THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Issued
December 8, 2021

In the Matter of:	:	
	:	
ARCHIE L. RICH, II,	:	
	:	Board Docket No. 18-BD-042
Respondent.	:	Bar Docket Nos. 2013-D003
	:	& 2013-D181
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 471754)	:	

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

Respondent Archie L. Rich stipulated to three counts of misconduct charged by Disciplinary Counsel, including reckless or intentional misappropriation, failure to supervise his paralegal and ensure her conduct was compatible with the rules, and failure to provide competent representation. The Hearing Committee found that Disciplinary Counsel proved each count, by clear and convincing evidence, and held a hearing to take evidence and consider Rich's motion for mitigation of sanction based on disability, known as *Kersey* mitigation. *See In re Kersey*, 520 A.2d 321 (D.C. 1987). The Hearing Committee found that Rich's evidence established that he suffered from alcohol use disorder ("AUD") at the time of the misconduct, that AUD substantially caused his misconduct, and that he is substantially rehabilitated from AUD. Because *Kersey* mitigation applied, the Hearing Committee

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

recommended that instead of disbarment normally required under *In re Addams*, 579 A.2d 190 (D.C. 1990) (en banc), Rich should serve three years of probation with specific conditions.

Disciplinary Counsel took exception, arguing that Rich did not establish by a preponderance of the evidence that AUD was a substantial cause of his misconduct charged in Counts I and II. The Board, having reviewed the record and considered the parties' arguments and controlling law, agrees with the Hearing Committee that Rich established the elements of *Kersey* mitigation and adopts the Hearing Committee's recommended sanction of probation with conditions.

I. RULE VIOLATIONS

The Board "'must accept the Hearing Committee's evidentiary findings, including credibility findings, if they are supported by substantial evidence in the record.'" *See In re Klayman*, 228 A.3d 713, 717 (D.C. 2020) (per curiam) (quoting *In re Bradley*, 70 A.3d 1189, 1193 (D.C. 2013) (per curiam)); *see also In re Thompson*, 583 A.2d 1006, 1008 (D.C. 1990) (per curiam) (defining "substantial evidence" as "enough evidence for a reasonable mind to find sufficient to support the conclusion reached"). We review de novo its legal conclusions and its determinations of ultimate fact. *See Klayman*, 228 A.3d at 717; *Bradley*, 70 A.3d at 1194 (the Board owes "no deference to the Hearing Committee's determination of 'ultimate facts,' which are really conclusions of law and thus are reviewed de novo").

Rich stipulated to the facts and rule violations and neither party took exception to the Hearing Committee's resolution of those two issues. Except where addressed

below, the Board concurs with the Hearing Committee's factual findings as supported by substantial evidence in the record and adopts and incorporates those findings. *See* Board Rule 13.7. And the Board adopts the Hearing Committee's conclusions on the rule violations. Both the findings and conclusions on rule violations are addressed in the same section below.

A. Count I: Delayed Payment to Medical Providers, Commingling and Misuse of Funds.

Rich is the managing attorney of The Rich Law Firm. Findings of Fact ("FF") 2. His practice, in and around 2012, was largely personal injury matters, and as relevant here, he agreed to represent 18 clients on a contingency basis. *See* FF 5; Hearing Transcript ("Tr.") 129-130 (noting that his firm started with auto accident cases but has evolved to focus on medical malpractice cases).

Rich maintained one trust account and IOLTA subaccounts for individual clients. FF 6-7. He also had an operating account. FF 8. Settlement funds were deposited into the subaccounts and then transferred to the trust account for distribution. *See* FF 8-10. With limited exceptions, Rich paid his clients their portion of the settlement amounts but delayed paying medical providers and misappropriated portions of those funds, transferring them to his operating account to maintain a positive balance there. FF 11-12, 82-83; Appendix to Hearing Committee Report ("Appendix") 1-2. The exceptions are that Rich misappropriated client funds in two instances, but he corrected the shortfall the following business day. FF 11, 83-84. Along with misappropriation, Rich also commingled funds, for

example on July 18 and 24, 2012, when he transferred his fees into an account that also contained entrusted funds. FF 12. Through July and August 2012, by delaying payment to providers and using the funds for his operating account, Rich misappropriated over $22,000. FF 82.

Based on these admitted facts we adopt the Hearing Committee's conclusions that Disciplinary Counsel established by clear and convincing evidence that Rich violated Rule 1.15(a) when he recklessly or intentionally[1] misappropriated funds that belonged to medical providers to pay expenses from his operating account; Rule 1.15(a) when he commingled his funds with entrusted funds; and Rule 1.15(c) when he failed to pay funds promptly to medical providers. Hearing Committee Report ("Rpt.") 45-48.

