THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Issued
July 25, 2019

In the Matter of:	:	
	:	
CLARISSA THOMAS EDWARDS,	:	
	:	Board Docket No. 15-BD-030
Respondent.	:	Bar Docket Nos. 2013-D261 and
	:	2013-D463
A Member of the Bar of the District	:	
of Columbia Court of Appeals	:	
(Bar Registration No. 434607)	:	

REPORT AND RECOMMENDATION OF THE BOARD ON PROFESSIONAL RESPONSIBILITY

I. INTRODUCTION

This matter arises out of Respondent's repeated and protracted commingling of entrusted funds with her personal funds; her failure to maintain records concerning her handling of those entrusted funds; and her false statement on a U.S. District Court for the District of Columbia ("D.C. District Court") attorney renewal application. The full Hearing Committee found that Respondent commingled and failed to maintain adequate records in violation of Rule 1.15(a) and D.C. Bar R. XI, § 19(f),[1] and a majority of the Hearing Committee found that Respondent knowingly failed to correct the misrepresentation concerning her prior discipline on her renewal application, in violation of Rules 3.3(a)(1), 8.1(b), and 8.4(c).[2] In her Separate

[1] D.C. Rule XI, § 19(f) was in effect at the time of Respondent's misconduct, but was deleted from Rule XI as duplicative of Rule 1.15(a), effective March 1, 2016. *See* Order, No. M-251-15 (D.C. Feb. 4, 2016).

[2] The Hearing Committee found that Disciplinary Counsel did not prove by clear and convincing evidence that Respondent misappropriated client funds in violation of Rule 1.15(a); commingled

* 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.

Statement, the Chair of the Hearing Committee dissented only from the majority's finding that Respondent's failure to correct the misrepresentation about her disciplinary history was knowing, finding instead that Respondent's misconduct was reckless, thus concluding that she violated Rule 8.4(c), but not Rules 3.3(a)(1) or 8.1(b).

We concur with the full Hearing Committee's finding that Respondent commingled and failed to maintain adequate records in violation of Rule 1.15(a) and D.C. Bar R. XI, § 19(f). However, we agree with the Hearing Committee Chair and find that Respondent's misstatement on her renewal application for the D.C. District Court was made recklessly and, consequently, that Respondent violated Rule 8.4(c), but not Rules 3.3(a)(1) or 8.1(b). We also find Respondent's failure to correct that misstatement was done recklessly, and thus violated Rule 8.4(c).

This case is unusual in a number of respects. A considerable portion of the Hearing Committee's thorough and well-documented report was spent deliberating whether Respondent engaged in reckless or knowing dishonesty when she failed to report her 2009 public censure on a D.C. District Court attorney renewal form. Members of the Bar have a "duty . . . to be scrupulously honest at all times."[3] Here,

---

client "A.M.'s" funds with Respondent's own in violation of Rule 1.15(a); failed to segregate disputed funds in violation of Rule 1.15(d); failed to supervise her employees in violation of Rules 5.3(a) and (b); committed perjury in violation of Rule 8.4(b); knowingly made a false statement of fact in a Bar application in violation of Rule 8.1(a); or engaged in conduct that seriously interfered with the administration of justice in violation of Rule 8.4(d). Disciplinary Counsel does not take exception to these conclusions.

[3] *In re Cleaver-Bascombe*, 986 A.2d 1191, 1200 (D.C. 2010) (emphasis omitted) (citations omitted).

however, we are even more concerned with Respondent's recalcitrance in failing to safeguard entrusted funds.

For several years Respondent recklessly handled entrusted funds and failed to maintain the required records of those funds to such a degree that Disciplinary Counsel was wholly unable to determine whether a misappropriation had occurred. Moreover, Respondent began doing so shortly after being disciplined by the Court for precisely the same misconduct at issue here, and after having received extensive training on the handling of entrusted funds. The Hearing Committee unanimously recommended that Respondent receive a three-year suspension, with a requirement that she establish her fitness to practice law before she is reinstated. For the reasons discussed herein, we recommend that Respondent receive a two-year suspension with a fitness requirement as a condition of reinstatement.

II. FACTS

A. Respondent's Prior Discipline and Subsequent Training

Respondent was disciplined by the Court in March 2009 for the very same type of conduct at issue in this case. In the prior matter, she admitted that she commingled her funds with entrusted funds and failed to keep complete records of those funds. *In re Thomas-Edwards*, 967 A.2d 178, 179 (D.C. 2009) (per curiam). The Court publicly censured Respondent and ordered that she take five hours of pre-approved continuing legal education and meet with the manager of the Practice Management Advisory Service of the District of Columbia Bar (PMAS). *Id*.

Following the Court's Order, Respondent participated in multiple Continuing Legal Education (CLE) courses that provided comprehensive training on law firm financial account management, including recordkeeping and segregating client funds. FF 13-15.[4] Additionally, the Manager of PMAS assigned Leigh Manasevit, Esquire, to work extensively with Respondent from August 4, 2009 through September 13, 2010 to improve her firm's operations. FF 16. In particular, Mr. Manasevit met with Respondent to discuss the Rules concerning the handling of client finds, trust account deposits and disbursements, and maintaining records. FF 17. After her PMAS training concluded in September 2010, Respondent knew she could continue to seek assistance from the D.C. Bar regarding questions that she had about these issues but did not do so. FF 19-20.

