THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Issued
July 31, 2019

In the Matter of:	:	
	:	
EVAN J. KRAME,	:	Board Docket No. 16-BD-014
	:	Bar Docket Nos. 2007-D040 &
Respondent.	:	2012-D449
	:	
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 370772)	:	

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

INTRODUCTION

Respondent Evan J. Krame served as the court-appointed trustee of Special Needs Trusts. A Special Needs Trust holds the assets of a disabled person without jeopardizing his or her receipt of governmental health and welfare benefits. Each of the three trusts at issue in this case was funded by a large civil settlement obtained on behalf of a severely disabled minor: Vernice Seay ("*Seay* trust"), De'Shawn Mecco Brown ("*Brown* trust"), and Dion Baker ("*Baker* trust").

This matter arose primarily out of Respondent's dogged claim to Probate Division judges that his compensation as trustee should be set annually as 1% of a trust's assets, and that he not be required to account for the time he spent acting as trustee. Respondent also sought to charge his trust clients for a litigation cost and the time he spent pursuing his compensation argument. The Probate Division and the Court of Appeals uniformly rejected his claims. *See In re D.M.B.*, 979 A.2d 15 (D.C. 2009).

* 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.

Disciplinary Counsel filed a four-count Specification of Charges against Respondent on March 31, 2016 (amended July 14, 2016), alleging violations of seven Rules of Professional Conduct.[1] After a ten-day hearing, the Hearing Committee unanimously found that Respondent violated Rules 3.3(a)(1) (knowingly making a false statement to a tribunal), 3.4(c) (knowing violation of an obligation to a tribunal) in two instances; 8.4(c) (dishonesty) in five instances; and 8.4(d) (serious interference with the administration of justice). The Committee was divided on some of the additional charges. One Committee member found three negligent misappropriations in violation of Rule 1.15(a), and a different Committee member found more extensive and additional violations of Rules 3.3(a)(1), 3.4(c), and 8.4(c), as well as a violation of Rule 1.5(a) (unreasonable fee). As a result, the Committee members made three different sanction recommendations.

Before the Hearing Committee, Respondent conceded that he knowingly violated a probate judge's order when he billed the *Brown* trust for his time and for a cost spent litigating his fee claim, both in violation of Rule 3.4(c). Before the

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[1] Count I (*Seay* trust) alleged violations of Rule 1.15(a) (intentional, reckless, or negligent misappropriation), 3.3(a)(1) (knowing false statement to a tribunal), 3.4(c) (knowingly disobeying a court order), 8.4(c) (dishonesty), and 8.4(d) (serious interference with the administration of justice).

Count II (*Brown* trust) alleged violations of Rule 1.15(a) (intentional, reckless, and negligent misappropriation, record-keeping) and D.C. Bar R. XI, § 19(f) (record-keeping), and Rules 1.15(c) (intentionally or recklessly failing to maintain disputed funds separate), 3.3(a)(1), 3.4(c), 8.4(c), and 8.4(d).

Count III (*Baker* trust) alleged violations of Rules 1.15(a) (intentional or reckless misappropriation), 1.15(c) (intentional or reckless failure separately to maintain disputed funds), 3.3(a)(1), 3.4(c), 8.4(c), and 8.4(d).

Count IV (post-appeal fee petitions for *Brown* and *Baker* trusts) alleged violations of Rules 1.5(a) (unreasonable fee), 3.3(a)(1), 3.4(c), 8.4(c), and 8.4(d).

Board, he concedes that he violated Rules 8.4(c) and 8.4(d) when he included dishonest time entries in fee petitions seeking payment from the *Brown* and *Baker* trusts. All of Respondent's concessions are clearly and convincingly supported by the evidence.[2]

On the other hand, Respondent challenges the Hearing Committee's finding that he violated Rules 3.3(a)(1), 8.4(c) and 8.4(d) by virtue of a statement contained in a brief filed on his behalf in the Court of Appeals. We agree that the evidence does not clearly and convincingly show that Respondent committed those violations.

Disciplinary Counsel contends that the Hearing Committee should have found that Respondent committed two negligent misappropriations in violation of Rule 1.15(a), engaged in additional acts of dishonesty in violation of Rules 3.3(a)(1) and 8.4(c), and charged an unreasonable fee in violation of Rule 1.5(a). We agree with most of those arguments.[3]

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[2] Except as noted, we adopt the Hearing Committee's findings of fact because they are supported by substantial evidence in the record as a whole. We have also made supplemental fact findings established by clear and convincing evidence, citing directly to the transcripts and exhibits. *See* Board Rule 13.7.

[3] The parties' exceptions to the Hearing Committee Report are limited to the following issues:

> Count I (*Seay* trust) - whether Respondent committed two negligent misappropriations in violation of Rule 1.15(a) when he twice made duplicate fee payments to himself;
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> Count II (*Brown* trust) - whether Respondent violated Rules 3.3(a)(1) and 8.4(c) by making false statements to Probate Division Judge Wolf, and Rules 3.3(a)(1), 8.4(c), and 8.4(d) by making false statements in an appellate brief. Before the Board, Disciplinary Counsel does not address the mistaken withdrawal of $1,447.17 from the *Brown* trust on September 24, 2006, which Respondent returned to the trust on December 20, 2006, identified by one Committee member as a misappropriation. *See* FF 80, 85-87; Separate Statement of Ms. Mims at 193, 196-97;

We conclude that Respondent committed two violations of Rule 1.15(a), two violations of Rule 3.4(c), six violations of Rules 3.3(a)(1) and 8.4(c), four violations of Rule 8.4(d), and two violations of Rule 1.5(a). We recommend that he be disbarred for his negligent misappropriations, deliberate violations of court orders to advance his own interests at client expense, and flagrant dishonesty to the courts.

DISCUSSION

I. Respondent Negligently Misappropriated Funds from the *Seay* Trust

Following settlement of a civil action brought on behalf of disabled minor Vernice Seay, Respondent prepared and filed documents establishing the *Seay* trust. Probate Division Judge Christian approved the trust and appointed Respondent as its trustee on January 22, 1997. FF 18.[4]

A. Respondent's *Seay* Trust Fees

Respondent understood that he was to bill his *Seay* trustee fees trust annually.[5] FF 21; Tr. 2109. He asserted that the *Seay* trust instrument, which he drafted, did not require either a fee petition or a court order to pay his fees. Thus, in late

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Count III (*Baker* trust) - whether Respondent violated Rules 3.3(a)(1) and 8.4(c) by making false statements to Probate Division Judge Wertheim; and
Count IV (post-appeal fee petitions for *Brown* and *Baker* trusts) - whether Respondent violated Rules 3.3(a)(1), 8.4(c), and 8.4(d) by submitting falsified billing entries to the Probate Division, and violated Rule 1.5(a) by submitting a dishonest fee petition that included charges for non-compensable work.

[4] "FF_", "DX_", "RX _", and "Tr. _" respectively refer to the Hearing Committee's Findings of Fact, Disciplinary Counsel's exhibits, Respondent's exhibits, and the disciplinary hearing transcript. "Resp. Br.", "ODC Br.", and "Resp. Reply Br." respectively refer to Respondent's brief to the Board; Disciplinary Counsel's brief to the Board, and Respondent's reply brief.

[5] On May 8, 1997 Respondent filed a fee petition seeking payment for his legal services setting up the trust. DX B6. That application (which was not governed by the terms of the trust instrument) was approved in July 1997. DX B8.

December 1997, Respondent prepared a statement of services he had rendered to the trust from April 1 to December 5, 1997, and simultaneously paid himself $5,295 without filing a fee petition. FF 21.

The First Account for the trust (filed August 13, 1998) disclosed both the July and December 1997 "attorney fees" payments to Respondent. FF 21-22. The probate auditor asked Respondent "to clarify the prior Court authority" for both disbursements. *See* DX B14 at 2. Respondent told the auditor that the July payment (*see* note 5, above) was for pre-trust legal work and had been approved by the court, but the December trustee fees "were paid by the trust without prior approval as the trust instrument does not require an Order of the court before payment." DX B15 at 2.

When Respondent filed a Second Amended First Account, the auditor again questioned the December 1997 payment and predicted that the court would not approve it unless Respondent filed a supporting fee petition. FF 25.[6]

On August 26, 1999, Respondent filed a fee petition *nunc pro tunc,* but again insisted that no order was required before he was allowed to pay himself: the "trust document does not require Court approval of the trustee's fees by the filing of [a] petition. . . . The authority for the payment of fees . . . is the trust document itself." DX B24 at 2.

On October 13, 1999, Judge Christian approved most of Respondent's fee request, but ordered that future compensation requests be "accompanied by a

[6] Respondent amended the First Account for reasons irrelevant to this case. FF 22.

detailed statement of services . . . submitted by the trustee for the Court's consideration prior to the payment of any fees to the trustee . . . such that the reasonableness of the compensation claimed can be determined." FF 27. After receiving that order, Respondent believed that only the filing of a fee petition, and not a court order, was a precondition to paying his fees. In Respondent's view, once he "deliver[ed] a detailed statement of services . . . to the court, [he] could pay [himself] the fees stated therein. That's in the nature of the way trusts operate." FF 28 (quoting Tr. 2118).[7]

In March 2000 Respondent filed the Third Account and filed a fee petition seeking $6,579.68 in attorney's fees and expenses. Respondent did not, however, withdraw his fee at that time. Rather, he paid his fee in December 2000, after the court authorized it. *See* FF 29-31.

B. The Two Duplicate Fee Payments

On February 8, 2001, Respondent filed the Fourth Account along with a fee petition seeking $7,178.80. FF 32. Rather than wait for a court order, Respondent paid himself $7,090.05 on February 21, 2001. FF 33; DX K10 at 4.[8]

In an order dated December 20, 2001, the Probate Division approved his $7,178.80 fee request. FF 34. Respondent paid himself that amount on January 2, 2002, and deposited it in his new law firm's operating account. DX K14 at 4; FF 35.

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[7] The Hearing Committee did "not find by clear and convincing evidence that Respondent's testimony regarding his interpretation of the October 13, 1999 Order is not credible." FF 28; HC Rpt. at 98 (majority finding no Rule 3.4(c) violation in Count I (*Seay* trust)).

[8] The record does not explain why Respondent paid out $7,090.05 when only two weeks earlier he had filed a fee petition seeking $7,178.80. *See* Respondent's Reply Brief at 4, n.1; *see also* Tr. 2140, 2143 (Respondent could not recall why the amounts did not match).

That payment clearly duplicated the payment Respondent had made on February 21, 2001 ("*first* duplicate payment"). FF 35.