B. Count II: Negotiations with Medical Providers.

In many of Rich's personal injury cases, the client had outstanding medical bills. Rich's firm negotiated with the medical providers to reduce their fees to support the settlement of these personal injury cases. *See* Tr. 405-06. His paralegal, Amanda Garcia, sent letters to the medical providers asking them to reduce their

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[1] Rich stipulated to Disciplinary Counsel's charge that he engaged in "reckless or intentional misappropriation." FF 4. The Hearing Committee adopted that conclusion as does the Board. Here, as in most cases, the distinction between reckless and intentional misappropriation is not relevant because the discipline is the same. *See Addams*, 579 A.2d at 191 ("[I]n virtually all cases of misappropriation, disbarment will be the only appropriate sanction unless it appears that the misconduct resulted from nothing more than simple negligence.").

fees. FF 14-15; *see* Tr. 373. In those letters, the paralegal acknowledged the amount owed to the medical provider and represented that the insurance company had made a "last and final" settlement amount that was "set in stone." *See, e.g.*, DX 5 at 6; DX 7 at 6; DX 9 at 3; DX 11 at 1; DX 13 at 1; DX 15 at 2; DX 17 at 2; DX 19 at 18; DX 21 at 3; DX 25 at 6; DX 27 at 2; DX 29 at 3; DX 31 at 1; DX 33 at 2. But the amount stated in the letter was not the final amount and in each of the cases before the Hearing Committee, the letters to the providers understated the actual final settlement amount. *See* Appendix 3. *Compare, e.g.*, DX 5 at 6, DX 7 at 6, DX 9 at 3, DX 11 at 1, DX 13 at 1, DX 15 at 2, DX 17 at 2, DX 19 at 18, DX 21 at 3, DX 25 at 6, DX 27 at 2, DX 29 at 3, DX 31 at 1, *and* DX 33 at 2, *with* DX 5 at 13, DX 7 at 9, DX 9 at 7, DX 11 at 3, DX 13 at 4, DX 15 at 7, DX 17 at 6, DX 19 at 22, DX 21 at 10, DX 25 at 7, DX 27 at 4, DX 29 at 5, DX 31 at 4, *and* DX 33 at 5. The letters also represented that Rich agreed to reduce his fee to facilitate settlement. FF 14, 18. But Rich did not reduce his fees. FF 14, 18. The medical providers agreed to reduce their fees and as reflected in the memoranda with the final settlement accounting, the reductions were passed along to Rich's clients. FF 15; Rpt. 62 n.27; *see, e.g.*, DX 97 at 9-10; DX 19 at 22; DX 21 at 3, 10; DX 25 at 6-7; DX 33 at 2, 5.

Rich's firm did not inform the medical providers that the cases settled for higher than reported. FF 17. In the Johnson settlement, the letter to the medical provider followed the final settlement. FF 16, 19. Thus, the final settlement amount was known to Rich's firm when his paralegal misrepresented a lower "final" settlement amount. FF 16. *Compare* DX 19 at 16 (6/27/12 Johnson settlement check

for $87,500), *with* DX 97 at 9 (7/3/12 letter to medical provider referencing the "last and final offer of $12,000.00 is set in stone").

Rich acknowledged he did not supervise his paralegal sufficiently. Stipulations ("Stip.") ¶ 74; *see* Tr. 410. And his testimony confirmed that he did not review his paralegal's letters. For example, in the Johnson settlement, Rich described it as a "punch" when he saw the letter to the medical provider. Tr. 410 ("When I saw that our firm, in a letter, it's my responsibility; you know, my paralegal did it, but I'm responsible, I'm on the hook for this.").[2]

But Rich also testified about his practice of negotiating with medical providers and that he would report final offers to the provider to seek a reduction of the medical bill but would also continue to advocate for his client to obtain a larger settlement offer. Tr. 406-07. When he did achieve a larger settlement, he did not "circl[e] back to the provider to disclose the higher settlement offer." Tr. 408.

Rich's acknowledgement of responsibility that he did not supervise his employee and his testimony about his practice of negotiations are in tension; and this tension may *imply* that Rich's failure was not one of supervision but that his

[2] The Johnson matter presented the greatest discrepancy between the settlement amount reported to medical provider ($12,000.00) (*see* DX 19 at 18) and the actual settlement value ($87,500.00) (*see* DX 19 at 22). The medical provider uncovered this discrepancy and demanded payment of the full amount owed. *See* DX 97 at 8. Rich and the provider discussed resolution but based on this record it is unclear whether the matter is fully resolved. *See* Sanction discussion about restitution to each provider.

employee implemented his negotiation tactics. The Hearing Committee picked up on that tension when it later characterized the rule violations in Count II as a "fraudulent scheme" that "involved a knowing and intelligent determination to permanently deprive the medical services provider of payment to which the medical provider was entitled and which [Rich] had promised to pay." Rpt. 62. The Hearing Committee believed that this conduct "exhibits a *mens rea*," Rpt. 62, but recognized that Rich's "admission of responsibility with regard to misrepresentations to medical providers was a failure to adequately supervise his paralegal," Rpt. 63. The Hearing Committee also acknowledged that the paralegal was not called as a witness. Rpt. 63 n.28.

This acknowledgment by the Hearing Committee is critical. The paralegal's testimony or some other evidence was needed to show that Rich was involved in establishing an office practice and that the paralegal implemented that practice in what she represented in the letters to the medical providers. But without that added evidence, contrary to the statement of the Hearing Committee, there is insufficient evidence to establish the "*mens rea*" for a "fraudulent scheme."