B. Respondent's Extensive Commingling and Lack of Recordkeeping

In 2011, the year immediately following her probation period, Respondent was again mishandling entrusted funds. Despite understanding her obligations at that time, she again ceased to maintain accurate records of those funds. FF 29, 34. Indeed, by September 2013 she knew that Disciplinary Counsel was investigating her handling of entrusted funds, yet even in July 2015, when Disciplinary Counsel requested Respondent's IOLTA financial records (check registers, subsidiary client ledgers and monthly reconciliations) for the period from February 2011 through June 2015, Respondent could not provide those records, acknowledging that her files

[4] "FF" refers to the Findings of Fact contained in the Report and Recommendation of the Ad Hoc Hearing Committee.

were incomplete and disorganized. FF 26-29. The Hearing Committee found that Respondent's lack of recordkeeping was so egregious that it "stymied Disciplinary Counsel's efforts to reconcile or reconstruct the funds" in Respondent's accounts, "prevent[ing] Disciplinary Counsel from determining whether Respondent misappropriated entrusted funds." HC Rpt. at 36-37.

Respondent also continued to commingle entrusted and personal funds during this period. In fact, she deposited her own funds into her trust account so frequently and to such an extent that the Hearing Committee found that "client funds, firm operating funds and even earned fees were commingled such that it was difficult or impossible to identify which deposits and withdrawals were for what purpose." HC Rpt. at 36. Respondent admitted that she did not know how much of her own money or client funds remained in the account at various points in time. FF 31-34; Appendix A; *see also* Tr. 1322.[5] As the Hearing Committee report recounts in painstaking detail, in many instances it was unclear whether, in paying client expenses – or even refunding client funds – from her trust account, Respondent had actually used that particular client's funds, funds of a *different* client, or her own commingled funds.

[5] We adopt the findings of fact in the Hearing Committee report, including Appendix A thereto, and in the Chair's Separate Statement, and we make additional findings of fact, supported by clear and convincing evidence, pursuant to Board Rule 13.7.

The Hearing Committee report identifies the following such examples:

(i) March 28, 2012 payment of $362.56 on behalf of E.J.;[6]

(ii) May 2, 2012 payment of $200 on behalf of Santos Legacy;

(iii) April 1, 2013 and April 4, 2013 payments totaling $810 on behalf of Perry Payne;

(iv) April 9, 2013 refund in the amount of $1,333.33 to Nadine Gross; and

(v) October 18, 2013 payment of $400 on behalf of Glenn Zinn.

See HC Rpt. Appendix A at ¶¶ 85-89.

In an attempt to show that her mishandling of client funds was not intentional, Respondent elicited hearing testimony from the bank manager that Respondent made so many deposit mistakes that the bank employees routinely would meet and correct her transactions after Respondent left the bank. Tr. 666-67. Her handling of the bank accounts was so poor that that there was a "running joke" at the bank that the employees were eager for Respondent's husband (who assisted with managing the firm's financial matters) to resume that responsibility because he was "more diligent with the books." Tr. 667.

C. Respondent's False Statements in her *Pro Hac Vice* Application and D.C. District Court Renewal Application

Respondent's haphazard practices extended beyond her trust account management. On two separate occasions, she failed to disclose having received the public censure issued by the Court in 2009. On July 15, 2011, less than one year

[6] Respondent's IOLTA records reflected no deposits related to this client. HC Rpt. Appendix A at ¶ 85. At the hearing, Respondent could not explain whose funds were used to pay this client expense. *Id*.

after completing her probation, she falsely indicated on a *pro hac vice* form in the Eastern District of Virginia that she had "not been reprimanded in any court nor [had] there been any action in any court pertaining to [her] conduct or fitness as a member of the bar." FF 43. On July 28, 2011, Respondent signed and filed a triennial renewal application in the D.C. District Court. She again failed to disclose her prior disciplinary history in response to a direct question on the form calling for its disclosure. FF 50-51. The form asked that Respondent identify "[a]ll occasions, if any, on which you have been held in contempt of Court, convicted of a crime, censured, suspended, disciplined or disbarred by any Court since your last renewal date" and further stated "(If none, so state.)" FF 51 (emphasis omitted). Respondent hand-wrote "none" in response to the question. FF 52.

After opposing counsel in the Virginia matter discovered Respondent's disciplinary history and asked Respondent to explain the discrepancy on the *pro hac vice* form, Respondent promptly completed a revised *pro hac vice* application identifying the fact that she had been disciplined. FF 46-47. Although opposing counsel raised Respondent's disciplinary history only days after Respondent filed her D.C. District Court renewal application, Respondent did not revisit her application to confirm its accuracy. Tr. 1111-14. She did not correct the misrepresentation on the D.C. District Court renewal application until Disciplinary Counsel sent her an inquiry letter concerning the filing. FF 47, 53.

Again, Respondent does not dispute these facts. Rather, she defends that her misconduct was not intentional but instead was caused by her tendency to act hastily.

In support thereof, she sponsored hearing testimony from a former D.C. Superior Court Clerk, Jody Smith, who explained that, over the years, both the court and its staff had repeatedly advised Respondent to slow down and correct errors made in filings. FF 65. Ms. Smith had to return "thousands of times" forms improperly completed by Respondent, and Respondent failed to include even the correct case number on documents "half of the time." Tr. 473-74.

