if there is nothing going on.”). Similarly, at times, the reviewers had to wait to receive new documents to review, and were told they had “a light day today. Leave early if you want . . . take a long lunch or whatever.” Tr. 214-15 (Cline).

54. Respondent billed time on days when he had informed Mr. Abraham that the reviewers had run out of work (or were running out of work) and Mr. Abraham told them to “hold tight,” do other things, or take a long lunch. *See, e.g.*, DX 8 (Respondent billed 8.5 hours for January 31, 2013, a day on which Mr. Abraham told him to “hold tight”); DX 9 (Respondent billed 8.5 hours for February 8, 2013, a day on which Relativity work appeared to be limited); DX 40 (February 6, 2013 email from Mr. Abraham to Respondent regarding lack of documents to review on February 8, 2013; “If anything, I will just have you guys review the privilege protocol and what not Friday to pass the time.”); DX 16 (Respondent billed 12 hours for March 25, 2013, a day on which he informed Mr. Abraham at 11:30 a.m. that the reviewers had only 30 batches left to review); DX 18; DX 44 (Respondent billed 9.5 hours for April 10, 2013, a day on which Respondent reported at 11:55 a.m. that the existing work has been completed and Mr. Abraham instructed the reviewers to “take a long lunch to enjoy the weather” because “[t]he next steps may not be ready until tomorrow.” Respondent replies that the reviewers will leave around 5 p.m. “if there is nothing going on.”).

55. There was no evidence presented about whether the other Epiq attorneys billed time on days when they were in the office, but there was little or no work to do.

56. There was no evidence presented concerning the rules or guidance governing the Epiq attorneys' billing practices. For example, Disciplinary Counsel did not present any evidence that the Epiq attorneys were not permitted to bill for time during which they were told to take a long lunch because there were no documents to review. Similarly, Disciplinary Counsel presented no evidence that it was improper for the Epiq attorneys to bill for "down time" when they were at Dickstein but there were no documents to review or Relativity was not working. Nor did Disciplinary Counsel present any evidence that it was improper for the Epiq attorneys to bill for time when they were in Dickstein's offices but not working on the Relativity platform (such as time spent reviewing a privilege protocol).

57. On February 20, 2013, Respondent inquired whether Mr. Abraham could "open the hours a bit, say from 8:30 [a.m.] to 7:30 [p.m.]," to accommodate the reviewers' travel and schedules and avoid rush hour commuting. HCX 1 at 98 (February 20, 2013 email from Respondent to Mr. Abraham). On February 25, 2013, Mr. Abraham responded that "you are all ok to work later than 6 [p.m.] starting today." *Id.* at 100 (February 25, 2013 email).

58. On March 7, 2013, a Dickstein attorney wrote to the Epiq document reviewers that the team was "in crunch time." HCX 1 at 102 (March 7, 2013 email). She stated that "we need your time—*whether during the work day, in the evenings,*

or on the weekends—to get the job done.” Id. (emphasis added). After receiving the email, Respondent asked Mr. Abraham whether this meant “all bets are off as far as hours.” Id. Mr. Abraham responded that he was “not sure yet.” Id.

59. On March 20, 2013, Respondent asked Mr. Abraham whether he foresaw weekend work in the near future. HCX 1 at 103 (March 20, 2013 email). Mr. Abraham responded that he would report back soon. *Id.*

60. On March 28, 2013, Mr. Abraham requested that the Epiq attorneys’ Kastle cards be modified to allow them to access their office on weekends. DX 43 at 2. The Kastle cards were updated on March 29, 2013 to allow the Epiq attorneys to access their offices from 8 a.m. to 8 p.m. seven days a week. *Id.* at 1.

61. On April 19, 2013, Mr. Abraham notified Respondent that Mr. Abraham would be working on Saturday, April 20, 2013, and invited the reviewers to do the same. HCX 1 at 111 (April 19, 2013 email). Respondent replied, “Perfect, thank you!” *Id.* Respondent billed 11.5 hours for April 20, 2013. DX 19 at 1.

62. Ms. Cline recalled that the hours cap also may have been lifted in May or June 2013 during a “big push[]” to produce documents. Tr. 216 (Cline).

63. On June 7, 2013, Mr. Abraham notified Respondent and Ms. Cline that they could work weekend hours to review a new batch of documents. HCX 1 at 118 (June 7, 2013 email).

64. Ms. Cline recalled that there occasionally were days when she worked at Dickstein and Respondent did not. Tr. 209-10 (Cline). She estimated that there were “not more than a dozen” such days. Tr. 210 (Cline).

65. Disciplinary Counsel did not call any other witness who worked directly with Respondent on the Project in the same office.

66. The last day on which Respondent billed time to the Project was Tuesday, August 6, 2013. DX 35 at 1.

67. On August 7, 2013, Mr. Abraham wrote to a group of “friends and superstars,” including Respondent, to ask them to volunteer for a D.C. pro bono clinic. HCX 1 at 454-55 (August 7, 2013 email). Respondent responded, “count me in here. I would assume I am both friend AND superstar?” *Id.* at 454 (August 7, 2013 email). Mr. Abraham responded, “Indeed both.” *Id.*

68. Ms. Manchester had no information that Mr. Abraham had any problem with either Respondent’s pace or his work product on Relativity. Tr. 69 (Manchester). As discussed above, Mr. Abraham had access to daily status reports from Relativity concerning the Epiq reviewers’ work. FF 12; Tr. 65-66, 68 (Manchester). Ms. Manchester expected Mr. Abraham to address any issues in the Epiq attorneys’ time records and to supervise the Epiq attorneys. Tr. 64-66 (Manchester). During the Project, Mr. Abraham believed that Respondent was a good employee, and he understood that he could have fired Respondent if he was not getting the job done. Tr. 149-50, 155 (Abraham). The Committee credits Mr. Abraham’s contemporaneous opinion concerning Respondent’s work performance, which is supported by documentary and testimonial evidence.

B. The Investigation and Complaint Against Respondent.

69. On May 22, 2013, Bryan Bellack of Epiq wrote to Mr. Abraham and another Dickstein employee requesting payment of outstanding Epiq invoices. DX 46 (May 22, 2013 email). Mr. Abraham responded that Mr. Bellack should contact the Client directly, and that Mr. Abraham's role "ha[d] been only to spot check the invoices" before sending them to the Client for payment. DX 46 (May 23, 2013 email).

70. After corresponding with Mr. Bellack, Mr. Abraham observed that the bills "were very high, extremely high, but beyond sort of what we were doing." Tr. 138-39 (Abraham).

