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

In the Matter of:	:	
	:	
DONALD B. TERRELL,	:	
	:	
Respondent.	:	Board Docket No. 16-BD-036
	:	Bar Docket Nos. 2015-D106 and
A Member of the Bar of the	:	2015-D206
District of Columbia Court of Appeals	:	
(Bar Registration No. 416562)	:	

REPORT AND RECOMMENDATION OF THE
AD HOC HEARING COMMITTEE

Respondent, Donald Terrell, is charged with violating Rules 1.3(a), 1.3(c), 1.4(a), 1.4(b), 1.15(a), 1.15(e), and 1.16(d) of the District of Columbia Rules of Professional Conduct (the "Rules"). The charges arise from Respondent's alleged neglect, lack of communication, and failure to return papers and unearned fees in his representation of two clients, Amal Azzam and Esther Howard, as well as the alleged reckless or intentional misappropriation of unearned fees in his representation of Ms. Howard. Disciplinary Counsel contends that Respondent committed all of the charged violations and should be disbarred as a sanction for his misconduct. Respondent contends Disciplinary Counsel has not proven any of the charged Rule violations by clear and convincing evidence, but, if the Committee finds that a violation did occur, the appropriate sanction would be a suspension within a range of thirty days to six months, including an opportunity to have any said suspension stayed.

As set forth below, the Hearing Committee finds clear and convincing evidence that Respondent violated Rules 1.3(a), 1.3(c), 1.4(a), 1.4(b), 1.15(a), 1.15(e), and 1.16(d). The Hearing Committee recommends that Respondent receive a sanction of disbarment.

I. PROCEDURAL HISTORY

On June 28, 2016, Disciplinary Counsel served Respondent with a Specification of Charges ("Specification"). DX 3.[1] The Specification alleges that Respondent violated the following rules:

Count I (Amal Azzam representation)

- Rule 1.3(a) and (c), by failing to represent his clients zealously and diligently, and failed to act with reasonable promptness in representing his client;
- Rule 1.4(a) and (b), by failing to keep his client reasonably informed about the status of her matter and promptly comply with reasonable requests for information, and failing to explain a matter to the extent reasonably necessary to permit his client to make informed decisions about the representation;
- Rule 1.16(d), by failing to take timely steps to the extent reasonably practicable to protect his clients' interests, including surrendering paper and property to which the client was entitled, and refunding the advance payment of fees or expenses that were not earned or incurred.

[1] "DX" refers to Disciplinary Counsel's exhibits, and "RX" refers to Respondent exhibits. "Spec." refers to the Specification of Charges filed on June 23, 2016. "Tr." refers to the transcript of the hearing on December 12 and 14, 2016.

Count II (Esther Howard representation)

- Rule 1.3(c) by failing to act with reasonable promptness in representing his client;
- Rule 1.4(a), by failing to keep his client reasonably informed about the status of her matter and promptly comply with reasonable requests for information;
- Rule 1.15(a), by failing to keep and preserve complete records of trust account funds;
- Rule 1.15(a) and (e), by failing to safekeep and hold advances of unearned fees that were in his possession in connection with a representation separate from his own funds and in his trust account, but, rather, intentionally or recklessly misappropriated the funds of his client; and
- Rule 1.16(d), by failing to take timely steps to the extent reasonably practicable to protect his clients' interests, including surrendering paper and property to which the client was entitled, and refunding advance payment of fees that had not been earned.

See Spec. ¶¶ 23(a)-(c), 46 (a)-(e).

Respondent filed an answer on July 21, 2016. On October 24, 2016, a prehearing conference was held before the Chair of the Ad Hoc Hearing Committee, Leslie H. Spiegel, Esquire, with Disciplinary Counsel represented by Julia L. Porter, Esquire, and Respondent, represented by Leonard L. Long, Esquire. At the conference, the Chair set deadlines for filing exhibits and witness lists before the scheduled hearing. Disciplinary Counsel submitted its exhibits, DX 1-30, and witness list on November 29, 2016. Respondent did not submit any exhibits or witness list before the hearing.

The hearing was held on December 12 and 14, 2016, before the Ad Hoc Hearing Committee (the "Hearing Committee") comprised of the Chair; Curtis D. Copeland, Jr., Public Member; and Arlus J. Stephens, Esquire, Attorney Member. Disciplinary Counsel was represented at the hearing by Ms. Porter. Respondent was present and represented by Mr. Long.

All of Disciplinary Counsel's exhibits were received into evidence. Tr. 118-23, 155-56. During the hearing, Disciplinary Counsel called as witnesses Amal Azzam and Esther Howard (Respondent's former clients) and Kevin O'Connell, an investigator with the Office of Disciplinary Counsel. Respondent testified on his own behalf. The Committee accepted into evidence an additional document, DX 31, during Disciplinary Counsel's cross-examination of the Respondent. Tr. 264.

At the conclusion of the hearing, the Hearing Committee made a preliminary non-binding determination that Disciplinary Counsel had proven at least one of the ethical violations set forth in the Specification. Tr. 268; *see* Board Rule 11.11. In the sanctions phase of the hearing, Disciplinary Counsel submitted DX 32, an informal admonition issued to Respondent in 2016, as evidence in aggravation. Tr. 268-69 (submitted into evidence without objection) As to sanction, Respondent requested that his depression be considered as a mitigating factor and further requested that the hearing record remain open so that he could submit a letter from his medical provider documenting his "diagnosis and treatment for his illness." Tr. 191-92, 240, 273. Disciplinary Counsel objected to the late submission of evidence of an alleged mental disability, which failed to comply with Board Rule 7.6, and the

Hearing Committee denied Respondent's request to keep the record open. Tr. 275; *see* Board Rule 7.6(a) (providing that a respondent seeking to raise disability in mitigation of sanction under *In re Kersey*, 520 A.2d 321, 326 (D.C. 1987) must file a Notice of Intent to Raise Disability in Mitigation with the Board and serve a copy on Disciplinary Counsel on or before the date that an answer to the petition is due). *See infra* at 60-61.

Disciplinary Counsel submitted its Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction on January 18, 2017. On February 7, 2017, Respondent filed a Motion for Reconsideration of his request to keep the hearing record open in order to accept his documentary evidence of a medical-mental illness – specifically, a one-page letter from a physician – in mitigation. In his Motion, Respondent contended that (1) although he did not technically comply with the Board Rules governing disability mitigation, Disciplinary Counsel had notice of Respondent's mental health issues through certain of his communications with Ms. Azzam contained in Disciplinary Counsel's exhibits and through his testimony at the hearing; (2) Disciplinary Counsel would not be prejudiced; (3) he would suffer grave harm due to the potential for a serious sanction arising from this disciplinary matter; (4) he was willing to be monitored in lieu of suspension. On February 9, 2017, Disciplinary Counsel filed its Opposition to Respondent's motion, contending that Respondent waived his right to seek mitigation under *Kersey* and had not shown good cause for permitting admission of his evidence, and that, in any event, the evidence would fall far short of the level of proof necessary to establish *Kersey*

mitigation.[2] On February 14, 2017, the Chair denied Respondent's motion because he presented no new argument, and the hearing record remained closed.

Respondent filed his Amended Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction and Motion for Leave to Late File on February 17, 2017.[3] Disciplinary Counsel's Reply was filed on February 27, 2017.

I. FINDINGS OF FACT

The following findings of fact are based on the testimony and documentary evidence admitted at the hearing. The Committee finds that these facts have been established by clear and convincing evidence. *See* Board Rule 11.5.

1. Respondent was admitted to the Bar of the District of Columbia Court of Appeals on December 5, 1988 and assigned Bar number 416562. DX 1. Respondent graduated from law school in 1986. *Id*. Respondent is not a member of any other state Bar, but he is admitted to practice in the federal courts in Maryland and D.C. Tr. 179-80 (Respondent).

---

[2] To carry the burden of proof under *Kersey*, the respondent must prove:

(1) by clear and convincing evidence that he suffered from a disability or addiction at the time the misconduct;
(2) by a preponderance of the evidence that the disability or addiction substantially caused him to engage in that misconduct; and
(3) by clear and convincing evidence that he is substantially rehabilitated.

In re Stanback, 681 A.2d 1109, 1111-15 (D.C. 1996).

[3] Respondent's initial Proposed Findings of Fact had not complied with the briefing order directing him to respond to each numbered paragraph in Disciplinary Counsel's Proposed Findings of Fact, so the Chair ordered Respondent to amend his Proposed Findings of Fact.

2. In 2014, Respondent maintained his law office at 46 N Street, NW, in Washington, D.C. Tr. 201, 215 (Respondent); DX 26 at 3 (address on check). In or around February 2015, Respondent closed his office in the District of Columbia, and after that he worked out of his home in Maryland. Tr. 218 (Respondent). When he closed his D.C. office, Respondent did not notify most of his clients of the move or his new address. Tr. 201-02, 219 (Respondent).

3. In 2014 and 2015, Respondent maintained a trust account (account no. ending in 5601) at Premier Bank, formerly known as Addams National Bank. DX 29-30. Respondent was the sole signatory on that account and responsible for all funds deposited in and withdrawn from it. DX 29; Tr. 127-28 (O'Connell); Tr. 220 (Respondent).

4. Respondent also maintained an operating account (account no. ending in 3228) and a personal account (account no. ending in 2006) at Premier Bank, and he was the only signatory on those accounts. Tr. 129-30 (O'Connell); Tr. 220 (Respondent).

5. Respondent knew that his trust account was for safekeeping client funds, including advances of unearned fees and unincurred expenses, as well as for funds in which clients or third parties had an interest. Tr. 206, 220, 222 (Respondent). Respondent deposited the advances paid by Ms. Azzam, who hired Respondent to sue a former mortgage lender, and advances paid by Ms. Howard, who hired him to sue her former employer, in his trust account. DX 30 at 14-16,

69-71, 136, 146-49, 161-163; Tr. 225-26, 250, 254, 258 (Respondent); Tr. 131, 140-44 (O'Connell).

