THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Issued
May 10, 2021

In the Matter of:	:	
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DONALD R. HARRIS,	:	
	:	
Respondent.	:	Board Docket No. 19-BD-004
	:	Disc. Docket No. 2017-D364
A Suspended Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 485340)**	:	

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

All of the conduct at issue in this matter took place in Ohio. Respondent, who is only licensed to practice in the District of Columbia, practiced bankruptcy law in the federal court in Ohio under the federal practice exemption in the state's unauthorized practice of law rules. The Baileys, a husband and wife, retained Respondent to assist them with the return of their minor children who were in the custody of a local child services agency. While the Baileys already had a court-appointed attorney to assist them with the state court custody matter, they were told to retain a separate "civil attorney" which led them to Respondent. Custody proceedings are typically state law matters that are resolved in state court. Respondent did not adequately disclose that he was not barred in the state of Ohio

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* 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.

** Respondent was suspended from the practice of law in the District of Columbia pursuant to D.C. Bar R. XI § 13(c) pending final resolution of these disciplinary proceedings. *In re Harris*, 241 A.3d 243 (D.C. 2020) (per curiam).

or that he was a federal bankruptcy attorney with no experience in child custody cases. Because Respondent was only admitted to practice in federal court in Ohio, his single option was to file a federal court action based on federal constitutional grounds. Constricted by this limitation, Respondent crafted a strategy that required a showing that the child services agency in Lucas County, Ohio treated Black parents differently in comparison to White parents. Even if what the Hearing Committee termed Respondent's "moonshot" tactic prevailed, it would not have resulted in the return of the Baileys' children because a federal court does not have jurisdiction over child custody matters. Hearing Committee Report ("HC Report") at 4 (referring to "moonshot federal claim"). Respondent's intended strategy, its low likelihood of success and the outcome (if attained) was never explained to the Baileys. What the Baileys understood after meeting with Respondent was his assurance that he would get their children back.

Hearing Committee Number Eleven (hereinafter, the "Hearing Committee") determined that Respondent violated District of Columbia Rules of Professional Conduct (the "Rules") 1.4(b) (failure to explain a matter to a client), 1.15(a) (failure to maintain records and intentional, or at least reckless misappropriation), 1.15(e) (treatment of advanced unearned fees), and 8.1(a) (knowingly false statement of fact in connection with a disciplinary matter), but not 1.15(a) (commingling), 1.5(a) (unreasonable fee), or 8.4(c) (dishonesty, fraud, deceit, or misrepresentation). The Hearing Committee recommended that Respondent be disbarred for intentional misappropriation and determined that Respondent failed to establish his *Kersey*

mitigation claim because he failed to prove by clear and convincing evidence that he suffered from a disability during the relevant time period.

Respondent admitted to violating Rule 1.15(a)'s recordkeeping requirements before the Hearing Committee but takes exception to the Hearing Committee's Report and Recommendation, arguing before the Board that in relevant part that he did not engage in any misconduct because he used disclaimers to inform clients that his practice was limited to federal law, that he fully informed the Baileys of his strategy and that they specifically retained him because of his strategy and federal court experience. Respondent asks that he not be sanctioned and that the Board consider that he was under extreme health and mental duress at the time of the events at issue. Disciplinary Counsel supports the Hearing Committee's Report and Recommendation, except for its failure to find violations of Rules 1.5(a) (unreasonable fee) and 8.4(c) (dishonesty, fraud, deceit, or misrepresentation), and its failure to recommend restitution as a condition of reinstatement.

We agree with the Hearing Committee's conclusion that Respondent violated Rules 1.4(b), 1.15(a) (recordkeeping and misappropriation), 1.15(e) and 8.1(a). We also agree with the Hearing Committee's conclusion that Disciplinary Counsel failed to prove a Rule 1.15(a) commingling violation because there was no clear and convincing evidence establishing that the clients' entrusted funds were intermingled with other unentrusted funds in Respondent's operating account. We disagree with the Hearing Committee's determination that Disciplinary Counsel did not prove by clear and convincing evidence that Respondent violated 1.5(a) or 8.4(c), and

conclude that Respondent violated these Rules for the reasons discussed below. We agree with the sanction recommendation that Respondent be disbarred for intentional misappropriation, and that Respondent failed to establish his *Kersey* mitigation claim. Finally, we recommend that Respondent be required to make full restitution to Mrs. Bailey as a condition of reinstatement.

I. STANDARD OF REVIEW

Disciplinary Counsel bears the burden of proving the alleged Rule violations by clear and convincing evidence, which is "'evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established.'" *In re Cater*, 887 A.2d 1, 24 (D.C. 2005) (quoting *In re Dortch*, 860 A.2d 346, 358 (D.C. 2004)). In deciding whether Disciplinary Counsel has carried this burden, we are required to accept the Hearing Committee's factual findings that are supported by substantial evidence in the record as a whole, even where the evidence may support a contrary view as well. *In re Robbins*, 192 A.3d 558, 564 (D.C. 2018) (per curiam); *In re Martin*, 67 A.3d 1032, 1039 (D.C. 2013); *In re Godette*, 919 A.2d 1157, 1163 (D.C. 2007). "Substantial evidence means enough evidence for a reasonable mind to find sufficient to support the conclusion reached." *In re Thompson*, 583 A.2d 1006, 1008 (D.C. 1990) (per curiam). The Board reviews *de novo* the Hearing Committee's legal conclusions and its determinations of ultimate fact. *In re Bradley*, 70 A.3d 1189, 1194 (D.C. 2013) (per curiam).

II. PROCEDURAL BACKGROUND

Respondent was charged with failing to explain a matter to the extent reasonably necessary to permit the client to make an informed decision regarding the representation in violation of Rule 1.4(b); charging and collecting an unreasonable fee in violation of Rule 1.5(a); failing to keep complete records of entrusted funds, commingling advanced unearned fees with his own funds and intentional or reckless misappropriation by using the Baileys' advanced fee before it was earned and without the clients' authorization, all in violation of Rule 1.15(a); failing to treat the Baileys' advanced fee as their property by placing these funds into a trust account in violation of Rule 1.15(e); knowingly making false statements of fact to Disciplinary Counsel in violation of Rule 8.1(a); and, engaging in conduct involving dishonesty, fraud, deceit and misrepresentation in violation of Rule 8.4(c). Respondent filed an answer on January 28, 2019 denying the charges against him, and asserting a claim under *In re Kersey*, 520 A.2d 321 (D.C. 1987), specifically that his disability of depression and diabetes, should be considered as mitigation of any sanction.