D. Respondent's Personal Challenges During this Period

In addition to her general habit of rushing, leading to errors, Respondent was suffering through a myriad of personal and family challenges during this period. Both Respondent's mother and husband were very ill during this time, and Respondent served as principal caretaker. FF 62; *see also* Tr. 749, 950-51, 1044-45. Additionally, Respondent provided care for other seriously ill family members between 2014 and 2015. FF 62. Due to her husband's illness, he could not consistently assist in her office between 2011 and 2015. Tr. 948-51. Respondent and her husband also endured significant financial difficulties from 2002 to 2016, exacerbated by Respondent's serious illness that prevented her from working regularly between 2005 and 2009. FF 60-61; HC Chair FF 24 & n.28.

III. CONCLUSIONS OF LAW

"[T]he Board is obliged to accept the hearing committee's factual findings if those findings are supported by substantial evidence in the record, viewed as a whole." *Cleaver-Bascombe*, 986 A.2d at 1194. We review *de novo* its legal conclusions and its determinations of ultimate fact. *In re Bradley*, 70 A.3d 1189,

1194 (D.C. 2013) (per curiam) (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*").

The full Hearing Committee concluded that Respondent commingled and failed to maintain adequate records in violation of Rule 1.15(a) and D.C. Bar R. XI, § 19(f). Although the majority of the Hearing Committee concluded that Respondent knowingly failed to correct the misrepresentation concerning her prior discipline on her D.C. District Court renewal application, in violation of Rules 3.3(a)(1), 8.1(b), and 8.4(c), the Chair of the Hearing Committee concluded instead that Respondent acted recklessly, thus concluding that she violated Rule 8.4(c), but not Rules 3.3(a)(1) or 8.1(b).

Disciplinary Counsel argues that the Board should adopt the Hearing Committee majority's conclusions of law. Respondent argues that she did not act knowingly as required by Rules 3.3(a)(1) and 8.1(b), or recklessly, for purposes of Rule 8.4(c), and that she is entitled to mitigation because of the challenges in her personal life at the time of the misconduct.

For the reasons discussed below, we find that Respondent commingled her funds with entrusted funds and failed to maintain records of those funds, violating Rule 1.15(a) and D.C. Bar R. XI, § 19(f). We further find that Respondent recklessly made and failed to correct the misrepresentation concerning her disciplinary history, and that she violated Rule 8.4(c), but not Rules 3.3(a)(1) or 8.1(b).

A. Respondent's Extensive and Protracted Commingling and Failure to Maintain Records in Violation of Rule 1.15(a) and D.C. Bar R. XI, § 19(f)

Attorneys in the District of Columbia must handle entrusted funds with "the care required of a professional fiduciary." *See* Rule 1.15, cmt. [1]. Rule 1.15, entitled "Safekeeping Property," and specifically provision (a), addresses both the attorney's mandate not to commingle her funds with entrusted funds, as well as the obligation to maintain records of entrusted funds. It requires a lawyer to "hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property." As the Court of Appeals repeatedly has underscored, this requirement provides important protections for client funds. "The rule against commingling has three principal objectives: to preserve the identity of client funds, to eliminate the risk that client funds might be taken by the attorney's creditors, and most importantly, to prevent lawyers from misusing/misappropriating client funds, whether intentionally or inadvertently." *In re Rivlin*, 856 A.2d 1086, 1095 (D.C. 2004) (per curiam) (appended Board Report); *see In re Hessler*, 549 A.2d 700, 702 (D.C. 1988) ("The rule against commingling was adopted to provide against the probability in some cases, the possibility in many cases, and *the danger in all cases* that such commingling will result in the loss of clients' money." (emphasis added) (citations omitted)). "By mingling client funds with the attorney's own, the client's funds become more difficult to trace." *Hessler*, 549 A.2d at 702. The inherent harm in comingling entrusted funds does not require moral turpitude for, "as far as the client is concerned[,] the result is the same whether his money is deliberately

misappropriated by an attorney or is unintentionally lost by circumstances beyond the control of the attorney." *Id.* (quoting *Clark v. State Bar*, 246 P.2d 1, 5 (Cal. 1952) (per curiam)).

Respondent does not dispute that she commingled her funds with entrusted funds on a protracted basis and failed to maintain records in violation of Rule 1.15(a) and D.C. Bar R. XI, § 19(f). Her concessions are supported by the substantial record evidence in this case, and we therefore conclude that she violated these Rules.

B. Respondent Engaged in Reckless Dishonesty, in Violation of Rule 8.4(c)

The only question pending before the Board concerning Respondent's misrepresentation of her disciplinary history is whether Respondent knowingly misrepresented her disciplinary history on the D.C. District Court renewal form and failed to correct that misrepresentation after she was on notice that she made the same misrepresentation on the Virginia *pro hac vice* form.[7] We find there to be clear and convincing evidence only that she did so recklessly.