Respondent blamed the double payment on "personal and administrative difficulties" in the law firm he had established seven months earlier, as well as the "passage of time between the February 12, 2001 [*sic*] and January 2, 2002 disbursements, [and] the administrative processes for handling the numerous payment authorizations coming into the firm [during that] period." FF 35; *see also* Tr. 2121-26. Respondent testified that although it had been his "custom and practice to file a petition . . . and then pay the fee," he speculated that because his office received "many orders from the court" authorizing payments in *other* matters, it "would not be unusual to see an order like this [December 20, 2001 order] come through the mail," and staff "would have" authorized the payment after receiving it. Tr. 2147-48; FF 35-36. The Hearing Committee credited Respondent's conjecture and concluded that "he *likely* made the disbursement from the trust when 'instructed' by a staff person . . . to do so, following receipt of the court's order approving the fee request . . . ." FF 35 (emphasis added).

On February 5, 2002, shortly after making the *first* duplicate fee payment on January 2, Respondent filed the Fifth Account along with a fee petition for $6,835.38 and on the same day – without court approval – paid himself that amount. DX K15 at 4; FF 38. This constituted a second, purportedly annual, fee payment made by Respondent within the first five weeks of calendar year 2002. *See* Tr. 2109.

On July 30, 2002, the Probate Division approved the Fifth Account's petition for fees, but in a lesser amount ($6,770.38). FF 39. On September 18, 2002, pursuant to the order, Respondent paid himself $6,770.38. DX K16 at 4; FF 40. This payment, of course, was another duplicate – this time of the payment that Respondent had made in February 2002 ("*second* duplicate payment").

Thus, for five years Respondent paid himself intermittently pursuant to two incompatible payment protocols: he paid himself without a court order in December 1997 (FF 21), after a court order in December 2000 (FF 31), without a court order in February 2001 (FF 33), after a court order in January 2002 (FF 35), without a court order February 2002 (FF 38), and after a court order in September 2002 (FF 40).

C. Recognition of the Duplicate Fee Payments

Respondent prepared the Sixth Account (covering calendar year 2002) in February 2003. It listed three fee payments to Evan J. Krame. FF 42. Realizing that he had paid himself twice for the Fifth Accounting (i.e., the *second* duplicate payment), Respondent returned $6,835.38 to the *Seay* trust on February 26, 2003. FF 41, 43. Respondent attributed the *second* duplicate payment to his "continued press of heavy work, combined with the difficulties of obtaining adequate supporting services in an increasingly troubled partnership arrangement." FF 44. He was also "unhappy . . . very, very unhappy at that time, and . . . think[s] that that affected [his] skill in reviewing things and [his] memory." Tr. 2153. Respondent did not, however, reimburse the trust for the interest lost by the trust. FF 45 (admitting it

was an "oversight sort of mistake" but insisting there was "no law, regulation or rule that requires the repayment of interest"). Respondent continues to contend that reimbursement of lost interest to the trust was not required. Oral Arg. Tr. at 63; *cf. In re Estate of Greene*, 851 A.2d 418, 425 (D.C. 2004).

Respondent did not then appreciate that he had made the *first* duplicate payment because, according to his testimony, the two disbursements of approximately $7,000 "fell into two separate accounting periods, so it wasn't readily apparent in preparing accountings that there had been a double payment." Tr. 2149. Respondent did not discover the *first* duplicate payment until the investigation by Disciplinary Counsel nine years later. FF 36. Although Respondent reimbursed $7,090.05 to the trust on November 30, 2010, soon after learning of the error, he did not reimburse the interest lost by the trust ($2,424.75) until February 2013. FF 36-37. Once again, Respondent insists he had no obligation to pay any interest on those wrongly-disbursed funds. FF 36, 45.

D. The Two Duplicate Payments Were Both Misappropriations

Misappropriation is "'any unauthorized use of a client's funds entrusted to [his or her lawyer], including not only stealing but also unauthorized temporary use for the lawyer's own purpose, whether or not he [or she] derives any personal gain or benefit.'" *In re Anderson*, 778 A.2d 330, 335 (D.C. 2001) (quoting *In re Harrison*, 461 A.2d 1034, 1036 (D.C. 1983) (alterations added)). When misappropriation is intentional or reckless, disbarment is imposed absent "the most stringent of extenuating circumstances." *In re Addams*, 579 A.2d 190, 193 (D.C.

1990) (en banc). To sustain a charge of reckless or intentional misappropriation, the evidence must show that a lawyer "handle[d] entrusted funds . . . in a way that reveals either an intent to treat the funds as the attorney's own or a conscious indifference to the consequences of his behavior for the security of the funds." *Anderson*, 778 A.2d at 339. These principles apply equally to attorneys serving as fiduciaries. *See In re Speights*, 189 A.3d 205, 209 (D.C. 2018) (per curiam); *In re Bach*, 966 A.2d 350, 350 (D.C. 2009); *In re Burton*, 472 A.2d 831, 837 (D.C. 1984) (per curiam) (appended Board Report).

Disciplinary Counsel contends that Respondent negligently misappropriated from the *Seay* trust on two occasions. We agree that two misappropriations occurred, and that they were negligent.

Respondent's two duplicate fee payments satisfied the facial elements of misappropriation. First, the funds were entrusted: moneys held by court-appointed fiduciaries constitute entrusted funds for the purposes of misappropriation analysis. *Burton*, 472 A.2d at 837. Second, Respondent used the funds: he withdrew them from the *Seay* trust by writing checks to himself and depositing them into his own firms' operating accounts. Finally, his use was unauthorized: he had the right to pay himself twice, not four times.

A majority of the Hearing Committee concluded that Respondent did not commit misappropriation because, it hypothesized, both duplicate fee disbursements were triggered by mistakes of his staff, not by Respondent personally. In the Hearing Committee majority's view, Respondent was merely a scrivener, responsible only to

adhere to the instructions of his accounting personnel: "Respondent appears to have been essentially an amanuensis and nothing more in each of the two [double payments] at issue." HC Rpt. at 92. Because they credited Respondent's speculation that his staff "would have" authorized the misappropriations (*see* Tr. 2147-48) and that he thus "*likely* made the disbursement from the trust when 'instructed' by a staff person . . . to do so" (FF 35) (emphasis added), two members of the Hearing Committee concluded that the "errors were made not by Respondent but by his employees" and Respondent was not responsible for misappropriation. HC Rpt. at 92. We disagree, both on the law and on the facts.

Misappropriation is essentially a *per se* offense, and does not require proof of improper intent. *See Anderson*, 778 A.2d at 335. Respondent had a fiduciary duty to the *Seay* trust, and to the court, to safeguard the trust's funds since they were entrusted client funds. *See In re Confidential*, 664 A.2d 364, 367 (D.C. 1995); *Burton*, 472 A.2d at 837 ("Certainly respondent's obligations with respect to funds that came into his hands as a court-appointed trustee should be no less than his obligation with respect to funds of a client."). Sanctions for misappropriation are harsh, but the Court's concern is "that there not be an erosion of public confidence in the integrity of the bar. Simply put, where client funds are involved, a more stringent rule is appropriate." *Addams*, 579 A.2d at 198.

The safeguarding of entrusted funds is thus a "nondelegable, fiduciary responsibility that cannot be transferred and is not excused by ignorance, inattention, incompetence, or dishonesty." *In re Gregory*, 790 A.2d 573, 578 (D.C. 2002) (per

curiam) (appended Board Report) (internal quotation marks omitted). Contrary to the view of the Hearing Committee majority, therefore, even if it had been shown that Respondent relied on his staff (and the evidence in that regard was entirely conjectural), he was neither bound nor permitted merely to follow their directives. He cannot excuse his misappropriations by blaming his employees:

> [The] effort to blame [a] secretary . . . is not a defense. An attorney is responsible for his client's case despite any errors by subordinates. [*In re*] *Outlaw*, 917 A.2d [684] at 685 [(D.C. 2007)] (attorney blamed her case manager); *In re Cohen*, 847 A.2d 1162, 1166 (D.C. 2004) (attorney blamed a subordinate); *In re Joyner*, 670 A.2d 1367, 1369 (D.C. 1996) (attorney blamed his secretary); *In re Banks*, 577 A.2d 316, 317 (D.C. 1990) (attorney blamed his law clerk).

In re Weiss, Bar Docket No. 2012-D437, at 23 (HC Rpt. Apr. 12, 2017). Nor does turmoil within Respondent's office (which he "think[s]" contributed to the double payments) (Tr. 2026)) or "difficulties of obtaining adequate supporting services in an increasingly troubled partnership arrangement" (FF 44) avail Respondent here. Those facts "may explain, [but do] not excuse" the errors. *In re Choroszej*, 624 A.2d 434, 436 (D.C. 1992) (per curiam) (quoting Hearing Committee Report at 19).

Even when a wrongful disbursement is triggered by an honest mistake, it nevertheless constitutes a negligent misappropriation. *See, e.g.*, *In re Pye*, 57 A.3d 960, 967 (D.C. 2012) (per curiam) (appended Board Report describing mistaken transfer of funds from estate). Negligent misappropriation occurs even though a respondent has an "objectively reasonable, albeit erroneous, belief his actions were proper." *See In re Evans*, 578 A.2d 1141, 1142 (D.C. 1990) (per curiam); *In re Abbey*, 169 A.3d 865, 872 (D.C. 2017) (hallmarks of negligent misappropriation

"include a good-faith, genuine, or sincere but erroneous belief that entrusted funds have properly been paid; and an honest or inadvertent but mistaken belief that entrusted funds have been properly safeguarded").

The Hearing Committee majority also overlooked Respondent's substantive, controlling – and negligent – involvement in both of the duplicate fee payments.

Respondent had sole signature authority for the *Seay* trust account. He personally signed all checks disbursing its funds, and personally reviewed and signed the accountings that listed the improper payments. FF 32-33, 35, 38, 40, 42. Respondent made the wrongful disbursements in connection with a legal representation with which he was intimately involved and for which he was solely responsible.[9]

Moreover, Respondent claimed that his procedure for signing trust checks was distinctly hands-on. He testified that "[w]hen you prepare an accounting, you look at all of the checks, not just check statements, not just what somebody's entered into Quicken. You actually look at the checks. . . . I would review the accounting." Tr. 1621-22. Had Respondent attentively reviewed either the check statements or the accountings before paying his fees, however, neither duplicate payment would have happened.

[9] Respondent's direct relationship with the payments, and the matters from which they emanated, refutes the Hearing Committee's concern that finding misappropriation in this case would mean "every partner in every law firm – a solo practice or a firm with a thousand partners — will have to be found liable for misappropriation every time a careless mistake – an erroneous transfer from an IOLTA or other trust account or whatever – occurs." HC Rpt. at 93.

Thus, if Respondent had carefully reviewed the checking statement for February 2001 before he paid himself $7,178.80 on January 2, 2002, he would have seen that it duplicated the $7,090.05 payment that had already been made to "Evan J. Kinme [*sic*]." DX K 14 at 4. Similarly, if he had prudently reviewed the checking statement for February 2002 before he paid himself $6,770.38 on September 18, 2002, he would have seen that it duplicated the $6,835.38 payment he had already made to "Evan J. Krame PC [*sic*]." DX K15 at 4.