71. On Friday, May 31, 2013, nine days after Mr. Bellack's request for payment of the outstanding Epiq invoices, Mr. Abraham notified Respondent that "[w]e need to shut down weekend work for the time being. There is serious concern over the bills. I'll give you an update on next steps on Monday." DX 47 at 1. Respondent replied to Mr. Abraham that Ms. Manchester had authorized the team to "go" on the documents, "so we went." *Id.* Mr. Abraham responded, "[o]nce we figure out the rest of the priv[ilege] work, we can turn it on again." *Id.*

72. There is no evidence in the record that Mr. Abraham found any discrepancy between the hours Respondent billed through May 31, 2013 and the information in the Relativity daily activity reports.

73. Despite Mr. Abraham's email informing Respondent that the Epiq attorneys should not work on weekends as of May 31, 2013, Respondent billed time for Saturday, June 1, 2013 and Sunday, June 2, 2013. *See* DX 25; DX 26.

74. There is no evidence in the record about whether any of the other Epiq attorneys billed time on June 1 or 2, 2013. Respondent believed that Mr. Abraham subsequently changed his mind and allowed work on those days, but he could not recall any specific communication in that regard. Tr. 351-52 (Respondent).

75. On July 23, 2013, Epiq sent its invoices for May and June 2013 to Mr. Abraham and another Dickstein employee. DX 48 at 2. After the Client expressed concern regarding the "number of hours being spent" by Epiq in those two months, Ms. Manchester asked Mr. Abraham for the time sheets for the three Epiq document review attorneys who remained—Respondent, Mr. Marcel, and Ms. Cline. Tr. 22-24, 45 (Manchester).

76. On July 25, 2013, Mr. Abraham requested information from Epiq concerning the Epiq document review attorneys' hours on the Project. DX 48 at 1.

77. On July 26, 2013, Mr. Abraham wrote to Respondent and instructed him to "cut back to a more reasonable pace." DX 49 at 1. Mr. Abraham wrote to Respondent that he was "concerned about the sticker shock for the client." *Id.*

78. Ms. Manchester was "alarmed at the high level of billing for two of the attorneys"—Respondent and Mr. Marcel. Tr. 23-24 (Manchester). On July 26, 2013, Mr. Abraham wrote again to Epiq, noting that "the hours totals for the review are extraordinarily high" and that there must be a mistake because Respondent

agreed that he did not bill 442.5 hours in May, as reflected in the invoices. DX 48 at 1. Respondent's time sheets for May 2013 actually totaled 396.5 hours, not 442.5 hours. *See* DX 21 (52 hours billed for May 1-4, 2013); DX 22 (90.5 hours billed for May 5-11, 2013); DX 23 (90.5 hours billed for May 12-18, 2013); DX 24 (86.5 hours billed for May 19-24, 2013); DX 25 (77 hours billed for May 26-31, 2013). The record does not explain this discrepancy.

79. In September 2013, Ms. Manchester requested from Epiq a Relativity printout showing the Epiq document reviewers' activity on the Relativity platform. Tr. 25 (Manchester); Tr. 533-34 (Catton).

80. In response to Ms. Manchester's request for Relativity records relating to the Epiq reviewers, Mr. Catton provided a summary Relativity report to Ms. Manchester. *See* Tr. 527-28 (Catton). The summary Relativity report in the record purports to reflect the total hours Respondent spent on Relativity on various dates between February 4, 2013 and August 7, 2013. *See* DX 50 (Relativity printout for Respondent reflecting total hours spent on platform on various dates from February 4, 2013 through August 7, 2013); Tr. 30 (Manchester) (identifying DX 50 as the Relativity printout Ms. Manchester received from Epiq); DX 77 (excerpt of DX 50 in larger font); Tr. 30 (Manchester) (identifying DX 77 as a reprint of portions of DX 50 in larger font). There is no summary Relativity report for any other Epiq attorney in the record. As a result, it is impossible to compare the summary Relativity report for Respondent to any Relativity reports relating to the other Epiq attorneys.

81. Mr. Catton did not provide Ms. Manchester a detailed “daily activity log” that would have reflected Respondents’ work on Relativity with greater specificity, although the Relativity program had the capacity to create such reports. Tr. 537-38 (Catton). *Compare* DX 50 (summary Relativity report provided to Ms. Manchester), *with* DX 59, Exs. C-1, C-2 (detailed Relativity reports for two specific dates in July 2013 submitted by Epiq with disciplinary complaint). There is no evidence in the record that Ms. Manchester requested from Epiq the detailed Relativity daily activity log for Respondent, which would have shown the specific times that he was logged into Relativity.

82. On September 9, 2013, Ms. Manchester requested from the Dickstein Manager of Security the Dickstein building log record for Respondent and Mr. Marcel. DX 70; Tr. 34-35 (Manchester). On September 10, 2013, Ms. Manchester received a report for the period January 2013 through August 2013, which indicated when Respondent had swiped his Kastle card in the Dickstein building. DX 70. The building log is DX 51. Tr. 34 (Manchester); DX 51; *see also* DX 75 (affidavit from former Dickstein Manager of Security). The building log relating to Mr. Marcel is not in the record. Nor is there any evidence in the record concerning the Kastle card activity of the other Epiq reviewers who worked on the Project at Dickstein.

83. Ms. Manchester reviewed Respondent’s time records and compared them to the Relativity summary report she received from Epiq and the Dickstein building log. Tr. 38-42, 45-47 (Manchester). She concluded that there were numerous days when Respondent billed time but the Dickstein building log reflected

no entry by Respondent into the building and the summary Relativity report reflected no activity by Respondent on Relativity. She also concluded that there were numerous days when Respondent billed longer hours than the Relativity summary records reflected. Tr. 46-47 (Manchester).

84. Ms. Manchester's investigation of Respondent involved reviewing the building log, the summary Relativity report, and Respondent's time sheets. Tr. 76 (Manchester). To determine the amount of alleged overbilling, Ms. Manchester simply subtracted the number of hours Respondent was logged into Relativity (according to the summary Relativity report) from the number of hours billed by Respondent. Tr. 96-97 (Manchester).

85. Ms. Manchester did not interview Respondent or any of the other Epiq document review attorneys regarding Respondent's work hours. *See* Tr. 60 (Manchester) (Ms. Manchester asserts she has never met Respondent); Tr. 77-78 (Ms. Manchester did not interview Ms. Cline).

86. Ms. Manchester did not review all of the emails between Respondent and Mr. Abraham as part of her investigation. *See* Tr. 70-71.