Rule 3.3(a)(1) provides that "[a] lawyer shall not knowingly . . . fail to correct a false statement of material fact or law" that she "previously made to the tribunal." Rule 8.1(b) provides that "in connection with a Bar admission application," a lawyer "shall not . . . [f]ail to disclose a fact necessary to correct a misapprehension known

[7] Rule 8.5(b)(1) provides that "[f]or conduct in connection with a matter pending before a tribunal, the rules to be applied shall be the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise." Although Respondent's misrepresentation on the Eastern District of Virginia *pro hac vice* form was "in connection with a matter pending before a [Virginia] tribunal," Disciplinary Counsel declined to charge her with violating the Virginia disciplinary rules. Consequently, the majority of the Hearing Committee declined to find a violation of the D.C. Rules for this misrepresentation. Neither party challenged the issue before the Board.

by the lawyer or applicant to have arisen in the matter . . . ." Pursuant to Rule 8.4(c), "[i]t is professional misconduct for a lawyer to . . . [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Each of the foregoing Rules prohibits an attorney from either making or failing to correct false statements. However, only "knowing" misconduct violates Rules 3.3(a)(1) and 8.1(b), while "recklessness" is sufficient to violate Rule 8.4(c). *In re Romansky*, 825 A.2d 311, 317 (D.C. 2003).

Under the Rules, the terms "knowingly," "known," or "knows" denote "actual knowledge of the fact in question," Rule 1.0(f), which "may be inferred from circumstances." *Id*. On the other hand, recklessness is a state of mind in which a person demonstrates a disregard for the truth or falsity of the information supplied. *See In re Rosen*, 570 A.2d 728, 729 (D.C. 1989) (per curiam); *see also In re Romansky*, 938 A.2d 733, 741-42 (D.C. 2007) (defining recklessness as a state of mind in which a respondent consciously disregards the risk of his or her actions).

The majority of the Hearing Committee concluded that Respondent's failure to correct her false statement was done knowingly, in violation of Rule 3.3(a)(1), 8.1(b), and 8.4(c), because it did not credit her explanation that it was simply a mistake. HC Rpt. at 28, 34. We disagree with the majority that there is clear and convincing evidence of knowing dishonesty.

We agree with the Hearing Committee Chair, as stated in her Separate Statement, that there is clear and convincing evidence that Respondent's initial misstatement on the D.C. District Court form demonstrated a disregard for its truth

or falsity, *i.e.* recklessness. And we further find Respondent was reckless in her failure to correct that false statement. We are particularly troubled that, despite her prior discipline, Respondent did not undertake any requisite care or due diligence to ensure that she accurately completed the D.C. renewal application. Respondent's explanation that she had originally rushed through the form and made a mistake was consistent with the substantial evidence adduced at the hearing from multiple credible witnesses called by both Disciplinary Counsel and Respondent that she generally rushed and lacked attention to detail, but had an overall honest character. HC Rpt. at 87-91.[8]

The Hearing Committee majority's conclusion that Respondent knowingly chose not to correct timely the D.C. form was based in large part on her having recently been alerted to the misstatement on her *Virginia* form, HC Rpt. at 42-44. However, there was no evidence that Respondent had ever been alerted that her *D.C.* renewal application contained a misstatement. HC Chair FF 12. Notably, the Hearing Committee majority found that, while Respondent "*should have known*" that the statement on her D.C. renewal application was false, there was not clear and convincing evidence that Respondent actually knew its falsity *at the time*[] [*it was*] *made*. HC Rpt. at 44 (emphasis in original); *see also id.* at 34, 46 (unanimous findings of no clear and convincing evidence supporting Rule 8.1(a) (knowingly false statement) or Rule 8.4(b) (perjury) violations). We agree that being alerted to

[8] The Board reviews issues of a respondent's credibility *de novo*. *In re Luxenberg*, Board Docket No. 14-BD-083, at 12 (BPR July 6, 2017) ("'Actual knowledge' or whether Respondent acted 'knowingly,' is an ultimate fact, which we review *de novo*."), *matter dismissed*.

a misstatement on the Virginia form regarding prior discipline *should have* prompted Respondent to confirm the accuracy of her recently-filed D.C. renewal application, but there is no evidence that she obtained *actual* knowledge of the D.C. form's falsity since the time the misstatement had been made. To the contrary, Respondent's contemporaneous email to opposing counsel in Virginia explaining her (erroneous) understanding that the "federal court" renewal form required disclosure only of discipline within the last year is further evidence of recklessness, rather than knowing misconduct. FF 47; HC Chair FF 7.[9]

For all these reasons, we find that Respondent's misconduct in connection with her D.C. District Court renewal form violated Rule 8.4(c) and not Rules 3.3(a)(1) or 8.1(b).

IV. SANCTION RECOMMENDATION

Disciplinary Counsel contends that the Board should adopt the Hearing Committee's unanimous sanction recommendation of a three-year suspension with fitness. Respondent argues that she should receive a public censure. For the reasons set forth below, we recommend that Respondent be required to serve a two-year suspension with a fitness requirement.

[9] The Hearing Committee majority notes that under Respondent's articulated understanding of the requirement, her probation ended in September 2010, within one year of submitting her application in July 2011. HC Rpt. at 42. However, Respondent was censured in March 2009, more than two years before her renewal application, and there is no evidence as to whether Respondent's understanding was based on the completion of her probation, rather than the date of the Court's public censure.