This is not a criticism of Disciplinary Counsel's evidence. Disciplinary Counsel did not set out to establish a fraudulent scheme. Instead, Disciplinary Counsel charged Rich with Rule 5.3(a) and (b) violations based on evidence that he failed to supervise his paralegal and he did not know about the contents of her letters. Stip. ¶ 74. The Hearing Committee needed to determine whether the evidence supports Rule 5.3(a) and (b) violations based on the stipulated facts and admitted

evidence. This required the Committee to consider whether the evidence described above was not merely in tension but in contradiction with the facts in the stipulation. Stip. ¶ 74 (noting that Rich did not know about the content of his paralegal's letters).

In other words, if the evidence supported that the paralegal was implementing Rich's instructions and that Rich knew about her actions, then the stipulated facts and evidence presented at the hearing would be in conflict, raising the question of whether a Rule 5.3(c), 8.4(b), or 8.4(c) violation(s) should have been charged. Ultimately the Hearing Committee accepted that the evidence supported Rule 5.3(a) and (b) violations for failure to supervise and we agree. Where we part ways with the Hearing Committee is using the term "fraud" to describe the conduct in Count II because it extends outside the scope of the charges. *See In re Ruffalo*, 390 U.S. 544, 552 (1968) (a respondent in a disciplinary proceeding is entitled to "fair notice as to the reach of the grievance procedure and the *precise nature of the charges*" (emphasis added)); *see also In re Robinson*, 225 A.3d 402, 406 (D.C. 2020) ("[N]o authority for the Hearing Committee, acting alone, to add charges that were not sought by Disciplinary Counsel or approved by a Contact Member."). Further, the assertion that Rich engaged in fraud is not based on clear and convincing evidence and is largely speculative. *See* Rpt. 63 n.28 (acknowledging the evidentiary gap without the paralegal's testimony).

We appreciate that the Hearing Committee may have wondered if Rich had more knowledge of the content of his paralegal's letters. The Board too had

questions about the paralegal's motive. But we caution hearing committees that they should not engage in speculative conclusions.[3]

Based on the stipulated facts, testimony, and other evidence offered during the hearing, the Board adopts the Hearing Committee's conclusions that there is clear and convincing evidence that Rich violated Rule 5.3(a) and (b) when he failed to supervise his paralegal allowing letters to medical providers that included false statements. Rpt. 49-50. The Board does not adopt the discussion of fraud at pages 58, 62-63, 66 of the Hearing Committee Report because it is not based on clear and convincing evidence.

C. Count III: Missed Statute of Limitations.

In 2008 Rich agreed to represent Vance L. Turner related to an automobile accident that occurred on February 3, 2007. FF 23. The statute of limitations for negligence in the District is three years, D.C. Code § 12-301(8); thus the statute of limitations expired February 3, 2010. FF 26. Rich tried to settle the matter with GEICO from August 2008 to February 2010 but was unable to settle it before the statute of limitations expired. FF 25, 27. Rich did not discuss with Turner the approaching statute of limitations or the option of filing suit, and he did not file suit

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[3] Disciplinary Counsel did not charge or seek to prove fraud, but used the Hearing Committee's discussion in its brief before the Board to argue against *Kersey* mitigation, arguing that Count II involved self-interest and that the fraud "aided and abetted Mr. Rich's misappropriation." ODC Br. 22-23. But Disciplinary Counsel cannot change the nature of their charges before the Board and, as discussed in the Mitigation Section, we reject this argument.

on behalf of Turner. Instead, Rich let the claim expire. FF 25-27. When Rich learned of his error, he took prompt action and informed Turner. FF 28, 91. Turner later sued Rich for malpractice. FF 28, 92-93 (describing Rich's offer to settle with Turner and advice that Turner seek independent counsel). Rich obtained a case management system following this error and has not missed another statute of limitations. FF 94, 101.

We agree with the Hearing Committee and adopt its conclusions that the evidence and stipulated facts establishes by clear and convincing evidence that Rich violated Rules 1.1(a), 1.1(b), 1.3(a), 1.3(c), and 1.4(a)-(b) when he failed to provide competent representation, did not represent Turner with diligence and zeal, allowed Turner's claims to expire, and did not communicate adequately with Turner before the expiration of the statute of limitations. FF 29; Rpt. 15, 24, 50-51.

D. Additional Findings by the Hearing Committee.

The Hearing Committee recited a lengthy procedural history with frustrating "procedural tactics" by Rich or his former counsel that resulted in unnecessary delay and expense. Rpt. 3-12. The Hearing Committee did not explain if this history was considered in aggravation. *See In re Yelverton*, 105 A.3d 413, 430-31 (D.C. 2014) (fitness requirement appropriate based, in part, on respondent's conduct during the disciplinary proceedings); *In re Speights*, 173 A.3d 96, 102 (D.C. 2017) (per curiam) (evasive and dishonest hearing testimony considered in aggravation of sanction). The Board and Court may also consider these findings in determining whether

aggravation of his sanction is appropriate.[4] We reviewed these facts and do not find that Rich's conduct before the Hearing Committee warrants a greater sanction than that recommended by the Hearing Committee itself.