As well, a timely review of the relevant accountings, as Respondent claimed to have done, would also have avoided both misappropriations. Every account prominently and unambiguously listed Respondent's fee payments as "legal fees" in the administrative expenses category (Section H). If Respondent had carefully reviewed the expenses for 2001 before making the $7,178.80 payment on January 2, 2002, he would have seen that it duplicated the $7,0790.05 payment to "Evan J. Krame" he made on February 21, 2001. DX B44 at 7. And, had he reviewed 2002 administrative expenses before making the $6,770.38 payment on September 18 of that year, he would have seen that *it* duplicated his $6,835.38 payment on February 5 to "Evan J. Krame." DX B57 at 16.

Finally, in early 2003 Respondent did review the Sixth Account.[10] Three of the first five listed "outflow" entries were the following:

[10] The Sixth Account covered the period of January 1, 2002 to December 31, 2002. DX B57.

1/02/02	Check #210	Evan J. Krame Legal Fees Administrative	$7,178.50
2/06/02	Check #213	Evan J. Krame Legal Fees Administrative	$6,835.38
9/18/02	Check #229	Evan J. Krame Legal Fees Administrative	$6,770.38

DX B57 at 6. He realized that two of the listed payments were duplicates (check #213 and check #229). Yet even after he repaid $6,835.38 to the *Seay* trust, the account still showed two fee payments for that one year, *i.e*., checks #210 and #229. FF 42; DX K15 at 4**;** Tr. 2406-07. Those two lingering and purportedly "annual" payments should have led Respondent to look at the accounting for the prior year (2001) to see why there was a second payment during 2002, but he "missed it." Tr. 2406-07. A look back at the Fifth Account, of course, would have disclosed that check #210 was also a duplicate payment and would have triggered its reimbursement nine years sooner than it was actually made. *See* DX B57 at 16, DX B44 at 17; Tr. 954-55, 957. Respondent's discovery of the *second* duplicate payment in early 2003 should have been "a serious wake-up signal to the sole individual with ultimate responsibility for the trust account . . . [His] failure to pursue the matter in a more diligent fashion . . . *extended the misappropriation*" caused by the *first* duplicate payment. *In re Robinson*, 74 A.3d 688, 695 (D.C. 2013) (emphasis added).

In sum, Respondent was legally and factually responsible for both misappropriations. Their root cause was Respondent's adherence to inconsistent and contradictory fee payment protocols – payment of fees alternately with, and without, a court order – exacerbated by his failure timely and diligently to review relevant checking or account statements. When he learned of an irregular fee payment, he

failed diligently to correct another anomaly. Respondent negligently misappropriated from the *Seay* trust on two occasions and violated Rule 1.15(a).

II. Respondent Disobeyed Court Orders Circumscribing His *Brown* Trust Fees

For years, Respondent insistently sought to persuade the Probate Division to allow him annually to pay himself fees amounting to 1% of the value of each Special Needs Trust he administered, regardless of the time he spent working as a trustee. Probate judges and the Court of Appeals uniformly rejected his argument, and ordered him to document his activities so they could assess the reasonableness of his charges.

Respondent, however, refused to accept the legitimacy of those judicial decisions and insisted that he was entitled to a percentage fee: "I was outraged, and I was in my mind serving the justice that I thought I was being denied." Tr. 2283. The Hearing Committee found that his "inflated self-esteem, intellectual arrogance and anger over" the courts' rulings " – manifested several times in his testimony – clouded his judgment" and led him to violate multiple ethical Rules. HC Rpt. at 137. We agree.

A. Respondent Improperly Sought to be Paid for His Time

Respondent sought to pay himself annual fees amounting to 1% of the *Brown* trust value. On May 11, 2006, Judge Wolf denied his request for a percentage fee and ordered Respondent not to charge the trust for the time he had spent litigating the fee issue. FF 105. Respondent deliberately defied that order.

On November 22, 2006, Respondent filed a fee petition seeking $17,943.58 from the *Brown* trust. Despite Judge Wolf's order, Respondent included eleven entries in the petition that reflected time he had spent fighting the fee issue. The entries totaled $8,700 (approximately half of the total fee request) and were difficult to discern because they were not highlighted in any way. FF 106-07; *see* DX C35 at 4-8. Respondent knew he was violating Judge Wolf's order, but did so because he was angry and "disturbed" by it. FF 109. He also knew he should have highlighted the non-compensable time before submitting the petition. FF 107 ("I wish I had perhaps highlighted or circled or grouped together those fees . . . I could have done that better . . . [but] I was [a] zealous advocate for my case, maybe a little too zealous and it colored the way I approached it.").

When he reviewed the petition, Judge Wolf nevertheless detected the prohibited time entries and, on January 18, 2007, disallowed that portion of Respondent's fee request because it was "time spent solely to benefit himself and not the trust beneficiary." FF 108. He also sanctioned Respondent fifteen percent of the remainder of his fee due to the "direct violation of a court order." *Id*. Respondent appealed both the May 11, 2006 and January 18, 2007 orders, but the Court of Appeals held that Judge Wolf "was well within his statutory authority to sanction [Respondent] for breach of duty to the trust by charging the trust for litigation that would benefit only [Respondent]." *D.M.B*., 979 A.2d at 23.

The Hearing Committee unanimously found, and Respondent admits, that this conduct violated Rule 3.4(c). HC Rpt. at 112-13; Resp. Br. at 7. We agree.[11]

B. Respondent Improperly Billed a Litigation Cost to the Trust

Respondent's counsel, Edward Varrone, filed a notice of appeal from Judge Wolf's May 11 order in August 2006, paid a $200 filing fee, and billed Respondent for the cost. Respondent repaid his counsel with money from the *Brown* trust. FF 91; DX K39 at 3. The $200 disbursement was listed in the trust's Third Account as an administrative expense. FF 92. Judge Wolf spotted the disbursement when he reviewed the account, and disallowed it on January 18, 2007. He ordered Respondent to reimburse it "forthwith" and to file a *praecipe* when he had done so. FF 94. Respondent knew he was required to repay the $200 but did not, again because he "believe[d Judge Wolf] was wrong . . . . In hindsight, I think I should have paid it back, [but] [a]t the time I thought I was right." FF 95 (quoting Tr. 1432).

When Respondent appealed the January 18 order he did not seek a stay. FF 96. After the Court of Appeals affirmed Judge Wolf's order and his counsel reminded him to repay the disbursement "forthwith," Respondent further delayed

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[11] During oral argument before the Board (Oral Arg. Tr. at 58) and in briefing to the Board (Resp. Br. at 30 n.1), Respondent cited to *In re Smith*, 138 A.3d 1181 (D.C. 2016) as recent authorization for Respondent's charging the trusts for his fee litigation time and expenses. However, in *Smith,* the litigation involved whether "an individual who was appointed by the court without explicit reference to the Guardianship Act, but who in good faith performed the duties of a guardian" was entitled to obtain compensation from the Guardianship Fund. *Smith*, 138 A.3d at 1186. The decision in *Smith* distinguished non-compensable fee claims such as a guardian's unsuccessful pursuit of "a claim for reimbursement that the Superior Court has rejected as unreasonable in amount, or where a conservator appeals from an order surcharging him for mismanagement of a ward's assets." *Id*. The Court of Appeals emphasized: "Nothing in this opinion would cabin the trial court's discretion to deny such a claim." *Id*.

payment until October 14, 2009, but still failed to file a *praecipe*. FF 102-04. The Hearing Committee found, and Respondent admits, that this defiance of the January 18, 2007 order violated Rule 3.4(c). HC Rpt. at 112-13; Resp. Br. at 7. Again, we agree.

III. Respondent Knowingly and Dishonestly Altered Time Records Submitted to the Probate Court

A. Background

On January 18, 2007 Judge Wolf also amended the *Brown* trust instrument to require Respondent to file future fee petitions accompanied by statements of services showing the time "on each service that was rendered." FF 110; *see* DX C40. The court did so "out of concern over the manner in which [Respondent] had been administering the trust to date, especially with regard to trustee compensation." *D.M.B.*, 979 A.2d at 26. In the *Baker* trust, Judge Burgess had similarly ordered that Respondent's compensation be subject to the court's review for reasonableness and that "the time devoted to trust duties" was a factor to be considered. FF 125.

Respondent acknowledged to the Hearing Committee that, as a result of the courts' rejection of his percentage fee argument, by at least 2005 he understood that he "needed to be cognizant of the hours [he] was spending and have that information available if the fees were questioned." FF 125-26 (quoting Tr. 2264). By May 2006, Respondent became "more attentive to recording time in PCLaw," the billing software program he began using in 2001. FF 144, 148 (quoting Tr. 1326). Respondent certainly knew that if he lost his appeals, he would be required to submit a detailed statement of services in order to be paid a fee. FF 110-11, 148.

For the three years his consolidated appeals were pending (October 2006 - August 2009), Respondent did not file fee petitions for either the *Brown* or *Baker* trusts.[12] But Respondent and his staff did contemporaneously record their time for both trusts in PCLaw in case the Court of Appeals rejected the percentage billing argument, although they did not do so "perfectly." FF 148 (quoting Tr. 1665).

Following the Court of Appeals' ruling, in late 2009 Respondent prepared time-based fee petitions for both trusts. FF 149. He claimed that he and his staff "went through the usual process of looking back [] over two years of time entries, looking at all the documents, the correspondence, the pleadings, the emails, the calendar, and double-checking." *Id.* As he drafted the applications, Respondent, knew that the Court of Appeals had upheld the Probate Division's orders that he not seek compensation for time spent litigating his fee claims. *See D.M.B.*, 979 A.2d at 23; FF 70, 153. Respondent nonetheless continued his defiance of the courts: in both fee petitions he (1) deleted references to his fee-litigation activities from his time entries, without reducing the corresponding amounts charged, and (2) supplemented existing time records by adding entries for services he purported to recall rendering up to three years earlier. FF 145-47, 149, 152-53, 157-58, 163.

In December 2009 Respondent filed the *Brown* trust fee petition and attached his edited and enhanced statement of services, seeking $43,055 in fees. FF 150. In January 2010, he filed the amended *Baker* trust fee petition and attached a similarly

[12] Respondent transferred supervision of the *Seay* trust to the Circuit Court for Prince George's County in September 2006. DX B94 at 1; FF 55 (a typographical error in the Hearing Committee Report mistakenly dates the transfer as September 2016). He remained as trustee.

altered and expanded statement of services, seeking $47,642.50 in fees. FF 156. He signed both petitions and verified them under oath. DX C53 at 8 (*Brown* petition); DX D35 at 11 (*Baker* petition). Neither submission alerted the Probate Division (either Judge Campbell, who reviewed the *Brown* fee petition, or Judge Hamilton, who reviewed the *Baker* fee petition) that Respondent had edited some entries and retrospectively created others. Both petitions were fully approved. FF 154, 165; Tr. 871-72.