87. Ms. Manchester declined to obtain surveillance video from the security cameras in Dickstein Shapiro's lobby to evaluate whether or not Respondent entered the building on various dates. Tr. 76-77 (Manchester).

88. Ms. Manchester did not review Mr. Abraham's time records as part of her investigation. Tr. 91-92 (Manchester). Nor did she review the time records of any Dickstein attorney who worked on the Project. Tr. 91-93 (Manchester).

89. As noted above, Mr. Abraham acknowledged that he worked weekends on the matter “[a]ll the time” and that he was working until 9:00 or 10:00 pm on the matter on daily basis. FF 6; Tr. 158-60 (Abraham). Other attorneys on the case also were working long hours. Tr. 160 (Abraham).

90. As noted above, Dickstein raised concerns with Epiq about billing in the summer of 2013. *See* FF 75-80. After completing its own internal investigation, Epiq offered a partial credit to the Client. HCX 1 at 28-29.

91. In October 2013, Epiq wrote a letter to Respondent seeking reimbursement for alleged overbilling. Tr. 169 (Euler); DX 56.

92. On August 12, 2014, Epiq filed a complaint against Respondent with the Office of Disciplinary Counsel. DX 59. Epiq attached as exhibits to the complaint two detailed daily Relativity reports reflecting Respondent’s activity on Relativity on July 3, 2013 and July 8, 2013. DX 59, Exs. C-1, C-2. Epiq cited and relied on those Relativity reports in its complaint. DX 59 at 2.

C. Disciplinary Counsel’s Claims and Documentary Evidence.

93. The Specification of Charges alleges that “Respondent falsely represented that he had worked on multiple days when he did not enter the Dickstein Shapiro building” and that “Respondent falsely represented the extent of the hours he worked when he was present at the Dickstein Shapiro offices.” DX 2 (Specification) ¶¶ 7-8.

94. Disciplinary Counsel alleges that: (i) Respondent failed to appear at Dickstein’s offices (and did no work) on 51 specific days on which he billed time to

the Project; and (ii) on other days, Respondent billed hours in excess of those he actually worked. *See* DX 79, Ex. A (Disciplinary Counsel’s Statement Regarding List of Dates, identifying 51 dates between February 14, 2013 and August 4, 2013 on which “Respondent Allegedly Did Not Work but Billed for Time”); DX 80 (Disciplinary Counsel’s Statement Regarding Overbilling).

95. Ms. Manchester acknowledged that Respondent’s billing for January and February 2013, and “maybe March” 2013, did not seem out of line. Tr. 49 (Manchester). According to Ms. Manchester, the alleged fraud took place from April 2013 through August 2013. *Id.* Notwithstanding Ms. Manchester’s testimony, Disciplinary Counsel alleges that Respondent fraudulently billed for six days in February and March 2013 on which he allegedly was not present in Dickstein’s offices, and that Respondent fraudulently overbilled in both February and March 2013. *See* DX 79, DX 80.

96. Apart from the 51 identified days on which Respondent allegedly billed for work but allegedly never came into the office (*see* DX 79, Ex. A), Disciplinary Counsel acknowledges that it does not “specify with precision exactly how many hours . . . Respondent billed that were not warranted.” DX 80 (Disciplinary Counsel’s Statement Regarding Overbilling) at 1. “Moreover, Disciplinary Counsel does not intend to (or claim to be able to) identify with specificity the monetary damages Complainant [allegedly] suffered in this case.” *Id.* Instead, Disciplinary Counsel “contend[s] that the days when Respondent *was* in the building and still overbilled provide further evidence of support for the charges in this case.” *Id.*

97. With respect to alleged overbilling on days when Respondent was in the office, Disciplinary Counsel “submits that applying a twenty-five percent allowance to Respondent’s time is appropriate in this matter. In other words, if Respondent billed ten hours on a given day, a record of 7.5 hours or more on Relativity would not necessarily constitute evidence of dishonesty and/or fraud.” DX 80 at 2.

98. Disciplinary Counsel did not call any witness with personal knowledge of Respondent’s work on the Project who testified that Respondent was not present at work on any day on which he billed time. Nor did Disciplinary Counsel call any witness with personal knowledge of Respondent’s work on the Project who testified that Respondent overbilled on any given day.

99. In the absence of percipient witness testimony, Disciplinary Counsel’s case is based on three sets of documents: (i) the summary Relativity report for Respondent that Epiq created and sent to Ms. Manchester in or about September 2013 (DX 50/DX 77); (ii) the Dickstein Shapiro building log for Respondent that Ms. Manchester received in September 2013 (DX 51); and (iii) Respondent’s time sheets (DX 6-35).

100. For example, Disciplinary Counsel alleges that Respondent falsely billed 11 hours on Thursday, March 14, 2013, because the Dickstein building log does not indicate that Respondent swiped his Kastle card on that day and the summary Relativity report does not indicate that Respondent was logged into Relativity on March 14, 2013. *See* DX 14 (time sheet including March 14, 2013);

DX 51 at 17 (building log entries for March 11-25, 2013); DX 77 at 3 (summary Relativity report for March 1-22, 2013); DX 79, Ex. A (identifying March 14, 2013 as a day on which Respondent did not work but billed for time).

101. The summary Relativity report on which Disciplinary Counsel relies is problematic. First, as discussed below, the summary report (DX 50/DX 77) is inconsistent with one of the two detailed daily Relativity reports that Epiq attached to its disciplinary complaint (DX 59, Exs. C-1, C-2). Second, unlike the daily activity reports, which were generated on a daily basis during the Project, *see* FF 12; Tr. 187-90 (Euler), the summary report is not a contemporaneous record of Respondent's work on Relativity. It was created after the conclusion of the Project, at Ms. Manchester's request, after issues had arisen between Dickstein and Epiq regarding Epiq's invoices. *See* FF 79-80.

102. Epiq preserved the detailed daily Relativity reports for Respondent for only two dates: July 3, 2013 and July 8, 2013. *See* DX 59, Exs. C-1, C-2; DX 65 (Euler email to Disciplinary Counsel: "Unfortunately, we have learned that no archive data still exists for that case, which means we are unable to pull Mr. Reid's Relativity logs for the project beyond what has already been provided to you.").

103. Mr. Euler admitted that Epiq's investigation included a review of Respondent's detailed daily activity logs on Relativity. Tr. 188 (Euler). According to Mr. Euler, "at one point in time we had all the Relativity logs for [Respondent's] time because that was used to come up with the total hours." Tr. 189 (Euler).