A hearing was held on April 23-25, 2019 before the Hearing Committee. The Hearing Committee recommended that Respondent be disbarred for intentional misappropriation, as Respondent failed to meet his burden for *Kersey* mitigation. As to the other charges, the Committee recommended that the Board find violations of Rules 1.4(b), 1.15(a) (recordkeeping), 1.15(e) and 8.1(a) and also recommended that the Board find that Disciplinary counsel did not prove by clear and convincing

evidence that Respondent violated 1.5(a) (unreasonable fee) and 1.15(a) (commingling). The Hearing Committee also concluded that Disciplinary Counsel had not proven that Respondent engaged in conduct that violated Rule 8.4(c) (dishonesty, fraud, deceit, or misrepresentation), that had not already been addressed in the finding of other Rule violations.

Respondent filed exceptions to both the Hearing Committee's factual findings and the sanction recommendation. Disciplinary Counsel does not object to the Hearing Committee's factual findings or the sanction recommendation of disbarment but objects to the legal conclusions that Respondent's misconduct did not violate Rules 1.15(a) (commingling), 1.5(a) (unreasonable fee) or 8.4(c) (dishonesty, fraud, deceit, or misrepresentation).

III. FINDINGS OF FACT

We fully adopt the Hearing Committee's factual findings. Respondent was admitted to the Bar of the District of Columbia on March 1, 2004. He is not licensed to practice law in any other state but is admitted to practice before Ohio federal courts where he principally practices bankruptcy law. FF 1.

By the time that Victoria and Armond Bailey consulted with Respondent regarding their child custody issue, their children had been removed from their home after a finding of abuse by the Lucas County Children Services ("Children Services") with respect to their youngest daughter. FF 2-3. Their minor children were placed in foster care and, after approximately a year and a half, the children were removed from foster care by Children Services because the foster parents kept the children in

‘“unsatisfactory”’ conditions and subjected them to abuse. FF 4 (quoting, in part, DX 11 at 4). Thereafter, Children Services sought permanent custody of Mrs. Bailey’s minor children in state juvenile court. *Id.* Approximately a year later in October 2016, the juvenile court ordered the return of the Mrs. Bailey’s three oldest minors but terminated her parental rights to her five youngest children. Mrs. Bailey timely appealed this decision. FF 6.

During the entirety of the state court proceedings, including the appeal, the Baileys were represented by court-appointed counsel. They sought Respondent’s services because they were advised by the children’s therapist to seek separate “civil” counsel to supplement their court-appointed attorney’s representation. The Baileys did not know what a “civil” attorney meant, but an internet search led them to Respondent. FF 4.

Mrs. Bailey initially contacted Respondent and his firm in December 2015, but she could not afford Respondent’s $2,500 advance fee. FF 5. A little over a year later she was able to pay Respondent’s fee via credit card. On January 3, 2017, three months after the state juvenile court order, the Baileys met with Respondent in order to retain him to assist them in the return of their children. FF 6-7. During this meeting, Respondent learned that the appeal of the Ohio juvenile court’s custody order was pending before the Ohio Court of Appeals. Respondent told the Baileys that he could help them get their children back by ‘“forc[ing] [Children Services] to return custody of the children to [them].”’ He did not explain how he would accomplish this goal including the nature of the claim(s) that he would raise.

Respondent never revealed the scope of his experience or expertise, specifically that he had never handled a child custody matter, that he was principally a bankruptcy attorney and that his practice was limited to the federal courts in Ohio. He also did not explain to the Baileys that child custody matters are state matters and that federal courts do not have jurisdiction. *See* FF 9-10 (second alteration in original) (quoting DX 22 at 1).

Respondent asserts that the Baileys came to him because Children Services was treating Black parents unfavorably in comparison to White parents with respect to custody issues. In other words, Black parents were having their children removed, and their parental rights terminated, at a much higher rate in comparison to White parents. Respondent readily acknowledges that the only action he could take to effectuate the return of the Baileys' children was a federal court action premised on a constitutional violation. He believed that the Baileys hired him because he was best suited to handle this case because he was a Black attorney and that they specifically agreed with his federal court strategy because they already had a court-appointed attorney handling the state court action. Respondent also claims that they knew the limitations of his practice because he included licensure disclaimers in his correspondence and on his website. *See* HCX 1 n.1 ("Licensed in Washington DC and Northern District of Ohio Federal Courts, not admitted in Ohio or New York.").

During their meeting, the Baileys executed a "Retainer Letter." Respondent's Retainer Letter itself makes no mention of the fact that Respondent's practice was confined to the federal courts in Ohio or that he was not barred in the state. The

cover letter that accompanied the agreement confusingly provided, '"Please note that we have both Federal [sic] and State attorneys at our firm."' FF 8 (quoting HCX 1 at 1).

The agreement called for a $2,500 advanced fee and specified a $300 hourly rate for Respondent's services. Both the agreement and the cover letter indicated that the advanced fee would be held in trust and applied towards time and expenses incurred during the course of the representation. FF 13. Instead of depositing the Baileys' payment into a trust account, the funds were deposited into Respondent's PayPal account, minus the $67.50 PayPal fee. FF 14-15. Most of the Baileys' money, $2,100, was immediately transferred to Respondent's firm's operating account where he used it for personal and business expenses including employee payroll, rent and a Sears bill. FF 19, 21. As detailed in the Hearing Committee's Report, Respondent failed to maintain any of the Baileys' money in trust and in fact, overdrew his operating account ten times. FF 23. He had not earned the Baileys' funds at the time that he disbursed them for his personal use; he did not obtain their authorization or otherwise keep them informed of the status of their entrusted funds and he did not keep any records of the $2,500 paid to him. FF 24-26.

Towards the latter half of January 2017, Respondent hired Miles Mull. Even though Mr. Mull lacked any legal experience (except for taking online classes towards a degree in paralegal studies), as part of his interview process, Respondent asked Mr. Mull to research a "hypothetical" child-custody case. Mr. Mull provided his results prior to being hired. FF 27-28. Approximately two weeks after he started

working at Respondent's firm, Respondent assigned Mr. Mull the task of researching the Bailey child custody matter and preparing a draft complaint. It was at this point that Mr. Mull learned that the "hypothetical" he researched during the interview process was actually the Baileys' case. FF 31.