B. The Altered Time Entries

The Hearing Committee unanimously found that Respondent acted dishonestly and seriously interfered with the administration of justice in violation of Rules 8.4(c) and 8.4(d) when he edited four separate time narratives by deleting references to his fee litigation without reducing the corresponding amounts charged. It concluded that Respondent's "inflated self-esteem, intellectual arrogance and anger over Judge Wolf's, Judge Wertheim's and the Court of Appeals' rulings in the 2007-2009 time period . . . clouded his judgment in the fall of 2009 . . . to the point of irresponsibly and baselessly inflating the entries . . . ." HC Rpt. at 137. Respondent does not contest those findings. Resp. Br. at 11, 31-32.

Despite its findings of dishonesty, the Hearing Committee majority did not find a violation of Rule 3.3(a)(1) (knowingly making a false statement of material fact to a tribunal) because it did not believe Disciplinary Counsel proved that Respondent knowingly prepared the four false entries. HC Rpt. at 140. The same majority also concluded that even though the fee petitions containing the false entries

were entirely approved, Respondent did not collect an unreasonable fee. Disciplinary Counsel asks the Board to find that the four edited entries were knowingly (rather than recklessly) altered and thus Respondent should be found to have violated Rule 3.3(a)(1) and Rule 1.5(a). We agree with Disciplinary Counsel.

Respondent altered the *Brown* trust entries as follows (deletions made by Respondent are noted in bold) (*see* DX J7 at 13, 18):

Date of Service		Narrative	Hours	Fees
09/07/07	Original Entry	**~~t/c Varrone [Respondent's appeal counsel] re: status of appeal~~**, t/c M. Pavlides	.20	$70
09/07/07	Changed To	t/c M. Pavlides re: Seard [sic] fraud matter	.20	$70
03/25/08	Original Entry	**~~discuss appeal with Varrone~~,** t/c Latoyia re: Seard [sic], review electrical problems at house.	.50	$175
03/25/08	Changed To	t/c Latoyia re: Seard [sic], review electrical problems at house.	.50	$175

Respondent altered the *Baker* trust time entries as follows (*see* DX J11 at 6, 22):

Date of Service		Narrative	Hours	Fees
11/29/2006	Original Entry	**~~review status of appeal and fee petitions~~**	.30	$90
11/29/2006	Changed To	review Account entries, statements and Fees payable	.30	$90
2/13/08	Original Entry	work on **~~notice and petition for fees~~**	1.50	$525
2/13/08	Changed To	work on Account	1.50	$525[13]

It is worth noting that the probate judges who reviewed the *Brown* and *Baker*

[13] Disciplinary Counsel and one member of the Hearing Committee urge that two additional entries in the *Baker* trust fee petition were false. *See* Separate Statement of Mr. Kassoff at 179. The majority acknowledged the entries but made no fact-finding with respect to them. *See* HC Rpt. at 137 n.43:

Date of Service	Changes	Explanation	Hours	Fees
09/07/2007	Original Entry	t/c Chris, review receipts, sign check, **~~t/c Varrone re: appeal~~**	.40	$140
09/07/2007	Changed To	t/c Chris, review receipts, sign check	.40	$140
11/12/2007	Original Entry	contact Olender's office re: praecipe needed, t/c Bullock re: discharge meeting, **~~t/c Varrone re: brief~~**	.80	$280
11/12/2007	Changed To	contact Olender's office re: praecipe needed, t/c Bullock re: discharge meeting	.80	$280

Although these entries appear to be of a kind with those found to be dishonest, neither Disciplinary Counsel's brief, nor its proposed findings of fact to the Committee, direct us to any evidence on that issue, beyond citation to Mr. Kassoff's Separate Statement. For that reason, and because further analysis would not affect our recommended sanction, we decline to address them.

fee petitions did not know that the PCLaw software billing program used by Respondent recorded all modifications made to billing entries and also recorded *when* modifications were made. The records that facilitated the creation of the above charts only came to light as a result of Disciplinary Counsel's investigation and expert testimony about the PCLaw software program. *See* FF 145-47.

Confronted during the hearing with his edits to time narratives that had been made years earlier, Respondent defended the changes.[14] He claimed he did not need to reduce the amount charged despite deleting non-compensable work because, upon re-visiting his records, he discovered that he had performed additional but previously-unrecorded work. FF 153 ("It also turned out that, in reviewing my documents, I found on that day I had been working with Latoiya Brown, De'Shawn's . . . mother, regarding electrical problems at the house . . . ."); FF 163 (changed description of work on February 13, 2008 from "work on notice and petition for fees" to "work on account" because "I would have noticed something in my files that indicated that I had maybe received the accounting . . . that day and was reviewing their work, or perhaps it was a day when I shipped out to them documents to prepare the accounting, so I would have been reviewing documentation that was necessary to prepare an accounting"). When confronted with the improbability that the additions of originally-unrecorded work *precisely* offset the reductions from writing off unbillable time, he suggested that the charges were nevertheless accurate because he had had a habit of undercharging. *Id*. ("The first entry was in my opinion

[14] Respondent concedes the four entries were "recklessly dishonest" before the Board, but he defended his actions in his testimony and in his post-hearing briefing to the Hearing Committee.

under charging. . . . Often when I'm entering time I enter too little time"). When asked if he had evidence to justify the alterations, Respondent asserted that his counsel would provide those records, but neither he nor his counsel ever produced them. *See infra* at 28; FF 153.

We agree with Disciplinary Counsel that Respondent's justifications are not credible. The Hearing Committee unanimously found that the amounts of the time entries about which Respondent testified were "baselessly inflat[ed]" (HC Rpt. at 137) and that Respondent's alterations to the four entries were unwarranted, unsupported and, ultimately, dishonest: "We are convinced by clear and convincing evidence that the September 7, 2007 entry in the *Brown* Trust *Pre-Bill* (FF 152), the March 25, 2008 entry in the *Brown* Trust *Pre-Bill* (FF 153), the November 29, 2006 entry in the *Baker* Trust *Pre-Bill* (FF 158), and the February 13, 2008 entry in the *Baker* Trust *Pre-Bill* (FF 163) *are not supported* by available documentation, other information, and/or Respondent's experience." *Id*. at 136-37 (final emphasis added). Respondent does not dispute that his alterations were dishonest.

The issue, then, is whether Respondent acted recklessly or intentionally when he altered the time narratives. The Hearing Committee majority found the former, but its answer is an ultimate fact, subject to *de novo* review. *In re Romansky*, 938 A.2d 733, 735 (D.C. 2007).

Recklessness is a "state of mind in which a person does not care about the consequences of his or her action." *Anderson*, 778 A.2d at 339 (citation omitted). There is no evidence in the record that supports a conclusion that Respondent "did

not care" about the alterations of the changed time entries. He did care, and intensely so:

> When we lost the appeal and it was time to file a petition for compensation, we went through the usual process of looking back now over two years of time entries, looking at all the documents, the correspondence, the pleadings, the emails, the calendar, and double-checking. Because at that point, filing a petition for compensation with that court, *I wanted to make sure everything was accurate.*
>
> * * * * *
>
> It had been a couple of years since I'd been paid in those cases, but we actually – it was a process. We did it over weeks, and I think we finally submitted the fee petition in these cases in November with a process of amending, and then I gave it to my partner, I believe, to review.

FF 149 (emphasis added). Shortly before he submitted the petitions, Respondent's associate warned him that they still included proscribed time entries that had to be removed, and Respondent replied "Show me." DX I49 at 2-3. Respondent then meticulously and deliberately edited each of the four narratives to render them compensable. He had no reason to believe the Probate Division would ever know about his editorial deletions, and indeed the judges who reviewed the petitions never discovered them. That Respondent acted intentionally is further confirmed by his proffered rationale for the deceptions, claiming that it "wasn't that I needed the money. It was that I was standing up for a princip[le]. . . . I was outraged, and I was in my mind serving the justice that I thought I was being denied." FF 132. Yet the "principle" to which he adhered was merely Respondent's quest to be paid for what he felt he was worth, and not what the courts held he deserved.

The evidence is conclusive that Respondent deliberately altered time entries that he admits were false and dishonest, and thus we find that the Hearing Committee

majority's conclusion that Respondent's dishonesty was "reckless" – rather than intentional – is not correct.

C. Respondent's False Testimony

Our *de novo* review of the dishonest time entry issue inexorably leads us to conclude not only that Respondent's editorial revisions constituted an intentional end-run around the Probate Division and Court of Appeals, but that his testimony seeking to justify that conduct was intentionally false. *See In re Bradley*, 70 A.3d 1189, 1193-94 (D.C. 2013) (per curiam) ("Although, in general, reviewing bodies accord considerable deference to credibility findings by a trier of fact . . . 'there are certain times when a [reviewing body] must override such a determination by examining evidence in the record that detracts from the [trier of fact's] finding.'").

In reaching this conclusion, we consider that, reduced to its essence, Respondent urged the Hearing Committee to believe that for each of the disallowed entries he was able – years after the fact – serendipitously to unearth previously-unrecorded conduct that exactly offset each of the improper time entries he deleted. This explanation was, on its face, preposterous. *See, e.g.*, FF 158. We share the Hearing Committee's concern "about the unlikelihood that anyone could reliably testify with specificity about brief actions (the work and the reporting) after 7-10 years, as Respondent purported to do in some instances." HC Rpt. at 134-35.

We have also examined the record for any evidence that corroborates Respondent's testimony and have found none. *See* RX 16 (10 pages); RX 17 (33 pages). Notably, when the one member of the Hearing Committee expressed

disbelief that Respondent had actually located records to support his editing changes, Respondent assured him that his counsel would go through his Exhibits 16 and 17 with great care to produce the backup materials upon which he claims to have relied. *See* FF 153; Separate Statement of Mr, Kassoff at 181-82. That promised disclosure never materialized, and the Hearing Committee was "troubled" by that failure. *See* HC Rpt. at 134. Moreover, the Hearing Committee independently reviewed Respondent's Exhibits 16 and 17 and did not find any documents that explained the four entries at issue. *Id.* Respondent identifies no such records in his briefs to the Board. Nor did Respondent present testimony from his staff to support his claim that he had unearthed records supporting his changes. *See* FF 149; HC Rpt. at 134.

Thus, there are no documents that support Respondent's alterations of time entries and no witnesses who corroborate his story. He testified to a facially incredible rationale with no supporting evidence. There is "no evidence in the record to support a finding that respondent was merely confused and that [his] detailed testimony was inadvertent and not intentional." *Bradley*, 70 A.3d at 1194.