104. Although Epiq (i) learned from Dickstein in 2013 of a potential claim against Respondent for fraudulent overbilling; (ii) threatened a claim against Respondent in October 2013; (iii) reviewed Respondent's detailed daily activity logs on Relativity as part of its investigation of Respondent; (iv) filed a disciplinary complaint regarding Respondent in 2014; and (v) attached two Relativity daily activity reports to its disciplinary complaint against Respondent, Epiq did not preserve the detailed Relativity daily activity reports for Respondent for any dates other than July 3, 2013 and July 8, 2013. *See* DX 56; DX 59, Exs. C-1, C-2; DX 65; *see also* Tr. 189 (Euler) ("at one point in time we had all the Relativity logs for [Respondent's] time"); Tr. 96 (Manchester) ("I know that Epiq also did a review. I had asked them, you know, they should do their own investigation also.").

105. On June 2, 2015, Disciplinary Counsel wrote to Mr. Euler at Epiq and requested that Epiq maintain all Relativity records relating to Respondent's work on the Project. DX 60.

106. On January 11, 2017, Disciplinary Counsel served a subpoena on Epiq seeking, *inter alia*, "Relativity Log-in and Activity Reports" for the time period November 1, 2012 through August 31, 2013. DX 64. On January 12, 2017, in response to the subpoena, Mr. Euler informed Disciplinary Counsel that Epiq had no Relativity records beyond those which already had been produced. DX 65; *see* FF 102.

107. The daily Relativity reports (of the type Epiq attached to its disciplinary complaint; *see* DX 59, Exs. C-1, C-2) are far more detailed than the summary

Relativity report (DX 50) on which Disciplinary Counsel relies. *Compare* DX 59, Exs. C-1, C-2, *with* DX 50.

108. Epiq failed to preserve the most probative evidence of Respondent's work in the Relativity database, on which it relied in its investigation and disciplinary complaint. *See* FF 102-04; FF 107.

109. One of the only two Relativity daily activity reports that Epiq preserved (the July 3, 2013 Relativity report) is inconsistent with the summary Relativity report. The detailed report indicates that on July 3, 2013, Respondent logged in at 12:50 p.m. and logged out at 5:43 p.m.—a more than four-hour period. DX 59, Exhibit C-1. The summary Relativity report, however, states that Respondent spent only two hours and 22 minutes on Relativity on July 3, 2013. *See* DX 77 at 10; DX 50 at 6.

110. Because one of the only two Relativity daily activity reports that Epiq preserved is inconsistent with the summary Relativity report, and Epiq failed to preserve the Relativity daily activity reports for Respondent, the Committee is unable to conclude that the summary report (DX 50/DX 77) is reliable. The summary report was generated after-the-fact by Epiq during an investigation undertaken by Dickstein following its Client's complaints about billing; the summary report was not created by Epiq in the normal course of its business with Dickstein. *See* Tr. 187-89 (Euler); Tr. 530-32 (Catton); Tr. 534-36 (Catton); Tr. 547 (Catton). Given the discrepancy between the summary report and one of the only two daily activity reports that were preserved, and Epiq's failure to preserve highly

probative, contemporaneous evidence of Respondent's work on Relativity, the Committee concludes that the Relativity summary report (DX 50) is not reliable evidence of Respondent's work on Relativity.

111. For several reasons, the Dickstein building log is not clear and convincing evidence that Respondent failed to report to work at Dickstein on the 51 days that Disciplinary Counsel contends that Respondent billed time but never came to work.

112. First, the evidence is undisputed that it was possible to move about the Dickstein building without using a Kastle card by "piggybacking" on a person who swiped a Kastle card. *See* FF 40. In addition, on Mondays to Fridays between 7 a.m. to 6 p.m., entry to the Dickstein building did not require swiping, and a person did "not need to swipe to leave the building or floor" at any time. FF 40; HCX 1 at 9 (Manchester). As a result, the absence of a record of Kastle card swipes on the Dickstein building log for a particular day does not necessarily mean that a person was not present in the Dickstein building on that day.

113. Second, the record reflects that, on four occasions, Respondent sent emails using his Dickstein Shapiro email address on days when the building log does not indicate any swipes of Respondent's Kastle card. *See* DX 79, Ex. A (identifying March 18, 2013 as one of the 51 dates on which Respondent allegedly never entered the Dickstein building and did no work, but billed for time); DX 51 at 17 (building log indicating no swipes on March 18, 2013); DX 14 at 2 (March 18, 2013 email from Respondent at 2:26 p.m. using Respondent's Dickstein email address); DX 79,

Ex. A (identifying May 13, 2013 as one of the 51 dates on which Respondent allegedly never entered the Dickstein building and did no work, but billed for time); DX 51 at 9 (building log indicating no swipes on May 13, 2013); DX 22 at 2 (May 13, 2013 email from Respondent at 11:50 a.m. using Respondent's Dickstein email address); DX 79, Ex. A (identifying June 3, 2013 as one of the 51 dates on which Respondent allegedly never entered the Dickstein building and did no work, but billed for time); DX 51 at 7 (building log indicating no swipes on June 3, 2013); DX 25 at 2 (June 3, 2013 email from Respondent at 9:38 a.m. using Respondent's Dickstein email address); DX 79, Ex. A (identifying July 23, 2013 as one of the 51 dates on which Respondent allegedly never entered the Dickstein building and did no work, but billed for time); DX 51 at 2 (building log indicating no swipes on July 23, 2013); DX 32 at 2 (July 23, 2013 email from Respondent at 9:10 a.m. using Respondent's Dickstein email address).

114. Because both Respondent and Ms. Cline used their personal email when they were not in the Dickstein offices, *see* FF 36, and Disciplinary Counsel did not establish by clear and convincing evidence that Respondent had remote access to Dickstein's email system, *see* FF 36, the Committee finds that Respondent's use of the Dickstein email system during work hours on the four dates referenced in FF 113 indicates that Respondent *was* present in Dickstein's offices on those dates. At a minimum, this evidence calls into serious question the reliability of the building log (DX 51) and the summary Relativity report (DX 50/DX 77) to establish whether Respondent was or was not present in the Dickstein building on any given day.