The Hearing Committee also included additional findings related to Rich's conduct during Disciplinary Counsel's investigation. Rpt. 25-30. This conduct differs from the delay tactics that occurred before the Hearing Committee that can be considered in aggravation. Instead, these findings relate to conduct that occurred during Disciplinary Counsel's investigation and describe Rich's delayed or incomplete responses and his work with the accounting firm he hired to audit his accounts. FF 30-55. The Hearing Committee concluded this section finding that Rich's AUD caused the "*original* violations charged" but "his AUD does not explain the failure to provide a forthright accounting, the delay in response, or the incomplete compliance" and these actions "leave[] [the Hearing Committee] with a firm conviction that he purposely delayed his responses to the ODC's efforts to investigate this matter." FF 56 (emphasis added).

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[4] The application of the *Kersey* doctrine requires only that the sanction that the respondent would have received but for *Kersey* mitigation be stayed in favor of a lesser sanction. *See, e.g.*, *In re Mooers*, 910 A.2d 1046 (D.C. 2006) (per curiam) (disbarment stayed under *Kersey* in favor of 30-day suspension followed by three-years of probation with conditions); *In re Brown*, 912 A.2d 568 (D.C. 2006) (per curiam) (disbarment stayed under *Kersey* in favor of a three-year probation with conditions and restitution).

Finding 56 implies that Rich engaged in *additional* violations beyond those "original[ly]" charged. And the Hearing Committee "considered this conduct to [Rich's] detriment in [its] findings and suggestions in this report." FF 56. The Board does not adopt this finding for two reasons. *First*, it is not clear how the findings in this section were used to Rich's detriment. The Hearing Committee does not identify any finding, conclusion, or recommendation that was influenced by these findings. *Second*, Disciplinary Counsel did not charge Rich with a Rule 8.1(b) or 8.4(d) violation—the rules that apply to respondents who fail to comply with Disciplinary Counsel's requests for information and documents or otherwise engage in obstructive tactics during an investigation. DX 2; *In re Padharia*, 235 A.3d 747, 748 (D.C. 2020) (per curiam) (adopting Board finding that respondent "violated both Rule 8.4(d) and Rule 8.1(b) by failing timely to respond to the inquiries of Disciplinary Counsel"). If Disciplinary Counsel believed that this conduct was a violation of either of those rules, then it should have charged them and either included them in the stipulations, or sought to prove them before the Committee. Disciplinary Counsel did neither. Here again, *Ruffalo* and *Robinson* counsel against consideration of rule violations for which Rich was not given fair notice.

II. MITIGATION

Because Rich engaged in non-negligent misappropriation, the presumptive sanction is disbarment. *See Addams*, 579 A.2d at 191. But the Court has permitted mitigation of sanction, to include disbarment, where the respondent's misconduct was caused by a disabling addiction or mental illness, from which the respondent

has been substantially rehabilitated. *See Kersey*, 520 A.2d at 326-27 (alcoholism); *see also In re Soininen*, 783 A.2d 619, 622 (D.C. 2001) ("We have applied *Kersey* where the misconduct included incidents of misappropriation of clients funds which, in 'virtually all cases,' mandates disbarment." (quoting *Addams*, 579 A.2d at 191)).

Kersey mitigation is available where the respondent demonstrates:

> (1) by clear and convincing evidence that the respondent had a disability;
>
> (2) by a preponderance of the evidence that the disability substantially affected the respondent's misconduct; and
>
> (3) by clear and convincing evidence that the respondent has been substantially rehabilitated.

In re Verra, 932 A.2d 503, 505 (D.C. 2007) (per curiam) (quoting *In re Lopes*, 770 A.2d 561, 567 (D.C. 2001)); *see In re Stanback*, 681 A.2d 1109, 1115-16 (D.C. 1996) (discussing the differing burdens of proof); Board Rule 11.13.

A respondent who establishes all three prongs of the *Kersey* test may have the sanction stayed in favor of probation. *See, e.g.*, *Kersey*, 520 A.2d at 328 (disbarment stayed in favor of probation); *In re Temple* (*Temple II*), 629 A.2d 1203, 1209-1210 (D.C. 1993) (same); *Verra*, 932 A.2d at 505 (disbarment for reckless misappropriation stayed in favor of thirty-day suspension and three years' probation).

Rich offered evidence, to include testimony of two experts, to establish that he is entitled to *Kersey* mitigation. The Hearing Committee's findings of fact on Rich's disability, its effect on his misconduct, and his rehabilitation are supported

by substantial evidence in the record, and the Board adopts and incorporates those findings with additional findings supported by citation to the record. *See* Board Rule 13.7.

A. Rich's Evidence of Binge Drinking.

Rich began drinking alcohol at an early age and started to drink heavily after law school. FF 58-59. In 2010-2014, the period relevant to his misconduct, Rich was a binge drinker. He went out after work and drank until the bar closed and continued at after-hours locations. Tr. 107-113. He did not count his drinks but described that he was not "comfortable without a drink in front of" him and the drinks "didn't last long" before he was "onto the next one." Tr. 111. Early in his legal career he tried to control his binges, based on his workload the next day; for example, he would allow himself to drink late if he could still get up by noon for a 2:00 meeting. Tr. 103-05 (describing the time before opening The Rich Law Firm). He also used cocaine to sustain his inebriation. Tr. 114 (describing his cocaine use as allowing him to "stretch" his binge "all night, a day, two days"); FF 73. Rich's cocaine use was limited to when he was already drinking. Tr. 117, 122-23; FF 73.

