In the Matter of: SYLVIA J. ROLINSKI, Respondent. A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 430573)	Board Docket No. 19-BD-067 Disciplinary Docket No. 2015-D231

VII. CONCLUSION

As we conclude our work in this matter, and before summarizing our recommendations, we close, regretfully, with some observations.

First, we have already noted our and the Board's concern about "prosecuting in bulk" and the "unique challenges" that the tactic presents for the disciplinary system. Such challenges were certainly present in this case, beginning with the initial failure in the Hearing Committee's view to provide adequate notice to Respondent of the charges against her and continuing with the December 2, 2020 Notice of Violative Conduct that consisted of little more than an apparent grab-bag of incidents that Disciplinary Counsel apparently found suspicious primarily because of Judge Long's and Judge Christian's views and conclusions. Such suspicions and skepticism are certainly a reasonable starting point for further investigation, but they need to be substantiated by evidence, and Disciplinary Counsel needs to exercise its independent judgment carefully and responsibly as to which suspicions can actually be proved. In this regard, we note that, with one exception, Disciplinary Counsel did not present a single witness with direct personal knowledge of an alleged non-visit or exaggerated court appearance nor any physical evidence such as visitor logs

indicating, at the least, that visits were in fact logged and that Respondent's name is absent from the log-on dates pertinent to Disciplinary Counsel's charges. (The single exception is DX 56, the transcript of August 28, 2013, hearing in Williams, pertaining to the Rule 1.5(d) Charge No. 53, the 3-hour entry for a .3-hour hearing.) Similarly, as we have frequently noted previously, the repeated lack of any substantive examination of Respondent by Disciplinary Counsel was both vexing and telling. The passage of time may account for this total evidentiary failure but the answer to such a problem is not to press ahead and leave the appearance of hoping that the Hearing Committee will be overwhelmed by the number of charges or will stumble on something incriminating. The apparent "throw it against the wall and see what sticks" approach in this case, combined with Disciplinary Counsel's admission that it "cannot say with specificity what she did or didn't do," Tr. 1075, is, in our view, irresponsible and abusive. This approach undoubtedly imposed a financial, physical, and emotional burden on Respondent of an entirely different magnitude than what is normally present in these disciplinary proceedings, not to mention the corresponding burden on the Hearing Committee members. We are reminded of the remark by Judges Posner, Esterbrook and Dumbauld that "Judges are not like pigs, hunting for truffles buried in briefs." *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (per curiam). Nevertheless, we did in fact undertake such a forage – over the course of more than a year and hundreds and hundreds of hours of time on the

part of the Hearing Committee members and the Board's staff members supporting this Hearing Committee – with the result that where there was sufficient documentary evidence of one Rule 8.4(c) charge, one 1.5(a) charge and the group of Rule 8.4(d) charges, a majority of the Hearing Committee has recommended a conclusion of law that a violation occurred; however, in the scores of other situations where there was no first-hand evidence and extremely little or no other evidence, the entirely foreseeable conclusion of a failure of proof by clear and convincing evidence was reached.

Second, we find it troubling that an attorney would attempt to mislead a witness and the Hearing Committee by attempting to have the witness read into the record one part of one Probate Division Judge's ruling distributed as an exhibit only late in the preceding afternoon regarding the compensability *vel non* of travel time without disclosing other clarifying and contradictory observations in the remainder of the exhibit, a task that fell to the Hearing Committee. Tr. 1124-1131.

Third, and similarly, we find it troubling that an attorney would introduce into evidence a confessed judgment in a real estate dispute without also disclosing that the confessed judgment was vacated and the underlying action dismissed. Tr. 3703-04, 3709-12, 3719-32; DX 225; RX 102, 103 at 1668.

Fourth, we find it troubling that an attorney would advance a motive of financial problems when not only had the confessed judgment theory been

thoroughly debunked but any other evidence of finance pressure was absent and the record in this proceeding contains abundant and uncontested evidence of Respondent's financial success and stability. FFs 154-157.

Fifth, we find it troubling, as we have previously noted, that an attorney would assert that Respondent "induced her expert to unknowingly file false certifications with the Board"

- without providing a single citation to a single piece of evidence in support of that accusation, DC PFFs & PCLs at 93;

- when the expert in question testified without contradiction that cancelled and rescheduled appointments are not unusual and not significant, Tr. 4823; and

- when the record contains abundant proof – specifically, almost 100 pages – of Respondent's sessions with her treatment professionals throughout 2019 and 2020. DXK 312B at 3775-3793; DXK 312C at 3795-3808; DXK 314 at 3832-3906.

Aggressive advocacy can be both effective and admirable; aggressive advocacy and serious accusations without a basis are something else entirely.

Finally, we respectfully observe that much of the controversies in this and apparently many other disciplinary proceedings could probably have been avoided or at least significantly narrowed if the Probate Division had ever adopted uniform rules for what is compensable, what is not compensable, and what information must be provided in fee petitions and attached invoices. *See* FFs 41-44. Based on our

appraisal of the entire record in this proceeding, we think that Respondent – obviously exasperated but reflecting the testimony of other witnesses in this proceeding including, especially, Ms. Sloan, FF 40, and Ms. Patel, FF 44 – has probably described the pervasive underlying problem accurately:

> . . . [T]here is no harmony among the judges as to what is compensable and what is not compensable.
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> *****
>
> . . . I don't know why the Probate Division runs it this way, but this is the life of practitioners, and it's a precarious life . . . and in my humble opinion an arbitrary and capricious administration of justice when a member of this Bar submits to the same court, and different members of the Bar submit the same thing to the court . . . that one judge says yes and another judge sends you to Bar Counsel. But that's the Probate Division.