115. Third, Disciplinary Counsel alleges, based on the building log and the summary Relativity report, that Respondent never entered the Dickstein building, but billed time, on at least ten weekdays when one or more of the three other Epiq attorneys (as well as Mr. Abraham and other Dickstein attorneys) likely would have been working. *See* DX 79, Ex. A (identifying numerous weekdays on which one or more of the other Epiq attorneys, and Mr. Abraham and other Dickstein attorneys, likely were working when Respondent allegedly did not show up for work, including February 14, 2013, March 14-15, 2013, March 19, 2013, April 5, 2013, April 17, 2013, April 24, 2013, May 2, 2013, May 8, 2013, and May 13, 2013). As discussed above, Ms. Cline worked part-time on the Project (generally on Mondays, Tuesdays, and Wednesdays) through its conclusion, and Ms. Patterson and Mr. Marcel worked full-time on the Project through March 22, 2013 and May 31, 2013, respectively. *See* DX 42; DX 26 at 2. There is no record evidence that Respondent was admonished for being absent, or that he was described by co-workers or supervisors as having an absenteeism issue or having overbilled for his time, at any point during the Project.

116. As discussed above, all of the Epiq document review attorneys worked together in a single office at Dickstein. FF 33. If Respondent were absent without explanation on a day when one or more of the other Epiq attorneys were working, his absence could not have gone unnoticed, because Respondent held the physical key to the office for the Epiq reviewers and was responsible for unlocking the Epiq document reviewers' office each day. FF 37. The importance of Respondent

unlocking the reviewers' office is evidenced by contemporaneous emails sent by Respondent concerning the key on days when he would be absent or late. *See* FF 37-38.

117. If the Epiq document review attorneys were unable to get into their office at Dickstein on any given day because Respondent did not come to work, an issue certainly would have been raised because Respondent held the physical key to unlock the single office where all of the Epiq attorneys worked. *See* FF 37. Yet Disciplinary Counsel presented no evidence that any Epiq document review attorney was unable to get into the reviewers' office because Respondent failed to appear to let in the Epiq attorneys on any day—let alone on multiple days. This calls into further question the accuracy of the building log (and the summary Relativity report) as evidence of Respondents' alleged absence on numerous dates.

118. Fourth, Disciplinary Counsel alleges, based on the building log and the summary Relativity report, that Respondent was entirely absent on 51 days for which he billed time, including numerous Thursdays, Fridays, Saturdays, and Sundays on which he billed time after May 31, 2013 (when both Mr. Marcel and Ms. Patterson had ceased working on the Project). *See* DX 79, Ex. A (identifying numerous Thursdays, Fridays, Saturdays, and Sundays after May 31, 2013 on which Respondent billed time but allegedly did not show up for work). Disciplinary Counsel alleges that Respondent did not appear for work on numerous Thursdays, Fridays, Saturdays, and Sundays because he knew that Ms. Cline, the only other remaining Epiq document review attorney, who generally worked on Mondays,

Tuesdays, and Wednesdays (*see* FF 29), would not be at work on those days. ODC Br. at 24. But Mr. Abraham worked full-time and overtime, including on Thursdays, Fridays, and many weekends, throughout the entire time frame of the Project. *See* FF 6. Similarly, other Dickstein attorneys were working long hours on the Project. *Id.*; Tr. 158-60 (Abraham). If Respondent (the only document reviewer who was scheduled to work on Thursdays and Fridays after May 31, 2013) were absent on numerous days when Mr. Abraham and other Dickstein attorneys were working, someone surely would have noticed. Yet there is no evidence that anyone at Dickstein was unable to locate or communicate with Respondent at any point during the Project.

Respondent was not operating as a lone wolf on the Project. He was working with a team of Dickstein attorneys who depended on his work product, including a supervising attorney, Mr. Abraham, who communicated with him on a regular basis. *See, e.g.*, FF 14, 16, 38. As discussed above, Respondent could not perform any work on Relativity outside of Dickstein's offices, and Disciplinary Counsel failed to present clear and convincing evidence that Respondent had remote access to Dickstein's email system. *See* FF 34-36, 114; Tr. 59-60 (Manchester). Thus, if Respondent were completely absent on 51 days, including numerous Thursdays, Fridays, Saturdays, and Sundays, he would not have been able to respond to emails from Dickstein attorneys or to perform document review work requested by Dickstein attorneys. Yet there is no evidence in the record that Mr. Abraham or any other Dickstein attorney was ever unable to locate Respondent; that Respondent ever

failed to respond to any call or email from Mr. Abraham or any other Dickstein attorney; or that Respondent ever failed to perform any work requested of him, on any day on which Respondent allegedly did not appear for work but billed time.

119. Fifth, the record reflects that Mr. Abraham learned in late May 2013 that “[t]here is serious concern over the [Epiq] bills.” DX 47. Yet there is no evidence that Mr. Abraham, who was responsible for supervising the Epiq attorneys and who had access to daily Relativity activity reports that reflected Respondent’s work, FF 12; Tr. 68 (Manchester), raised any concern during the Project that Respondent was billing for days he did not work or that Respondent was fraudulently billing for hours he did not work. Nor is there any evidence that Mr. Abraham had any concern about Respondent’s productivity or performance during the Project. To the contrary, Mr. Abraham wrote on August 7, 2013, after Respondent’s work on the Project had concluded, that Respondent was a “superstar.” HCX 1 at 454-55 (August 7, 2013 email). The record thus calls into question the accuracy of both the Dickstein building log and the summary Relativity report for a host of reasons.

120. The remaining documentary evidence on which Disciplinary Counsel relies, Respondent’s time sheets (DX 6-35), reflect that Respondent billed very high hours. FF 99. But those records do not constitute clear and convincing evidence of fraudulent overbilling. Mr. Abraham acknowledged that he worked extremely high hours on this matter. FF 6; Tr. 158-60 (Abraham). He also acknowledged that the other Dickstein associates on the matter were working very high hours. *See* FF 6, 89.

III. CONCLUSIONS OF LAW

Clear and Convincing Evidence

Disciplinary Counsel has the burden of proving each disciplinary charge by clear and convincing evidence. *In re Anderson*, 778 A.2d 330, 335 (D.C. 2001); *see also* Board Rule 11.6 (“Disciplinary Counsel shall have the burden of proving violations of disciplinary rules by clear and convincing evidence.”). Disciplinary Counsel retains this evidentiary burden even where the “paucity of details” or “fault for the lack of evidence” may lie with the respondent. *In re Daniel*, 11 A.3d 291, 298-99 (D.C. 2011). The burden of proving any Rule violation by clear and convincing evidence remains with Disciplinary Counsel throughout; it never shifts to the respondent. *See In re Szymkowicz*, 195 A.3d 785, 789-90 (D.C. 2018) (*per curiam*).