During the one-month period that Mr. Mull worked on the Baileys' case, he drafted a chronology, a memorandum regarding Ohio child custody cases, a "Case Brief" and a draft complaint (collectively, the "work product"). According to Mr. Mull, he was the '"lead"' person working on the Bailey matter; Respondent provided limited input regarding edits, identifying the venue for filing and citations to applicable statutes. FF 32-34 (quoting Tr. 209). Respondent claims that he was the one who created the work product and that Mr. Mull was simply a "scriber." Board Oral Argument Tr. 15. The Hearing Committee found that Respondent made no edits to Mr. Mull's work, however, Mr. Mull testified that he did not know if Respondent or anyone else worked on the Baileys' file after he left the firm in May 2017. Tr. 288. Mr. Mull acknowledged that Respondent provided input into the complaint and that he required assistance in order to complete it. Tr. 287. While we cannot discern who did what or to what extent, what is evident is that the work product is irregular and deficient in most respects but adequate in other respects. For example, the chronology appears to be a sufficiently detailed timeline while the case summary is riddled with misspellings and syntax errors. DX 7 ("Calendar of Events"); DX 8 (Case Brief).

The draft complaint recites specific events related to the Baileys' child custody matter and attempts to connect these facts to a denial of due process claim. The complaint does not, however, bear out the theory of the case that Respondent described at the hearing or during oral argument before the Board. Specifically, Respondent asserted that he planned to pursue a federal civil rights claim akin to a class action based on how Children Services treated White families more favorably in comparison to Black families. HC Report at 46; Board Oral Argument Tr. 10-13. However, the complaint lacks any allegations regarding this issue or any other "facts" that would otherwise support a disparate treatment claim. A review of the complaint reveals a document that is inadequate for filing with a court. For example: (1) asserts venue under 28 U.S.C. § 1331 (federal question) without citation to 28 U.S.C. § 1391 (venue generally) or statement explaining why the District Court for the Northern District of Ohio, Western Division was the proper forum (DX 9 ¶ 2); (2) includes citation to 28 U.S.C. § 1331 (federal question) but fails to reference 28 U.S.C. § 1343 (civil rights) (DX 9 ¶¶ 1-2); (3) asserts a claim under 42 U.S.C. § 1983 without explanation regarding "under color of state law" (DX 9 ¶¶ 1, 27); (4) the statement of facts fails to identify and explain how the specific action or policy was applied in a disparate manner based on race (DX 9 at 2-4); (5) and the prayer for relief requests dismissal and remand, despite the fact that there was no appeal pending before the court (DX 9 ¶ 32). Additionally, it is unclear what, if any, work Respondent or any employee of the firm performed on the Baileys' case after Mr.

Mull separated from the firm in May of 2017. *See* FF 34-37; Tr. 288; *see also* DX 29 (invoice).

On June 23, 2017, the Ohio Court of Appeals affirmed the juvenile court's custody order. FF 38. Respondent claims that he was waiting for the conclusion of the state case (FF 9) (quoting Tr. 372) before proceeding with the federal action, however, there is no evidence in the record that he took any action after the appellate decision was issued. Several months after the appellate court decision, on October 31, 2017, Respondent met with the Baileys at the Toledo library wherein he informed them that he lacked the '"manpower"' to handle their case. Mrs. Bailey suggested that she could help by putting the case files in chronological order. Respondent accepted her offer of assistance and promised to email her on how to proceed. FF 40-41 (quoting Tr. 54). Respondent never followed up with Mrs. Bailey as he had promised, and when she and her husband confronted Respondent at his office a month later, he had no explanation other than that he was still grieving over the loss of his mother but at the same time, appeared to be continuing to practice law as he was '"in a rush . . . to go to another hearing."' FF 44, 47-48 (quoting Tr. 66-67).

Shortly thereafter, Mrs. Bailey terminated Respondent and filed a complaint with the Office of Disciplinary Counsel on December 18, 2017. FF 49-52. On January 4, 2018, Respondent generated, for the first time, an invoice containing time entries concerning his legal work on the Baileys' case. FF 53. On February 8, 2018, Respondent generated a second "draft" invoice that included "new" time entries in

comparison to the January invoice. By this time, Respondent was aware that Disciplinary Counsel was investigating Mrs. Bailey's complaint and that Mrs. Bailey had requested a refund of her fee advance. FF 56. The February invoice had erroneous entries to include, for example, attributing the creation of a "calendar of events" to another employee when Mr. Mull created this document and a time charge on January 3, 2017 for Mr. Mull even though Mr. Mull did not start working at the firm until January 29, 2017. FF 57. Both the January and February 2018 invoices reflected a billing rate of $350 and not the $300 rate agreed to in the Retainer Letter. FF 58. Disciplinary Counsel asked Respondent twice during its investigation to explain the creation of the two invoices, and whether he had sent the invoices to the Baileys. FF 60 (DX 23); FF 62 (DX 27). Respondent made representations to Disciplinary Counsel, during the investigation and at the hearing during his testimony, that the invoices were created and delivered to the Baileys before the representation was terminated. FF 63-64, 66.

IV. CONCLUSIONS OF LAW

Respondent filed objections to both the findings and sanction recommendation. In his five-page brief to the Board containing his exceptions, Respondent expended a considerable portion of his brief on the issue of whether it was inappropriate for the Hearing Committee to have cited findings by the Ohio Supreme Court in two unrelated cases.[1] The Hearing Committee's citations to the

[1] Specifically, in *Disciplinary Counsel v. Harris*, 996 N.E.2d 921, 923 (Ohio 2013), the court found that Respondent was not subject to the disciplinary authority of the court because he was not a

Ohio Supreme Court's decisions were used to clarify threshold issues including that Respondent was not admitted to practice in Ohio and why the District of Columbia Rules of Professional Conduct were being applied to events that occurred entirely in another state. The findings in the Ohio state cases are not the subject of this disciplinary proceeding, are not part of the record here and have no bearing on the charged violations of the rules of this jurisdiction or the recommended sanction of disbarment.

A. Rule 1.15(a) and (e)

Respondent is charged with three violations of Rule 1.15(a): (1) failing to keep complete records of entrusted funds, (2) commingling advanced unearned fees with his own funds and (3) intentional or reckless misappropriation by using the Baileys' advanced fee before earned and without the clients' authorization. Respondent acknowledged that he violated the recordkeeping requirements of Rule 1.15(a) by failing to maintain complete records of his client's entrusted funds[2], but contests the remaining violations.[3]

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member of the Ohio bar. *See* HC Report at 3, n.2. In *In re Application of Harris*, 804 N.E.2d 429, 431-32 (Ohio 2004) (per curiam), the court discussed Respondent's character and moral qualifications in denying his application to become a member of the Ohio bar. *See* HC Report at 2, n.1.

[2] The Hearing Committee found that Disciplinary Counsel proved the Rule 1.15(a) recordkeeping violation by clear and convincing evidence based in part on Respondent's admission that he did not keep complete records. HC Report at 40 (citing Parties' Joint Stipulation, ¶ 17). Respondent did not address this determination in his brief to the Board.