Tr. 1127-28.

Our and Respondent's and Ms. Sloan's and Ms. Patel's observations and concerns appear to be shared by the Court of Appeals. *In re Wilson, Bruce E. Gardner, Appellant*, 277 A.3d 940 (D.C. 2022), involved an appeal by a guardian in an intervention proceeding – much like Respondent's appeal in *Williams*, FFs 114 & 115 – from a Probate Division judge's reduction of the guardian's fee request on the ground that "some of Mr. Gardner's requests were excessive and that others stemmed from noncompensable tasks." *Id*. at 942. In a detailed opinion finding fault with nearly every aspect of the Probate Division judge's understanding of applicable Court of Appeals decisions, the Court of Appeals commenced its analysis of various

aspects of the fee request and ensuing Probate Division rulings with the following observation:

> Ideally, people appointed to be guardians would be able to consult uniform rules and policies in preparing their petitions for fees. . . . They would know what categories of costs and fees the court will and will not compensate. **The Superior Court as yet has no rules of this sort. . . .**

Id. at 944 (footnote omitted) (emphasis added).

The Court of Appeals then:

- rejected the Probate judge's arbitrary 50% reduction of Gardner's travel expense claims, *id.* at 943-44;

- directed the Probate Division judge to explain why he had disapproved expenses in the present fee petition that he had previously approved in a previous petition from the same guardian, *id*. at 945;

- rejected a universal no-compensation-for-administrative-tasks rule, observing that "[t]he Guardianship Act authorizes a guardian to be paid from the Guardianship Fund for services he rendered 'in connection with a guardianship,' D.C. Code §21-2060(a) – language we have deemed to 'have a very broad meaning'" and further observing that "[a]s to administrative tasks in particular, our cases have grappled with – or mentioned but declined to grapple with – what rates a guardian might reasonably charge for tasks that are largely administrative," *id*. at 945-47 (footnotes and citations omitted);

- observed that "[t]he notion of a blanket rule precluding a guardian from seeking compensation for tasks that might be called administrative or clerical is at odds with our 'expansive view of the kinds of duties that are compensable under the Act'" and thereupon rejected a "flat rule prohibiting compensation for 'clerical' tasks such as electronic filing . . .

because the Guardianship Act authorizes payment for such services. . . .", *id*. at 946-47 (citation omitted);

- admonished the Probate Division judge that "[c]ontrary to the court's characterization of 'such personal services' as noncompensable, this court has made clear that 'core aspects of a guardian's services' are indeed 'interpersonal in nature,'" *id*. at 947;

- ruled that becoming better acquainted with the ward over breakfast while waiting for a lessor to arrive to show the ward an apartment – a task indistinguishable from many that Respondent Rolinski was criticized for in both *RTW* and *Williams* – "fit squarely within a guardian's statutory duty to remain acquainted with his ward," *id*.; and,

- ruled that helping a ward find housing – as Respondent did in both *RTW* and *Williams* – is an "indisputably legitimate objective" under "D.C. Code § 21-2047(b)(2) (describing one of a guardian's duties as 'establishing the ward's place of abode')," *id*.

Respondent's Fee Petitions in *RTW* that are at issue in this proceeding were filed between 2007 and 2012, and Respondent's single Fee Petition in *Williams* was filed in 2014. The guardian's third Fee Petition in *Wilson* covered the time period of July 2018 through July 2019. *Wilson*, 277 A.3d at 942. The Court of Appeals' decision in *Wilson* was issued on July 7, 2022, approximately three months before the submission of this Report. The persistence of the problems caused by the absence of uniform compensation standards in the Probate Division are especially troublesome, we respectfully observe, in a system whose overriding purpose and responsibility is to protect the most vulnerable members of the community. The system depends on guardians to obtain and monitor the necessary services for their

wards, without being dis-incentivized by inconsistent and sometimes inexplicable compensation uncertainties and judicial interpretations thereof and without being dis-incentivized by ensuing disciplinary proceedings that emanate from those uncertainties and that appear, at least in this instance, not to have been responsibly thought out, investigated, analyzed, or vetted.

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We unanimously recommend that the Board conclude that Respondent violated Rule 1.5(a) by billing for 3 hours instead of .3 hours for attending a hearing, and two members recommend that the Board conclude that Respondent also violated Rule 8.4(c) by her reckless misstatement about the August 28, 2013 hearing in her Motion for Reconsideration and Rule 8.4(d) by missing 11 filing deadlines between 2005 and 2015 in the two guardianships. We further recommend, unanimously, that the Board conclude that Disciplinary Counsel has not proven any of its approximately 160 other charges against Respondent by clear and convincing evidence. Two members further recommend that Respondent be informally admonished for the three rule violations found by the majority, and one member recommends that Respondent be informally admonished for the single rule violation found by that member. Finally, we unanimously recommend that this sanction not be mitigated on the basis of *In re Kersey*.