Circumstantial evidence may be relied upon, but, like direct evidence, circumstantial evidence must meet the clear and convincing standard. *See In re Luxenberg*, Board Docket No. 14-BD-083, at 22 (BPR July 6, 2017) (Board Order dismissing charges); *In re Shannon*, Board Docket No. 09-BD-094, at 21-23 (HC Rpt. Nov. 4, 2011) (fraud and dishonesty charges not proven by clear and convincing evidence, despite existence of irregularity in notarized signature, because Disciplinary Counsel presented insufficient evidence establishing the cause of the irregularity).

The Hearing Committee requested that the parties, in their briefing, “specifically address the burden of proof in this matter, including (1) a discussion of

the relevant legal standard and (2) specific references to the record that support each party's contentions with respect to whether the burden of proof has been satisfied with respect to the alleged rule violations." Hearing Committee Order (Sept. 18, 2018).

In its brief, Disciplinary Counsel acknowledges that it has the burden of proving the charges in the Specification by clear and convincing evidence, and that, for a violation of Rule 8.4(b), it also has the burden of proving each element of D.C. Code § 22-3221(a) (fraud in the first degree) by clear and convincing evidence. ODC Br. at 22. Disciplinary Counsel relies on a concurring opinion by the D.C. Court of Appeals for the proposition that clear and convincing evidence does not mean that Disciplinary Counsel has to "negate every possible inference of innocence" ODC Reply Br. at 1, 5 (quoting *In re Nave*, 180 A.3d 86, 95 n.18 (D.C. 2018) (Thompson, J., concurring in part and concurring in order of discipline)). That decision, however, was modified on rehearing, see *In re Nave*, 197 A.3d 511 (D.C. 2018), with the Court overruling the Board's finding of misappropriation because the evidence presented by Disciplinary Counsel was short of clear and convincing: "We cannot say that there was *no* misappropriation, but we are satisfied that misappropriation was not clearly and convincingly proven." 197 A.3d at 521 (emphasis added).¹⁰

¹⁰ In doing so, the Court noted the risk of making improper inferences and relying on insufficient evidence:

[T]he Hearing Committee found that evidence was presented regarding when respondent's clients were paid *in only* those five of the 19 cases. Thus, for the

In his brief, Respondent notes that the clear and convincing evidence standard “lies between a preponderance of the evidence and beyond a reasonable doubt.” Resp. Br. at 16 (quoting *In re K.A.*, 484 A.2d 992, 995 (D.C. 1984)). Respondent contends that Disciplinary Counsel’s theory and evidence is “merely speculative” and is contradicted by the absence of any suggestion during the document review period that Respondent “was not coming into work or getting the work done.” *Id.* at 1-2. Respondent asserts that the evidence is insufficient to prove a violation of Rule 8.4(b) or 8.4(c) by clear and convincing evidence, given the incomplete Relativity records, the Dickstein Shapiro emails that contradict the building log, and the testimony of Mr. Abraham and Ms. Cline. *See id.* at 17-20.

As we noted earlier, 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.” *Cater*, 887 A.2d at 24. Clear and convincing evidence is not equivocal. *See id.*; *see also In re Krame*, Board Docket No. 16-BD-014, at 33-34 (BPR July 31, 2019). The Hearing Committee has concluded that Disciplinary Counsel did not prove, by clear and convincing evidence, a violation of either Rule 8.4(b) or Rule 8.4(c). We recommend dismissal of the charges.

majority of cases, *the record does not permit an inference* that insurance company payments were received by the date the client signed, or within days of the client’s signing, the client disbursement sheets. Substantial evidence does not support the Board’s finding that in all 19 cases, the signed disbursement sheets “evidence[d] [respondent's] actual receipt of funds.”

Nave, 197 A.3d at 517 (emphasis added).

A. Disciplinary Counsel Has Not Proven a Violation of Rule 8.4(b).

Under Rule 8.4(b), “[i]t is professional misconduct for a lawyer to . . . [c]ommit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects.” Thus, “an attorney may be disciplined for having engaged in conduct that constitutes a criminal act.” *In re Slattery*, 767 A.2d 203, 207 (D.C. 2001). “[A] respondent does not have to be charged criminally or convicted to violate the rule. . . . It is sufficient if his conduct violated a criminal statute and the crime reflects adversely on his honesty, trustworthiness, or fitness.” *In re Silva*, 29 A.3d 924, 937-38 (D.C. 2011) (appended Board Report) (citing *Slattery*, 767 A.2d at 207; *In re Pierson*, 690 A.2d 941 (D.C. 1997); *In re Gil*, 656 A.2d 303 (D.C. 1995)).

To establish a Rule 8.4(b) violation, Disciplinary Counsel has the burden of proving each element of the alleged criminal offense by clear and convincing evidence. *See Slattery*, 767 A.2d at 207, 212-13. Here, Disciplinary Counsel alleged that Respondent violated D.C. Code § 22-3221(a) (fraud in the first degree) which provides:

A person commits the offense of fraud in the first degree if that person engages in a scheme or systematic course of conduct with intent to defraud or to obtain property of another by means of a false or fraudulent pretense, representation, or promise and thereby obtains property of another or causes another to lose property.

We conclude that Disciplinary Counsel has not met its burden of proving by clear and convincing evidence that Respondent engaged in a “scheme or systematic course of conduct with intent to defraud or to obtain property of another by means

of a false or fraudulent pretense.” Disciplinary Counsel primarily bases its case on its contention that Respondent was entirely absent on 51 days for which he billed time. *See* FF 96-97. As discussed above, apart from the 51 identified days on which Respondent billed for work but allegedly never came into the office (*see* DX 79, Ex. A), Disciplinary Counsel does not “specify with precision exactly how many hours . . . Respondent billed that were not warranted.” DX 80 at 1. Moreover, Disciplinary Counsel acknowledged that it “does not intend to (or claim to be able to) identify with specificity the [alleged] monetary damages Complainant suffered in this case.” *Id.* Instead, Disciplinary Counsel “contend[s] that the days when Respondent *was* in the building and still [allegedly] overbilled provide further evidence of support for the charges in this case.” *Id.*

Disciplinary Counsel’s claim that Respondent completely failed to appear for work on 51 days over a period of approximately five months (February through early August 2013, *see* DX 79, Ex. A) is not supported by clear and convincing evidence. The only witness called by Disciplinary Counsel who worked directly with Respondent on the Project in the same office, Ms. Cline, did not support Disciplinary Counsel’s claim that Respondent billed for days on which he failed to appear at work or that Respondent fraudulently overbilled. Indeed, no witness who worked directly with Respondent on the Project testified that he billed for days on which he failed to appear at work or that he fraudulently overbilled.¹¹

¹¹ As discussed above, Ms. Manchester did not work directly with Respondent. She concluded that Respondent fraudulently overbilled based on her review of documents, not based on personal knowledge. *See, e.g.*, FF 78-85. Indeed, she asserted that she had never met Respondent. FF 85.