6. Respondent testified that he deposited payments for earned fees in his operating or personal account but that on occasion he also deposited earned fees in his trust account. Tr. 220-21, 253-54 (Respondent). He acknowledged that it was "wrong" to deposit earned fees in his trust account. Tr. 254 (Respondent).

7. Respondent kept no records of the entrusted funds he deposited in and withdrew from his trust account,[4] including unearned fees advanced to him by Ms. Azzam and Ms. Howard when they retained him. Tr. 126, 138, 146-47, 149, 154 (O'Connell). Respondent had only one document or record for Ms. Azzam's funds: a trust account deposit slip he completed noting the amount of $1,000 with the name "Azzam."[5] DX 11 at 5; DX 12; Tr. 126 (O'Connell); Tr. 223 (Respondent). Respondent had no records of receiving or handling Ms. Howard's funds. Tr. 138 (O'Connell); Tr. 223-24, 232 (Respondent).

[4] In his Response to Disciplinary Counsel's Proposed Finding of Fact, Respondent disputed this statement and suggested that "Respondent's trust account is a record in and of itself." Respondent's Amended Response to Disciplinary Counsel's Proposed Finding of Fact, ¶ 7. However, the "record" of Respondent's trust accounts offered as evidence to the Committee was created and produced to Disciplinary Counsel by Respondent's bank. Tr. 126-27 (O'Connell). Respondent did not produce any other records related to the trust account to Disciplinary Counsel or the Committee, and no evidence indicates that records related to the trust account (other than the minimal materials described above) were maintained by Respondent. Tr. 126, 138, 146-47, 149, 154 (O'Connell).

[5] Records provided by Respondent's bank indicated a payment of $500 from Respondent to Randy Squire for an "Azzam consult fee." Tr. 131 (O'Connell), DX 30 at 25. Respondent did not offer any documentary evidence related to that payment. Tr. 186 (Respondent describing payment to Mr. Squire).

8. At the hearing, Respondent claimed he had a check register for his trust account (Tr. 222) (Respondent), but he never produced it (Tr. 126, 138, 146-47, 149 (O'Connell)). He wrote few checks, however, on his trust account. *See* DX 30 (only 17 checks in 18 months written on his trust account: including four payable to himself without notation relating to a client matter (DX 30 at 129, 177, 196, 198); one payable to "cash" (DX 30 at 84); one payable to the bank and endorsed by Respondent (DX 30 at 8-9); and one payable to the DMV (DX 30 at 131)).

9. Respondent generally used internet transfers to move funds from his trust account to his personal account (account no. ending in 2006). DX 30; Tr. 129-30, 146 (O'Connell). He made almost all such transfers in round numbers and within days – sometimes on the same day – of depositing entrusted funds. The transfers left no record indicating whether the withdrawal related to a client matter and, if so, which one. DX 30 at 1, 11, 32, 51, 65-66, 94, 109, 136-37, 150, 174, 179, 199 (31 internet transfers from Respondent's trust account to his personal account between May 2014 and October 2015); *see* Tr. 129-30 (O'Connell).

10. Respondent also made internet transfers from his trust account to his business or operating account (account no. ending no. 3238). These too were in round numbers and made within days, or on the same day, as a deposit of entrusted funds, with no record indicating whether the withdrawal related to a client matter and, if so, which one. DX 30 at 32, 51, 65-66, 137, 179 (seven transfers from the trust account to the operating account between May 2014 and October 2015); *see* Tr. 129-30 (O'Connell).

11. Respondent overdrew his trust account in August 2014, and again in December 2014 and May 2015. Tr. 132, 143-44 (O'Connell); DX 30 at 52, 137, 185. After the August 2014 overdraft, Respondent took no corrective steps to safeguard the entrusted funds in the account. Tr. 230-32 (Respondent). He did not take steps to record funds deposited in the trust account or the disposition of those funds. Tr. 230-32 (Respondent). Instead, he continued making internet transfers without regard to whose funds were in the trust account and without recording the transfers and their purpose. Tr. 230, 232 (Respondent); DX 30 at 51-199. Respondent described his recordkeeping of his trust account as "a mess." Tr. 230-31 (Respondent). The only step Respondent claimed to have taken in response to the overdrafts was to "put money into the client trust account [from Respondent's personal account] so that wouldn't be overdrawn" when he received an overdraft notice. Tr. 230-31 (Respondent).

12. The bank sent Respondent monthly statements for his trust account, as well as for his business and personal accounts. Tr. 228 (Respondent). The bank also sent him notices when the accounts were overdrawn, *see, e.g.*, DX 30 at 50, 135, 186 (notices of trust account overdrafts sent to Respondent), and on occasion called him about the overdrafts. Tr. 228-29 (Respondent). Respondent testified that he did not open most statements when he received them because "for the most part, [he] knew what was in [his] trust account." Tr. 228-29 (Respondent). When reminded of the overdrafts in the trust account, however, Respondent acknowledged that "[t]here were times where [he] didn't know what was in the account." Tr. 230

(Respondent). Respondent claimed that he eventually opened all of the bank statements. Tr. 229-30 (Respondent).

13. By no later than June 2014, Respondent was using funds in his trust account to pay personal expenses. He continued to engage in this practice in and after August 2014, when he overdrew his trust account. DX 30 at 51-199. Among the creditors Respondent paid with funds from his trust account were Speedpay, BillMatrix, American Water/Phone (a phone company), LaClede Gas Cons. (a gas utility company), Automobile Club, and the District of Columbia Department of Motor Vehicles.[6] Tr. 134-36 (O'Connell); DX 30 at 1-2, 10-11, 31-32, 51, 66, 94, 108, 131, 136, 150, 179.

14. Respondent's personal account (account no. ending in 2006) and operating account (account no. ending in 3238) also were overdrawn on "several" occasions. Tr. 144 (O'Connell).

15. Respondent twice made internet transfers from his operating account to his trust account when the trust account was overdrawn. *See* DX 30 at 51-52. On three occasions, Respondent made internet transfers from his personal account into the trust account – one on November 5, 2014 for $100 (DX 30 at 108), another on March 11, 2015 for $500 (DX 30 at 179), and a third on October 31, 2015 for $2,000 (DX 30 at 199).

[6] Respondent disputes that the payments were for "personal" expenses but does not further explain those payments except to suggest that the payment records "speak for themselves." Respondent's Amended Response to Disciplinary Counsel's Proposed Finding of Fact, ¶ 13. The nature of the recipients (including utility companies and the Department of Motor Vehicles) and the lack of any demonstrated or even asserted connection to a client matter sufficiently indicates that the payments were for personal expenses. Respondent has failed to offer any evidence to the contrary.

Respondent's Representation of Amal Azzam

16. In 2008, Ms. Azzam bought a condominium at 240 M Street, SW, financed with a mortgage loan from JP Morgan Chase Bank ("Chase"). After losing one of her jobs, Ms. Azzam was unable to make the mortgage payments and sought to refinance or modify her mortgage. Her efforts to refinance failed, and in April 2012, Ms. Azzam agreed to convey her unit to Chase by signing a deed in lieu of foreclosure. Ms. Azzam believed she no longer would be responsible for any mortgage payments or other expenses, including the condominium fees associated with the property, after executing the deed.[7] Tr. 56-59 (Azzam); *see also* DX 6 at 12-15.[8]

17. Although Ms. Azzam executed the deed in favor of Chase in April 2012, Chase did not process it in a timely manner, and the bank claimed that Ms. Azzam continued to owe money to the bank and the condominium association. In May 2014, Chase was seeking almost $80,000 from Ms. Azzam for monthly mortgage payments from April 2012 through May 2014. DX 6 at 15 (draft

[7] Respondent "disagrees" that Ms. Azzam believed she would not be responsible for further payments after executing the deed. Respondent's Amended Response to Disciplinary Counsel's Proposed Finding of Fact, ¶ 16. However, the draft complaint provided by Ms. Azzam to Respondent asserts that a Chase representative "confirmed that once the DIL was accepted, [Ms. Azzam] would not be pursued for all the outstanding debt associated with this loan" and that on the date Ms. Azzam executed the deed, her condominium fees were "up-to-date with zero balance." DX 6 at 12. Ms. Azzam testified to the same effect. Tr. 58-59 (Azzam). Respondent offers no evidence to the contrary.

[8] Ms. Azzam retained a lawyer to assist her in connection with the deed-in-lieu of foreclosure agreement and the outstanding condominium fees. That lawyer stopped representing Ms. Azzam after the agreement was negotiated. Tr. 60, 67, 104-05 (Azzam).

complaint prepared by Ms. Azzam); DX 7 at 22-23 (draft complaint included in Respondent's file); Tr. 59 (Azzam).

18. Ms. Azzam was anxious and distressed by Chase's collection efforts which continued for years after she executed the deed. She believed that Chase had treated her unfairly and wanted to take legal action against the bank. Tr. 58-60 (Azzam). In May 2014, Ms. Azzam went to the Free Legal Advice Clinic at Bread for the City (a program of the D.C. Bar's Pro Bono Center), seeking advice and a referral to a lawyer who could represent her in filing an action against Chase and possibly others. Tr. 60, 61-63 (Azzam). Angela Thornton, a lawyer working at the Clinic, referred Ms. Azzam to Respondent for representation. Tr. 60, 61-63 (Azzam); Tr. 195 (Respondent).

19. In May 2014, Ms. Azzam met with Respondent at his office on N Street NW, in Washington, D.C. Ms. Azzam gave Respondent the draft complaint that she had prepared to file against Chase, as well as underlying documents supporting her claims. Respondent told Ms. Azzam that he would represent her. Tr. 60-61, 63-65 (Azzam); *see also* Tr. 182-83 (Respondent telling Ms. Azzam he "would do everything that was necessary or desirable to pursue her interest").

20. A week or two after her visit, Ms. Azzam received a call from Arlene Bazar, who worked with Respondent, asking her to meet with Respondent again and provide further information. Tr. 61, 64-65 (Azzam); Tr. 217 (Respondent testifying Arlene Bazar was his girlfriend but not an employee). Ms. Azzam met a

second time with Respondent, to give him more information and $1,000 for his legal fee, on June 11, 2014. Tr. 61, 65-66, 109 (Azzam); Tr. 182 (Respondent).