Respectfully submitted,

Warren Anthony Fitch

Warren Anthony Fitch, Chair

David Bernstein

David Bernstein

Michael E. Tigar

Michael E. Tigar

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

In the Matter of:	:	
	:	
SYLVIA J. ROLINSKI,	:	
	:	
	:	Board Docket No. 19-BD-067
Respondent.	:	Disciplinary Docket No. 2015-D231
	:	
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 430573)	:	

SEPARATE STATEMENT OF MR. BERNSTEIN
IN PARTIAL DISSENT

I agree with the Findings of Fact set forth in the Report and Recommendation of the Ad Hoc Hearing Committee ("the Report"); however, I disagree with the majority's conclusions that Respondent's conduct violated D.C. Rules of Professional Conduct 8.4(c) (conduct involving dishonesty), and 8.4(d) (serious interference with the administration of justice). I explain the elements of my dissent herein. I then offer additional considerations in mitigation of sanction, though I agree with the majority's recommendation of an informal admonition. My concern is not the sanction itself but rather the factual basis for the sanction.

I. Disciplinary Counsel did not prove by clear and convincing evidence that Respondent was recklessly dishonest in violation of Rule 8.4(c), pertaining to her Motion for Reconsideration ("Motion").

Rule 8.4(c) provides that "[i]t is professional misconduct for a lawyer to" "[e]ngage in conduct involving dishonesty."

In assessing whether Disciplinary Counsel has proven reckless dishonesty under Rule 8.4(c) (Respondent consciously disregarded the risk that her statement in her Motion was incorrect), we look to the particular circumstances of the case. *See, e.g.*, *In re Romansky*, 938 A.2d 733, 735 (D.C. 2007) (anticipating that the Board, on remand, would make findings on the respondent's state of mind "'in the existing circumstances'" to specify whether the respondent acted knowingly or recklessly dishonest (citation omitted)); *see also In re Brown*, 851 A.2d 1278, 1279 (D.C. 2004) (per curiam) (no exceptions filed) (agreeing with the Board in finding an 8.4(c) violation "supported by the findings of the [SEC] related to the circumstances of [the respondent's] conviction"). These two examples illustrate that Disciplinary Counsel has not met its burden.

At issue is Respondent's false statement relevant to her incorrect time entry (and label) for the August 28, 2013 hearing in her Petition for Compensation ("Petition") and her extensive efforts to provide an accurate statement. Specifically, Respondent's Motion stated that the "[p]arties had a particularly long wait in the Probate Division hearing room prior to the hearing. This allowed the parties to confer." FF 115.

As the Committee has unanimously found, Respondent's colleague Ms. Wilson "was shocked by Judge Christian's Order," and Respondent "was shaken to the core." FF 153 (internal quotations omitted). And as the Committee again has unanimously found, Respondent and Ms. Wilson made every effort to submit accurate responses in Respondent's Motion:

- They undertook an "all-hands-on-deck" "around the clock" effort over the next ten days permitted for the filing of Respondent's Motion because they "had so little time and so much data to go through."
- This included time sheets, Respondent's calendar, the Guardianship Reports, court records, and notes.
- They cut the amount of the invoice by "thousands of dollars . . . as a courtesy . . . to try to comply with Judge Christian's specific requirements," even though they believed all of the entries reflected work that had been done.
- Throughout this process, Respondent repeatedly renewed her emphasis on accuracy.

See FF 153. In sum, the record shows that Respondent's review was assiduous, and painfully thorough exerting every effort to get the Motion *right*. *See also* FF 158-*53* (Committee unanimously crediting Respondent's good-faith attempts to provide accurate data). Considering the need to review a huge volume of data within a constrained time period, and also attempting to reconstruct data where there were gaps, Respondent and Ms. Wilson achieved an extremely high level of accuracy. Considering the level of effort, an occasional error and inability to recall is to be expected.

The majority faults Respondent for failing "to step back and ask herself whether she had any actual basis for saying that she had attended the hearing in person and had spent three hours" there (Report Section IV.F.53). The majority also emphasizes that Respondent made her statement "based solely on her experience in other such hearings without having any information in her records or any recollection of this particular hearing." *Id.* But these statements are inconsistent with what we have unanimously found. It is true that Respondent charged an

unreasonable 3.0 hours in her Petition (with a label of "attend court hearing" – (DX 73 at 686)), and that Judge Christian's order put Respondent on notice of the error, along with many potential others she identified. But thereafter, as we have unanimously found, Respondent diligently tried to get it right, but regrettably did not when describing her incorrect "3.0 hours" entry in her Motion. This is inconsistent with the majority's conclusion that Respondent made her statement "based solely on her experience in other such hearings."

We can only speculate as to why Respondent's answer was incorrect a second time. Speculation *could* conclude that she failed to take a step back.[1] But importantly, the evidence shows only that Respondent made an error,[2] not that she consciously disregarded a risk that she was providing false information to Judge Christian. There is no evidence that Respondent understood that a risk existed. She believed she was being truthful. There is every indication, beyond speculation, that Respondent made every effort to provide correct information.