[3] The Hearing Committee concluded that Disciplinary Counsel failed to prove the Rule 1.15(a) commingling violation because it could not establish by clear and convincing evidence that the Baileys' entrusted funds were intermingled with other unentrusted funds in the Respondent's

1. Rule 1.15(a) Misappropriation

Rule 1.15(a) prohibits the misappropriation of entrusted funds. The Hearing Committee found that the clients paid Respondent an advanced fee, and thus, he was required to hold the funds in trust until he had earned those funds by performing legal services. The Hearing Committee found that Disciplinary Counsel proved that Respondent misappropriated the clients' advanced fee when he withdrew the fee from his account before it had been earned. The Hearing Committee also found that Respondent's misappropriation was intentional because he '"calculatingly disbursed' his clients' funds to satisfy unrelated personal obligations before the funds were earned." HC Report at 38 (quoting ODC Reply Br. to the Hearing Committee at 5-6). In the alternative, the Hearing Committee found that Respondent's misappropriation was "reckless in the extreme" because he transferred entrusted funds into his operating account, and failed to track his use of those funds. *Id.* We agree with the Hearing Committee's findings.

Respondent did not address the misappropriation issue in his brief to the Board and did not meaningfully contest it at oral argument. At oral argument, Respondent contended that there was no intent to fraudulently misappropriate the clients' funds, but he did not identify any factual or legal errors in the Hearing Committee's analysis. *See* Board Oral Argument Tr. 13-15. Disciplinary Counsel supports the

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operating account. HC Report at 39. Disciplinary Counsel did not challenge this determination in its brief to the Board, and Respondent did not address the issue in his brief to the Board. We agree with the Hearing Committee's commingling findings for the reasons stated in the Report and Recommendation. *See id.*

Hearing Committee's analysis, but did not separately address this Rule violation in its brief.

Misappropriation is defined as "any unauthorized use of client's funds entrusted to [a lawyer], including not only stealing but also unauthorized temporary use for the lawyer's own purpose, whether or not [the lawyer] derives any personal gain or benefit therefrom." *In re Edwards*, 808 A.2d 476, 482 (D.C. 2002) (first alteration in original, citation and quotation marks omitted). Advances of unearned fees are client funds that must be held as entrusted funds "until they are earned by the lawyer's performance of legal services." *In re Mance*, 980 A.2d 1196, 1203 (D.C. 2009); Rule 1.15(e). To prove misappropriation here, Disciplinary Counsel must establish that the balance in Respondent's account fell below the amount of fees that he had not yet earned through the performance of legal services, and thus, the amount that he was required to hold in trust for his clients. *In re Ekekwe-Kauffman*, 210 A.3d 775, 794 (D.C. 2019) (per curiam).

It is easy to find that Respondent engaged in misappropriation. After receiving the Baileys' advance fee via PayPal, Respondent transferred the bulk of the payment to his operating account where he promptly used the funds for personal and business expenses. By January 9, 2017, Respondent had spent at least $2,311 of the Baileys' funds. Even if the Board were to accept, *arguendo*, the validity of the time entries contained in Respondent's two *post hoc* invoices, Respondent had spent at least $1,286 more than what he had allegedly earned by this date. Accordingly, Disciplinary Counsel has established by clear and convincing evidence

that Respondent engaged in misappropriation by using the Baileys' entrusted funds without authorization.

We must next consider Respondent's state of mind, whether his conduct was intentional, reckless, or negligent. *See In re Anderson*, 778 A.2d 330, 336-37 (D.C. 2001). Intentional misappropriation most obviously occurs where an attorney takes a client's funds for the attorney's personal use. *See id.* at 339 (intentional misappropriation occurs where an attorney handles entrusted funds in a way "that reveals . . . an intent to treat the funds as the attorney's own" (citations omitted)). The Court has found intentional misappropriation where the respondent used entrusted funds to pay personal and business expenses. *In re Cappell*, 866 A.2d 784 (D.C. 2004) (per curiam). The level of intent may be established by circumstantial evidence. *See In re Mabry*, 11 A.3d 1292 (D.C. 2011) (per curiam).

"Reckless misappropriation reveal[s] an unacceptable disregard for the safety and welfare of entrusted funds, and its hallmarks 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." *In re Ahaghotu*, 75 A.3d 251, 256 (D.C. 2013) (internal quotation marks and citation omitted) (alteration in original); *see also Anderson*, 778 A.2d at 339 ("[R]ecklessness is a state of mind in which a person does not care about the consequences of his or her action." (citation and quotation

marks omitted)). Further, "'[r]eckless misconduct requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts that would disclose this danger to any reasonable person.'" *Anderson*, 778 A.2d at 339 (quoting 57 Am. Jur. 2d Negligence § 302 (1989)). Thus, an objective standard should be applied in assessing whether a respondent's misappropriation was reckless.

2. Rule 1.15(e) Advanced Fee Held in Trust

Both the Retainer Letter (agreement) and cover letter indicated that the Baileys' advanced fee would be held in a trust account. Respondent knew that he was required to hold the Baileys' funds in trust, but their funds never even touched a trust account as required by Rule 1.15(e). The funds went from Respondent's PayPal account immediately into the firm's operating account where they were disbursed for personal and business expenses, including credit card bills, employee payroll, rent and a Sears bill. On January 4, 2017, the balance in the operating account fell to $1,298.89, which was well below what he was required to hold in trust. Less than one week after receiving the advanced fee, Respondent used all of the $2,100 that he had transferred, leaving the operating account with a negative balance.

At no point did Respondent inform the Baileys that he had used their funds or requested their consent to use their funds. He never provided them with an invoice, billing statement or any other indication as to how their funds were used.

3. Respondent's Intentional or Reckless Misappropriation of Advanced Fees

Based on these circumstances, we agree with the Hearing Committee's findings that the immediate transfer of the advanced fee to the firm account to pay personal and business expenses before the work had even begun, establishes that Respondent's conduct was intentional. *See, e.g.*, *In re Grigsby*, Board Docket No. 14-BD-103, *et al.* at 2-3 (BPR Nov. 14, 2016) (finding intentional misappropriation where the respondent transferred advanced fees from his trust account to his operating account before performing services to earn the fees), *recommendation approved where no exceptions filed*, 167 A.3d 551 (D.C. 2017) (per curiam). We also agree with their finding that, in the alternative, Respondent's conduct was reckless "in the extreme" because he failed to track his client's funds in any manner, and had a total disregard for the status of his account in which he placed these entrusted funds, which resulted in the repeated overdraft of his firm's operating account, coupled with the indiscriminate movement of money from his PayPal account to his operating account where it was disbursed for his personal needs. Finally, we agree with the Hearing Committee that Respondent's failure to treat the Baileys' advanced fee as their property by placing these funds into a trust account violated 1.15(e).