As discussed above, *see* FF 35-36, 114, Respondent did not work alone on the Project. During the period in question, Respondent worked in a Dickstein office with other Epiq attorneys, for a team of Dickstein attorneys who relied on his work product, and a supervising attorney, Mr. Abraham, with whom he was in regular communication. *E.g.*, FF 4-5, 14, 16, 27-33, 117-18. Respondent could not perform any work on Relativity outside of Dickstein's offices, and the record does not contain clear or convincing evidence that Respondent could access his Dickstein email account remotely. *See* FF 35-36. If Respondent were absent, and could not access either the Relativity program or the Dickstein email system, on 51 days in a five-month period during which Dickstein attorneys were working extremely long hours and weekends on a very active matter, someone surely would have noticed.

Similarly, if Respondent were missing on numerous days on which other Epiq attorneys were working, an issue would have been raised immediately because Respondent held the physical key that allowed the Epiq reviewers access to the single office at Dickstein where they worked together. FF 37-38, 117. But there is no evidence that any of Respondent's Epiq colleagues (or any Dickstein attorney) ever reported that Respondent was missing, unresponsive to emails, or did not perform work that he was requested to perform on any given day. FF 117-18. Nor is there any evidence in the record that Respondent failed to respond to emails from Dickstein attorneys, or failed to perform work requested of him by Dickstein, at any point during the Project. FF 118. Respondent's direct supervisor, Mr. Abraham, who had access to the Relativity daily activity reports and who regularly received

Epiq's invoices, praised Respondent's work and recommended Respondent for additional work; Mr. Abraham never reported excessive absences by Respondent or complained about the quality of the work Respondent completed. FF 12, 21, 25-26, 67, 118-19.

Disciplinary Counsel's case is based on documents that, upon close inspection and a review of the full record, are not clear and convincing evidence of alleged fraud. As discussed in detail above, the probative value of the summary Relativity report presented by Disciplinary Counsel is questionable at best, for several reasons. *See* FF 102-110, 114-18. The summary Relativity report created by Epiq after the conclusion of the Project is contradicted by one of the only two contemporaneous daily activity reports that Epiq preserved. FF 102, 109. Epiq failed to preserve any other Relativity daily activity reports, which were created contemporaneously and were highly probative evidence of Respondent's work on Relativity, further calling into question the accuracy of the summary report. FF 81, 102, 104-110. The summary Relativity report also is undermined by contemporaneous emails indicating that Respondent was in Dickstein's offices on four days when the summary Relativity report reflects that he did no work. FF 113-14. We similarly are not persuaded by the Dickstein building log, which is undermined by (i) contemporaneous emails indicating that Respondent was at work on several days when the log indicates he was absent; (ii) undisputed evidence that a person could move about the Dickstein building without using his Kastle card; and (iii) evidence

in the record suggesting that Respondent could not have been missing for 51 days in a five-month period without anyone noticing. *See, e.g.*, FF 40, 111-19.

With respect to alleged overbilling on days that Disciplinary Counsel agrees that Respondent was at work, Disciplinary Counsel acknowledges that this allegation does not stand alone; rather, it allegedly “provide[s] further evidence of support for the charges in this case.” DX 80 at 1. Because Disciplinary Counsel’s primary allegation that Respondent failed to appear at all on 51 days for which he billed time has not been established by clear and convincing evidence, this ancillary allegation falls with it.

Even if this ancillary allegation were an independent basis for the charges brought by Disciplinary Counsel, Disciplinary Counsel failed to prove fraudulent overbilling by clear and convincing evidence on any day on which Disciplinary Counsel concedes Respondent came to the office. First, Disciplinary Counsel does not even attempt to “specify with precision exactly how many hours . . . Respondent billed that were not warranted.” DX 80 at 1. “Moreover, Disciplinary Counsel does not intend to (or claim to be able to) identify with specificity the monetary damages Complainant [allegedly] suffered in this case.” *Id.* Second, for all of the reasons discussed above, the Relativity summary report and Dickstein building log are not reliable evidence of the number of hours Respondent worked on any given day. As a result, Disciplinary Counsel has not presented clear and convincing evidence of overbilling on any day on which Disciplinary Counsel acknowledges Respondent came to work at Dickstein.

Even if the Relativity summary report were reliable, a discrepancy between the hours reflected on the summary report and the hours billed by Respondent on any given day is not clear and convincing evidence of fraudulent overbilling. The Relativity summary report does not account for time spent outside of Relativity. For example, the record reflects that, on several days, there was little or no work to do on Relativity, and the Relativity program had problems on other days. FF 52-53. There is no evidence that it was improper for Epiq attorneys to bill, for example, for time spent waiting for additional work or for times when the Relativity program was not functioning. FF 54-56. Thus, one cannot simply subtract the hours reflected on the Relativity summary report from the hours billed by Respondent on a given day and conclude that the difference constitutes fraud. Further, there is evidence in the record that the Epiq document reviewers performed tasks outside of Relativity (such as reviewing a privilege protocol, sending emails, and attending team meetings), *see* FF 10, 41, 53, and Respondent had additional administrative duties as well. *See* FF 41, 44. There is no evidence in the record about the work Respondent performed on any given day. No witness who worked with Respondent on the Project and had personal knowledge of Respondent's work on the Project testified that Respondent fraudulently overbilled. On this record, it would be speculation to conclude that Respondent fraudulently overbilled on any given day.

Evidence that Respondent billed very high hours on the Project is not sufficient to establish, even under a preponderance standard, a scheme or course of conduct to defraud. Mr. Abraham testified to his own very long hours on the matter

and testified that other Dickstein attorneys on the matter also were working very long hours. FF 6.

For all of the foregoing reasons, Disciplinary Counsel has failed to prove the elements of D.C. Code § 22-3221(a) by clear and convincing evidence.

B. Disciplinary Counsel Has Not Proven a Violation Rule 8.4(c).

Rule 8.4(c) provides that it is professional misconduct for a lawyer to “[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation.”

Dishonesty is the most general category in Rule 8.4(c), defined as:

fraudulent, deceitful, or misrepresentative behavior [and] conduct evincing a lack of honesty, probity or integrity in principle; [a] lack of fairness and straightforwardness Thus, what may not legally be characterized as an act of fraud, deceit or misrepresentation may still evince dishonesty.