In re Anderson and *In re Dailey* provide additional support. These are largely misappropriation cases, yet the same principles apply: Analyzing whether

[1] Disciplinary Counsel argues (DC PFFs & PCLs at 72) that Respondent was at least reckless in not looking at her time sheet and calendar, and in only looking for the number of hearings on the invoice, rather than the original documentation. But it cites its own PFFs 25, 134, and 138 for support, which do not discuss the statement in her Motion. Rather, these refer to Respondent's original Petition (or her Petitions generally), and the October 11 telephonic hearing. What is more, we have unanimously found that Respondent and Ms. Wilson reviewed all appropriate documents before filing the Motion.

[2] Notably, Disciplinary Counsel charged Respondent with only two violations based on her Motion – the one at issue here, and one we have previously, and unanimously, found wholly unpersuasive. *See* Report Section IV.F.52.

Disciplinary Counsel proved that a respondent's misappropriation was negligent or reckless turns on *how* the attorney handled the funds. *In re Anderson*, 778 A.2d 330, 339 (D.C. 2001). Similar to the current matter, in both cases the respondents developed a system to comply with the Rule, and did comply, except in one instance. The Court found only negligent, not reckless misappropriation in both. *In re Dailey*, 230 A.3d 902, 912 (D.C. 2020) (per curiam) (the respondent had "a system to track client funds" and only misappropriated funds in one instance); *Anderson*, 778 A.2d at 339-40 (same). Based on the foregoing factors, Disciplinary Counsel has not established recklessness under Rule 8.4(c), and I thus respectfully dissent from the majority on this charge.

II. Disciplinary Counsel did not prove by clear and convincing evidence that Respondent's conduct seriously interfered with the administration of justice in violation of Rule 8.4(d).

Rule 8.4(d) provides that "[i]t is professional misconduct for a lawyer to" "[e]ngage in conduct that seriously interferes with the administration of justice."

The Court of Appeals has construed Rule 8.4(d) in *In re Pearson* as follows:

> Rule 8.4(d) states that "[i]t is professional misconduct for a lawyer to . . . [e]ngage in conduct that seriously interferes with the administration of justice." A violation requires improper conduct that "bear[s] directly upon the judicial process . . . with respect to an identifiable case or tribunal" and "taint[s] the judicial process in more than a *de minimis* way." *See In re Hopkins*, 677 A.2d 55, 59-61 (D.C. 1996). "[T]he purpose of Rule 8.4 is not to safeguard against harm to the client from the attorney's incompetence or failure to advocate. Rather it is to address the harm that results to the 'administration of justice' more generally." *Yelverton*, 105 A.3d at 427. Rule 8.4(d) seeks to protect both litigants and the courts from unnecessary "legal entanglement." *Id*.

228 A.3d 417, 427 (D.C. 2020) (per curiam) (alterations in original). To establish a violation of Rule 8.4(d), Disciplinary Counsel must prove by clear and convincing evidence that (1) the respondent either took an improper action or failed to take action when he or she should have acted, (2) the improper action bears directly on an identifiable case, and (3) that the improper action taints the judicial process in more than a *de minimis* way, "meaning that it must 'at least potentially impact upon the process to a serious and adverse degree.'" *In re Hallmark*, 831 A.2d 366, 374 (D.C. 2003) (quoting *Hopkins*, 677 A.2d at 60-61).

In its relevant decisions, the Board and the Court of Appeals have emphasized that the misconduct must "seriously interfere" with the administration of justice. In *In re Edwards*, Bar Docket No. 488-02, at 14-20 (BPR Dec. 18, 2006), *recommendation adopted*, 990 A.2d 501, 506 (D.C. 2010), the Board noted that the failure to locate and file a will caused financial harm to the potential legatees, and violated specific probate rules. In addition, no steps could be taken to fulfill the decedent's wishes until the will was filed, and thus the misconduct seriously interfered with the administration of justice. In *In re Uchendu*, 812 A.2d 933, 934 (D.C. 2002), the respondent signed others' names to documents, including false notarizations, and entered other false signatures resulting in serious interference with the administration of justice. In *Hopkins*, the respondent violated Rule 8.4(d) by depleting the estate account, despite not having any negative intent when doing so, because the misconduct had more than a *de minimis* effect, in that it at least

potentially impacted upon the probate process to a serious and adverse degree. 677 A.2d at 59-63.

In each of these cases, the lawyer's misconduct had a measurable and significant adverse effect on the judicial process. This matter however involves only four summary hearings, over several years in two separate matters, in a system that sweeps the hundreds of late filings during a typical year into a series of summary calendar proceedings that are a normal part of the guardianship administrative system. In fact, these summary hearings are a normal function of the probate process, not a causative factor in overburdening the Court.

Of course, lawyers should make timely filings, but the automatic generation of delinquency notices does not impose a burden on the probate administrative process. It is the numerous summary hearings which require a probate judge's attention and the probate division staff's preparation that has an effect on the probate system. Indeed, in describing the time and Court resources used, Ms. Stevens focused on the summary hearings and preparations thereof, not the delinquency notices themselves. Tr. 3816-17.