B. Rule 1.4(b)

The Hearing Committee found that Respondent violated Rule 1.4(b) because he failed to explain to the clients that he had never handled a child custody case, that he was not licensed to practice in Ohio, and that child custody matters are typically

matters of state law that are resolved in state courts. Disciplinary Counsel supports the Hearing Committee recommendation.

Mrs. Bailey testified that she contacted Respondent after she reviewed a "complaint" and learned that Children Services sought to terminate Mrs. Bailey's parental rights over her oldest daughter and other of her children. According to Mrs. Bailey, her daughter "had nothing to do with it. She was not a part of the '14 case. But the way that this paper had read is if she was part of it. And so they had took my daughter." Tr. 35. It was the children's therapist who suggested that Mrs. Bailey seek out a "civil attorney." Mrs. Bailey performed an internet search which led her to Respondent. A week after contacting his firm, Mrs. Bailey spoke to Respondent and explained that the agency had "stolen [her] daughter and [her daughter] had nothing to do with this case. And I asked if he – if there was any way that he could help me. And he said, yes, that he wanted me to call back . . . tomorrow and he would have his secretary explain the process, and then we would go from there." Tr. 37-38. When Mrs. Bailey called the next day, Respondent's secretary informed her that she would need to pay $2,500 in order for Respondent to begin working on her matter. Tr. 38.

Approximately a year later, after Mrs. Bailey was able to pay Respondent's fee via a credit card, she and her husband met with Respondent on January 3, 2017. During this meeting, she reiterated to Respondent what had happened with their first seven children and "now our eighth child has been taken." Tr. 44. Respondent told her that all they needed to do was pay the $2,500 and that "the agency had been

asking questions," "but now they would be having to ask him questions, and all we needed to do was give the money and sign the agreement." Tr. 44-45. Mrs. Bailey understood that this meant that Respondent would now deal directly with the agency on her behalf. She further explained, "first, he had to get our children back for us, *then* we would deal with the agency itself." Tr. 45 (emphasis added).

Rule 1.4(b) requires that an attorney "shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." The attorney "must be particularly careful to ensure that decisions of the client are made only after the client has been informed of all relevant considerations" and "must initiate and maintain the consultative and decision-making process if the client does not do so and [to] ensure that the ongoing process is thorough and complete." Rule 1.4, cmt. [2]; *see also In re Askew*, 225 A.3d 388, 396 (D.C. 2020) (per curiam) (to satisfy Rule 1.4(b), '"a lawyer not only must respond to client inquiries but also must initiate communications to provide information when needed"' (quoting *In re Hallmark*, 831 A.2d 366, 374 (D.C. 2003))).

Respondent argues that the clients wanted a "federal attorney," as they already had an attorney licensed to practice in the Ohio courts. He also argues that the clients were sufficiently sophisticated to understand his role as a "federal attorney," as demonstrated by the fact that were able to make a disciplinary complaint against Respondent in the District of Columbia and not in Ohio, where the representation occurred. Disciplinary Counsel asserts that Respondent knew it was a legal

impossibility to overturn a state custody order through federal action, yet he failed to inform his client of his inability to assist her due to the limitations of his practice. Respondent acknowledged before the Hearing Committee that he was '"well aware that we couldn't have forced the overturn [of the custody order] because this was a state issue."' ODC Br. to the Hearing Committee at 6-7 (alteration in original) (quoting Harris Closing Argument, Tr. 434).

Regardless of his intention, "Respondent had an obligation to adequately 'explain his approach, including that he could *not* overturn the existing custody order,' so that the Baileys could make an informed decision about whether to engage him." HC Report at 29 (emphasis in original) (quoting ODC Br. to the Hearing Committee at 27). As the Hearing Committee noted, "A member of the general public cannot be expected to have fluency in what can be subtle distinctions between state and federal practice . . . [and] if an attorney intends to rely on such distinctions, the onus is on the attorney to make clear and explicit in writing exactly what [he] can or cannot do for those who have entrusted their problems to [him]." FF 11.

On the record before us, it is evident that Respondent failed to provide Mrs. Bailey with information sufficient for her to make an informed decision regarding his representation. FF 43; *see also* Tr. 48, 106 (Bailey). Respondent's Retainer Letter also falls short of providing the required disclosures. The cover letter that accompanied the agreement was also confusing if not outright misleading regarding the limitations of his practice. It stated, '"Please note that we have both Federal [sic] and State attorneys at our firm."' FF 8 (quoting HCX 1). Conflating the bar

admissions of the attorneys that periodically worked at his firm in this manner is the exact opposite of Respondent's obligation to reasonably inform the Baileys about his status as an out-of-state attorney and the attendant limitations on his practice.

Mrs. Bailey had extremely limited resources. She initially could not afford the $2,500 fee that Respondent required in order to represent her. While she was clearly desperate, she likely would not have retained him if he had explained to her that child custody matters are typically within the exclusive purview of the state courts, that Respondent was only admitted in federal court and, therefore, he could only file an action on her behalf in federal court using an approach that had an extremely low likelihood of success.

Moreover, what Respondent told Mrs. Bailey he *would* do for her if she retained him is inconsistent with what he *could* do for her. He told her that his first priority would be to obtain the return of her children and after this goal was achieved, he would "deal with the agency." The limitations inherent in a federal suit on a child custody matter would actually result in the reverse. First, Respondent would have to "deal with the agency" by asserting a federal claim based on due process and/or disparate treatment grounds, that Mrs. Bailey was treated unfairly by Children Services. Second, by Respondent's own testimony, the goal of the federal suit was to force Children Services to reevaluate the decision regarding the custody of the Baileys' children using the same standard that applied to White families. Tr. 380. And if Mrs. Bailey was successful in the "reevaluation," her children would have been returned to her. This true sequence of events, as opposed to the snake oil that

Respondent peddled to Mrs. Bailey to induce her to retain him, further supports our conclusion that Respondent violated 8.4(c), as discussed below.

C. Rule 8.1(a)

The Hearing Committee found that Respondent violated Rule 8.1(a) by submitting false billing statements to Disciplinary Counsel in response to Disciplinary Counsel's request for information about Mrs. Bailey's complaint. Respondent did not address this issue in his brief. Disciplinary Counsel supports the Hearing Committee's recommendation.

Rule 8.1(a) provides that "a lawyer . . . in connection with a disciplinary matter, shall not . . . [k]nowingly make a false statement of fact[.]" "Knowingly" is defined as "actual knowledge of the fact in question[,]" which "may be inferred from circumstances." Rule 1.0(f).