A. Length of Suspension

As the Court has observed, the determination of the appropriate sanction is among the more difficult tasks in a disciplinary case and the choice of sanction is '"not an exact science."' *In re Ukwu*, 926 A.2d 1106, 1120 (D.C. 2007); *In re Edwards*, 870 A.2d 90, 94 (D.C. 2005) (quoting *In re Goffe*, 641 A.2d 458, 463 (D.C. 1994) (per curiam) (internal citation omitted)). The sanction imposed in an attorney disciplinary matter must protect the public and the courts, maintain the integrity of the legal profession, and deter the respondent and other attorneys from engaging in similar misconduct. *See, e.g.*, *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc); *In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013); *In re Cater*, 887 A.2d 1, 17 (D.C. 2005). "In all cases, [the] purpose in imposing discipline is to serve the public and professional interests . . . rather than to visit punishment upon an attorney." *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (en banc) (citations omitted); *see also Goffe*, 641 A.2d at 464. The sanction must not "foster a tendency toward inconsistent dispositions for comparable conduct or . . . otherwise be unwarranted." D.C. Bar R. XI, § 9(h)(1); *see, e.g.*, *Hutchinson*, 534 A.2d at 923-24; *Martin*, 67 A.3d at 1053; *In re Berryman*, 764 A.2d 760, 766 (D.C. 2000).

We must consider but are not limited to: (1) the seriousness of the conduct; (2) prejudice to the client; (3) whether the conduct involved dishonesty; (4) the presence or absence of violations of other provisions of the disciplinary rules; (5) previous disciplinary history; (6) whether or not the attorney acknowledged her wrongful conduct; and (7) aggravating or mitigating circumstances. *See In re Vohra*,

68 A.3d 766, 784 (D.C. 2013) (appended Board Report) (citing *Hutchinson*, 534 A.2d at 924); *Martin*, 67 A.3d at 1053 ; *In re Elgin*, 918 A.2d 362, 376 (D.C. 2007).

Seriousness of the Misconduct and Prejudice to Clients

The facts established in this case are quite serious. There is no dispute that Respondent engaged in commingling over a lengthy period of time, even after having just received extensive training concerning the proper handling of client entrusted funds. While neither party argues that any client was prejudiced by Respondent's misconduct, the extensive commingling coupled with Respondent's lack of recordkeeping was so severe and pervasive that Disciplinary Counsel simply could not determine whether or not any misappropriation had occurred.

Acknowledgment of Wrongful Conduct

Respondent violated three disciplinary Rules arising from her uncorrected misrepresentation to the court and her mishandling of entrusted funds. Respondent readily admits that she violated the Rules, although she denies engaging in reckless dishonesty. FF 29-31, 34, 81. She seems not to appreciate the seriousness of her misconduct, however. Her defense to the charges is, in essence, that she was not motivated by financial gain[10] and was going through significant personal challenges at the time. During oral argument before the Board, Respondent explained that she

[10] In a seeming effort to argue to the Board that her misconduct was not motivated by financial interests, Respondent emphatically stated "I don't care about money!" Board Oral Argument, September 13, 2018, 46:08-46:15. But Respondent's lack of care with clients' money is at the heart of this case.

did not cease practicing law during this difficult period in her life because "[she] had to feed [her] family" and "had no additional income to take care of them." Board Oral Argument, September 13, 2018, 5:50-5:55. While the Board is sympathetic to the significant personal difficulties Respondent encountered, these circumstances do not excuse any member of the Bar from her obligations to protect the safety of client entrusted funds. Further, Respondent knew of various D.C. Bar and PMAS resources available to her that she could have contacted for assistance. FF 19-20. We view Respondent's own statements to the Board as further evidence that she does not appreciate the seriousness of the Rule violations at issue here.

Dishonesty

While certain of Respondent's underlying misconduct involved dishonesty, we have found that her dishonesty was reckless and not knowing. Additionally, we have considered the consistent testimony from both Respondent's and Disciplinary Counsel's witnesses that she has a general character for being truthful and honest.

Mitigating Factors

We find no mitigating circumstances here. Respondent contends that the Hearing Committee failed to mitigate her sanction based on evidence that her misconduct was caused by a thyroid condition, anxiety, and depression. However, the record evidence in support of her contention that she suffered from these conditions is scant, at best. Respondent offered no testimony from a medical professional, or even medical records, concerning her condition or treatment. Nor is there sufficient evidence that any of these conditions caused her misconduct.

Finally, Respondent admitted to the Board that she has not recovered from any such conditions. Board Oral Argument, September 13, 2018, 10:55-11:00. Recovery, however, is required to establish entitlement to disability mitigation either pursuant to or outside of the formal *Kersey* process.[11] For all these reasons, the Hearing Committee properly declined to consider the asserted conditions in mitigation of sanction, and we are constrained to follow suit.

Aggravating Factor of Prior Disciplinary History

Respondent's disciplinary history serves as a significantly aggravating factor, particularly because her misconduct is "strikingly similar" to that in the prior disciplinary matter and occurred so soon after her probation and training concluded. *In re Omwenga*, 49 A.3d 1235, 1239 (D.C. 2012) (per curiam) (respondent had been the subject of discipline in three '"strikingly similar"' matters (quoting Hearing Committee Report)); *In re Douglass*, 859 A.2d 1069, 1086 (D.C. 2004) (per curiam)

---

[11] Respondent did not formally assert a disability in mitigation of sanction pursuant to *In re Kersey*, 520 A.2d 321 (D.C. 1987), which would have required her to show: (1) by clear and convincing evidence that she was under a disability at the time of the violations; (2) by a preponderance of the evidence that the disability substantially affected her conduct in violating the Rules; and (3) by clear and convincing evidence that she has been substantially rehabilitated from the disability. *See also In re Stanback*, 681 A.2d 1109, 1114-15 (D.C. 1996).