As to these preparations, Ms. Stevens helpfully and effectively testified to the challenges she and her colleagues faced. Specifically, preparations would begin at least two to three weeks ahead of the hearing, which included "call[ing] people to remind them." Then a week before the hearing, another courtesy call was made. Docket management was employed to determine prior delinquencies or summary hearings, looking for "pattern[s] and practice[s]" to accurately represent the status

of the Fiduciary/Guardian to the Judge. With the time and effort these functions required, Ms. Stevens and her colleagues were unable to focus on other matters. Tr. 3816, 3818.

However, the challenges Ms. Stevens and her colleagues faced is not clear and convincing evidence of a more than *de minimis* interference under prong three of *Hopkins*. In her testimony, Ms. Stevens was careful not to use the term "burden" (or "burdensome") in describing the effects of preparing for and having summary hearings. Tr. 3816 ("I don't really want to use the word burdensome, it can . . . take up a lot of time" and resources "if we have a lot of summary hearings"); *see also* Tr. 3914 ("Again, I wouldn't use [burden]").

But undue "burden" is part of the *Hopkins* test. *See In re Johnson*, 275 A.3d 268, 279-80 (D.C. 2022) (per curiam) (agreeing with the Board that "wasted time and added expense for the former client, as well as added administrative burden on the ALJ" violated Rule 8.4(d)); *see also In re Thyden*, 877 A.2d 129, 142-43 (D.C. 2005) (explaining that the respondent's "actions crossed the line between zealous advocacy and those that are impermissible because they unduly burden the courts"); *In re Hallmark*, 831 A.2d 366, 375 (D.C. 2003) (explaining that though a deficient voucher undoubtedly "placed an unnecessary burden on the administrative processes of the Superior Court and on the presiding judge," an 8.4(d) violation generally requires "more egregious conduct" or "intentional disregard for the effect that an action may have on judicial proceedings"); *In re White*, 11 A.3d 1226, 1230 n.2, 1247 (D.C. 2011) (per curiam) (disagreeing with the Board's conclusion that the

respondent violated Rule 8.4(d), but nonetheless agreeing with the Board's analysis of Rule 8.4(d), which included that "[n]ot every action that requires a court to decide a motion interferes with the administration of justice, even though the court expends resources in deciding the matter" (appended and incorporated at 11 A.3d at 1247)). Disciplinary Counsel has not proven an undue burden on the judicial process.

Ms. Stevens' testimony also provides additional support: "it can take up a lot of time and really [use our scarce Court resources] if we have *a lot* of summary hearings." Tr. 3816 (emphasis added). To reiterate, from Respondent's First Guardian Report in *RTW* filed in January 2005 (FF 48), to Respondent's Final Guardian Report in *Williams* in November 2014 (FF 111), Respondent was involved in four summary hearings. Notably, we have unanimously found that Respondent did not cause the hearing related to the Acceptance in *Williams*. *See infra*. And these hearings were far from consecutive: there was one in 2008 (FF 56); one in 2011 (FF 91); one in 2013 (FF 103); and one in 2014 (FF 106). And notably, the two hearings for the late Guardian Reports in *RTW* occurred *after* Respondent had filed her Guardian Reports. Put simply, we have four summary hearings in almost ten years, which cannot be described as "a lot of summary hearings," that would take up the Court's time. We thus do not have clear and convincing evidence of more than a *de minimis* effect on the judicial process. *Cf.* Tr. 3816 (Stevens).

ODC has not offered evidence that Respondent's conduct was (1) wrongful in the filing of the guardianship reports in *RTW*, none of which were late, and (2) even

if they are found to be late, she was only involved in four summary hearings, total.[3] Though Ms. Stevens, her colleagues, and the Probate Court expended time and energy in preparing for and having these hearings, as with any and all summary hearings, the effects did not burden the judicial process in more than a *de minimis* way.

A. <u>Ruth Toliver-Woody – Guardianship Reports</u>

Insufficient evidence exists to show that the Guardianship Reports at issue were, in fact, late and, as a result, I dissent from the majority that the first prong of "improper" conduct is established. The record is clear that Judge Lopez ordered Respondent to file her first Guardianship Report on February 15, 2005, and she subsequently filed the reports at six-month intervals thereafter. That court order, understandably, would have been interpreted as setting the subsequent schedule, and this case was not a situation where an eight-month or ten-month period lapsed with no report being filed. Respondent credibly testified that Judge Lopez' order set the six-month intervals for the filing of Guardianship Reports for February and August of each year – and not January and July of each year. *See* FF 158-*57* (crediting

[3] To reiterate, I recognize that lawyers should make timely filings; however, procedural rules recognize that they often do not. For example, Fed. R. App. P. 4(a)(1) prescribes the time within which a notice of appeal must be filed in a civil case. Fed. R. App. P. 4(a)(5) provides an orderly procedure for extending the time for filing, even if the time has expired.

Respondent's testimony regarding her belief of the filing deadlines for the 2nd, 5th, 6th, 7th, 10th, 12th, 13th and final Guardianship Reports in *RTW*).[4]

Second, even if the first element of an improper action had been proven by clear and convincing evidence in *RTW*, the evidence is not clear and convincing that Respondent's conduct "seriously interfered" with the administration of the Probate Courts. Neither filing her Report before a notice of summary hearing was issued, nor after one was issued constitutes an impact upon the process to a serious and adverse degree. Incorporating my previous findings, I address each group immediately below.