But over time Rich was unable to control his drinking and he would miss the appointments scheduled the next day and fail to show up at the office. Tr. 135-37; FF 62. And his absences from the office increased in frequency. Tr. 142, 144-46 (estimating that he would fail to show up at the office 3-10 days per month); FF 63-64. Rich's paralegal, Jacqueline Mendizabal, estimated that he was in the office nine days per month. FF 63. Mendizabal resigned, citing Rich's absences from the office

as the reason. Tr. 152-53; FF 68. Even when Rich was in the office, he experienced the lingering effects of alcohol. FF 67.

Rich's drinking also created problems in his personal life. He described, as an example, that when he attended a National Bar Association meeting in New Orleans, he was too drunk to make the flight home. Tr. 166-67. His mother was also on the trip, and he left her in the motel waiting. Tr. 168-69. There was a similar incident when his mother, who lives in Michigan, flew to the District to visit Rich and he failed to pick her up at the airport. Tr. 612-13. Both Rich's mother and sister testified that Rich's drinking strained their relationships with him. *See* Tr. 601-02, 604, 610-611.

Rich's drinking also affected his relationship with his then-wife. He described a planned trip for their anniversary that he had to cancel because he "got drunk, somebody hit [him] in a face with a bottle" and he had to go to the emergency room. Tr. 178-79; *see* Tr. 181-84 (describing another incident where he and his wife argued on a trip to New York and the long night of drinking that followed).

In the fall of 2014, Rich stopped drinking. Tr. 186, 193. Rich received counseling. Tr. 193-95, 213-18. And he also started to address the "mess" of his escrow account. Tr. 196-97 (noting the disciplinary matter and that he retained counsel). Rich hired an accounting firm, MillerMusmar, to reconcile his account. Tr. 200. At the time of the hearing the accounting work continued, but Rich explained that as MillerMusmar determined that a medical provider was owed funds, he paid them. Tr. 200-02. Rich also retained a bookkeeper and an associate who

handles the firm's finances. Tr. 211-12, 703-04. More recently, Rich started to attend Alcoholics Anonymous ("AA") meetings and had sessions with the D.C. Lawyer Assistance Program ("LAP"). Tr. 219-220, 695-98.

B. *Kersey* Test.

Disciplinary Counsel took exception to the Hearing Committee's conclusion that Rich established the second prong of the *Kersey* test—arguing that Rich has not shown by a preponderance of the evidence that his AUD substantially affected his misconduct because the conduct in Counts I and II was deliberate. Office of Disciplinary Counsel's Brief ("ODC Br.") 13. We address Disciplinary Counsel's argument and each of the *Kersey* prongs in turn below.

1. Rich Established that He Has a Disability.

There is no dispute that Rich has AUD and that he was actively drinking when the misconduct occurred. ODC Br. 12 ("Mr. Rich does suffer from AUD."). Rich's two experts, Dr. Ronald Smith, M.D. and Dr. Christiane Tellefsen, M.D., testified that Rich's primary diagnosis is AUD. Tr. 547 (Tellefsen); DX 201 at 13; RX 4 at 3 (Smith referring to it as alcoholism). AUD or the prior term, alcoholism, has been recognized by the Court as a condition that qualifies for mitigation. *See, e.g.*, *Kersey*, 520 A.2d at 327-28; *In re Rohde*, 191 A.3d 1124, 1127 (D.C. 2018). Accordingly, we adopt the Hearing Committee's conclusion that Rich established by clear and convincing evidence that he had a disability.

2. Rich Established that AUD Substantially Affected His Misconduct.

The experts explained that absenteeism from work is common for individuals with AUD who binge drink. FF 65. Medically, the adverse effects of alcohol last longer than the binge or the immediate morning-after hangover. FF 66. And years of drinking would make it harder for Rich to complete work tasks even if he were at work and "sober." FF 69.

Both Drs. Smith and Tellefsen describe the effects of AUD as an impairment to a person's judgment. FF 70; Tr. 888-89 (Smith: "The way we believe alcohol works is that it disinhibits judgment; in other words, it makes us make a pass at somebody that's not our wife. It makes us spend excessively . . . . [O]ne [of] the products of excessive alcohol is excessive bad judgment."). Dr. Tellefsen described alcohol use as "'infiltrat[ing] everything [Rich] was doing in some way, whether he was actively intoxicated or barely sober, . . . his life was circling the drain.'" FF 70 (quoting Tr. 588 (Tellefsen)). This is because AUD is a "'disease that takes its toll . . . on your brain, your personality, your motivation, your body[.]'" FF 70 (quoting Tr. 582 (Tellefsen)). And as the excessive drinking continues, "the complications get worse, the judgment gets worse." Tr. 893-94 (Smith); FF 72.

Drs. Smith and Tellefsen also described the common use of a stimulant by someone with AUD to continue drinking longer. FF 75; Tr. 871 (Smith). Rich's use of a stimulant, here cocaine, was tied to Rich's drinking; he was primarily

addicted to and dependent on the alcohol, not cocaine. FF 74-75. In Drs. Smith and Tellefsen's opinion, Rich was disabled by AUD. FF 76.