21. Respondent deposited Ms. Azzam's check in his trust account on June 12, 2014 (although the deposit slip was dated June 11, 2014). DX 30 at 10, 14-16.

22. After the June 11, 2014 meeting, Ms. Azzam met with Respondent once more, around October 20, 2014. Tr. 70-71 (Azzam).[9] In the interim, Ms. Azzam sent Respondent a number of e-mails and called him. Tr. 72, 75-77, 108 (Azzam); *see* DX 7 at 4, 8, 30; DX 8 at 1-3, 14. Respondent often did not answer the phone, frequently failed to return her calls, and rarely responded to her e-mails. Tr. 72, 75-77, 108 (Azzam); *see* DX 7 at 4, 8, 30; DX 8 at 1-3, 14.

23. When Respondent requested and received $1,000 from Ms. Azzam on June 11, 2014, he failed to provide her with a fee agreement. DX 6 at 1-2; Tr. 66, 69 (Azzam). On June 13, 2014, and on June 16, 2014, Ms. Azzam e-mailed Respondent requesting a fee agreement. DX 6 at 1-2. Respondent sent her an agreement by e-mail on June 16, 2014. DX 6 at 3-5. In the agreement, Respondent said he would pursue "claims for damages that may be available under law against JP Morgan/Chase Bank, North American Title Company and others, in connection

[9] Ms. Azzam stated it was possible she met with Respondent on one other occasion between June and October, during a meeting when Respondent tried to call someone but could not reach him. Ms. Azzam believed, though, that the attempted call occurred at the June 11, 2014 meeting. Tr. 70-71 (Azzam). Respondent offered no time records or other evidence of a meeting between June 11 and October 20, 2014. Even if Respondent met with Ms. Azzam one additional time, that would not materially change our view of Respondent's failure to maintain communication with Ms. Azzam.

with a prior dispute with these entities concerning a Deed in Lieu of Foreclosure . . ." DX 6 at 4.

24. Also on June 16, 2014, Ms. Azzam e-mailed Respondent the latest version of her draft complaint against Chase and the title company, which she continued to revise and update. DX 6 at 11-20; Tr. 68-69 (Azzam). Respondent confirmed receipt of the draft complaint or "revised narration" and told her he would "review it shortly." DX 6 at 22.

25. Ms. Azzam asked Respondent some questions about the fee agreement and requested that he reduce his hourly fee of $250 to $200 because of her financial condition. DX 6 at 11, 22, 32-33, 36-37; Tr. 66-67, 69-70 (Azzam). On June 17, 2014, Respondent e-mailed Ms. Azzam a revised fee agreement that required her to pay Respondent a retainer of $1,000 (which she had already paid) "to be applied towards expenses and/or attorney fees" (that would be calculated at $200/hour in the event of the client's dismissal of Respondent or the Respondent's withdrawal). DX 6 at 39-40.[10] The agreement provided that Respondent's contingency fee would be one-third of the recovery but that if the matter proceeded to trial, he would receive 40%. DX 6 at 38-40. Ms. Azzam signed the revised fee agreement, dated it June 18, 2014, and returned it to Respondent. DX 5; Tr. 68 (Azzam).

[10] The agreement also had conflicting language indicating that the retainer would be "nonrefundable, subject only to a court award of attorneys' fees specifically including the retainer, in which case it shall be returned to the client, and is not contingent upon obtaining a remedy for the client." DX 6 at 39. However, when Respondent subsequently withdrew, he informed Ms. Azzam that he would return a portion of the retainer, confirming that he, as with Ms. Azzam, understood that the $1,000 was to be applied to expenses and/or attorney fees. DX 8 at 15; Tr. 244 (Respondent).

26. Ms. Azzam told Respondent about the financial harm she already had suffered and the stress caused by her continued dealings with Chase. *See* DX 11 at 1 (Respondent's response); DX 6 at 12-15. Ms. Azzam told Respondent – as he acknowledged – that she wanted to move forward as quickly as possible in filing a court action. Tr. 66-67, 84-85, 87, 103 (Azzam); Tr. 195, 237 (Respondent knew Azzam wanted to move quickly); *see also* DX 7 at 9; DX 8 at 3, 14 (e-mails).

27. On June 24, 2014, Ms. Azzam sent Respondent the first of many e-mails asking about the status of her matter and whether he had filed a complaint with the court. DX 6 at 42. Respondent never told Ms. Azzam he was unwilling or unable to file a lawsuit on her behalf, or that he had any concerns about the viability of her claims against Chase. Tr. 99 (Azzam); DX 13. To the contrary, on those occasions when he responded to Ms. Azzam's inquiries about filing an action, Respondent assured her that he was moving forward and, on two occasions, that it would be only a matter of days.[11] *See, e.g.*, DX 7 at 30; DX 8 at 4.

Respondent Took All of Ms. Azzam's Funds and Delegated Work to Others

28. In June and July 2014, Respondent asked Randy Squire, a former banker he knew, to assist him on Ms. Azzam's matter. Tr. 185, 237 (Respondent). On June 16 and 17, 2014, Respondent e-mailed Mr. Squire many of the documents Ms. Azzam had provided to support her claims. DX 6 at 24-31, 34-35. On June

[11] Respondent disagrees with these findings of fact (*see* Respondent's Amended Response to Disciplinary Counsel's Proposed Finding of Fact, ¶ 27), but they are supported by Ms. Azzam's communications to him and her testimony at the hearing. Respondent did not offer any evidence to the contrary, including in his own testimony.

20, 2014, Mr. Squire provided a "rough timeline" based on those documents (DX 6 at 41), and Respondent sent him a check for $500 drawn on his trust account that same day with the notation "Azzam" (DX 30 at 25); Tr. 131-32 (O'Connell).

29. The files Respondent maintained reflected that Mr. Squire did not have any further involvement in Ms. Azzam's matter after July 2014. *See* DX 6 at 45, 47-56 (last e-mails exchanged between Respondent and Squire). Respondent told Ms. Azzam that someone who knew "bank codes" would assist him with her case, but Ms. Azzam never met with or spoke with Mr. Squire. Tr. 70-71, 73 (Azzam). Respondent testified that at some point he participated in a three-way conversation with Ms. Azzam and Mr. Squire. Tr. 185-86, 237 (Respondent). Respondent had no records of that communication, and Ms. Azzam testified credibly that Respondent was unable to reach Mr. Squire when he attempted to do so with Ms. Azzam. Tr. 70-71, 73 (Azzam). The Committee finds that Respondent's testimony about the three-way conversation is not credible, although it may have been a failure of memory rather than an intentional misrepresentation. Ms. Thornton, the lawyer who referred Ms. Azzam to Respondent, later told Ms. Azzam that the person who was supposed to help Respondent failed to assist him. Tr. 72 (Azzam).

30. By August 6, 2014, at the latest, Respondent had removed all of Ms. Azzam's $1,000 from his trust account, although he gave her no invoices or receipts and had no records of his time or what he did with her funds. Tr. 115 (Azzam); Tr. 223, 226, 233 (Respondent). Respondent had disbursed $500 to Mr. Squire in June 2014 and had taken the rest of Ms. Azzam's funds for purposes unrelated to Ms.

Azzam's matter – although there is no record of specifically when or how he withdrew the funds. Tr. 131-34 (O'Connell). On August 6, 2014, the trust account into which Respondent had deposited Ms. Azzam's funds was overdrawn by $129.27. DX 30 at 52; Tr. 131-32 (O'Connell).[12]

31. By August 2014, Respondent was not initiating any communication with Ms. Azzam and was not responding to her e-mails. DX 7 at 1-3; Tr. 188 (Respondent admitting "not a lot of communication"). On August 26, 2014, Ms. Azzam e-mailed Respondent requesting an update on her case. DX 7 at 3. When Respondent failed to respond, Ms. Azzam e-mailed him again on September 5, 2014, providing additional information and asking Respondent "where [he was] with [her] case." DX 7 at 4. Ms. Azzam did not know whether Respondent had done anything to pursue her case and his failure to communicate caused her additional anxiety and stress. Tr. 77, 78-79, 96 (Azzam).

32. In early September 2014, Respondent enlisted help from Shola Emmanuel Ayeni in Ms. Azzam's matter. Mr. Ayeni, who was disbarred in 2003, had shared office space with Respondent and, in 2014, he worked part-time for Respondent. Tr. 186-88, 215 (Respondent); Tr. 137, 149 (O'Connell). Respondent

[12] Although by August 6, 2014, Respondent had withdrawn all of Ms. Azzam's funds, he wrote a $500 trust account check on September 15, 2014, to Oswald Gaines that included the notation "Azzam." DX 30 at 88; Tr. 132-33, 150-51 (O'Connell). Respondent testified that he employed Mr. Gaines as an investigator, but he admitted Mr. Gaines had nothing to do with Ms. Azzam's matter and he could not explain the notation on the check. Tr. 233-34 (Respondent); *see also* Tr. 133 (O'Connell). Respondent also could not explain the source of money in his trust account that funded the $500 payment to Mr. Gaines. Tr. 234-35 (Respondent); *see* Tr. 133 (O'Connell). Respondent made other payments to Mr. Gaines with checks drawn on his personal account. Tr. 133 (O'Connell); Tr. 234 (Respondent).

never told Ms. Azzam about Mr. Ayeni or his assistance. Tr. 79 (Azzam). Respondent claimed he paid Mr. Ayeni for work in Ms. Azzam's matter, but he did not have any records of Mr. Ayeni's time or payment to Mr. Ayeni. Tr. 188 (Respondent).