1) Guardian Reports filed before a notice of summary hearing was issued – The Fifth, Seventh, Tenth, and Twelfth Reports.

There was no "serious interference" when Respondent filed her Reports after delinquency notices had been issued but before a notice of summary hearing had been sent. An automatic process for the issuance of delinquency notices exists within the Probate Division to deal with these filing infractions, and Respondent properly responded by taking corrective action. As described by ODC witness Nicole Stevens, delinquency notices issue automatically through a tickler

[4] I disagree with the majority on whether Judge Lopez' Order shifted each subsequent Guardian Report deadline by a month – from January/July to February/August.

I note that the Fifth Guardian Report was filed in August, rather than February when it would have been expected to be filed. But Disciplinary Counsel did not argue, and the majority did not find that this report was months overdue. I will not speculate on this undeveloped record.

calendaring system, and if that delinquency is not cured within 14 days, a summary hearing is scheduled.[5]

In these instances, no summary hearings took place – indeed, no notices of summary hearings were issued. This does not contradict Ms. Stevens' testimony described earlier; the focus instead is on the automatic process. And the probate process is unaffected by automatic generation of notices, like the ones found in this group. *See* FFs 53-54 (July 2007 delinquency notice, Fifth Report filed August 8, 2007), 58-59 (July 2008 delinquency notice, Seventh Report filed July 25, 2008), 69-70 (January 2010 delinquency notice, Tenth Report filed on January 27, 2010), 81-82 (January 2011 delinquency notice, Twelfth Report filed on January 25, 2011).

2) Guardian Reports filed after a notice of summary hearing was issued – The Second, Sixth, and Thirteenth and Final.

There is no serious interference with the administration of justice for Respondent's delinquent Guardian Reports filed after the notices of summary hearings were issued. The Second Guardianship Report, filed on August 11, 2005, was filed after the Court issued its delinquency notice on July 15, 2005, and after the Court issued a Notice of Summary Hearing on August 1. FFs 49-50. The Hearing

[5] A delinquency notice is generated when the filing is late, and the guardian is given 14 days from the date of the notice to come into compliance before the order to appear at a summary hearing is issued. Tr. 3805 (Stevens). During the period of 2005-2015, approximately 50-75 summary hearings were held per week among the two or three summary hearing calendars. Tr. 3860 (Stevens). The majority of those hearings involved late guardianship reports. Tr. 3860 (Stevens). However, Respondent's conduct had a minuscule effect on those calendars.

was set for September 1, but it was "[v]acated." DX 5 at 68-69 (entries 193 and 203). So no summary hearing took place.

The delinquent Sixth and Final Reports, however, each generated a summary hearing. Specifically, Respondent filed her Sixth Report on February 12, 2008, which was after the Court issued its delinquency notice on January 16, and after the Court issued a Notice of Summary Hearing on February 1. FFs 56-57; DX 5 at 61 (entry 120). A summary hearing was held on March 4, 2008, and was then continued to and held on March 18. FF 56. For the Final Guardianship Report, Respondent filed it on August 10, 2011, which was also after the delinquency notice was issued on July 18, and after the Court issued a Notice of Summary Hearing on August 3. FFs 89-90; DX 5 at 50 (entry 14). A summary hearing was held on August 26, 2011; an Order followed noting that the summary hearing was "[h]eld and disposed. The Court finds that the delinquent item has been filed." FF 91; *see also* DX 5 at 49 (entries 11-12).

In sum, the *four-total* summary hearings over an extended period did not rise above *de minimis*. So the *two* summary hearings in the *RTW* matter did not do so either. To again illustrate, the delinquent reports (the Sixth and Final respectively) had been filed by the time of each hearing. Of course, the hearings themselves contributed to "tainting the judicial process." But because Respondent had cured the deficiencies in filing her Reports before the hearings, we do not have clear and convincing evidence that the hearings generated a more than *de minimis* effect on the judicial process.

B. James H. Williams – Two Summary Hearings

In *Williams*, once again insufficient evidence exists to show a more than *de minimis* effect for a single late Guardian Report[6] and the two[7] summary hearings (with one being continued).[8] While Ms. Stevens did describe the administrative time required to prepare for summary hearings, FF 34, the two summary hearings in *Williams* were very brief as, in one instance, Respondent filed the delinquent item (Guardianship Plan) on the same day that the notice of summary hearing issued, *see* FFs 104-105, and in the other, the Acceptance and Consent Form was filed immediately after the summary hearing. FF 103. In regard to that late Acceptance and Consent Form, Ms. Stevens testified that given the short turn-around required: "we don't usually have a lot of hearings for Acceptance and Consent. I mean [a late filing of the Acceptance and Consent] is a deal, but would I characterize it as a big deal? Not in the scheme of things." Tr. 3801 (Stevens). Further, we have credited

[6] For the final Guardianship Report filed in *Williams*, a delinquency notice was generated but, again, no notice of summary hearing was generated as Respondent soon thereafter filed the report (titled 2nd and Final Report of Guardian). *See* FFs 110-111. In addition, because the Notice of Death was filed before the 2nd Guardianship Report's due date of August 28, 2014, Respondent's report constituted the "final report" which was timely filed, well before its due date. *See* FFs 37 & 158-*61*.