And both Drs. Smith and Tellefsen believe that AUD was a substantial cause of Rich's professional misconduct. DX 201 at 13 (Tellefsen's report: Rich's "alcoholism, underscored by the attentional problems, more likely than not led to neglect of his office and professional and fiscal responsibilities"); RX 4 at 1 (Smith's report: "It is my opinion that alcohol was the primary cause of Mr. Rich's misconduct"). Dr. Smith explained how the trust account problems are connected to AUD:

> [Question:] Assuming for the sake of argument that Mr. Rich knew this money in the trust account was not his, could alcohol have caused him to [move the money into his operating account]?
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> [Smith:] Well, it impairs your judgment. . . . [W]hat happens is: "Well, I can borrow it, and I can take it and I'll repair this later." That's the kind of bad decisions gamblers make. It's the kind of bad decisions alcoholics make, the "this time won't affect," or "I'll borrow it for just a little while, and then it will be okay."

Tr. 898 (concluding that alcoholism "was substantially and was primarily the cause of [Rich's] difficulty").

The second prong of *Kersey* requires Rich to show by a preponderance of the evidence that the disability substantially affected his misconduct. *Kersey* described this as a "'but for' test" that "must be met in order to prove causation in disciplinary cases involving alcoholism." *Kersey*, 520 A.2d at 327. In other words, Rich must show that "[b]ut for [his] alcoholism, his misconduct would not have occurred." *Id.*

The Hearing Committee quoted at length the Court's description of this "but for" test from *In re Temple* (*Temple I*), 596 A.2d 585, 589 (D.C. 1991). Rpt. 60. In *Temple I*, the Court explained that a respondent must show "that the condition substantially affected his or her professional conduct." *Id.* at 589. And that the "but for" language from *Kersey* does not require that alcoholism be the "'sole cause' of the misconduct, but a substantial contributing one, the elimination of which was expected to assure the attorney's fitness to practice law." *Id.* at 590. Indeed, in *Kersey* the Court explained that it "believe[s] that it is an impossible burden to prove that Kersey's alcoholism caused each and every disciplinary violation" rather "the fact that alcoholism has a severe effect on human physiology and behavior, along with the record of evidence of Kersey's own behavior, establish that [his] professional conduct was substantially affected by alcoholism." *Kersey*, 520 A.2d at 326; *id.* at 327 (referring to a "sufficient nexus" between the disability and the misconduct).

Disciplinary Counsel agrees with the Hearing Committee that Rich established a sufficient nexus between his AUD and the misconduct in Count III. ODC Br. 12 ("AUD was, indeed, a substantial cause of his misconduct in Count III."). And we too agree with the Hearing Committee that Rich established by a preponderance of the evidence that his AUD substantially affected his professional conduct. The AUD was a substantial contributing cause of his failure to provide competent representation to Turner. Count III's conduct is consistent with the

impaired judgment and absenteeism that is common for someone with AUD who is not in recovery.

But Disciplinary Counsel disagrees that Rich established the causal connection between his AUD and the misconduct in Counts I and II. Here, Disciplinary Counsel draws a line between "negligent failure to act" in Count III with acts it believes were intentional in Counts I and II. ODC Br. 13, 14 (referring to these as "sins of commission"). In its reply brief to the Board ("ODC Reply"), Disciplinary Counsel clarified that it was not seeking to show that "intentional misconduct can never be eligible for *Kersey* mitigation" but that here Rich's intentional actions are not consistent with the experts' opinions that someone with AUD "suffer[s] a broad and general impairment of function." ODC Reply 10. Despite that clarification, Disciplinary Counsel's argument boils down to an intentional/unintentional line, arguing that Rich did not establish causation because his actions were "knowing, rational, and deliberate." ODC Reply 11. We disagree that this line is supported by the record or case law.

Starting with Count I, Disciplinary Counsel argues that Rich's ability to carefully distinguish client funds from funds owed to a medical provider in the trust account does not fit with a broad and general impairment of function. ODC Br. 17 (referring to the conduct in Count I). But the record is not so clear that Rich made deliberate choices between client and medical provider as opposed to paying clients mostly on time because they were involved in the settlement and came to his office to close out the cases. *See* Tr. 382-83 (describing typical settlement procedure,

including "repeated disclosure of offers to the client," client review of the settlement memorandum and accounting, and obtaining the client's signature authorizing disbursement of settlement funds); *see, e.g.*, DX 7 at 9-10; DX 21 at 10-11; DX 29 at 5, 7 (showing checks issued to clients on same date clients signed settlement memorandum). The payments to medical providers, however, were paid later and resulted in Rich using those funds temporarily for other purposes. FF 80-81; *see* Tr. 372-73, 391-94; *see, e.g.*, DX 9 at 7-12.

But even if Rich's conduct was intentional, the experts did not cabin their opinions on an intentional/unintentional line. Instead, they explained a person with AUD will make bad decisions and those decisions get worse over time as the person continues his excessive drinking. *See* Tr. 567, 587-88 (Tellefsen); 893-94, 898 (Smith). Examples of bad decisions include actions that are deliberate, such as cheating on a spouse, spending large sums of money, and using illicit drugs. Tr. 888-89 (Smith); Tr. 574-75 (Tellefsen). Dr. Smith directly addressed how someone with AUD can justify for himself using funds from the trust account. *See* Tr. 898.