Since Respondent's fee petition entries were false and dishonest, when he testified to the contrary he "necessarily also lied under oath at the hearing." *In re Cleaver-Bascombe*, 892 A.2d 396, 410 (D.C. 2006) ("*Cleaver-Bascombe I*"). Respondent "exacerbated [his] misconduct in sworn testimony when [he] 'defended [his] voucher as written and insisted that it fairly reflected the services [he] rendered.'" *In re Cleaver-Bascombe*, 986 A.2d 1191, 1200 (D.C. 2010) (per curiam) ("*Cleaver-Bascombe II*") (quoting supplemental Board Report) (alterations added).

We thus conclude that in addition to the Rule 8.4(c) and 8.4(d) violations found by the Hearing Committee and now conceded by Respondent, Respondent's editorial manipulation of his time entries was done knowingly and violated Rule 3.3(a)(1). *See Cleaver-Bascombe I*, 892 A.2d at 403-04 (a knowing false statement in a CJA petition submitted to the Superior Court violated Rule 3.3(a)(1)). We also find that his testimony seeking to justify the falsified fee petitions was deliberately false.[15]

D. Respondent Charged an Unreasonable Fee

The Hearing Committee majority rejected Disciplinary Counsel's assertion that the falsified time entries violated Rule 1.5(a) (charging an unreasonable fee) because it did "not see any basis on which we could find that the total amounts in each fee petition or any individual entries in the petition were unreasonable in and of themselves." HC Rpt. at 142. *But see* Separate Statement of Mr. Kassoff at 183-85 (dissenting). Yet Respondent submitted two fee petitions that included false and dishonest entries (with an aggregate value of $860) that the Hearing Committee found to be "baselessly inflat[ed]." HC Rpt. at 137. The fee petitions were approved in their entireties, and Respondent was paid out of the trusts' funds. The total fee payments were contaminated by their illegitimate components. Respondent charged

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[15] As the Court noted in *Cleaver-Bascombe II*, 986 A.2d at 1197 (quoting Board Report):

> [W]hen she stuck with her story during the disciplinary proceedings, she did so knowing it was false . . . . And even though the Hearing Committee listened to her testimony and did not find it to be knowingly false, we find that the Committee erred in this respect. We find that Bar Counsel proved by clear and convincing evidence that Respondent knew when she testified to it that her story . . . was false.

and was paid unreasonable fees in both the *Brown* and *Baker* trusts in violation of Rule 1.5(a). *See Cleaver-Bascombe I*, 892 A.2d at 403 (charging a fee for work not performed violated Rule 1.5(a)).

E. The Alleged Padding of Respondent's Time Entries

There can be no doubt that many lawyers do not embrace the task of timely recording their work. As distasteful as it may seem, however, accurate and contemporaneous preparation of time sheets can serve as a powerful aid to a careful lawyer. This is so because a client may view the lawyer's bill as the most significant communication he or she receives from the lawyer. To the extent time entries clearly describe the tasks completed, they inform the client about matters relating to the representation and can enhance the client's confidence in the lawyer's actions, in turn encouraging the payment of fees and preventing or minimizing lawyer-client disagreements. Superficial (or non-existent) time entries, on the other hand, can have the opposite effect. Since malpractice claims often result from fee disputes, minimizing the latter reduces the possibility of the former. Even in a fixed-fee representation, complete and accurate time entries can avoid a client's perception that the lawyer cut corners to maximize the value of the fee.

A contemporaneous time record accurately and unambiguously describing a lawyer's actions can also help corroborate that an event or communication with the client or an adversary actually occurred. A lawyer's file may contain little or no other evidence that the lawyer did something she says she did or that she was told not to do something that the client later characterizes as a failure to act. In those

cases, substantive time entries can be significant, if not critical, evidence. Of course, non-existent, superficial or misleading time entries can have the opposite effect. Time entries can thus help the defense of a malpractice case if well done, but can complicate the defense if done badly.

Finally, the quality of time entries is frequently a core issue in disciplinary matters, and can underpin – or complicate – a disciplinary charge. *Cleaver-Bascombe I*, 892 A.2d at 404 ("[A]n attorney who recklessly maintains inadequate time records, and consciously disregards the risk that she may overcharge a client (or here the CJA fund), also engages in dishonesty within the meaning of Rule 8.4(c).").

In this case, Respondent admits that his contemporaneous recording of time was deficient. Tr. 862, 2310-11. In addition to *falsifying* the time entries discussed above, Respondent *supplemented* his fee petitions by retrospectively adding a substantial number of time entries. FF 151, 154, 157, 160, 161, 164. Many of the added entries were for generalized services vaguely described as "review" or "work on." Disciplinary Counsel continues to contend that each of these belated additions were dishonest – in effect claiming that Respondent "padded" his time sheets to seek an additional $10,800 fee in the *Brown* trust and $8,775 in the *Baker* trust. FF 150, 154, 156, 164.

A majority of the Hearing Committee declined to address the padding allegations because Disciplinary Counsel did not produce sufficient evidence to

show that discrete supplemental entries were dishonest.[16]

Before the Board, Disciplinary Counsel argues that "the passage of time makes it implausible that Respondent – or any lawyer – could remember" a specific task undertaken on a particular day two or more years after the fact, much less the exact amount of time spent on that task. ODC Br. at 37. "The volume of the entries, the substantial amount of time that had passed, and the vague descriptions are all circumstantial evidence that Respondent dishonestly made the entries to increase his fees." *Id.* We do not challenge the common-sense forcefulness of Disciplinary Counsel's observations, which were implicitly acknowledged by the Hearing Committee: delayed recordation inevitably diminishes the accuracy and credibility of time entries.[17] The question is, however, whether Disciplinary Counsel produced clear and convincing *evidence* that the Respondent' supplemental time entries were dishonest. We agree with the Hearing Committee majority and "reject Disciplinary Counsel's apparent theory that submitting time records after a substantial passage of

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[16] The majority noted both an evidentiary deficiency and due process issues with respect to the contention that all the entries Respondent added after the Court of Appeals decision in *D.M.B*. were dishonest and created for the purpose of obtaining the percentage fee that had been denied him. *See* HC Rpt. at 140-41 n.45. Having reviewed the facts alleged in the Specification of Charges and Disciplinary Counsel's opening statement at the hearing, we do not agree that due process prevents our consideration of whether all the changes entered in late 2009 were dishonest, *see, e.g*., *In re Slattery*, 767 A.2d 203, 209 (D.C. 2001), but agree that Disciplinary Counsel's direct evidence was too limited to establish that both fee petitions were falsely padded to obtain a percentage fee.

[17] The Hearing Committee members were "all familiar with professional billing on an hourly basis and may very well have (like many in-house counsel at many corporations) strong views on the reliability or unreliability of time data entered at the end of the month (or longer) or the week or even at the end of the day after providing the services in question. However, these personal views have no place in our analysis of the record pertaining to these disciplinary charges against Respondent." HC Rpt. at 133.

time (up to three years in this matter) and using terms such as 'review,' 'work on' or 'update' constitute dishonesty *ipso facto*." HC Rpt. at 132.

Before the Hearing Committee, Respondent countered Disciplinary Counsel by contending that after the Court of Appeals' decision in *D.M.B.*, he discovered when preparing his fee applications in *Brown* and *Baker* that he had not been complete in his contemporaneously-recorded time. FF 149. Knowing that he "had done an awful lot of work," he went "back to look at . . . calendar, emails, and correspondence, memos, invoices, court filings." *Id.*

> Given that I was doing this kind of work at that point for over ten years, I had a really good command of how long it took to do most of those activities, and I entered from those records amounts into PCLaw corresponding to the dates on the documentation that I reviewed."

Id. The Hearing Committee again discussed a litany of concerns about the veracity of Respondent's testimony on this point, citing the lack of corroborative documents and witnesses, his "frequently vague" testimony, and the "implausibility" of some entries. HC Rpt. at 135. We share those concerns, and we have already rejected Respondent's analogous explanations for his false and dishonest alteration of the four appeal-related time entries. Yet the Hearing Committee majority nevertheless concluded that there was "no basis in the record" to conclude that Respondent was dishonest concerning totality of the time entries he *added* in late 2009. HC Rpt. at 132-33. It concluded that Disciplinary Counsel did not clearly and convincingly prove that all the new entries were false. HC Rpt. at 140-41 n.45. The dissenting member argued that the falsity of the aggregated entries was established because they essentially ended up giving Respondent the percentage fee that he had been

seeking all along. *See* Separate Statement of Mr. Kassoff at 182-83. While we recognize the logic of his assessment, we cannot agree that the coincidental result can constitute clear and convincing proof of a Rule violation. *See In re Edwards*, 808 A.2d 476, 483 n.7 (D.C. 2002) (improper inference made by the Board when the significance of a coincidence is "ambiguous"). This is a close and troublesome question, as to which we defer to the fact-finding of the Hearing Committee. The evidence does not clearly and convincingly support the claim that Respondent inappropriately padded his time entries.

Disciplinary Counsel also contends that Respondent acted dishonestly when he failed to disclose to the probate court that his supplemental time entries were not contemporaneously created, relying on *In re McClure*, Board Docket No. 13-BD-018, at 10, 26-27 (BPR Dec. 31, 2015) (bill submitted to court was "deceitful because it failed to state that the billing was based on unsupported recollection, without the benefit of contemporaneous time records"). Clearly the better practice would have been for Respondent to make that disclosure, as he had done in another case. Tr. 1683. But the Hearing Committee majority concluded that, unlike *McClure*, Respondent's estimates were at least in part based on contemporary records. It is not inappropriate or unethical for lawyers retrospectively to prepare time entries that are supported by contemporaneous documentation.

We thus agree that on this record Disciplinary Counsel did not prove by clear and convincing evidence that Respondent's supplemented time entries, or his failure to disclose that his fee petitions included work based on estimates added in late 2009,

violated either Rule 3.3(a)(1) or Rule 8.4(c).

IV. Respondent Made False Statements to the Probate Division but Not to the Court of Appeals

A. Background

As we have noted, Respondent unsuccessfully fought to be compensated in both the *Brown* and *Baker* trusts at 1% of each trust's value without submitting a fee petition, and he lost a consolidated appeal from orders rejecting his arguments. During that campaign, Respondent and his counsel repeatedly claimed he had not kept time records for specific services he had performed and did not disclose the time records he had kept,[18] despite requests for their production by Judge Wolf (*Brown* trust) and Judge Wertheim (*Baker* trust). *See* FF 69 (Judge Wolf ordered Respondent to "file a petition for compensation herein, with full documentation of time expended and hourly rates"); FF 130 (Judge Wertheim ordered Respondent to submit "accompanying information establishing the reasonableness of such fees in accordance with . . . the trust instrument as amended"). During the disciplinary investigation it became evident that Respondent and his staff had indeed recorded their *Brown* and *Baker* trust time in six-minute increments, along with specific descriptions of services, in the PCLaw billing software. *See* FF 71, 128; DX I8 at 1-4; DX J7 at 1-3.