[7] Because we unanimously conclude that Disciplinary Counsel failed to prove that Respondent was at fault with respect to the circumstances regarding the filing of the Acceptance, it failed to satisfy the first prong of the *Hopkins* test. *See* Report Section IV.I n.65. But should the Board disagree on this point, and consider the third prong, I analyze the impact of the resultant summary hearing on the administration of justice in this section.

[8] The summary hearing for the Acceptance and Consent was continued, with Respondent's appearance waived upon a filing of the form, and she complied within the time required. *See* DX 59; DX 62.

Respondent's testimony that she believed her staff member (Mr. Baloga) had filed the Acceptance and Consent Form on her verbal instruction. *See* FFs 100 & 158-*59* (telephone conversation with Mr. Baloga regarding his completion of the Acceptance and Consent Form in *Williams*). Again, ODC identified such a limited number of summary hearings in *Williams*, and the circumstances of each suggest that they did not involve a more than *de minimis* delay.

C. Notices of Death

Insufficient evidence exists to suggest that the probate system was burdened or that its administration was "seriously interfered" with by Respondent's notifying the Probate Court of Ms. Toliver-Woody's death less than two months after it occurred and Mr. Williams' death approximately three weeks after it occurred. *See* n.9. I disagree with the majority that the timing of the filings constituted misconduct. I further disagree that, even if "misconduct" occurred, the filings seriously interfered with the administration of justice. ODC did not produce any evidence that *any one* of the potential negative effects of a late notice described by Ms. Stevens occurred, *see* FF 37, and several of those possible effects described by Ms. Stevens do not specifically affect the administration of justice, or the tribunal at issue, the Probate Court. ODC did not brief the issue of the timing of the filings but, instead, inaccurately stated that no notice of death was ever provided in *RTW* when ODC's own experts and the docket sheet suggested otherwise.[9] In contrast to the several

[9] Ms. Toliver-Woody passed away on June 20, 2011. FF 88. Respondent's final Guardianship Report (filed on August 10, 2011) gave notice that the "Ward passed away at St. Thomas More

cases cited by the majority in its analysis of Rule 8.4(d), *see* Report at 243-262, here, Disciplinary Counsel did not introduce any evidence demonstrating actual or potential adverse consequences for the notification of death occurring a few weeks or fewer than eight weeks after a ward's passing. FF 37.[10] In the cases relied on by the majority in its Rule 8.4(d) analysis, the respondents' misconduct had an identifiable measurable adverse effect. Essentially, significant, measurable damage was done. *See, e.g.*, *In re Alexander*, 496 A.2d 244, 251-52 (D.C. 1985) (per curiam) (appended Board Report) (conduct caused opposing counsel to prepare and appear for trial on wrong day); *Hopkins*, 677 A.2d at 62 (conduct resulted in the Probate Division being unable to administer the estate); *Uchendu*, 812 A.2d at 941 (conduct impaired the court's ability to hold respondent's clients responsible for false statements in the documents); *In re Cleaver-Bascombe*, 892 A.2d 396, 404-05 (D.C. 2006) (conduct caused the submission of a false voucher for CJA funds); *In re Evans*,

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Facility, MD" and that information gave the Probate Court notice that Ms. Toliver-Woody had passed away such that "the court could proceed to termination." FF 90 (ODC expert witness Andrea Sloan verifying that the report was an adequate substitute for a Suggestion of Death form); *see also* DX 5 at 49 (docket sheet reflecting that "suggestion of death" was included with the Final Guardianship Report). The Probate Court did not order the guardianship terminated until January 23, 2012. FF 93.

Mr. Williams passed away on July 23, 2014, and the Notice of Death was filed by Respondent on August 20, 2014. FFs 108-109. The Probate Court did not issue the order terminating the guardianship until November 26, 2014. FF 112.

[10] While the Notices or Suggestions of Death are to be filed "forthwith," the Probate Court orders terminating the guardianships in *RTW* and *Williams* were not docketed until five and three months, respectively, after the notices were filed. *See, e.g.*, FFs 93, 112. The filing of the *RTW* notice, less than two months after her passing, and the *Williams* notice, less than one month after his passing, do not appear so untimely by comparison.

902 A.2d 56, 69 (D.C. 2006) (per curiam) (appended Board Report) (conduct resulted in successor personal representative having to take corrective actions to recapture value of the estate); *In re Edwards*, Bar Docket No. 488-02, at 16-19 (BPR Dec. 18, 2006) (conduct caused financial harm to the potential legatees), *recommendation adopted*, 990 A.2d 501, 508 n.2 (D.C. 2010); *In re White*, 11 A.3d 1226, 1231-32 (D.C. 2011) (per curiam) (conduct disrupted and delayed the entire litigation in federal district court). Even if the Notices of Death are to be considered late as the majority suggests, ODC has not presented clear and convincing evidence showing an adverse effect on the ward or a potentially serious adverse effect on the Probate Court's administration of justice.