33. In September 2014, Respondent gave Mr. Ayeni information and documents relating to Ms. Azzam's claims, that Mr. Ayeni used to prepare part of a draft complaint. DX 7 at 6-7, 11-12. Mr. Ayeni e-mailed the draft he prepared to Respondent on October 17, 2014, and asked him, "'How far are you on the other half?'" DX 7 at 13-29. This was the first draft complaint prepared by Respondent, or anyone acting on his behalf. Tr. 238 (Respondent). Mr. Ayeni apparently had no further involvement after that. DX 7; DX 8; *see* Tr. 239 (Respondent testifying Mr. Ayeni was "gone" by November 2014).

34. Because Respondent had not responded to her calls and e-mails or otherwise communicated with her, Ms. Azzam contacted Ms. Thornton, the lawyer who made the initial referral. Tr. 77-78 (Azzam); Tr. 195-96 (Respondent). In September and October 2014, Ms. Azzam was concerned about Respondent's lack of communication and did not know what, if anything, he was doing on her matter. Tr. 77-78 (Azzam). On October 9, 2014, Ms. Thornton e-mailed Respondent about Ms. Azzam's concerns. DX 7 at 8-10. Respondent told Ms. Thornton he was "having some employee issues related to late production of assigned research" but claimed he would be "back on track next week." DX 7 at 10.

35. On October 20, 2014, Respondent sent Ms. Azzam an e-mail telling her that he should be done with the complaint that day and requesting an additional document. DX 7 at 30. Ms. Azzam responded the same day, expressing relief that he finally had contacted her, given her many unreturned calls and e-mails. *Id.* She sent him another e-mail that day, asking to meet with him. DX 7 at 31.

36. Ms. Azzam met with Respondent for a third and final time, on or around the same day, October 20, 2014. Tr. 71, 87 (Azzam). Respondent told her he had been working on other client matters but that her matter was now a priority. Tr. 87, 114 (Azzam). Respondent provided Ms. Azzam a draft complaint – an edited version of the narrative or draft complaint that she had given him months earlier, with a new introduction but containing errors and omitting information Ms. Azzam considered relevant. Tr. 79-80, 81-83, 106-07, 116-17 (Azzam). This was the first and only draft complaint Respondent produced. Tr. 80-81, 83, 90 (Azzam); *see also* Tr. 239 (Respondent)(admitting that he "never finalized any complaint for Ms. Azzam").

37. After receiving Respondent's edited version of the complaint, Ms. Azzam e-mailed Respondent, on October 20, 2014, the latest version of her complaint, which she had continued to revise. DX 7 at 33-46, 49-62. She also e-mailed him additional information and documents she believed relevant to her case, provided her comments on the draft complaint he had given her, and sent him a case filed against Chase with facts similar to hers. Tr. 83-84 (Azzam); DX 7 at 48, 64-67, 69. Respondent acknowledged receiving Ms. Azzam's e-mails of October 21

and 27, 2014, with the messages "Thanks. I look these over" and "Got it" (DX 7 at 67-68), but otherwise did not respond to Ms. Azzam. DX 7; Tr. 86, 108 (Azzam).

38. By November 13, 2014, Ms. Azzam had not heard anything further from Respondent, and he had not sent her a final or updated complaint. Tr. 82-86, 90, 108, 117 (Azzam). Ms. Azzam e-mailed him that day, asking for information about her case. DX 8 at 1. Respondent answered the next day, telling her he had no update but would have one after the weekend. DX 8 at 2. The weekend passed, and then an additional two weeks, and Respondent still did not send an update or communicate with Ms. Azzam. *See* DX 8 at 2. She called during this time but was unable to reach Respondent, and he did not return her calls. Tr. 86-87 (Azzam).

39. On December 3, 2014, Ms. Azzam e-mailed Respondent again, asking if he had time to pursue her case. DX 8 at 2. He answered the next day by e-mail, claiming he was "almost there" and would meet with her before filing the lawsuit. DX 8 at 10.

40. Ms. Azzam e-mailed Respondent on December 4, 5, 6, and 7, 2014, requesting that he file the action and providing him her latest version of the complaint. DX 8 at 5-8. On December 8, 2014, Respondent answered that he had to read it first and would get back to her. DX 8 at 5. Ms. Azzam sent Respondent two follow-up e-mails, attaching a Word version of her complaint so that Respondent could edit it, asking him to file it as soon as possible, telling him the case was time sensitive, and warning that further delay would prejudice her because

of potential tax consequences. DX 8 at 4-5; DX 9 at 1; Tr. 83-85, 88-89, 94 (Azzam).

41. Respondent did not answer, prompting her to send him another e-mail on December 12, 2014. DX 8 at 4. This time he answered that same day, claiming he had "been ill the last few days, but was getting better and would be done in a day or two." DX 8 at 4. Respondent also complimented Ms. Azzam's draft complaint as "nice work." *Id*.; *see also* Tr. 84-85 (Azzam).

42. The "ill[ness]" Respondent reported to Ms. Azzam on December 12, 2014, had not prevented him from meeting with Esther Howard the previous day, December 11th, and accepting her advance fee of $1,500 for a new representation. *See* FF 65-66; *see also* Tr. 202 (Respondent testified he was "fine," when he agreed to represent Ms. Howard in December 2014). Although Respondent may have been sick during that time, Respondent's suggestion to Ms. Azzam that he was unable to work on her matter because of illness was untrue.

43. Respondent did not communicate again with Ms. Azzam in December 2014. DX 8 at 3-4. She sent him e-mails on December 17 and 22, 2014, and January 2, 12, and 20, 2015, requesting updates, and Respondent ignored those requests. DX 8 at 3-4, 14. She also called and left messages that he failed to return. Tr. 88 (Azzam); DX 8 at 3-4, 14 (referring to unreturned calls).

44. On January 21, 2015, Respondent e-mailed Ms. Azzam, reporting that he had been ill and was "shut[ting] down [his] practice." DX 8 at 15; Tr. 196-97 (Respondent). He told Ms. Azzam he would return her file and "a portion of [her]

retainer fee" and advised her to seek other counsel. DX 8 at 15; Tr. 244 (Respondent).

45. Respondent never shut down his practice. *See* Tr. 242 (Respondent). There is no evidence that he intended to do so, despite his statement to Ms. Azzam. To the contrary, in December 2014, he had taken on at least one new client, Esther Howard. Tr. 198, 243 (Respondent). Respondent also took advance fees from other clients – including Quadri-Tech Limited (QTL), Mathew Nori, Reginald Cole, Arthur Mobley, and Lillian Tatum – that he deposited in his trust account (at least temporarily before taking them for himself). DX 30 at 136-73, Tr. 249-55 (Respondent); *see also* Tr. 145-46 (O'Connell).[13] In addition to receiving advance fees, Respondent continued to represent clients in ongoing litigation, including Willard King in a discrimination case before the federal court and Mathew Nori in a criminal case also pending in the federal court. Tr. 247-49, 255 (Respondent); DX 31 (in Nori case, Respondent filed a memorandum in aid of sentencing on December 15, 2014, and attended the sentencing hearing on January 8, 2015).

46. Although Respondent told Ms. Azzam on January 21, 2015, that he would return her file and refund at least a portion of her $1,000 retainer, Respondent took no steps to do so.[14] DX 8 at 15; Tr. 90 (Azzam); Tr. 244-45 (Respondent).

[13] Respondent testified that in addition to depositing advances of unearned fees in his trust account in December 2014 and January 2015, he also deposited two $500 checks from Robert and Maurice Scheer that he claimed were earned fees. DX 30 at 164-65, 167-70; Tr. 253-54 (Respondent) (admitting it was wrong to deposit earned fees in his trust account).

[14] Although Respondent disagrees that he took no steps to return the file at this time (*see* Respondent's Amended Response to Disciplinary Counsel's Proposed Finding of Fact, ¶ 46), the

47. On January 22, 2015, Ms. Azzam e-mailed Respondent about her file. DX 8 at 15. When he failed to respond, she sent him another e-mail on February 9, 2015, asking for her file and the return of her retainer as soon as possible. DX 8 at 16.

48. In late January 2015, Ms. Azzam, acting *pro se*, had filed a lawsuit against Chase in the United States District Court for the District of Columbia. Tr. 91-92, 97-98 (Azzam). Ms. Azzam needed her documents to pursue the case and respond to the motion to dismiss she anticipated from Chase. She also needed the $1,000 she had paid Respondent to retain another lawyer. Tr. 93-94 (Azzam). Ms. Azzam told Respondent about her need for the files and the $1,000. DX 8 at 16-17; DX 10 at 2; Tr. 93-94 (Azzam); Tr. 245 (Respondent).

49. Respondent finally responded to Ms. Azzam's requests for her file on February 17, 2015. He told her he had moved to Columbia, Maryland, but would return her files the next day if possible. DX 8 at 17. Ms. Azzam told Respondent where he could meet her to deliver the files on February 18 or 19, and she asked him to return her retainer. DX 8 at 17-19. On February 19, Ms. Azzam waited outside in the cold for more than an hour, but Respondent did not appear as arranged. DX 8 at 18-20; Tr. 95 (Azzam).

50. The following day, on February 20, 2015, Respondent delivered Ms. Azzam's client file, returning the documents she previously provided him. Tr. 90,

---

evidence, including his own testimony, shows no effort to return the file until February 17, 2015. *See, e.g.*, Tr. 244-45 (Respondent) (acknowledging that he did not return the file until "longer than I had wanted to").

95, 110 (Azzam). Ms. Azzam asked Respondent to talk to her, but he said he was in a hurry and would call her the next day. Tr. 92-93, 95 (Azzam). Respondent did not call. Respondent also did not provide her the refund he had agreed to make. DX 9 at 9; DX 10 at 1-2; Tr. 93, 95, 111 (Azzam).

51. Ms. Azzam called and sent Respondent another e-mail on February 21, 2015, again requesting a refund. DX 9 at 9. Respondent did not answer or provide the refund. Tr. 95-96, 111 (Azzam).

52. On March 1, 2015, Ms. Azzam filed a complaint against Respondent with Disciplinary Counsel, recounting her frustration and disappointment that he did nothing to pursue her case, failed to communicate with her, and then withdrew but failed to provide the agreed-upon refund. DX 10 at 1-2; Tr. 97-98 (Azzam).