When Disciplinary Counsel asked about the discrepancies between the January and February invoices, Respondent answered that both invoices were created in October 2017, presumably in advance of his meeting at the Toledo Library with the Baileys on October 31, 2017. Respondent confirmed this during his testimony at the hearing. However, contrary to Respondent's representations, the invoices were created in January and February of 2018 and also utilized an inflated billing rate. There is no evidence that these invoices were provided to the Baileys either before or after they terminated Respondent in December 2017. We therefore agree with the Hearing Committee's finding that Disciplinary Counsel proved a violation of Rule 8.1(a) by clear and convincing evidence.

D. Rule 8.4(c)

Before the Board, Disciplinary Counsel argues that Respondent violated Rule 8.4(c), in that he engaged in dishonesty, fraud, deceit and/or misrepresentation because he knowingly mislead the Baileys to believe that he would be able to reunite them with their children, even though he knew that that relief could not be obtained in federal court, that he had no intention of actually working on the case, instead instructing a non-lawyer assistant to perform needless "make-work" in order to create an ostensible basis for taking the fees, and finally that he engaged in fraud by intentionally taking the fee advanced under false pretenses and spending the funds. Disciplinary Counsel also argues that Respondent lied to Disciplinary Counsel during its investigation with respect to the post-hoc invoices, as discussed above. Respondent argues that the Baileys knew that he intended to file a civil rights claim requesting that the federal court order the local child services agency to hold a fair hearing, which would have resulted in a new hearing in state court, which presumably would have led to an opportunity for family reunification.

Despite finding that Disciplinary Counsel had made "a compelling case" on the Rule 8.4(c) charge, the Hearing Committee did not find a violation because it did not find that Respondent committed acts violative of Rule 8.4(c) "which have not otherwise been addressed in the disposition of other violations alleged in this proceeding." HC Report at 46. However, it is not unusual that the same misconduct violates numerous Rules. *See In re Drew*, 693 A.2d 1127, 1132 (D.C. 1997) (per curiam) (appended Board report); *see also Cater*, 887 A.2d at 16 n.14 ("There is no

preemption, however, where . . . the lawyer is found to have violated the more specific Rule. In that case it remains appropriate to determine whether the lawyer also transgressed the more general Rule."). We therefore disagree with the Hearing Committee's declination to consider the charged Rule 8.4(c) violation because the facts that Disciplinary Counsel argued supporting such a violation were already covered by other Rule violations. We agree with Disciplinary Counsel that Respondent's actions and statements about his ability to reunite Mrs. Bailey with her children involved dishonesty, deceit, fraud, and misrepresentation. ODC Br. to the Board at 19.

Dishonesty may be any "conduct evincing a lack of honesty, probity or integrity in principle; [a] lack of fairness and straightforwardness. . . ." *In re Shorter*, 570 A.2d 760, 767–68 (D.C. 1990) (per curiam) (alteration in original, citation and quotation marks omitted).

Deceit is the "suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact." *Shorter*, 570 A.2d at 767 n.12 (citation and quotation marks omitted). To establish deceit, the respondent must have knowledge of the falsity, but it is not necessary that the respondent have intent to deceive or defraud. *In re Schneider*, 553 A.2d 206, 207, 209 (D.C. 1989) (finding deceit where attorney intentionally submitted false travel expense forms but did not intend to deceive the client or law firm and there was no personal gain); *see also Shorter*, 570 A.2d at 767 n.12.

Misrepresentation is a "statement . . . that a thing is in fact a particular way, when it is not so." *Shorter*, 570 A.2d at 767 n.12 (citation and quotation marks omitted); *see also Schneider*, 553 A.2d at 209 n.8 (misrepresentation is element of deceit). Misrepresentation requires active deception or a positive falsehood. *Ekekwe-Kauffman*, 210 A.3d at 796; *see also Shorter*, 570 A.2d at 768. The failure to disclose a material fact also constitutes a misrepresentation. *See In re Outlaw*, 917 A.2d 684, 688 (D.C. 2007) (per curiam) ("Concealment or suppression of a material fact is as fraudulent as a positive direct misrepresentation.") (citations and quotation marks omitted). The misrepresentation need not be intentional, statements made in reckless disregard of the truth violate Rule 8.4(c).

By the time that Mrs. Bailey met with Respondent, he knew that her children had been taken away by Children Services and that she was unable to retain him a year earlier because she could not afford the $2,500 fee advance he required. Tr. 38 (Bailey). Mrs. Bailey was that much more desperate a year later when she met with Respondent while facing the removal of her eighth child, and paid his fee using a credit card. Tr. 39-40, 44. Respondent represented to Mrs. Bailey that all she had to do was pay his fee and he would get her children back. This is further supported by Respondent's own words, because he admitted that he told Mrs. Bailey that "he could attempt to 'force [Children Services] to return custody of [her] children.'" FF 10 (first alteration in original) (quoting DX 22 at 1). This was an untrue statement because, as a federal bankruptcy attorney, without an Ohio law license, he did not have the ability to challenge an Ohio state custody order in federal court let alone

have a federal court return her children. Respondent never explained this substantial limitation, instead relying on confusing disclaimers that would be lost on a lay person. He also never explained the type of claim that would be asserted in federal court, or that even if his federal court action was somehow successful it still would not result in the immediate return of her children. At best, under Respondent's theory of the case, the federal court could order Children Services to reevaluate the Bailey custody decision using the standard allegedly applicable to White families. *See* Tr. 380, 434 (Harris Closing Argument explaining that he was "well aware that we couldn't have forced the overturn [of the custody order] because this was a state issue."). Respondent's statements to Mrs. Bailey that he could return her children under these facts were dishonest and deceitful.

We find that Respondent was also dishonest in his communications with the Baileys that he intended to pursue their case. Respondent assured the Baileys that he was waiting for the conclusion of the state court action before filing the federal court complaint. However, after the state appeal was decided, instead of filing the federal action, Respondent sought to withdraw entirely from the case stating that the reason the federal complaint could not be filed was due to his lack of "'manpower"' despite the fact the complaint had already been drafted. FF 41 (quoting Tr. 54). When Mrs. Bailey offered to assist him with the manpower issue by organizing the case files, Respondent agreed, but then did not email her as promised and did not return her calls or texts. FF 44-46. When the Baileys ultimately appeared in person at Respondent's office in November 2017, Respondent again reassured them he

would email but did not do so. FF 47-48. Mrs. Bailey finally terminated Respondent when she became frustrated with him leading her on about filing the complaint. FF 49. We find that Respondent was dishonest in misrepresenting to the Baileys why their already drafted and paid for federal complaint could not be filed.