In re Shorter, 570 A.2d 760, 767-68 (D.C. 1990) (per curiam) (second alteration in original) (internal quotation marks and citation omitted); *see also In re Scanio*, 919 A.2d 1137, 1142-43 (D.C. 2007). Dishonesty in violation of Rule 8.4(c) does not require proof of deceptive or fraudulent intent. *See In re Romansky*, 825 A.2d 311, 315 (D.C. 2003). Thus, when the dishonest conduct is “obviously wrongful and intentionally done, the performing of the act itself is sufficient to show the requisite intent for a violation.” *Id.* A violation of Rule 8.4(c) also may be established by sufficient proof of recklessness. *See id.* at 316-17. To prove recklessness, Disciplinary Counsel must prove by clear and convincing evidence that the respondent “consciously disregarded the risk” created by his actions. *Id.* at 316.

The Court of Appeals has held that fraud “embraces all the multifarious means . . . resorted to by one individual to gain an advantage over another by false suggestions or by suppression of the truth.” *Shorter*, 570 A.2d at 767 n.12 (citation omitted). Fraud requires a showing of intent to deceive or to defraud. *See Romansky*, 825 A.2d at 315; *In re Hutchinson*, 534 A.2d 919, 923 (D.C. 1987) (en banc) (finding no violation of Rule 8.4(c) where the respondent committed misdemeanor violation of Securities Exchange Act of 1934 and crime did not require proof of specific intent to defraud or deceive).

Deceit is the “suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead” *Shorter*, 570 A.2d at 767 n.12 (citation omitted). To establish deceit, the respondent must have knowledge of the falsity, but it is not necessary that the respondent have intent to deceive or defraud. *In re Schneider*, 553 A.2d 206, 209 (D.C. 1989) (finding deceit where attorney submitted false travel expense forms but did not intend to deceive the client or law firm and there was no personal gain); *see also Shorter*, 570 A.2d at 767 n.12.

Misrepresentation is a “statement . . . that a thing is in fact a particular way, when it is not so.” *Shorter*, 570 A.2d at 767 n.12 (citation omitted); *see also Schneider*, 553 A.2d at 209 n.8 (misrepresentation is element of deceit). Misrepresentation requires active deception or a positive falsehood. *See Shorter*, 570 A.2d at 767-68. The failure to disclose a material fact also constitutes a misrepresentation. *See In re Outlaw*, 917 A.2d 684, 688 (D.C. 2007) (per curiam).

Here, both parties contend that Disciplinary Counsel either has proven a violation of both Rules 8.4(b) and 8.4(c) or has not proven either charge. *See* ODC Br. at 26; Resp. Br. at 22. As explained above, the Committee finds that the Rule 8.4(b) charge has not been proven by clear and convincing evidence. For the same reasons, the Rule 8.4(c) charge has not been proven by clear and convincing evidence. Although proof of an intent to defraud is not required under Rule 8.4(c), the record evidence falls very short of establishing dishonesty, deceit, or misrepresentation by clear and convincing evidence.

As discussed in Part III(A) above, Disciplinary Counsel's claim is primarily based on the allegation that Respondent failed to appear for work on 51 days on which he billed time. *See* DX 79, 80. The documents on which Disciplinary Counsel relies to support the claim are not reliable evidence of fraudulent billing for all of the reasons discussed above. The Dickstein building log is contradicted by, *inter alia*, contemporaneous emails indicating that Respondent was in Dickstein's offices on days when the building log indicates he was absent, and the summary Relativity report created by Epiq after the fact is contradicted by one of the only two contemporaneous Relativity daily activity reports that Epiq preserved. FF 109, 113. As discussed above, Epiq failed to preserve the remaining Relativity daily activity reports, which were highly probative evidence of Respondent's work on Relativity, significantly calling into question the accuracy of the summary report. FF 102-08.

Further, as discussed above, if Respondent were absent on 51 days in a five-month period during which he was working with a team of Dickstein attorneys on a

very active matter, his absences could not have gone unnoticed. As discussed above, Respondent could not access Relativity outside of Dickstein's offices, and Disciplinary Counsel failed to establish by clear and convincing evidence that Respondent had remote access to Dickstein's email system. FF 35-36. If Respondent were absent on 51 days in a five-month period, someone surely would have noticed because Respondent would be unable to respond to emails concerning the Project and would be unable to do any work on the Project. Similarly, if Respondent were missing on numerous days when other Epiq attorneys were working, his absence would have been noticed immediately because Respondent held the physical key that allowed the Epiq reviewers to enter the single office at Dickstein where they worked. FF 37-38. Yet no witness testified that Respondent was unresponsive, missing, or unaccounted for at any point during the Project.

No witness with firsthand knowledge of Respondent's work testified that he overbilled or billed for days on which he failed to appear at work. Respondent's supervisor, Mr. Abraham, who had access to the Relativity daily activity reports and who regularly received Epiq's invoices, praised Respondent for his work during the Project. FF 12, 21, 25-26, 67, 119. There is no evidence in the record that Mr. Abraham (or any other Dickstein attorney) ever complained during the Project that Respondent was absent, unreachable, or failing to perform. FF 118-19. Accordingly, the record does not support a conclusion that Disciplinary Counsel established by clear and convincing evidence that Respondent failed to appear for work on 51 days for which he billed time. Similarly, for all of the reasons discussed

above, Disciplinary Counsel failed to prove by clear and convincing evidence that Respondent overbilled for any day on which he appeared for work at Dickstein.

In sum, Disciplinary Counsel has not proven, by clear and convincing evidence, that Respondent violated Rule 8.4(c) by “[e]ngag[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation.”

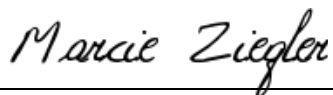
IV. RECOMMENDED SANCTION

Because we find that the charges have not been proven, we recommend that no sanction be imposed.

V. CONCLUSION

For the foregoing reasons, the Committee finds that Disciplinary Counsel has not proven, by clear and convincing evidence, that Respondent violated either Rule 8.4(b) or Rule 8.4(c). We recommend that the charges be dismissed.

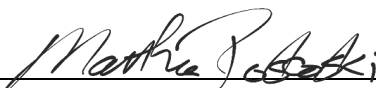
HEARING COMMITTEE NUMBER SEVEN



Marcie R. Ziegler, Chair



Dr. Robin J. Bell, Public Member



Matthew K. Roskoski, Attorney Member