53. In addition to filing a complaint, Ms. Azzam called and e-mailed Ms. Thornton, the lawyer who had referred her to Respondent, and asked for her assistance in obtaining a refund. DX 14; Tr. 97 (Azzam). Ms. Thornton e-mailed Respondent on April 1, 2015, about the refund, but he did not respond to this or her subsequent communications. DX 8 at 21; DX 14 at 10, 19, 25, 28.

54. On April 14, 2015, Disciplinary Counsel sent Respondent a copy of Ms. Azzam's complaint and requested a written response. *See* DX 11 at 1. In his response dated June 2, 2015, Respondent contended, among other things, that he had told Ms. Azzam that he "wasn't entirely sure [he] could help her but would try to help her nevertheless." DX 11 at 1. This statement was false. In fact, Respondent had never expressed reservations about the viability or merits of Ms.

Azzam's action or qualified his intention to pursue it. Tr. 99-100 (Azzam); DX 13; see also Tr. 236-37 (Respondent).

55. Respondent further claimed that he had a former mortgage banker assist him in Ms. Azzam's case and falsely claimed that he and the banker (Mr. Squire) had at least one or two speakerphone discussions that included Ms. Azzam. DX 11 at 2. In fact, Ms. Azzam never spoke with Mr. Squire and Respondent. Tr. 70, 73 (Azzam); DX 13.

56. Respondent contended that as of mid-October 2014 he had been unable to work "effectively" on Ms. Azzam's case and other client matters because of medical problems – described as "pain in [his] back" – and had begun to reduce his caseload. DX 11 at 2; *see also* Tr. 89-90 (Azzam). Respondent did not disclose that he had taken on new cases during this time, received advance fees from several clients, and continued to represent other clients in on-going litigation. DX 11.

57. In his response, Respondent admitted that he had not yet refunded the retainer fee to Ms. Azzam but stated he was "certainly prepared to do so." DX 11 at 2. Respondent, however, took no steps to do so in June, July, or the first half of August 2015, despite further calls and e-mails from Ms. Thornton on behalf of Ms. Azzam. DX 14; DX 16.

58. Respondent repaid Ms. Azzam only after Disciplinary Counsel asked him whether he had provided the refund and to submit proof he had done so. DX 15 at 1-2. On August 20, 2015, Respondent mailed Ms. Azzam a check for $1,000, written on a personal account he shared with Arlene Bazar. DX 16; Tr. 101

(Azzam); Tr. 197 (Respondent admitted he returned the money "very late" and only after Disciplinary Counsel contacted him – which he testified occurred in January or February but actually was in April 2015 (DX 11 at 1)).

Respondent's Representation of Esther Howard

59. In September 2014, Esther Howard met with Respondent about pursuing a claim against United Parcel Service ("UPS"), which had discharged her in July 2014. Tr. 14-16, 18 (Howard).

60. Ms. Howard had worked for UPS for 14 years and believed UPS had discriminated against her and treated her unfairly. Tr. 15-16, 19 (Howard); Tr. 198-99 (Respondent). She initially asked the union to help her challenge her termination and subsequently filed a *pro se* complaint with the Equal Employment Opportunity Commission ("EEOC"). Tr. 15-16, 41 (Howard). After filing the EEOC complaint, Ms. Howard was advised she would need counsel. A member of Ms. Howard's church, who was a lawyer and had practiced with Respondent in the past, referred Ms. Howard to Respondent. Tr. 16-18 (Howard).

61. When she met with Respondent on September 2, 2014, Ms. Howard gave him a check for $275 as a down payment for the fee Respondent said he would charge for representation. Tr. 18-19, 23, 26 (Howard); Tr. 256-57 (Respondent). Respondent did not provide Ms. Howard a fee agreement at the time or document the $275 payment and its purpose. Tr. 20, 30, 50 (Howard); Tr. 205 (Respondent explaining that Ms. Howard paid him "in pieces").

62. Respondent told Ms. Howard she had a "winnable" case and that he would represent her provided she paid the $2,500 fee he requested.[15] Tr. 19-20, 26 (Howard). In the interim, Ms. Howard was to pursue her discrimination claims before the EEOC on her own. DX 23 at 2; Tr. 19, 41-43 (Howard).

63. Respondent deposited Ms. Howard's check for $275 in his trust account on September 4, 2014. DX 30 at 69-71; Tr. 140 (O'Connell). By October 27, 2014, at the latest, Respondent had taken the money for himself, although he had not worked on Ms. Howard's matter and she was acting *pro se* before the EEOC. DX 30 at 95 (balance in trust account on October 27, 2014 was $4.15); Tr. 25 (Howard). Respondent claims that he "contacted UPS and EEOC in order to obtain Ms. Howard's personal records," in addition to meeting with Ms. Howard before October 27 (*see* Respondent's Amended Response to Disciplinary Counsel's Proposed Finding of Fact, ¶ 63), but the record establishes that Respondent did not contact either entity until December 2014. *See infra* at FF 65, 71.

64. By mid-December 2014, the EEOC had sent Ms. Howard a letter with notice of a hearing date for her claims against UPS, set in or around March 2015. Tr. 27-28, 45-47 (Howard). According to Respondent, the EEOC letter notified Ms. Howard of its decision to dismiss her claims – which, if true, would have triggered a 90-day period for Ms. Howard to file a court action. Tr. 198-99, 209,

[15] Respondent asserts that he told Ms. Howard that he "will do the best I can to give you the best outcome" but that he did not tell her that her case was "winnable." Respondent's Amended Response to Disciplinary Counsel's Proposed Finding of Fact, ¶ 62. The Committee finds that Ms. Howard's testimony on this point is more credible than Respondent's. *Compare* Tr. 19-20 (Howard testifying to specific details of conversation) *with* Tr. 199 (Respondent stating that he "[b]asically told her the same thing I'd tell all my clients").

261 (Respondent); *see* 29 C.F.R. § 1601.28 (when Commission dismisses charge, it issues notice of right to sue, giving aggrieved party 90 days to bring civil action). Either way, Respondent had until March 2015 to take action to preserve and protect Ms. Howard's interests. *See* Tr. 261-62 (Respondent admitting he had handled other EEOC or discrimination cases and knew about the time limits for filing an action).[16]

Ms. Howard Retained Respondent in December 2014, and Paid Him an Additional $2,200

65. On December 11, 2014, Ms. Howard returned to Respondent's office and met with Respondent to discuss her case. Tr. 22-24 (Howard). She told Respondent about the EEOC hearing scheduled for 2015, and Respondent agreed he would represent her and assured her she would get her job back. Tr. 27-28, 31, 46-47, 52 (Howard); *see* DX 23 at 20. The Committee finds that Respondent's testimony that "they dismissed the EEOC complaint prior to her coming to me" and "while she was with me, we never had a hearing date" is not credible. Tr. 199 (Respondent discussing initial conversation with Ms. Howard) and 209 (Respondent asserting that he had "no idea" of the EEOC hearing although he "filed an EEOC complaint" that was dismissed). The Committee does not find that that statement is intentionally false, although it suggests a surprising unfamiliarity with

[16] Respondent contended that before representing Ms. Howard, he had handled only four other employment cases, and that "[t]hey were a long time ago." Tr. 199. On cross-examination, however, he admitted he had been representing Mr. King in a federal employment discrimination action since 2012 and continued to do so through 2015. Tr. 255-56, 261 (Respondent).

the details of Ms. Howard's matter. Respondent told Ms. Howard that he first needed to enter his appearance with the EEOC and get her file. Tr. 28, 46 (Howard).

66. Ms. Howard did not have the funds to pay the rest of Respondent's fee ($2,225), so on December 11, 2014, she used a credit card to charge $1,500 as part of the fee. Tr. 24-25 (Howard). Respondent caused the $1,500 to be deposited in his trust account and on the following day, December 12, 2014, $1,447.35 was credited to the account - $1,500 minus the 3.5% and 15 cent fee charged by Square (the credit card servicer). DX 30 at 136; Tr. 141 (O'Connell).

67. On December 12, 2014, Ms. Howard sent Respondent a money order for $500, Tr. 25-26 (Howard), which Respondent deposited in his trust account on December 17, 2014. DX 30 at 146-49; Tr. 141 (O'Connell).

68. That same day, December 12, 2014, Ms. Howard e-mailed Respondent, asking about the fee agreement, which Respondent still had not provided. DX 19; Tr. 30, 49-50 (Howard).

69. On December 15, 2014, Respondent e-mailed Ms. Howard, attaching his fee agreement and asking her to sign, date, and return it to him. DX 19 at 2-3. Several hours later, he sent another e-mail, attaching a revised fee agreement (which did not account for the amounts Ms. Howard had paid ($2,275) and what she still owed ($225)). Tr. 49-50 (Howard); DX 19 at 4-5. Ms. Howard signed the revised agreement, dated it, and returned it to Respondent that day. Tr. 30-32, 49-51 (Howard).

70. In the revised fee agreement dated December 15, 2014, Respondent said he would represent Ms. Howard in her wrongful discharge case against UPS, and he set forth the fee he would charge for the representation as follows:

> As compensation for work performed, the client agrees to pay the lawyer 33 1/3 % of the value of any recovery, for legal services based on his normal hourly rate of $295.00/hr. If there is no monetary recovery, but Client is restored to her employment, the Client agrees to pay the lawyer the sum of $10,000 or lawyer's normal hourly rate multiplied by the number of hours expended on your case, whichever is the lessor [*sic*]. Lawyer's compensation shall be due and payable upon demand at the conclusion of your case. Client also agrees to pay the lawyer a retainer of $2,500 which will be deducted from any fee recovered. Client has thus far paid ___. The balance is to be paid by __. Client hereby agrees that the work encompassed by this agreement has already commenced since December 12, 2014 and therefore this agreement is effective *nunc pro tunc* to December 12, 2014.

DX 19 at 7.