The Hearing Committee unanimously found that Respondent violated Rules 3.3(a)(1), 8.4(c), and 8.4(d) because a brief filed on his behalf in the Court of

[18] As Respondent testified, "after 2005 in the District of Columbia, at that point, noticing that Judge Burgess was interested in the issue, and then that Judge Wolf was demanding it of me, you bet I started to keep track of my time." Tr. 1332-33.

Appeals in *In re D.M.B*. included the statement that Respondent "did not keep time records for that trust, as well as others, for the period covered by the Second Account." FF 76; HC Rpt. at 106-07. Respondent takes exception to that finding, arguing that he should not be disciplined for statements in a brief filed by his counsel. Disciplinary Counsel, on the other hand, agrees with that Hearing Committee's finding but takes exception to the majority's failure to find that Respondent violated Rules 3.3(a)(1) and 8.4(c) when he made similarly misleading statements to the probate court and the Court of Appeals and did not provide time records to the probate court. *See* ODC Br. at 28-35; DX J7 at 1-3 (*Brown* time records); DX I8 at 1-4 (*Baker* time records).

We agree with Respondent that he should not be held accountable for the statements filed by his counsel in his appellate brief, and we agree with Disciplinary Counsel that Respondent violated Rules 3.3(a)(1) and 8.4(c) before Judges Wolf and Wertheim.

B. False Representations to the Court of Appeals

Respondent's counsel filed a 52-page brief on Respondent's behalf in the Court of Appeals. *See* DX E38. The Hearing Committee concluded that Respondent "reviewed the brief before it was filed," and was thus responsible for any false statement contained in it. FF 75.

That finding is not supported by the evidence. At the hearing, in response to a single general question, Respondent acknowledged that he had reviewed the appellate brief. Tr. 1372. That concession, of course, was quite unremarkable

because Respondent was being cross-examined about it. He was, however, never asked when that review occurred. Nor was he ever asked whether, or when, he had reviewed and approved the specific statements in it that were challenged by Disciplinary Counsel.

Before the Board, Respondent correctly argues that the statements were "not Respondent's conduct" but were statements by his lawyer in a lengthy legal brief signed only by the lawyer. Resp. Br. at 16. Without evidence that Respondent read and endorsed the specific offending statements at a relevant time, Disciplinary Counsel did not prove by clear and convincing evidence that Respondent was responsible for false statements to the Court of Appeals. We find he did not violate Rules 3.3(a)(1), 8.4(c), or 8.4(d) by reason of them.

C. False Statements to the Probate Court

1. The *Brown* trust

In the Second Account in the *Brown* trust filed in December 2005, Respondent listed quarterly his fees, totaling $6,737.88 for the entire year, but provided no further detail. *See* FF 65. In response to the probate auditor's previous inquiry regarding the First Account, Respondent had written that quarterly fees "are computed at .25% of the fair market value of the estate." FF 63.

On January 20, 2006, Judge Wolf ordered Respondent to file "a thorough explanation" of the fees. DX C26 at 1-2; FF 66. Respondent's 20-page responsive memorandum (DX C27) did not provide any time records; instead, he argued entitlement to a percentage fee and stated that since a 1% fee had been approved in

the trust's First Account, "it has not been necessary to keep detailed time records for this Trust." FF 68. That response was evasive at best, and deliberately so. DX A4 at 36-37 (Respondent's Answer, ¶ 122). At the disciplinary hearing Respondent carefully rationalized that "I didn't say I wasn't keeping time records. I said it wasn't necessary for me to keep time records." *Id*.; *see* DX C27 at 15.

Judge Wolf rejected Respondent's percentage fee claim and ordered him to file a fee petition with "full documentation of time expended and hourly rates" since "at no time [has Respondent] clearly said he is unable to do so." FF 69. Respondent's counsel then filed a pleading titled "Trustee's Explanation of Services," this time stating more directly that Respondent "had not kept time for specific services as trustee in this case." FF 71. Respondent verified that the pleading was true and correct. *Id*. At the disciplinary hearing, Respondent again carefully parsed his statement, explaining that with "some specific services I had not kept time, and for some specific services I had kept time." *Id*. (quoting Tr. 1329). In truth, before he represented to the Judge Wolf that he "had not kept time for specific services," Respondent had generated a detailed, computerized time report that justified time-based fees of $5,600 (compared to the $6,737.88 percentage fee he sought). *See* DX J7 at 1-3.

Evidently believing that Respondent had no time records, Judge Wolf decided that he had no choice but to determine the reasonableness of Respondent's fee request by starting from a percentage fee, because Respondent "cannot provide an hourly statement of services, as he 'has not kept time for specific services as trustee

in this case.'" FF 72. "It is a quandary for the court since almost anything the court does, because of the total lack of information supplied by the trustee, involves some appearance of arbitrariness." DX C30 at 2 (July 21, 2006 Order). Judge Wolf began his allowance calculation at 1%, deducted expenses and allowed Respondent $1,000 in *additional* compensation so as not to prejudice him unfairly. DX C30 at 3.[19]

Despite the fact that Respondent now admits that he *could* have produced such time records (Tr. 1374; *see* FF 71 (*Brown* time records)), he chose not to correct Judge Wolf's misimpression – which was based on Respondent's prior misleading statements. Rather, he appealed the reduction of his fee request, knowing that time records justified time-based fees only in a lesser amount. *See* FF 71; DX A4 at 36-37 (Respondent's Answer, ¶ 122); ODC Br. at 29. The reason Respondent did not disclose his time records – or correct Judge Wolf's misimpression – was purely tactical and self-serving:

> I did not produce the time records because I was being an advocate for the proposition that, as a trustee of special needs trusts, or as trustee of any trust, percentage fee compensation was appropriate and I was advocating that position. Had I presented – *I believed at the time that if I had presented time records then I was conceding the point and there would be no argument left*.

FF 73 (emphasis added).

One Hearing Committee member concluded that Respondent's statements that "it has not been necessary to keep detailed time records for this Trust," and that

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[19] The Court of Appeals in *D.M.B* was also misled on this point: "[Judge Wolf] allowed $1,000 of additional fees to keep his assessment from being 'too harsh' *in light of appellant's failure to keep time records*, which had deprived the court of 'any other method of determining reasonableness.'" *D.M.B.*, 979 A.2d at 18-19 (emphasis added).

"he had not kept time records for specific services as trustee in this case" were knowingly dishonest. *See* Separate Statement of Mr. Kassoff at 167-68. The majority, however, credited Respondent's technical explanation that his statement was not false because, although he had kept time for certain specific services, he had not kept time for other specific services; in other words, as Respondent testified, his statements were not false because they were "not all inclusive statement[s]." FF 71; HC Rpt. at 104-05.

The Court of Appeals has recognized that "technically true" statements are nonetheless dishonest when they evince "a lack of integrity and straightforwardness," such as where a lawyer "refrained from supplying [requested] information even when asked questions that grazed the truth." *In re Shorter*, 570 A.2d 760, 768 (D.C. 1990) (per curiam). Rule 8.4(c) is not to be accorded a "hyper-technical or unduly restrictive construction." *In re Ukwu*, 926 A.2d 1106, 1113 (D.C. 2007). To prove dishonesty, Disciplinary Counsel need not satisfy all the elements of a criminal perjury prosecution. *See Cleaver-Bascombe II*, 986 A.2d at 1198. By narrowly focusing on whether Respondent's statements might literally be true, the Hearing Committee majority ignored the thrust of Respondent's statements and their context, namely the court's explicit and repeated efforts to assess the time he spent as trustee. It is evident that Respondent's statements were deliberately crafted to skirt the truth so as not to jeopardize his hoped-for percentage fee recovery. Even after Judge Wolf's order made it obvious that the court understood Respondent to have said that he did not have time records and credited him with an additional

$1,000 so as not to appear "too harsh," Respondent did not correct the misimpression.

We agree with Disciplinary Counsel that Respondent's statements, coupled with his failure to disclose his time records, were false and intentionally so, made in "an apparent effort to bolster his [percentage fee] argument." *In re Tun*, 195 A.3d 65, 74 (D.C. 2018) (alteration added). The evidence is clear and convincing that Respondent intentionally and dishonestly misled Judge Wolf. *See In re Carlson*, 745 A.2d 257, 258 (D.C. 2000) (dishonesty may consist of failure to provide information where there is a duty to do so). His dishonest statements that "it has not been necessary to keep detailed time records" and that "he had not kept time for specific services" violated Rule 3.3(a)(1) and 8.4(c). *See Ukwu*, 926 A.2d at 1117-18 (Board should consider the "entire mosaic" of a respondent's conduct when assessing a respondent's intent).

2. The *Baker* trust

Before approving the Special Needs Trust for Dion Baker, the Probate Division (Judge Burgess) held a two-day hearing on May 3 and May 24 of 2005 to address the issue of trustee compensation. FF 118, 123. Respondent had again proposed that his trustee compensation be set at 1%, to be paid without a fee petition or prior court approval. FF 119. Judge Burgess disagreed and amended the proposed trust instrument to provide that Respondent's annual compensation was "*not to exceed one percent*" of the trust value, with its reasonableness to be determined by several factors including "time devoted to trustee duties." FF 125.

On June 23, 2006, Respondent filed the First Account in the *Baker* trust, but did not submit a fee petition. FF 127-29. Instead, he attached a Notice of Payment of Fees, served on Dion Baker's mother, that asserted his compensation for the fiscal year was "calculated as 1% of the value of the trust, or $17,264.18." FF 127. A month later, Respondent created a PCLaw-generated bill ("For Professional Services") based on his time entries and paid himself the amount shown on that bill, $12,350.59, as fees. DX I8 at 1-4; FF 128-29. Respondent did not disclose the disbursement, or the time records supporting it, to either the probate court or to Dion Baker's mother. FF 128, 134.

On August 21, 2006, the Probate Division (Judge Wertheim) disapproved the percentage fee, without prejudice to Respondent's resubmission of "accompanying information establishing the reasonableness of such fees in accordance with the factors specified in . . . the trust instrument as amended [by Judge Burgess] . . . . " FF 130. On August 30, 2006, Respondent filed his response, falsely reiterating that he was to receive

> compensation for his services, *set by agreement of the parties at one percent (1%) of the trust corpus*, per year, payable quarterly. . . . The Trustee's fee of 1% has been approved by this Court in dozens of accountings filed in a number of other cases. . . . Therefore, in accordance with the provisions of Article 7, paragraph B, of the Trust, the Trustee paid himself the 1% fee without Order of [the] Court.