Even when a respondent fails to seek mitigation of sanction under *Kersey*, she may put evidence into the record establishing that (1) there is a causal connection between the misconduct and the disability, and (2) she has recovered from the alleged disability. *See In re Weiss*, Bar Docket No. 263-97, at 5-6, 13-14 (BPR Apr. 27, 2000) (accepting disability mitigation evidence after the respondent withdrew a formal 7.6 notice under Kersey), *recommendation adopted*, 839 A.2d 670, 671 (D.C. 2003); *see also In re Steele*, 630 A.2d 196, 199 (D.C. 1993) (recognizing that "cooperation with Bar Counsel, remorse, illness, or stress" are mitigating factors to be considered in assessing sanction). A respondent who successfully asserts disability outside of the formal *Kersey* process is not entitled to have the entire period of his or her suspension stayed in favor of probation, but the disability is taken into account in imposing a sanction.

(appended Board report) (prior discipline for similar misconduct aggravated the sanction, since it indicated that the respondent had "not internalized the obligation to pursue client matters with the appropriate promptness, preparation, diligence, and zeal").

Comparability

Pursuant to D.C. Bar R. XI, § 9(h), we must recommend a sanction that is consistent with those imposed in cases involving comparable misconduct. Although there are no cases involving conduct comparable to Respondent's, based on our analysis of precedent involving commingling accompanied by dishonesty, and considering the significantly aggravating factors present here, we recommend a two-year suspension.

Sanctions for commingling and failure to maintain records, standing alone, generally have ranged from public censure to brief periods of suspension. *See Martin*, 67 A.3d at 1053 (quoting *In re Berryman*, 764 A.2d 760, 767 (D.C. 2000) (alteration in original) (internal citations omitted)); *see, e.g.*, *In re Mott*, 886 A.2d 535 (D.C. 2005) (per curiam) (public censure for commingling, failure to deposit client funds in a designated trust or escrow account, and failure to maintain records); *In re Ukwu*, 712 A.2d 502 (D.C. 1998) (per curiam) (stayed 30-day suspension for commingling and failure to maintain records); *In re McGann*, 666 A.2d 489 (D.C. 1995) (per curiam) (appended Board Report) (30-day suspension for commingling and failure to maintain records). The Court also has imposed short periods of suspension for isolated instances of dishonesty, *see Martin*, 67 A.3d at 1053 (citing

In re Hawn, 917 A.2d 693, 693 (D.C. 2007) (per curiam) (30-day suspension for falsifying transcript)); *In re Owens*, 806 A.2d 1230, 1231 (D.C. 2002) (per curiam) (30-day suspension for false statements to administrative law judge); *In re Schneider*, 553 A.2d 206, 212 (D.C. 1989) (30-day suspension for falsifying receipts), and longer suspensions where the dishonesty is protracted or accompanied by other serious violations, *see Martin*, 67 A.3d at 1053-54 (citing *In re Wright*, 885 A.2d 315, 316-17 (D.C. 2005) (per curiam) (one-year suspension for pattern of dishonesty in several matters)); *Ukwu*, 926 A.2d at 1120 (two-year suspension for neglecting client's matters, dishonesty to client, and false statements to Bar Counsel)).

We view this case as sufficiently extraordinary as to be distinguishable from the foregoing precedent involving commingling. Respondent's handling of her clients' entrusted funds demonstrated the epitome of a conscious indifference as to the safety of those funds. In this regard, we find instructive *In re Ahaghotu*, 75 A.3d 251 (D.C. 2013).

In *Ahaghotu*, the Court disbarred a respondent whose reckless handling of entrusted funds led to a single instance of misappropriation, lasting only one day. The Court considered whether the respondent handled the entrusted funds "in a way that suggests the unauthorized use was inadvertent or the result of simple negligence, or in a way that reveals either an intent to treat the funds as [his] own or a conscious indifference to the consequences of his behavior for the security of the funds." *Id.* at 256 (quoting *In re Anderson*, 778 A.2d 330, 339 (D.C. 2001)). The Court found

that a number of the "hallmarks" of recklessness were present in his handling of entrusted funds.[12] The respondent had not "handle[d] his clients' funds in a way that protected them from obvious danger." *Id.* at 257. Notably:

> Mr. Ahaghotu had been on notice for more than a year that either his internal accounting practices were lacking . . . . His commingling of funds only papered over the problem and, unfortunately, showed a continued lack of interest in tracking what client funds were available at any given moment. . . . He [] was '"indiscriminate"' in the way he thought of the money in his trust account—disbursing funds without regard to how they matched up with previous deposits . . . .

Id. These facts bear a striking resemblance to the misconduct at issue here.

Here, while Disciplinary Counsel could not discern whether Respondent had misappropriated any client funds due to her self-described "sloppy records," Respondent engaged in the same conscious indifference as in *Ahaghotu.*[13] After more than one year of training by PMAS and demonstrating to their satisfaction that she understood what the Rules require to maintain the safety of entrusted funds, Respondent eschewed all that she had learned within months. *See, e.g.*, *In re Pleshaw*, 2 A.3d 169, 173-74 (D.C. 2010) (Respondent "demonstrated that he was aware of and understood [the rules] but he nonetheless disregarded them for his own convenience. This alone constitutes 'conscious indifference.'"). Respondent's

[12] Such "hallmarks" of recklessness include "the indiscriminate commingling of entrusted and personal funds"; a "complete failure to track settlement proceeds"; the "total disregard of the status of accounts into which entrusted funds were placed, resulting in a repeated overdraft condition"; "the indiscriminate movement of monies between accounts"; and finally "the disregard of inquiries concerning the status of funds." *Ahaghotu*, 75 A.3d at 256 (citations and quotation marks omitted).