The intentional line that Disciplinary Counsel attempts to draw is also not supported by the case law. Beginning with *Kersey* itself, the Court noted:

> [W]e are troubled by Kersey's own testimony that he intentionally neglected some clients' matters because these clients did not pay him. This is clearly an unacceptable rationale for unethical conduct. But, at this time, we accept the Board's conclusion that "the removal of the substantial contributory factor [i.e. active alcoholism] will end the offensive conduct."

Kersey, 520 A.2d at 327 n.16 (quoting *In re Kersey*, Bar Docket Nos. 275-80 *et al.*, at 11 (BPR June 6, 1985)). We too are troubled by actions of an attorney that include reckless or intentional misappropriation of funds. But mitigation based on disability is available even where the misconduct is troubling, and we have concluded that "the removal of the substantial contributory factor [i.e. active alcoholism] will end the offensive conduct." *See id.* at 327 n.16.

Disciplinary Counsel's argument is also not supported by its cited case, *In re Schuman*, 251 A.3d 1044 (D.C. 2021). ODC Reply 4-5. Schuman misappropriated funds that belonged to former clients while returning the funds that belonged to current clients. *Schuman*, 251 A.3d at 1048. In this regard there is a similarity to Rich's misappropriation of funds. But the similarity ends there. The Court did not reject Schuman's causation argument under *Kersey* because he deliberately misappropriated funds from one category of funds. Instead, the Court detailed the lack of evidence in support of causation that included: no evidence that his depression affected other areas of his life, the contemporaneous notes from his doctor reporting improvement in his depression throughout the time he misappropriated funds, the credited testimony of Disciplinary Counsel's expert that the depression was not disabling at the time of the misappropriation, and that Schuman's expert "only speculate[d] that [his] depression 'might have affected him' during the time period when his misconduct transpired." *Id.* at 1057-58. By contrast, Rich's evidence showed that his AUD negatively affected several aspects of his life—not only the misconduct in his practice with frequent absences and bad

judgments, but his personal life and relationships with his family. FF 70 (Dr. Tellefsen described alcohol use as "'infiltrat[ing] everything [Rich] was doing in some way, whether he was actively intoxicated or barely sober, . . . his life was circling the drain'"). There was no evidence that Rich was getting better during the time of his misconduct, but instead the evidence showed the AUD worsened over time. Tr. 893-94 (Smith); FF 72. And Rich's experts opined that his AUD caused his misconduct. DX 201 at 13; RX 4 at 1; Tr. 898.

Count II requires little discussion. Disciplinary Counsel argues that the fraudulent scheme is not consistent with a person suffering from AUD. ODC Br. at 21-22. But we need not address the fraudulent scheme again because it was not charged or proven in this matter. A failure to supervise a paralegal was charged and established and there is a clear connection between Rich's frequent absences from the office and his failure to adequately supervise his paralegal. *See* Tr. 413 (Rich testifying that he "missed" the false statements in letters sent to medical providers); Tr. 143 (Rich testifying that an associate or paralegal would run the office on days when he was absent). And the experts agreed absenteeism is a common problem for persons with AUD who binge drink. Tr. 562 (Tellefsen); Tr. 908 (Smith).

Therefore, based on this evidence and the controlling cases, we reject Disciplinary Counsel's argument and affirm the Hearing Committee's conclusion that Rich established a sufficient nexus between his AUD and the misconduct in Counts I and II.

3. Rich Established that He Has Been Substantially Rehabilitated.

Rich's sobriety is undisputed. He stopped drinking in late 2014 and is in recovery. FF 102; RX 4 at 2-3 (Smith noting positively that Rich is attending AA), 3 (Smith predicting that Rich "should stay sober [and] contribute greatly as a member of the Bar" with his "continued involvement in Alcoholics Anonymous, Psychotherapy, [and] the Step Work of AA"). Dr. Tellefsen similarly opined that there "is no current evidence of significant impairment in [Rich's] practice." DX 201 at 13 (referring to it as "sustained remission"); DX 201 at 13; RX 4 at 3 (Smith noting Rich's alcoholism is "now in full remission"). Disciplinary Counsel elected to not address this prong, asserting that it is "not at issue here." ODC Reply 3. The Board treats this intentional abandonment of an argument as waived. *See George Washington Univ. v. Violand*, 940 A.2d 965, 977-78 (D.C. 2008) (per curiam).

Moreover, we agree with the Hearing Committee that "there can be little doubt that [Rich] is in recovery from his AUD." Rpt. 57. Rich has abstained from alcohol for almost seven years. *See* FF 102. During those years he has been supported in his recovery through counseling, AA meetings, sessions from LAP, involvement in his church, and family. *See* Tr. 219-221, 224-28 (Rich). Rich's experts opined that based on his work with AA and therapy, they predict that Rich will remain sober. RX 4 at 2-3 (Smith); DX 201 at 13 (Tellefsen).