71. On December 15, 2014, the day he sent Ms. Howard his fee agreement, Respondent also sent her by e-mail a form entitled "Employment Release and Authorization." DX 20 at 1-2. As Respondent requested, Ms. Howard signed the form, dated it December 15, 2014, and e-mailed it back that same day. DX 20 at 3-4; Tr. 32-33, 48-49 (Howard).

72. On December 15, 2014, Respondent contacted the EEOC and had a ten-minute phone call. DX 21; Tr. 210 (Respondent). Later that day he sent three e-mails to Alan Anderson, an EEOC official. DX 21; Tr. 210 (Respondent). The first requested information about the discrimination complaint Ms. Howard had filed in September 2014 (DX 21 at 1); the second attached a two-sentence letter stating

Respondent represented Ms. Howard (DX 21 at 2-3); and the third e-mail requested all records relating to Ms. Howard's complaint pursuant to the Freedom of Information Act (DX 21 at 4). Mr. Anderson answered Respondent's third e-mail, requesting documents, by saying it would take approximately 20 days to obtain the file. DX 21 at 5; *see also* Tr. 200 (Respondent claiming he also contacted UPS to request records relating to Ms. Howard's claims, although there is no record of this contact).

73. On or about December 19, 2014, Ms. Howard sent a $200 check to Respondent, DX 30 at 162; Tr. 26 (Howard), which he subsequently deposited in his trust account, DX 30 at 161-63; Tr. 141-42 (O'Connell).

74. Apart from e-mailing the EEOC, Respondent did nothing further to pursue Ms. Howard's matter in December 2014, January 2015, and most – if not all – of February 2015. Tr. 200-01, 224-25, 258 (Respondent testifying that after December 15, 2014, he did no work in Howard's matter because he was waiting for her files, which he did not receive until February 19, 2015, and his file contained only DX 19-22 and records attached to DX 22); *see also* Tr. 139 (O'Connell) (Respondent's file reflected no work on Howard's claims; it contained only e-mails exchanged with Howard attaching the fee agreement and release form, e-mails to the EEOC on December 15, 2014, and documents provided by counsel for UPS on February 19, 2015). Respondent testified that at some point after he received approximately three reams of documents from UPS on February 19, he spent "less than two hours" "reviewing and organizing" those documents. Tr. 205, 207. The

Committee accepts that Respondent examined the documents to some extent, but Respondent produced no time records reflecting the details of that work.

Respondent Appropriated Ms. Howard's Funds for Himself Shortly After Receiving Them

75. Respondent deposited all Ms. Howard's payments, totaling $2,475, in his trust account. Tr. 140-42 (Howard); Tr. 258-59 (Respondent). Respondent admitted he had not earned the fees when he received them. Tr. 222, 254, 258-59 (Respondent). Respondent had spent Ms. Howard's September 2014 payment of $275 by October 2014, although he had done nothing to earn it. DX 30 at 95; Tr. 259 (Respondent).

76. In early December 2014, before Respondent deposited the bulk of Ms. Howard's funds in his trust account, the account had a negative balance of -$120.19. DX 30 at 137; Tr. 143 (O'Connell); Tr. 231 (Respondent).

77. On December 12, 2014, Ms. Howard's $1,500 credit card payment[17] was credited to Respondent's trust account, and three days later the balance in the trust account fell to $27.16. DX 30 at 136, 137 (balance of $79.81 on December 8 and balance of $27.16 on December 15, 2014). Respondent transferred Ms. Howard's payment of $1,500 to his personal account by internet transfer on December 15, 2014, along with other funds. DX 30 at 137 (showing $2,000 internet transfer); Tr. 141, 143 (O'Connell).

[17] As noted above (FF 66), the amount of the deposit was $1,447.35, reflecting a deduction for credit card fees. Tr. 141 (O'Connell).

78. On December 17, 2014, Respondent deposited the $500 money order from Ms. Howard in his trust account and, on that same day, transferred the entire $500 to his personal account, causing the balance in the trust account to fall again to $27.16. DX 30 at 137, 146-49; Tr. 141, 143 (O'Connell).

79. On January 2, 2015, Respondent's trust account had a balance of $21.96. DX 30 at 151.

80. Respondent deposited the $200 check from Ms. Howard, dated December 19, 2014, in his trust account on January 7, 2015, although he wrote the date of December 22, 2014, on the deposit ticket. DX 30 at 150, 161-63.

81. After depositing Ms. Howard's $200 check in his trust account on January 7, 2015, Respondent immediately took the funds for himself. On January 7, 2015, Respondent transferred $3,000 from his trust account to his personal account, leaving a balance of only $99.79 in his trust account. DX 30 at 150-51. By January 29, 2015, the balance in the trust account had fallen to $9.79. DX 30 at 151; Tr. 145 (O'Connell).

82. By the end of January 2015, Respondent had taken no steps to pursue Ms. Howard's case except participating in a ten-minute conversation with the EEOC, requesting documents from the EEOC by email, and, possibly, requesting documents from UPS on an unknown date. *See* Tr. 36-37 (Howard); Tr. 258 (Respondent).

83. Respondent spent no more than 10 minutes requesting Ms. Howard's records on December 15, 2015, and he had done nothing to earn the advanced fees

when he took them, as he later admitted. Tr. 257-58 (Respondent); DX 27 at 1 (December 15, 2015 e-mail from Respondent to Office of Disciplinary Counsel in which Respondent stated that it "appear[ed] that I removed those funds from the trust prematurely, as I cannot point to any substantive work (except telephone discussions relevant to obtaining records) done on the matter . . ."); *see also* Tr. 206 (Respondent admitted taking Ms. Howard's money from his trust account; contended he did not know why he took the funds, or remember when he took them).

84. Respondent did not keep any time records and he never sent Ms. Howard an invoice for any work on her case. Tr. 31 (Howard); Tr. 139-40 (O'Connell). Respondent admitted in his Answer to the Specification of Charges that he "had not billed any time to Ms. Howard when he took her funds from his trust account," and he also did not "seek or obtain Ms. Howard's permission to take her funds before withdrawing them from his trust account." *See* Spec. ¶ 33; Answer, ¶ 5 (admitting paragraph 33 of the Specification).

85. Ms. Howard never authorized Respondent to take and use any of the funds she had advanced for the representation. Tr. 33, 39 (Howard testifying that she never gave Respondent permission to take advance-funds). Respondent belatedly suggests that, "[b]y virtue of the terms of the Retainer Agreement[,] Ms. Howard authorized Respondent to take and use any of the funds she had advanced for representation, in connection with said representation." Respondent's Amended Response to Disciplinary Counsel's Proposed Finding of Fact, ¶ 85. However, that

claim misstates the terms of the retainer agreement. The agreement requires Ms. Howard to pay "compensation for work performed" and certain expenses. *See* DX 19 at 3. It does not permit Respondent to take advance-paid fees that have not been earned. Moreover, we note that Respondent already has admitted in his Answer to the Specification of Charges that he had never sought nor obtained Ms. Howard's permission to take her funds prior to his withdrawals. *See* Spec. ¶ 33, Answer, ¶ 5 (admitting paragraph 33).

86. The bank records showed that Respondent took all Ms. Howard's funds for himself promptly after depositing them in his trust account – in some cases on the same day as the deposit. FF 63, 77-78, 80-81; Tr. 206 (Respondent conceding that he could not take fees advanced by clients without earning them).

87. By February 2, 2015, the balance in Respondent's trust account was less than $500, and by the end of the month it was $9.79. DX 30 at 174-45.

Respondent Requested and Obtained Ms. Howard's Records Without Pursuing her Claim

88. After meeting with Ms. Howard in December 2014, Respondent did not communicate with her and she was not aware of anything he did to pursue her case. Tr. 32-33 (Howard); Tr. 208, 263 (Respondent admitting no communication after December 2014).

89. Ms. Howard called Respondent to ask about her case, but she could not reach him and he did not return her calls. Tr. 33-35 (Howard); Tr. 208, 263 (Respondent); DX 23 at 2.

90. On February 19, 2015, counsel for UPS, Ms. Howard's former employer, sent Respondent an e-mail, attaching Ms. Howard's employment records. DX 22. Respondent did not tell Ms. Howard he had obtained her records from UPS. Tr. 55 (Howard); Tr. 263-64 (Respondent).

91. Respondent testified he received "a couple of letters from the records' custodian" (presumably the EEOC) informing him the records would arrive shortly. Tr. 202 (Respondent). Respondent never produced these or any EEOC records; he produced only the documents attached to the February 19, 2015 e-mail from UPS's counsel. Tr. 138-39 (O'Connell); Tr. 223-25 (Respondent).

92. Ms. Howard continued to call Respondent during and after February 2015, but could never reach him. She also went to Respondent's office so they could discuss the upcoming hearing at the EEOC. Tr. 27-28, 34-36, 47-48 (Howard). Ms. Howard could not reach him or find him at his office, and she later learned from his neighbor that Respondent had moved. The owner of the property would not return Ms. Howard's calls to tell her where Respondent had moved. Tr. 34-35 (Howard); DX 23 at 2; Tr. 201, 208 (Respondent admitted never telling Ms. Howard he had moved).

93. Sometime in March 2015,[18] Respondent called Ms. Howard and left a message that he was still waiting for UPS and the EEOC. Tr. 33-34 (Howard); DX

[18] Respondent asserts that there is "no competent or substantial record evidence as to the date or content of the purported voicemail left by Respondent." Respondent's Amended Response to Disciplinary Counsel's Proposed Finding of Fact, ¶ 93. The Committee, however, finds Ms. Howard's testimony regarding the date and content of the voicemail credible.

23 at 2. The message was not truthful, because UPS had sent Respondent Ms. Howard's employment file in February. *See* DX 22.

94. Ms. Howard tried to reach Respondent after getting his message, but she still could not reach him and he did not return her calls. Tr. 36, 38-39 (Howard).

95. Ms. Howard did not attend the EEOC hearing scheduled in or around March 2015 that had prompted her meeting with Respondent on December 11, 2014. She was afraid to attend without a lawyer lest she "make a fool out of [her]self." Tr. 48 (Howard). She later "gave up" when she could not get Respondent to communicate with her. Tr. 38, 47-48 (Howard).