FF 131 (emphasis added). Respondent did not provide Judge Wertheim with his time records supporting the lesser fee of $12,350.59 for the hours he had recorded, nor did he disclose he had already paid himself that amount. Instead, he vaguely

stated only that he had devoted at least 40 hours to the trust. FF 133.[20]

Once again, at the disciplinary hearing, Respondent attributed his lack of candor to his "righteous" stand in support of "justice":

> Everything about my claim to the $17,000 amount to me was absolutely in accordance with the trust, with the law, with the custom of the community, with the industry standards, and Judge Wertheim having previously approved percentage fees just months earlier, now changing his mind. . . . *I took a somewhat righteous stand, drew a line and said, [e]nough of this; I'm getting ready to appeal*. . . . *I was outraged and I was in my mind serving the justice that I thought I was being denied*.

FF 132 (emphasis added).

In a September 28, 2006 order, Judge Wertheim admonished Respondent and reduced his requested fee to $8,400, stating that:

> Contrary to [Judge Burgess's] plain direction, the Trustee has calculated his proposed compensation by starting with his requested one percent and then reasoning backwards to justify it as reasonable, instead of the starting with the factors specified by the Court to arrive at a reasonable amount which is then subject to a one percent limitation. The Trustee's request and reasoning are presented as though his original draft proposal had been approved by the Court and the trust instrument never amended, i.e., as though the Court's hearing of May 3 and May 24, 2005 had never occurred.

FF 135. Judge Wertheim had retrieved and reviewed the transcript from the May 2005 hearings before Judge Burgess and quoted it extensively in his 11-page order. *See* DX D20 at 1-11. Although Judge Wertheim ultimately awarded Respondent a reduced fee of $8,400 in September 2006, Respondent did not promptly return the

[20] The Court of Appeals understood from the submission that Respondent "had records that merely showed 'at least 40 hours of service [being] devoted to this trust,' and gave no indication of how that time was divided among his services." *D.M.B.*, 979 A.2d at 20.

excess from the $12,350.59 that he had paid himself, nor did he seek a stay of the order when he appealed it. Instead, Respondent eventually returned $4,522.56 (the excess amount plus interest) to the *Baker* trust's account on September 18, 2009. FF 141-42.

We agree with Disciplinary Counsel and Mr. Kassoff that Respondent misrepresented to Judge Wertheim that his compensation had been set at 1%. *See* FF 135 (Judge Wertheim finding that Respondent's claim that his percentage fee had been 'set by agreement of the parties' was "inaccurate"); *see also* Separate Statement of Mr. Kassoff at 176 (Respondent falsely represented that trustee compensation had been "set by agreement of the parties at one percent"). Just as he wanted to maximize his fees and was angry about Judge Wolf not permitting him to do so, *see* FF 73, Respondent misled Judge Wertheim into believing that Respondent had "scant information about his time in this matter" when he failed to disclose that he had paid himself a precise, time-based fee based on a detailed billing statement. ODC Br. at 32-35. This deceitful conduct by Respondent violated Rules 3.3(a)(1) and 8.4(c). *See* Rule 3.3, cmt. [2] ("There may be circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation."); *In re Orci*, Bar Docket Nos. 376-02, *et al*., at 134 (HC Rpt. Oct. 3, 2008) ("[B]ecause a lawyer's duty of candor is so fundamental to his ethical obligations, any statement that has a potential impact on a judicial proceeding violates the Rule [3.3(a)(1)] unless the lawyer knows, or, 'on the basis of a reasonably diligent inquiry' has grounds to

believe, the statement to be true.") (citing *In re Owens*, Bar Docket No. 2-00, at 9 (BPR July 12, 2002)).

SANCTION

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); *see also In re Goffe*, 641 A.2d 458, 464 (D.C. 1994) (per curiam). 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 determining an appropriate sanction, we consider: (1) the seriousness of the conduct at issue; (2) the prejudice, if any, to the client which resulted from the conduct; (3) whether the conduct involved dishonesty; (4) the presence or absence of violations of other provisions of the disciplinary rules; (5) whether the attorney has a previous disciplinary history; (6) whether the attorney has acknowledged his wrongful conduct; and (7) circumstances in mitigation or aggravation. *See, e.g.*, *Martin*, 67 A.3d at 1053. The Court also considers "'the moral fitness of the attorney' and 'the need to protect the public, the courts, and the legal profession.'"

In re Rodriguez-Quesada, 122 A.3d 913, 921 (D.C. 2015) (per curiam) (quoting *In re Howes*, 52 A.3d 1, 15 (D.C. 2012)). We address how those factors apply in this case.

Seriousness of the Misconduct and Prejudice to Clients

Standing alone, Respondent's negligent misappropriations in the *Seay* trust are extremely serious and warrant at least a six-month suspension. *See, e.g.*, *Anderson*, 778 A.2d at 342; *In re Cooper*, 613 A.2d 938, 939 (D.C. 1991) (per curiam); *Evans*, 578 A.2d at 1143. The misappropriations in this case are, however, of more acute concern because of the vulnerability of their ultimate victim: a trust beneficiary who suffered "from multiple neurodevelopmental benefits [*sic*] as the result of severe trauma at birth." DX B2 at 1.

Respondent's misappropriations, moreover, were accompanied by additional misconduct that similarly targeted defenseless trust beneficiaries, one of whom suffered from "spastic cerebral palsy and quadriplegia with profound neurological damage" with "no expressive or receptive language and no gross motor movement although he startles to noise," DX C4 at 1, and the other of whom had "cerebral palsy, a seizure disorder, developmental delays and other neurological damage." DX D3 at 1. Both needed assistance "in every aspect of daily living." DX C4 at 2; DX D3 at 1. It is the impact of Respondent's conduct upon these disabled children that is the particularly troubling. *See In re Askew*, 96 A.3d 52, 60 (D.C. 2014) (per curiam) (the need to protect the public is especially acute where court appoints attorney to represent incarcerated indigent defendants with no ability to select

attorney); *In re Perez*, Bar Docket No. 40-00, at 4-5 (BPR June 14, 2002) (fitness requirement where attorney failed to appreciate ethical responsibilities to "vulnerable immigration client"). Respondent argues that "none of [beneficiaries or their guardians] complained to Disciplinary Counsel or appeared as witnesses for Disciplinary Counsel at the hearing." Resp. Br. at 31. No reasonable person, however, would expect them to do so. Certainly, the trust beneficiaries were not in a position to advocate for themselves or to challenge the fees taken. Yet they unquestionably suffered financial injury from Respondent's misappropriations (the lost interest which was never repaid) and from Respondent's falsified billings (which the court approved and were paid in full). *See Estate of Greene*, 851 A.2d at 425 ("[T]here is a strong argument that, as a matter of law, the guardian should be obliged to pay interest for improper use of the money during a period when that money should have remained in the estate earning income for the ward, not for the guardian.").

In addition, the structural characteristics of Special Needs Trusts and the challenges to their supervision also counsel an enhanced sanction. Attorneys "who are officers of the court – regularly serve as trustees in lieu of financial institutions, and [thus] court supervision of trustee compensation should fairly mirror the protections afforded by the guardianship statute, which the special needs trust effectively displaces." *D.M.B.*, 979 A.2d at 22-23. As noted by Judge Wolf:

> There *is* no one, other than the court, to oversee these trusts. The Probate Division has often insisted on service of all filings . . . upon the D.C. Attorney General's Office . . . . This judge has yet to see a single

> filing from that busy office, or from a beneficiary or his or her parent or guardian, thus accentuating the non-adversary nature of these cases.

DX C40 at 6 (emphasis in original); *see also In re Beal*, No. TR-2-99 (D.C. Super Ct. May 11, 2005), 2005 WL 1118153, at 3. Moreover, judicial supervision of the *Brown* and *Baker* trusts was complicated by the rotating judicial assignment procedures within the Probate Division – and the record suggests that Respondent took advantage of those transitions. *See, e.g.*, DX C40 at 2 (court noting Respondent's portrayal of the compensation provision in the *Brown* trust document "is somewhat disingenuous"); FF 27 and 46 (failing to disclose prior judge's order requiring "a detailed statement of services" when another judge was assigned to the *Seay* trust); FF 47 (quoting only one sentence from the original trust instrument and omitting the sentence describing "hourly" fees); FF 135 (acting "contrary to the Court's plain direction" and as if the proposed compensation for the *Baker* trust had never been amended). Probate Division judges often have little practical choice but to rely on a trustee's representations concerning the trust terms, the method of compensation, and any prior relevant orders. As noted by Judge Wolf in his January 18, 2007 order:

> Quite apart from the direct violation of this court's order [disallowing charges to the trust for the fee litigation], it appears Mr. Krame wishes to use the assets of this trust to further his own compensation interests. He seems to know that any of three senior judges and two associate judges currently assigned to the Probate Division may be designated to review his fee petitions and accounts. Items such as [time entries involving non-compensable charges, *i.e.,* travel time to court or fee litigation] can easily be overlooked by another judge, or even one formerly familiar with the case from earlier encounters. A tremendous amount of time of a busy judge is required to ferret out such matters –

> they are usually buried in time records and/or accounting schedules. More time is required to write about them.

DX C40 at 7 (citing other Memorandum Orders issued by the Probate Division, including four addressing Respondent's compensation).

Finally, the core motivation for all of Respondent's misconduct was financial: he was determined to be paid more money and refused to take "no" for an answer. That objective, which he described to the Hearing Committee as his motivating "principle," led Respondent to mislead the courts, to falsify fee requests, and to disobey court orders.

It is for all these reasons that we believe our sanction must be severe enough to "deter others from engaging in similar misconduct." *Askew*, 96 A.3d at 54; *In re Robinson*, 736 A.2d 983, 988 n.11 (D.C. 1999) (sanction plays a "significant protective role" in deterring future misconduct by the attorney in question "and others so situated."); *In re Jenkins*, Board Docket No. 15-BD-110, at 12 (BPR Dec. 5, 2016) (imposing a reprimand because the Board was "not confident that an informal admonition [recommended by the Hearing Committee] would send a clear enough message to attorneys . . .").

Dishonesty

Rather than accept repeated court rulings rejecting his compensation claims, Respondent resorted to dishonesty and deception to evade the courts' orders. He deceptively sought compensation for his time in defiance of a court order and later deliberately edited time records to mask the true character of his activities. He was unjustifiably paid for that time from trust assets because the courts did not discover

his fraud. He then compounded his misconduct by testifying falsely to the Hearing Committee. Respondent engaged in a pervasive dishonest scheme for personal gain, at the expense of vulnerable clients. His dishonesty was flagrant, "reflect[ing] a continuing and pervasive indifference to the obligations of honesty in the judicial system." *In re Pennington*, 921 A.2d 135, 141 (D.C. 2007) (quoting *In re Corizzi*, 803 A.2d 438, 443 (D.C. 2002)).