[13] During the evidentiary hearing, Respondent stated to the Hearing Committee: "With respect to the records, I'll concede it . . . . I'll fall on my sword with that." "Sloppy records, I'll eat it, because it's true . . . ." HC Rpt. at 19.

accounting practices were wholly lacking, as she well knew from her extensive PMAS training. She even elicited hearing testimony from the bank employee that she regularly made mistakes in the accounts, further demonstrating that Respondent was on notice at the time of her accounting problems. She commingled her own funds in her trust account with those of her clients. She indiscriminately disbursed funds from the account on behalf of clients, with no regard as to whether there had been any previous deposits from which those disbursements could be made. She handled entrusted funds as if they were fungible, when they are not.

We recognize that *Ahaghotu* is distinguishable from this matter because Mr. Ahaghotu was proved to have engaged in the unauthorized use of client funds for a single day, whereas here Disciplinary Counsel simply could not determine from Respondent's inadequate records whether a misappropriation had occurred. Thus, disbarment is not appropriate in this case. However, we view *Ahaghotu* to be more comparable than other cases involving commingling and deficient recordkeeping and to compel a lengthy suspension.

No non-misappropriation case involves comparable facts, but the cases of *In re Daniel*, 11 A.3d 291 (D.C. 2011), and *Martin*, 67 A.3d 1032, support a two-year suspension here, where Respondent's protracted commingling was recidivist and accompanied by reckless dishonesty.

In *Daniel*, the Court imposed a three-year suspension where the respondent's commingling involved dishonest intent. Specifically, Mr. Daniel exploited his position as an attorney and used his client trust accounts to hide his personal assets

from the IRS. *See* 11 A.3d at 299. Further, he committed multiple violations of Rule 8.4(c) (dishonesty), including submitting a false affidavit to the Hearing Committee, continued to deny his misconduct, and had previously received three informal admonitions for different rule violations. *See id.* at 296-97, 300-01.

In *Martin*, the Court suspended an attorney for eighteen months where, among other Rule violations, he commingled disputed client funds with his own (in violation of Rule 1.15(a)) and engaged in multiple instances of dishonesty (in violation of Rule 8.4(c)), including a false statement in his Virginia bar application. 67 A.3d at 1053-54. While the *Martin* Court acknowledged that "no cases involving comparable facts exist[ed] in this jurisdiction," *see id*. at 1055, it determined that a lengthy suspension was necessary because "honesty is basic to the practice of law" and the respondent's dishonesty was "both protracted and intended to conceal or excuse earlier misconduct." *Id*. at 1053-54 (internal quotation marks and citation omitted).

Respondent's misconduct here did not involve the dishonest intent and other aggravating factors that warranted the three-year suspension in *Daniel*. To be clear, we take very seriously Respondent's reckless dishonesty before the D.C. District Court. Respondent consciously disregarded the risk that her statement to the court regarding her prior discipline was less than honest, a responsibility that is "basic" to the practice of law. *Martin*, 67 A.3d at 1053. Respondent's reckless dishonesty also was not the protracted dishonesty that led to an eighteen-month suspension in *Martin*. However, whereas the Court considered, in mitigation, that Mr. Martin had

no prior discipline in twenty years of practice, *id*. at 1055, here Respondent had previously and recently been censured for precisely the same misconduct at issue in this matter. Respondent's previous discipline for commingling is a significant aggravating factor not present in *Martin*, and one that we conclude warrants a lengthier suspension. In addition, Mr. Martin commingled the funds of a single client after a fee dispute arose; by contrast, Respondent's commingling was pervasive and protracted, much more comparable to the conduct in *Ahaghotu*.

It is Respondent's egregious and protracted recidivism immediately following her probationary period and extensive PMAS training that we find to be one of the most significant factors in recommending a two-year suspension. Respondent's conscious indifference to the safety of entrusted funds in these circumstances, combined with her reckless approach to her renewal application, compels a suspension of this length in order to protect the public and the courts, and to deter similar misconduct. *See, e.g.*, *Hutchinson*, 534 A.2d at 924; *Martin*, 67 A.3d at 1053.

B. Fitness as a Condition of Reinstatement

Respondent argues that there is no evidence that she is unfit to practice law. The Hearing Committee determined otherwise. They unanimously found that a fitness requirement was appropriate "[i]n light of Respondent's record of prior disciplinary action and failure to adhere to the practices she learned during her disciplinary probation, along with her demonstrated inability to effectively manage the stress involved with caring for her family and running an ethically compliant practice . . . ." HC Rpt. at 56. We agree.