96. By July 2015, Respondent still had not communicated with Ms. Howard, and the date for the hearing (or, under Respondent's version of events, to file a lawsuit) had passed. Tr. 36-38, 47 (Howard). Respondent had done nothing to pursue Ms. Howard's matter. Tr. 36-37 (Howard); *see also* Tr. 207, 257 (Respondent admitting not taking any action in Howard case and conceding that he spent less than two hours to sort and read the UPS documents sometime after February 19, 2015).

Ms. Howard Complained to Disciplinary Counsel and Sought Return of her Funds

97. On July 10, 2015, Ms. Howard filed a complaint against Respondent with Disciplinary Counsel. Ms. Howard reported that after receiving a letter from the EEOC, she met with Respondent on December 11, 2014, and paid him to pursue her case, but he never did. Ms. Howard requested that Respondent return her money. DX 23 at 1-2; Tr. 36-37 (Howard).

98. On August 14, 2015, Respondent submitted a response to Ms. Howard's complaint, claiming he was "fully prepared to return Ms. Howard's retainer to her." DX 24 at 2. Respondent did not disclose that he had taken all of Ms. Howard's funds promptly after receiving them. DX 24.

99. Disciplinary Counsel asked Respondent on August 20, 2015, and again on September 30, 2015, about the status of the refund he had agreed to make to Ms. Howard. DX 25; DX 26. Disciplinary Counsel also served Respondent with a subpoena *duces tecum* for the client file and his financial records reflecting his handling of Ms. Howard's funds. *See* DX 27 at 2-3; Tr. 223-24 (Respondent).

100. On October 16, 2015, Respondent provided Disciplinary Counsel a copy of a $2,500 check dated September 26, 2015, that he mailed to Ms. Howard. DX 26; Tr. 39-40, 53-54 (Howard). The refund check was written on Respondent's personal account. DX 26 at 3.

101. Other than the fee agreement attached to his answer (DX 24 at 9), Respondent provided no financial records in response to the subpoena, including records reflecting how he disposed of Ms. Howard's funds. DX 28; Tr. 138 (O'Connell); Tr. 206 (Respondent testifying that his recordkeeping was "terrible"). Respondent did, however, provide the account number for his trust account and admitted he "took [Ms. Howard's] funds from trust prematurely." DX 27 at 1.

Evidence in Aggravation of Sanction

102. On July 8, 2016, Mr. Terrell was issued an Informal Admonition by the Office of Disciplinary Counsel for failing to provide a written contingent fee agreement to a client in violation of Rule 1.5(b) and (c). DX 32.

103. Before that Informal Admonition, Mr. Terrell had not been the subject of discipline. DX 32.

104. Before Disciplinary Counsel offered the Informal Admonition as evidence, Respondent testified that he had "never been disciplined anywhere." Tr. 213. After Exhibit 32 was accepted into evidence, Respondent retook the stand and testified that he had received and read the Informal Admonition letter from the Office of Disciplinary Counsel, but he "didn't see it as a discipline" until his attorney told him otherwise. Tr. 271.

Mitigating Factors Asserted by Respondent

105. Respondent testified that he is a veteran, was honorably discharged from the Marine Corps, and served 14 months in Vietnam. Tr. 193 (Respondent).

106. Respondent testified that around August, September, and October 2014, he was suffering from physical medical problems. Specifically, Respondent had fallen down a flight of stairs and hurt his back. Tr. 189 (Respondent). According to Respondent, a week or so after he fell, Respondent started experiencing "serious nerve damage" and found out later that he suffered a bulging disc as a result of his fall. Tr. 189-190 (Respondent). Respondent stated that his doctor prescribed non-narcotic medications. According to Respondent, this injury

debilitated him to the point that he could not walk "for long." Tr. 190 (Respondent). Respondent did not offer documentary evidence related to the fall, his injuries, or his treatment.

107. Respondent stated that he suffered pain every day during this period and that none of the medications he received lessened his pain. Tr. 190 (Respondent). Respondent suggested to his doctor that she give him morphine and she declined to do so. Tr. 190 (Respondent). During the August to October 2014 period, Respondent stated that he was "essentially incapacitated" physically, although he "did what [he] could in the office." Tr. 190-191 (Respondent).

108. Respondent stated that he has suffered from depression for approximately 25 to 30 years and that the depression "snowballed" when he injured his back. Tr. 191 (Respondent). He offered additional testimony related to the alleged depression and its effects during November 2014 through January 2015. Tr. 191-93 (Respondent). Respondent asserted that he was taken to a hospital by a friend in December 2014 and voluntarily committed himself. According to Respondent, he remained in the hospital over the Christmas and New Year holidays. Tr. 195 (Respondent).

109. Respondent claimed in his testimony that his physical and/or mental condition "contributed" to how he handled Ms. Azzam's and Ms. Howard's matters. Tr. 202-204. Before his testimony, which he provided on the second day of the hearing before the Committee, Respondent had not offered any evidence that related to his alleged depression. He claimed that he had possession of a letter from a

doctor substantiating his claim of depression but that he never provided the letter to Disciplinary Counsel or filed it as an exhibit during the hearing because he was "concerned it wasn't good enough." Tr. 240 (Respondent).[19] Disciplinary Counsel's exhibits contain vague references to illness: In a January 21, 2015 email to Ms. Azzam, he wrote that he "had been ill, which caused a delay in [his] working on [her] case," and that he would be closing down his practice. DX 8 at 15. He referred to his back pain in his response to Ms. Azzam's complaint and suggested that he "began to reduce [his] caseload" because of his health after December 2014. DX 11 at 2.

110. Respondent acknowledged that he began representing new clients and continued to represent existing clients, including Ms. Azzam and Ms. Howard, during the period of time he was allegedly afflicted with physical injuries and/or mental illness. Tr. 266-67 (Respondent).

III. CONCLUSIONS OF LAW

Disciplinary Counsel contends Respondent violated all of the rules charged in the Specifications of Charges: Rules 1.3(a) and (c), 1.4(a) and (b), and 1.16(d) in the Azzam matter and Rules 1.3(c), 1.4(a), Rule 1.15(a) and (e), and 1.16(d) in the Howard matter. Disciplinary Counsel contends that the misappropriation in the Howard matter was intentional or, at a minimum, reckless.

[19] As noted in the Procedural History section of the Report, *supra* at 4, Respondent unsuccessfully sought to introduce the letter into evidence after the close of the hearing; he did not produce the letter during the hearing.

Respondent concedes that (1) he engaged in commingling in the Azzam matter and (2) he removed funds from the trust account prematurely, "that is before they were fully earned," in the Howard matter.[20] *See* Rule 1.15(a) and (e) (failing to safekeep and hold advances of unearned fees separate from his own funds and in his trust account). As to the latter, however, he contends that his conduct in the handling of the Howard funds constitutes only negligent misappropriation.

A. Respondent Violated Rule 1.3(a) and (c)

Rule 1.3(a) states that an attorney "shall represent a client zealously and diligently within the bounds of the law." A Rule 1.3(a) violation "does not require proof of intent, but only that the attorney has not taken action necessary to further the client's interests, whether or not legal prejudice arises from such inaction." *In re Bradley*, Bar Docket Nos. 2004-D240 & 2004-D302 at 17 (BPR July 31, 2012), *adopted in relevant part*, 70 A.3d 1189, 1191 (D.C. 2013) (per curiam); *see also In re Lewis*, 689 A.2d 561, 564 (D.C. 1997) (per curiam) (appended Board Report) (Rule 1.3(a) violated even where "[t]he failure to take action for a significant time to further a client's cause . . . [does] not [result in] prejudice to the client").

Respondent violated Rule 1.3(a) in Ms. Azzam's matter. Respondent accepted the representation in May 2014. FF 19. Although Ms. Azzam provided a detailed factual narrative and supporting documents, Respondent failed to draft a complaint, file suit, or take any other substantive step to forward Ms. Azzam's matter

[20] Respondent's Amended Response to Disciplinary Counsel's Proposed Findings of Fact, Conclusions of Law, and Sanction Recommendation at 12-13.

before he withdrew from the representation in early 2015. FF 27-44. Respondent consulted with a former banker and a disbarred attorney about performing work on the matter. FF 28, 32-33. He never discussed those consultations with his client, and neither consultant produced a draft complaint or other work product usable by Ms. Azzam in her suit against Chase. FF 28-29 (Mr. Squire's involvement); FF 32-33 (Mr. Ayeni's involvement). When Respondent finally provided a draft complaint to Ms. Azzam in October 2014, the draft was a revised version of her own document that introduced factual errors and omissions. FF 36. Respondent never corrected those errors or finalized a complaint in the matter, although his client provided comments on the draft and additional documents. FF 36-38.

Ms. Azzam repeatedly asked Respondent about the status of her matter, with no response for long periods of time. FF 27, 31, 34-36, 38-40, 43. In early December 2014, she asked him to file the complaint as soon as possible because delay might have prejudicial tax consequences for her. FF 40. Respondent nevertheless failed to finalize the complaint or otherwise "take[] action necessary to further the client's interests." *Bradley*, Bar Docket Nos. 2004-D240 & 2004-D302 at 17. Nor did he return Ms. Azzam's files or retainer in a timely manner even after she told him she needed them back as soon as possible to pursue her case herself. FF 46-48, 50, 58. Eventually, Ms. Azzam was forced to file a complaint pro se before Respondent had returned either her files or her retainer. FF 48.

Rule 1.3(c) provides that an attorney "shall act with reasonable promptness in representing a client." "Perhaps no professional shortcoming is more widely

resented by clients than procrastination," and "in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed." Rule 1.3, cmt. [8]. The Court has held that failure to take action for a significant time to further a client's cause, whether or not prejudice to the client results, violates Rule 1.3(c). *In re Dietz*, 633 A.2d 850 (D.C. 1993). Comment [8] to Rule 1.3 provides that "[e]ven when the client's interests are not affected in substance . . . unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness," making such delay a "very serious violation."