And Rich's evidence tracks other mitigation cases. *See, e.g.*, *Rohde*, 191 A.3d at 1137 (listing as evidence that the respondent "ceased drinking" and "sought treatment" and that his "sustained sobriety in the many years that have passed since his crime is resounding evidence of rehabilitation"); *Temple II*, 629 A.2d at 1209 (finding rehabilitation where respondent "had been drug-free for over four years" and was "involved fully in a program of recovery . . . and regularly attended the group's meetings"). Accordingly, we find clear and convincing evidence that Rich has been substantially rehabilitated.[5]

III. SANCTION

Consistent with *Addams* and *Kersey*, we recommend that Rich be disbarred but the execution of the order of disbarment be stayed in place of three years of probation with conditions. *Addams*, 579 A.2d at 191; *Kersey*, 520 A.2d at 326, 328. The conditions are fundamentally the same as those recommended by the Hearing Committee. We recommend that Rich's disbarment be stayed in favor of a three-year period of supervised probation on the conditions that he:

(a) not commit any other disciplinary rule violations;

(b) maintain his sobriety;

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[5] The Hearing Committee did not credit Dr. Richard Cooter's testimony on behalf of Disciplinary Counsel. FF 72, 77. The Hearing Committee concluded that Rich was defensive and evasive during his interview with Dr. Cooter. FF 77. As noted, neither party took exception to the Committee's findings and the Board finds no error in the Hearing Committee's findings related to Dr. Cooter's testimony. Thus, it is not included in the summary of findings in this Report.

(c) be subject to sobriety monitoring;

(d) meet as frequently as necessary to maintain his sobriety with a representative of LAP;

(e) attend Alcoholics Anonymous as often as he, his LAP representative, and other involved experts deem necessary;

(f) attend and complete a CLE course approved by Disciplinary Counsel on the management of funds;

(g) if not already done, complete and provide to Disciplinary Counsel a review of the accounts and settlements audited by MillerMusmar within ninety days of the Court's order; and

(h) provide Disciplinary Counsel with evidence that he paid restitution, with standard interest, to each medical provider in Count II for the fees discounted based on inaccurate information, within eighteen months of the Court's order. The interest shall be calculated from the date on which he paid any person or entity any portion of the settlement funds. If Rich cannot locate the provider, the funds and interest should be submitted to the Bar's Client Security Fund.[6] *See Schuman*, 251 A.3d at 1058 (ordering

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[6] The requirement to pay restitution derives from D.C. Bar R. XI, § 3(b), providing that "the Court or the Board may require an attorney to make restitution . . . to persons financially injured by the attorney's conduct . . . as a condition of probation or of reinstatement." Where restitution is ordered, the respondent is required to pay six percent interest per annum. *See In re Edwards*, 990 A.2d 501, 508 (D.C. 2010); *see also In re Bettis*, 855 A.2d 282, 290 (D.C. 2004)

that if any misappropriated funds cannot be returned to the clients, those funds must be disgorged to the D.C. Bar's Clients' Security Fund).

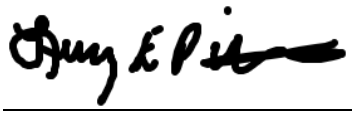
We recognize that in making this last (h) recommendation we are rejecting an argument that most medical providers will discount their bill when asked. While this may be true, we cannot determine whether each of these providers would have discounted their bills if they were provided with accurate information about the settlements, and if so, by how much. Rather than engage in speculation, we believe an efficient and fair solution is that the providers are paid without any discount. *See In re Wright*, Bar Docket Nos. 377-99, *et al*. at 61 (BPR Apr. 14, 2004) (respondent ordered to pay restitution to the provider in undiscounted sum), *aff'd on this issue*, 885 A.2d 315 (D.C. 2005) (per curiam).

(restitution to medical provider ordered in the original amount owed "plus interest from the earliest date on which settlement funds were distributed to any person or entity in [the respective] case."); *In re Clarke*, 684 A.2d 1276 (D.C. 1996) (per curiam) ("Because respondent promised by his signature on the authorization and assignment to pay his client's medical bills out of the proceeds of settlement, the enforcement of such a promise is an appropriate use of the restitution provision of [Rule] XI, § 3(b)").

In the disciplinary system, restitution is "distinct from . . . damages . . . . [where] the goal is to compensate an injured party for damages caused by another's breach of contract or duty." *In re Robertston*, 612 A.2d 1236, 1241 (D.C. 1992). The "objective of restitution" is to prevent "unjust enrichment." *Id.* Here, Rich did not retain the funds withheld from the medical providers. The evidence shows that those funds were passed along to his clients. But, by failing to pay the medical providers the total owed, Rich was unjustly enriched, irrespective of how he ultimately elected to use those funds.

We also recognize that we are not ordering restitution for any provider in Count I. As charged, the medical providers in Count I may ultimately have been paid but those payments may have also been delayed with Rich temporarily using those funds to operate his firm. There is support for restitution of interest when there is an unreasonable delay. *See Wright*, 885 A.2d at 316-317; *Bettis*, 855 A.2d at 287-290. But we have neither a sufficient record to determine whether each delayed payment was unreasonable nor argument from the parties on this issue. *See In re Dailey*, 230 A.3d 902, 913 (D.C. 2020) (per curiam) ("no bright line rule for 'prompt' payment, and the Rule's requirement should be evaluated in light of acceptable mitigating circumstances.").

BOARD ON PROFESSIONAL RESPONSIBILITY

By: 

Lucy E. Pittman

All members of the Board concur in this Report and Recommendation, except Mr. Hora, who did not participate.