To impose a fitness requirement as a condition of reinstatement, the record "'must contain clear and convincing evidence that casts a serious doubt upon the attorney's continuing fitness to practice law.'" *In re Adams*, 191 A.3d 1114, 1120 (D.C. 2018) (per curiam) (citing *In re Cater*, 887 A.2d 1, 24 (D.C. 2005)). "Serious doubt is a real skepticism, not just a lack of certainty," *id.*, the proof of which "involves 'more than no confidence that a Respondent will not engage in similar conduct in the future.'" *Id.* (quoting *In re Guberman*, 978 A.2d 200, 213 (D.C. 2009) (brackets and internal quotation marks omitted)). "[W]hile the decision to suspend an attorney for misconduct turns largely on the determination of historical facts, the decision to impose a fitness requirement turns on a partly subjective, predictive evaluation of the attorney's character and ability." *Cater*, 887 A.2d at 22.

In *Adams*, the Court acknowledged that there is no bright-line test for determining whether and when an attorney is fit to practice law but stated that the "court historically has imposed a fitness requirement when an attorney shows a lack of remorse; failed to cooperate or engaged in questionable conduct during the disciplinary process; engaged in repeated neglect of client matters; engaged in repeated misconduct of the type for which the attorney was previously disciplined; or failed to resolve misconduct attributed to her personal problems and pressures." 191 A.3d at 1121. In light of these factors, imposing a fitness requirement in this matter is warranted. *See also In re Salgado*, 207 A.3d 168, 168-69 (D.C. 2019) (per curiam) (fitness requirement was appropriate to protect the public where the

respondent admitted to extended failure to maintain records and having commingled personal funds with entrusted funds).

Respondent has shown little appreciation of the seriousness of her misconduct. She has engaged in the very same misconduct for which she was previously disciplined and for which she received intensive training. While we find no clear and convincing evidence of intentional dishonesty in this matter, the degree of Respondent's recklessness rendered her unable to accurately complete *pro hac vice* and renewal application forms involving questions that should have triggered heightened care given Respondent's disciplinary history. Nor is there evidence that she has resolved the issues underlying the misconduct. Respondent has not, for example, shown that she has developed any mechanisms to avoid making the very serious mistakes that result from her habit of rushing. Thus, Disciplinary Counsel has proven by clear and convincing evidence that there is a serious doubt as to her fitness to practice law.

Respondent argues that she should be permitted to practice in a small firm provided she has a qualified accountant to handle the finances. Resp. Reply Br. at 11-12.[14] Indeed, in responding to the Board's questions during oral argument, Respondent requested, and appears to acknowledge that she may require, a perpetual

[14] The Hearing Committee majority recommended that reinstatement be conditioned upon Respondent not working in a solo or small practice for a period of time, but rather a larger firm, which in the majority's view could ensure compliance with the Rules. HC Rpt. at 60. There is no record evidence that a large firm practice would better ensure Respondent's rule compliance, and we decline to recommend that reinstatement be conditioned upon such a practice limitation to which Respondent has not agreed. *Cf. In re Mance*, 171 A.3d 1133, 1144 (D.C. 2017) (respondent agreed to work in larger law firm).

practice monitor to ensure compliance with the Rules. Board Oral Argument, September 13, 2018, 13:25-14:00.

We do not believe a perpetual practice monitor would be permissible under the Rules. D.C. Bar R. XI, § 3(a)(7) provides that any period of probation shall be no more than three years. Practice monitors are generally appointed as a term of such probation. *See, e.g.*, *In re Cappell*, 866 A.2d 784 (D.C. 2004) (per curiam) (regular psychiatric treatment, practice monitor, quarterly reports); *In re Temple*, 629 A.2d 1203, 1210 (D.C. 1993) (sobriety monitor, practice monitor, financial monitor, meeting with financial consultant); *In re Peek*, 565 A.2d 627, 634 (D.C. 1989) (counseling and practice monitor); *see also In re Verra*, 932 A.2d 503, 505 (D.C. 2007) (per curiam) (psychotherapy and other reporting requirements). Read together, the foregoing supports our view that a practice monitor may not be imposed for a term in excess of three years.

Moreover, we view Respondent's request for a perpetual practice monitor as additional evidence that even Respondent does not believe that she is able to conform her law practice to the Rules. Based on the record in this matter, we have a serious doubt as to Respondent's fitness to practice law in the future.

V. CONCLUSION

For the reasons discussed herein, we recommend that Respondent be suspended for two years, with a requirement that she prove fitness before

reinstatement.[15] Respondent's attention should be directed to the responsibilities of suspended attorneys set forth in D.C. Bar R. XI, §§ 14 and 16, and to the fact that for purposes of reinstatement, the period of her suspension shall be deemed to run from the date on which she files the affidavit required by D.C. Bar R. XI, § 14(g). *See In re Slosberg*, 650 A.2d 1329, 1331-33 (D.C. 1994).

BOARD ON PROFESSIONAL RESPONSIBILITY

By: Elissa J. Preheim

Elissa J. Preheim

All members of the Board concur in this Report and Recommendation except Ms. Pittman and Ms. Soller, who are recused, and Ms. Smith, who did not participate.

[15] The Court's recent opinion in *Salgado*, suspending the respondent for thirty days for failure to maintain records and commingling, does not compel a different result. 207 A.3d at 168. There, the Court echoed the Board's concern that the length of suspension may have been insufficient alone, but agreed with its conclusion that the fitness requirement imposed on the respondent would sufficiently protect the public. *Id.* Furthermore, *Salgado* did not involve the aggravating circumstances present here. Accordingly, we do not believe that the length of suspension in *Salgado* compels a different sanction here.