As Disciplinary Counsel noted in its brief before the Board, even if Respondent "believed there were some one-in-a-million chance to pursue a federal claim that could affect child custody, it was incumbent on him to explain that to Mrs. Bailey." ODC Br. to the Board at 17. Moreover, Respondent "could not satisfy his ethical obligation to be honest, fair, and straightforward without explaining the dire, if not non-existent, odds of challenging child custody in federal court." *Id.* The failure to disclose to Mrs. Bailey that even if the federal suit were successful, the state custody order would not be overturned was a significant and material fact that Respondent failed to disclose to Mrs. Bailey.

Disciplinary Counsel also argues that Respondent violated Rule 8.4(c) by fraudulently inducing Mrs. Bailey to pay the $2,500 under the false pretense of returning her children and then intentionally spending the funds before they were earned. ODC Br. to the Board at 18-19. Fraud "embraces all the multifarious means . . . resorted to by one individual to gain an advantage over another by false suggestions or by suppression of the truth." *Shorter*, 570 A.2d at 767 n.12 (citation and quotation marks omitted). Unlike dishonesty, however, fraud requires a showing of intent to deceive or to defraud. *See In re Romansky*, 825 A.2d 311, 315 (D.C. 2003). Evidence of intent will almost always be circumstantial and can be

inferred by a respondent's behavior. *See In re Ukwu*, 926 A.2d 1106, 1116 (D.C. 2007) ("Intent must ordinarily be established by circumstantial evidence, and in assessing intent, the court must consider the entire context . . . . [I]t is generally in the interests of justice that the trier of fact consider the entire mosaic." (internal citation and quotation marks omitted)).

Respondent accepted the Baileys' fee on January 3, 2017 after misrepresenting his ability to return custody of their children. FF 10, 12, 14. Respondent immediately began transferring the Baileys' funds to his other accounts to pay for his own expenses before the fees were earned. FF 18-21 (detailing transactions occurring January 3-5, 2017), 25. Later in January 2017, Respondent hired an inexperienced paralegal student to research a complex custody issue and draft a federal complaint. FF 27-28, 31. The Hearing Committee found that although Respondent provided some suggestions, edits, and guidance on citation to applicable statutes, Mr. Mull was the lead person drafting the four relevant documents in the clients' file. FF 33-34. After the Baileys filed a disciplinary complaint, Respondent created invoice entries for work that was not performed and used an inflated billing rate to justify keeping the funds for himself. *See* FF 56-57. Compounding this conduct, Respondent thereafter did not refund the $2,500, even after receiving an email from Mrs. Bailey requesting that he return this sum. FF 51, 55. We find that this mosaic shows a clear and convincing picture that Respondent engaged in fraud when he intentionally took advantage of Mrs. Bailey by falsely convincing her that he could handle the custody case although he had no intent of

actually performing services on the matter or pursuing the representation in federal court, and that he did this so that he could improperly use the clients' funds for his own use.

For these reasons, the Board concludes that Disciplinary Counsel has proven, by clear and convincing evidence, that Respondent violated Rule 8.4(c) by engaging in dishonesty, fraud, deceit, and misrepresentation when convincing the Baileys to retain him to pursue a federal case for child custody then using the funds for his own use before abandoning the case. We also find a violation of Rule 8.4(c) based on Respondent's misrepresentations regarding the creation and content of his post-representation invoices (FF 56-58), and whether he had provided the invoices to the Baileys (FF 62-63).

E. Rule 1.5(a)

The Hearing Committee found that while there is some basis to conclude that the charged fee was *per se* unreasonable because Respondent failed to adequately explain the limitations of his practice, the approach he planned to take in a federal court action – and the result even if he was successful, there was no Rule 1.5(a) violation. HC Report at 31-32. The Hearing Committee concluded that "Disciplinary Counsel failed to establish by clear and convincing evidence that a properly informed client could not properly have been charged $2,500 for the legal work" that was performed. *Id.*

Disciplinary Counsel argues that Respondent's fee was unreasonable *ab initio* because his proposed approach had no chance of success.[4] Even if Respondent believed that his "moonshot" federal claim might obtain the requested relief, it was unreasonable to charge the clients without first explaining that his plan had little, if any, chance of success. Disciplinary Counsel's argument is premised on the argument that Respondent deprived the Baileys of making an informed choice and thus charging any amount was unreasonable. Respondent does not specifically address this issue in his brief, but maintains that the clients wanted a "federal" lawyer to pursue civil rights claims.

We disagree with the Hearing Committee's analysis and conclusion, and find that Disciplinary Counsel proved a violation of Rule 1.5(a). We have concluded that Respondent failed to provide Mrs. Bailey with information sufficient for her to make an informed decision regarding his representation. *Supra* at pgs. 20-24 (Rule 1.4

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[4] Because Disciplinary Counsel's argument is that Respondent charged an unreasonable fee *ab initio* it does not address the factors generally used to analyze the reasonableness of a legal fee. Rule 1.5(a) provides that "[t]he factors to be considered in determining the reasonableness of a fee include the following:

> '(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) The fee customarily charged in the locality for similar legal services;
> (4) The amount involved and the results obtained;
> (5) The limitations imposed by the client or by the circumstances;
> (6) The nature and length of the professional relationship with the client;
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
> (8) Whether the fee is fixed or contingent.'"

violation). Respondent gave dishonest and deceitful assurances to Mrs. Bailey that he could return her children in order to induce her to pay his fees, although he had no intention of pursuing their case. *Supra* at pgs. 27-28 (Rule 8.4(c) violation). After obtaining the retainer, Respondent handed the matter over to a newly-hired, inexperienced legal assistant, who drafted a deficient complaint. In reviewing Respondent's lack of effort on behalf of the Baileys and his attempt to hide that fact with dishonest billing statements, it is clear that the fee he alleges was earned was inaccurately calculated. But the mosaic further shows that Respondent fraudulently charged a legal fee when he falsely convinced the client that he could handle the custody case although he had no intent of actually performing services. The purpose of his fraud was to improperly use the clients' funds for his own use. *Supra* at pgs. 29-31 (Rule 8.4(c) violation). In sum, Respondent dishonestly and fraudulently convinced the Baileys to enter into a retainer agreement and pay a $2,500 advanced fee for services that Respondent never intended to provide. Respondent did not provide any benefit to the Baileys in their quest for custody because the draft complaint was never completed or filed. We agree with Disciplinary Counsel that these facts establish that Respondent's fee was unreasonable *ab initio*, and violates Rule 1.5(a).

V. SANCTION

The Hearing Committee recommended that Respondent be disbarred for intentional misappropriation. Respondent argues that he was under "severe health and mental duress during" the relevant time period, which warrants consideration.