D. Clear and Convincing Evidence

Even when considering together the delinquency notices, the notices of summary hearings, the four summary hearings, and the Notices of Death, Respondent's conduct in its totality did not seriously interfere with the administration of justice. I have expressed my reasoning previously, but I also find that the effect was minimal, especially in comparison with the late filings and accountings described by the Hearing Committee and Board in *In re Harris-Lindsey*, Board Docket No. 15-BD-042 (BPR July 28, 2017).[11] In that matter, the respondent "repeatedly filed untimely or incomplete accountings, which forced the Probate Court and staff to send repeated delinquency notices and schedule multiple hearings

[11] Appropriately, I believe, ODC did not argue it had proven a violation of Rule 8.4(d) in *Harris-Lindsey* in its briefing to the Hearing Committee and did not take exception to the Board's non-finding of the Rule 8.4(d) violation. *See* Board Docket No. 15-BD-042, at 1.

in connection with missed deadlines." *See* Separate Statement of Mr. Peirce at 4, *Harris-Lindsey*, Board Docket No. 15-BD-042 (citing FF 49 of the Hearing Committee Report). Yet the Board found no violation of Rule 8.4(d), because clear and convincing evidence requires "a degree of persuasion higher than mere preponderance." *Harris-Lindsey*, Board Docket No. 15-BD-042, at 37 (citation omitted), *recommendation adopted in relevant part*, 242 A.3d 613, 617 n.2 (D.C. 2020). In distinguishing *In re Cole*, 967 A.2d 1264 (D.C. 2009), the Board found that the multiple delinquency notices and even a show cause hearing did not constitute a serious interference with the administration of justice within the probate system. The Board noted that in *Cole*, "the additional expenditure and time on the judicial process involved a fully contested political asylum hearing" and then briefing and argument before the Board of Immigration Appeals – causing a burden on two judicial bodies. *Harris-Lindsey*, Board Docket No. 15-BD-042, at 39 n.37 (cautioning against the broadening of the scope of "more than a *de minimis* effect"); *see also In re Harris-Lindsey*, 242 A.3d 613, 617 n.2 (D.C. 2020) (adopting the Board's position that the conduct did not "taint the judicial process in more than a *de minimis* way" (internal quotations omitted)); *In re Pierson*, Bar Docket No. 214-93, at 14 (BPR Aug. 3, 1995) ("Just putting a court to the need to conduct proceedings that it otherwise would not have to conduct is not enough to establish a violation of Rule 8.4(d)."), *adopting without further discussion where no exception noted*, 690 A.2d 941, 946 (D.C. 1997).

While the majority cites to *Padharia*, Board Docket No. 12-BD-080 (BPR Apr. 7, 2017), as weighing in favor of a Rule 8.4(d) violation in this case, it is not a comparable case. In *Padharia*, the respondent's complete *failure to file* briefs in nearly *30 different immigration matters*, resulted in his clients' cases being dismissed; that set of facts constitutes clear and convincing evidence that the misconduct had more than a *de minimis* effect and seriously interfered with the administration of justice. *See id.* at 5-6. *Padharia* makes it evident that a single ministerial dismissal is not a big deal, but a volume of more than 30 dismissals can have a more than *de minimis* effect. *See id.* at 10. Here, by contrast, the cumulative effect of four summary hearings may have interfered with the administration of justice to a limited extent, but they did not "seriously" interfere with the administration of justice.

As the Court of Appeals commented in *Hallmark*: "We do not doubt that respondent's conduct placed an unnecessary burden on the administrative processes of the Superior Court and on the presiding judge, but her untimely submission of an obviously deficient voucher did not seriously and adversely affect the administration of justice, or her client." 831 A.2d at 375. Here, Respondent caused the issuance of automatic delinquency notices, which were intended to facilitate compliance without necessitating a summary hearing, and she consistently complied in all but a few instances.

In a system that sweeps the hundreds of late filings during a typical year into a series of summary hearings, ODC only offered evidence of Respondent being

called to four such summary hearings – despite her acting as a guardian in matters that spanned several years. ODC has provided no evidence of any adverse effect resulting from Respondent's actions. This is not clear and convincing evidence of an 8.4(d) violation. *See Harris-Lindsey*, Board Docket No. 15-BD-042, at 37.

III. Thoughts in Mitigation

A final thought, from a "Public Member's" perspective. My dissent from two of the Committee majority's recommendations speaks for itself. Respondent had had a successful and apparently lucrative law practice for many years. As a result of her life's experience she dedicated herself to providing support to those requiring the intervention of the Probate Court. Her record over the years demonstrates her capability and success as a Guardian. The purpose of the attorney-discipline system is to deter misconduct, not to punish the attorney. The time and effort for Respondent and the disciplinary process to take this matter through the disciplinary system over years to the result recommended by this Committee seems to no useful purpose. It may only dissuade those successful attorneys who desire to support the probate process, to the detriment of the process and those who enter the probate process of necessity.

It is also useful to consider the end-result of this matter. After over 30 hearing days, over 5,400 transcript pages, and over 60 charges in Disciplinary Counsel's Notice of Violative Conduct, merely one violation is proven – an error constituting an unreasonable fee. The toll is heavy and personal for Respondent and not necessarily the best use of funds for the Disciplinary process.

By: David Bernstein
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