Acknowledgment of Wrongful Conduct

The Hearing Committee correctly questioned whether Respondent acknowledged his misconduct, although he expressed some "remorse:"

> As we received his testimony and subsequently reviewed and discussed it repeatedly, we were uncertain at times whether he fully understands and acknowledges that he failed in his over-weening self-confidence even to think about seeking objective advice about the steps he might take, stepped out of bounds on the occasions we have identified above, and came perilously close to doing so on several others. On the other hand, toward the end of the hearing, Respondent convincingly expressed his remorse over certain of his missteps.

HC Rpt. at 146.

Additional Mitigating and Aggravating Circumstances

In mitigation, the Hearing Committee appropriately noted that Respondent has no prior discipline and cooperated with Disciplinary Counsel's investigation. His record also reflects diligent service to the beneficiaries of others of his trusts and their families, as well as exemplary service to the disabled community, to the legal profession, and to the community at large. HC Rpt. at 151. The events at issue in

this case took place a long time ago with no intervening disciplinary issues.[21] However, the:

> absence of prior discipline cannot excuse an offense against common honesty [that] should be clear even to the youngest [practitioner]; and . . . neither cooperation with the disciplinary body (which is already required by the ethical rules) nor contrition is sufficient to put at risk the continued confidence of the public in integrity of the bar and the judiciary.

Howes, 52 A.3d at 23 (quoting *Addams*, 579 A.2d at 196); *see id*. at 14 (Court disbarred respondent, unmoved by his "unblemished disciplinary record prior to and after the misconduct at issue in this case . . ."); *Cleaver-Bascombe II*, 986 A.2d at 1200 (absence of prior discipline was "massively outweighed" by the respondent's false testimony at the disciplinary hearing).

We disagree with the Hearing Committee that we should consider in mitigation of sanction "his principled defense" and "crusade" for the right to charge these and other trusts a percentage fee, or that his suspension from the practice of law would result in a hardship for his trust clients. *See* HC Rpt. at 147-48. Respondent's crusade here was not "principled" at all; it was a quest for compensation fueled by dishonesty and disobedience. Moreover, discipline may not

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[21] We agree with the Hearing Committee that delay is not a mitigating factor here, and that Respondent was at least partially responsible for the delay. Disciplinary Counsel sent its first inquiry letter to Respondent in February 7, 2007, seeking information related to Judge Wolf's January 18, 2007 Order. HC Rpt. at 3. Respondent requested that the investigation be held in abeyance pending appeal. *Id*. at 3-4. The Court of Appeals issued its decision in August 2009, but due to Respondent's motions for extensions, motions to quash, and appeals related to the production of documents, the investigatory period extended into 2013. *Id*. at 4. Unsuccessful negotiated discipline proceedings caused further delay until the Specification of Charges was ultimately filed on March 31, 2016. *Id*. at 5. Respondent's counsel requested a hearing date of October 26, 2016 due to Respondent's schedule, and that date was later postponed to December 5, 2016. *Id*. at 5-7.

affect his trustee appointments. Finally, the Hearing Committee relied on *In re Mance*, 980 A.2d 1196, 1208 (D.C. 2009), *see* HC Rpt. at 152, to support the notion that the Court has given significant weight to the impact of a suspension on a respondent's client but, unlike here, in *Mance* the respondent did not act dishonestly. *See Mance*, 980 A.2d at 1208.

In aggravation, we note that Respondent committed a large number of Rule violations spread over almost a ten-year period. In Count II (*Seay* trust), the negligent misappropriations occurred in 2001-2002; in Count II (*Brown* trust) the violations occurred during 2005-2007; in Count III (*Baker* trust), the violations occurred during 2006-2007; and in Count IV, the violations occurred during 2009-2010.

Comparability

D.C. Bar R. XI, § 9(h) requires that we recommend a sanction that is consistent with those imposed in prior cases involving comparable misconduct. Our "comparability" analysis leads us to recommend that Respondent be disbarred, the sanction imposed in *In re Cleaver-Bascombe*, *In re Howes*, and *In re Goffe*, all cases in which the respondent knowingly used falsified documents in pursuit of a personal benefit.

In *Cleaver-Bascombe II*, 986 A.2d at 1199-1200, the respondent deliberately submitted a "patently fraudulent" Criminal Justice Act voucher "seeking compensation from public funds for work she had not performed," testified falsely to the Hearing Committee in an effort to cover up her fraud, and did not admit her

fraudulent scheme during the disciplinary process. The Court found "no meaningful distinction" between the respondent's conduct and other types of fraudulent conduct that lead to disbarment: intentional misappropriation, mail or wire fraud, felony theft of federal funds, and other felony theft offenses. 986 A.2d at 1199. The Court's admonition to CJA lawyers applies with equal force to Respondent in his role of trustee for Special Needs Trusts:

> The compensation of [CJA] attorneys . . . is based upon the assumption that members of our Bar are honorable men and women who will accurately report the work that they have done, and who will not demean their noble calling and bring disgrace to themselves and to their profession by swearing that they performed work that they did not do. Attorneys who accept CJA appointments are therefore expected to be scrupulously honest and to exercise a high degree of care in completing their vouchers, which are paid out of taxpayer funds, and which are submitted to the court under penalty of perjury. Where an attorney has deliberately falsified a voucher and sought compensation for work that he or she has not performed, or for time that he or she has not devoted to the case, that attorney's fitness to practice is called into serious question. This is especially true if the attorney has compounded his or her initial fraud by testifying falsely during the resulting disciplinary proceedings.

Id. at 1198-99. In addition, as the Court recognized, the difficulty in detecting fraud of the type at issue here augurs in favor of a severe sanction, to deter future similar misconduct:

> In the interest of effective general deterrence, the severity of a sanction should take into account the difficulty of detecting and proving the misconduct at issue. That principle argues strongly in favor of disbarring Respondent, because inflated vouchers are difficult to detect and prove. To deter unscrupulous attorneys who know they are not

> likely to be caught if they inflate their charges, voucher fraud must incur a heavy penalty.

Id. at 1199-1200.

In *Goffe*, 641 A.2d at 461-65, the respondent engaged in dishonest conduct for personal gain (obtaining a larger tax deduction for his fiancée and prevailing in civil litigation against his tenant). In separate matters, he repeatedly falsified evidence, forged signatures and notarizations on legal documents, and lied under oath to cover up his misconduct. The Court noted that the respondent likely would have been disbarred if he had been convicted of tendering fabricated documents, that his conduct showed a pattern of dishonesty and fabrication of evidence over a number of years, that his dishonesty "was part of a plan to commit fraud intended to benefit himself," and that his "entrenched dishonesty" was his "principal means of dealing with the legal system." 641 A.2d at 465.

Howes is also relevant to the facts of this case. In *Howes*, 52 A.3d at 5-7, a federal prosecutor failed to disclose witness voucher payments to the trial court judges. Like Howes, Respondent was knowingly dishonest and took advantage of a system that made the misconduct hard to detect. Again, the Court noted that where "misconduct is particularly difficult to discover . . . a greater penalty is warranted in the interest of both deterrence and protection of the public." 52 A.3d at 22.

We are also mindful that "[a] trustee has the highest duty of loyalty to the beneficiaries of the trust that it administers." *Rearden v. Riggs Nat'l Bank*, 677 A.2d 1032, 1035 (D.C. 1996); RESTATEMENT (SECOND) OF TRUSTS § 170(1) (1959) ("The trustee is under a duty to administer the trust solely in the interest of

the beneficiaries."). As the Court recognized in *Burton*, trustee appointments are "presumably due in some measure to [the respondent's] reputation for integrity and competence." 472 A.2d at 837. Respondent utterly failed to fulfill those duties.

Finally, although this is not an intentional misappropriation case, the Court's misappropriation jurisprudence shows that there can be no tolerance for the fundamentally dishonest behavior found here:

> The appearance of a tolerant attitude toward known embezzlers would give the public grave cause for concern and undermine public confidence in the integrity of the profession and of the legal system whose functioning depends upon lawyers.

Addams, 579 A.2d at 193. We must and do recognize that that "[l]awyers have a greater duty than ordinary citizens to be scrupulously honest at all times, for honesty is 'basic' to the practice of law." *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987). That Respondent submitted false documents to a court for personal gain is simply intolerable because "[d]ocuments are an attorney's stock in trade, and should be tendered and accepted at face value in the course of professional activity," *In re Schneider*, 553 A.2d 206, 209 (D.C. 1989), and because "[a] lawyer's representation to the court must be as reliable as a statement under oath. The reliability of a lawyer's pleadings is guaranteed by the lawyer's membership in the bar." *In re Reback*, 513 A.2d 226, 231 (D.C. 1986).

Taking all these factors into account, we conclude that Respondent should be disbarred. We recognize that this sanction is substantially greater than that recommended by any of the Hearing Committee members, each of whom conscientiously evaluated the evidence and offered a sanction recommendation

based on their separate assessments of which Rules had been violated. However, our *de novo* review of the record and our findings of additional Rule violations compel a more serious sanction recommendation.

Similarly, we find the misconduct here sufficiently serious so as to recommend a sanction greater than that recommended by Disciplinary Counsel before the Board ("at least two years suspension") although it is the same as that recommended by Disciplinary Counsel to the Hearing Committee. *See* ODC Post-Hearing Br. at 86-87 ("For this flagrant dishonesty alone, Respondent should be disbarred")[22]; *see Cleaver-Bascombe I*, 892 A.2d at 412 n.14 (noting that the imposition of sanctions greater than that sought by Disciplinary Counsel "should be the exception, not the norm" in our adversarial disciplinary system).

CONCLUSION

For the foregoing reasons, we recommend that Respondent be disbarred, and that, as a condition of reinstatement, Respondent be required to make restitution of $245 to the *Brown* trust and to $615 to the *Baker* trust (the amounts paid by those trusts as a result of his false time entries), plus interest at the legal rate, and that he make restitution to the *Seay* trust in the form of the interest due on the $6,835.38 returned to the *Seay* trust on February 26, 2003. We further recommend that, for purposes of reinstatement, Respondent's period of disbarment not begin to run until he has complied with the notification requirements of District of Columbia Bar Rule

[22] Disciplinary Counsel did not explain in its briefing why it was now proposing a suspension of "at least two years" instead of disbarment, but when asked directly by the Board Chair why it was not recommending disbarment, Disciplinary Counsel responded that it "probably should have." *See* Oral Arg. Tr. at 42-43.

XI, § 14, and has also given notice of the Court's decision in this matter to all courts supervising trusts for which he serves as trustee, guardian, or conservator in any jurisdiction.[23]

BOARD ON PROFESSIONAL RESPONSIBILITY

By: 

Robert C. Bernius

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

[23] We make this recommendation because of Judge Wolf's observation of a possible "trend to move these trusts to Maryland . . . [where] the court suspects that Maryland court supervision at least of fees is minimal, though it has ordered Mr. Krame to inform the court about that in another of his cases in which he is seeking a move." DX C40 at 6.