Respondent further objects to any immediate suspension, citing "due process consideration[s]" until "the Court makes its final rul[ing]." Resp. Br. to the Board at 4-5. Disciplinary Counsel supports the Hearing Committee's recommendation, but asks that Respondent's reinstatement be conditioned upon proof of restitution of the $2,500 legal fee, plus interest, to the clients. ODC Br. to the Board at 23-24.

A. Disbarment for Intentional Misappropriation

Absent "extraordinary circumstances," disbarment is the presumptive sanction for intentional or reckless misappropriation. *In re Addams*, 579 A.2d 190, 191 (D.C. 1990) (en banc); *In re Hewett*, 11 A.3d 279, 286 (D.C. 2011); *see also In re Mayers*, 114 A.3d 1274, 1279 (D.C. 2015) (per curiam) ("'[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.'" (alteration in original) (quoting *Addams*, 579 A.2d at 191)). A lesser sanction may be imposed if the respondent is entitled to mitigation of sanction pursuant to *In re Kersey*, 520 A.2d 321 (D.C. 1987). *See In re Merritt-Bagwell*, 122 A.3d 874, 875-76 (D.C. 2015) (per curiam) (disbarment stayed in favor of three years of probation). We agree with the Hearing Committee's sanction analysis and recommend that the Court disbar Respondent for intentional misappropriation.

B. *Kersey* Mitigation

Before the Hearing Committee Respondent sought *Kersey* mitigation, which means that he was required to prove

(1) by clear and convincing evidence that he had a disability;

> (2) by a preponderance of the evidence that the disability substantially affected his misconduct; and
>
> (3) by clear and convincing evidence that he has been substantially rehabilitated.

In re Lopes, 770 A.2d 561, 567 (D.C. 2001); *In re Stanback*, 681 A.2d 1109, 1114-15 (D.C. 1996).

Respondent asserted that at the time of the misconduct, he was "operating under acute depression," and that uncontrolled diabetes and periods of hypoglycemia caused lapses in judgment, disorientation, memory loss and insomnia. HC Report at 52-53 (quoting FF 71). The Hearing Committee found that Respondent did not sustain his *Kersey* burden because he did not establish by clear and convincing evidence that he suffered from a disability at the time of the misconduct. While his employee's testimony tended to corroborate Respondent's timeline regarding the onset of the symptoms of his asserted disabilities, the only objective medical evidence he submitted postdated the conduct in question by many months. *Id.* at 53. The Hearing Committee did not consider the other *Kersey* factors, but noted that his mitigation witness was unable to confirm that Respondent's alleged disabilities were a substantial cause of his misconduct or that Respondent was substantially rehabilitated. *Id.* at 53-54.

Respondent asks that the Board consider his health, but does not specifically identify any errors in the Hearing Committee's *Kersey* mitigation analysis, or otherwise argue that there is clear and convincing evidence that he was suffering from a disability at the time of the misconduct. Disciplinary Counsel supports the

Hearing Committee's analysis, arguing that Respondent offered no supporting medical records or testimony from any treating physician or other health care professional to establish by clear and convincing evidence that he suffered from any disability during the relevant period. Respondent's misconduct with respect to the Baileys' representation occurred January through December 2017, and his misconduct during the disciplinary investigation occurred January through April 2018. The only medical records Respondent submitted were dated September 2018.

We agree with the Hearing Committee's findings as well as its conclusion that Respondent's lack of acceptance of any responsibility or recognition of the facts that transpired further undercuts his failure to meet his burden to establish that he is entitled to *Kersey* mitigation.

C. Restitution

Disciplinary Counsel argues that the Board should also recommend that Respondent be ordered to pay restitution to Mrs. Bailey in the amount of $2,500, plus interest at the statutory rate. There appear to be three grounds asserted for this request. First, that restitution should be ordered based on fact that the $2,500 was an unreasonable fee *ab initio* and/or Respondent failed to perform the work contracted for, either of which violates Rule 1.5(a). Second, that the taking of the $2,500 was a result of at least reckless dishonesty in violation of Rule 8.4(c). Third, that the failure to explain the limitations of the representation to the Baileys violates Rule 1.4(b). Respondent did not file a response to the restitution argument.

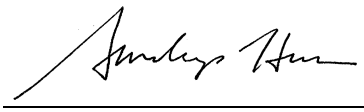
Under D.C. Bar R. XI, § 3(b), "the Court or the Board may require an attorney to make restitution . . . to persons financially injured by the attorney's conduct . . . as a condition of probation or of reinstatement . . . ." Restitution is designed to restore to the client any unearned benefit that the client has conferred on the attorney. *In re Robertson*, 612 A.2d 1236, 1240-41 (D.C. 1992) (Restitution is "a payment by the respondent attorney reimbursing a former client for the money, interest, or thing of value that the client has paid or entrusted to the lawyer in the course of the representation."); *see also In re Hager*, 812 A.2d 904, 923 (D.C. 2002) (restitution prevents unjust enrichment). 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).

We agree with Disciplinary Counsel that the $2,500 advanced fee the Baileys paid was an unreasonable fee *ab initio*. Respondent obtained the funds through dishonest and fraudulent means with the intent of using the funds for his own purposes, violating Rules 1.15(a) and 8.4(c). The $2,500 he collected for his services was far more than appropriate in light of the work he performed, the lack of value he provided to Mrs. Bailey, and the incompetent legal services he provided to her. Under these circumstances, we recommend that the Court require Respondent to pay restitution to Mrs. Bailey in the amount of $2,500 with interest at the statutory rate of 6% per annum, accruing from January 3, 2017, as a condition of reinstatement.

VI. CONCLUSION

For the foregoing reasons, the Board recommends that the Court conclude that Disciplinary Counsel has proven by clear and convincing evidence that Respondent violated Rules 1.4(b), 1.5(a), 1.15(a), 1.15(e), 8.1(a) and 8.4(c), and should be disbarred for intentional misappropriation. We also recommend that the Court require that as a condition of reinstatement Respondent be required to pay $2,500 in restitution to Mrs. Bailey (or the Client Security Trust Fund) at the 6% legal rate of interest calculated from the date of payment, January 3, 2017. We further recommend that Respondent's attention be directed to the requirements of D.C. Bar R. XI, § 14, and their effect on eligibility for reinstatement. *See* D.C. Bar R. XI, § 16(c).

BOARD ON PROFESSIONAL RESPONSIBILITY

By: 

Sundeep Hora

All Members of the Board concur in this Report and Recommendation, except Ms. Larkin and Ms. Blumenthal, who did not participate.