Respondent violated Rule 1.3(c) in both Ms. Azzam's and Ms. Howard's matters. As discussed above, in Ms. Azzam's matter, Respondent accepted the representation in May 2014 but failed to take any substantive step to pursue Ms. Azzam's potential claims before the end of the representation in early 2015. Respondent failed to act even after his client informed him that further delay might have prejudicial tax consequences for her. FF 40. Under the circumstances, Respondent's delay was unreasonable.

In Ms. Howard's matter, Respondent accepted the representation and then took no substantive steps to advance his client's interest for many months. Respondent accepted Ms. Howard's matter in early September 2014. He took no steps whatsoever in her case until December 2014 (despite having taken her advance-paid fees for himself by October 27, as discussed *infra* at 49). FF 63, 74-75. In December 2014, Ms. Howard informed him of a scheduled EEOC hearing in

March 2015. FF 64-65. Although Respondent was aware that inaction could prejudice his client's interests, the only steps he took were to request files from the EEOC and his client's former employer and, several months later, to spend "less than two hours" reviewing files sent by the former employer. FF 64-65, 72-74, 82, 90. Respondent did not prepare for or appear at the hearing, nor did he respond to his client's inquiries about the status of the matter. FF 88-96.[21] His delay and inaction violated Rule 1.3(c).

B. Respondent Violated Rule 1.4(a) and (b)

Rule 1.4(a) provides that "[a] lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." Under Rule 1.4(a), an attorney must not only respond to client inquiries but must also initiate contact to provide information when needed. *In re Bernstein*, 707 A.2d 371, 376 (D.C. 1998). The purpose of this Rule is to enable clients to "participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued." Comment [1] to Rule 1.4(a). Rule 1.4(b) provides that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

[21] The Committee does not credit Respondent's claim that the letter from the EEOC that Ms. Howard showed Respondent in December 2014 actually dismissed Ms. Howard's claim rather than setting a hearing date. FF 64. Even if that had been the case, though, Respondent failed to take any steps to protect Ms. Howard's interests before the 90-day period to bring a civil action after dismissal of an EEOC claim. FF 64.

In determining whether Disciplinary Counsel has established a violation of Rules 1.4(a) and (b), the question is whether Respondent fulfilled his client's reasonable expectations for information. *See In re Schoeneman*, 777 A.2d 259, 264 (D.C. 2001). In addition to responding to client inquiries, a lawyer must initiate communications when necessary. *See In re Hallmark*, 831 A.2d 366, 374 (D.C. 2003).

Respondent violated Rule 1.4(a) and Rule 1.4(b) in his representation of Ms. Azzam. Respondent repeatedly failed to communicate with his client, despite her repeated efforts to contact him both directly and through another attorney. FF 22, 27, 31, 34, 38-41, 43. Ms. Azzam might reasonably have expected her attorney to respond to her ongoing inquiries, particularly since (1) she had repeatedly expressed a desire for speedy action on her claims and concern about his non-communication and (2) he knew after early December that his client believed that further delay could results in adverse tax consequences for her. FF 35, 39, 40. In addition, although he apparently sought assistance from an outside consultant and a disbarred attorney on her matter, Respondent did not discuss those consultations with Ms. Azzam. FF 28-29, 32-33.

Respondent also violated Rule 1.4(a) in his representation of Ms. Howard. After accepting Ms. Howard's funds, Respondent essentially failed to communicate with her after December 2014 (apart from leaving one voicemail), despite her repeated efforts to contact him about the status of her matter. FF 88-89, 92-96. He did not discuss preparation or strategy for the March 2015 EEOC hearing with his

client, and he otherwise failed to prepare for or appear at that hearing. FF 92-96. Indeed, without responding to Ms. Howard's attempts to contact him, Respondent moved his office without providing his new address or other contact information to Ms. Howard. FF 92.

C. Respondent Violated Rule 1.15 (a) and (e) by Intentionally or Recklessly Misappropriating Ms. Howard's Funds

Rule 1.15 (a) provides, in pertinent part, that:

> A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds of clients or third persons that are in the lawyer's possession (trust funds) shall be kept in one or more trust accounts . . .

Rule 1.15(a) prohibits misappropriation of entrusted funds. Misappropriation is "any unauthorized use of client's funds entrusted to [an attorney], including not only stealing but also unauthorized temporary use for the lawyer's own purpose, whether or not [the attorney] derives any personal gain or benefit therefrom." *In re Cloud*, 939 A.2d 653, 659 (D.C. 2007) (internal citation omitted).

Misappropriation requires proof of two distinct elements. First, Disciplinary Counsel must establish the unauthorized use of client funds. *See In re Anderson*, 778 A.2d 330, 335 (D.C. 2001); *In re Harrison*, 461 A.2d 1034, 1036 (D.C. 1983). Misappropriation is essentially a *per se* offense and does not require proof of improper intent. *See Anderson*, 778 A.2d at 335. It occurs where "the balance in the attorney's . . . account falls below the amount due to the client [or third party],

regardless of whether the attorney acted with an improper intent." *In re Edwards*, 990 A.2d 501, 518 (D.C. 2010) (appended Board report).

Rule 1.15(e) provides that "[a]dvances of unearned fees and unincurred costs shall be treated as property of the client pursuant to paragraph (a) until earned or incurred unless the client gives informed consent to a different arrangement." The Court has held that "when an attorney receives payment of a flat fee at the outset of a representation, the payment is an 'advance[ ] of unearned fees'" and must be held as property of the client pursuant to Rule 1.15(e). *In re Mance*, 980 A.2d 1196, 1202 (D.C. 2009). Thus, Respondent was required to maintain the advance fees as client property in his trust account until earned (absent a different arrangement approved by the client).

Second, Disciplinary Counsel must establish whether the misappropriation was intentional, reckless, or negligent. *See Anderson*, 778 A.2d at 336. Intentional misappropriation most obviously occurs where an attorney takes a client's funds for the attorney's personal use. *Id*. at 339 (citations omitted) (intentional misappropriation occurs where an attorney handles entrusted funds in a way "that reveals . . . an intent to treat the funds as the attorney's own"). In determining whether a respondent's unauthorized use of funds was reckless, one must ascertain whether the act "reveal[s] an unacceptable disregard for the safety and welfare of entrusted funds . . . . " *Id*. at 338. "[R]ecklessness is a state of mind in which a person does not care about the consequences of his or her action." *Id.* at 339 (internal

citations and quotation marks omitted). The Court reiterated the possible factors showing recklessness in *In re Carlson*, 802 A.2d 341 (D.C. 2002):

> In examining how the attorney handled entrusted funds, and whether reckless misappropriation has occurred, we look for "a pattern or course of conduct demonstrating an unacceptable disregard for the welfare of entrusted funds, such as (1) the indiscriminate commingling of entrusted and personal funds, (2) the failure to track settlement proceeds, (3) the disregard of the status of accounts into which entrusted funds were placed, or (4) permitting the repeated overdraft condition of an account." [Anderson, 778 A.2d at 339] Two other factors may also indicate recklessness: "(1) the indiscriminate movement of monies between accounts and (2) the disregard of inquiries concerning the status of funds." *Id*. at 338.

Carlson, 802 A.2d at 348-49.

We find clear and convincing evidence that Respondent committed intentional misappropriation with respect to the advance fee payment from Ms. Howard. Respondent accepted a $275 advance payment of fees from Ms. Howard on September 2, 2014, and deposited the payment in his trust account on September 4. FF 61, 63. By October 27, 2014 (when the balance in her trust account was $4.15), Respondent had taken the funds for himself, without Ms. Howard's approval (*see* FF 84-85), although he had performed no work on Ms. Howard's matter. FF 63, 75.

On December 11, 2014, Respondent accepted a $1,500 credit card payment for advance-paid fees from Ms. Howard (credited to his trust account as $1,447.35 because of credit card fees). Three days later the balance in the trust account fell to $27.16. On December 17, he deposited a $500 money order payment from Ms. Howard into his trust account, and on that same day, transferred the entire $500 to his personal account, causing the balance in the trust account to fall again to $27.16.

On December 19, he received an additional $200 check from Ms. Howard, which he deposited in his trust account on January 7. He then transferred $3,000 from his trust account to his personal account that same day, leaving a balance of only $99.79 in his trust account. *See* FF 66-67, 73. The only work Respondent did on the matter between December 2014 and February 19, 2015, was to contact the EEOC by a ten-minute phone call and follow-up email to request Ms. Howard's files and possibly to contact UPS to request files. FF 72, 74, 82-83. Nevertheless, Respondent had transferred the entire value of Ms. Howard's unearned fee payments to himself by January 29, 2015, without authorization from his client and without having performed enough work to justify taking this amount as payment for services rendered. FF 75-81, 85, 86. Respondent maintained no time records and never sent Ms. Howard an invoice for work on her case. FF 84. Respondent acknowledged that he had no right to those funds at the time he withdrew them, and he claimed not to remember why he had done so. FF 83.

This conduct is consistent with "an intent to treat the funds as the attorney's own," and, as such, is intentional misappropriation. *Anderson*, 778 A.2d at 339; *see also In re Cappell*, 866 A.2d 784, 784 (D.C. 2004) (per curiam); *In re Pierson*, 690 A.2d 941 (D.C. 1997). Respondent was aware that Ms. Howard's payments represented unearned fees that should have been maintained in trust until earned. FF 75. He nevertheless took those funds for himself almost immediately without performing services and without the client's permission. FF 75-78, 80-86. Indeed,

for several of those payments, he transferred those funds to himself within a few days or even the same day as the payment. FF 63, 77-78, 80-81, 86.

At a minimum, Respondent's conduct constitutes reckless misappropriation. Respondent claimed that "for the most part" he knew what funds he held in the trust account, but the account was repeatedly overdrawn. FF 11-13, 77, 81. Nor did he maintain adequate records of the trust account. *See* Section D, *infra* at 51. He continued to transfer his client's funds into and out of the trust account when he had, at best,[22] no understanding of what funds were or should have been in the account and whether the funds he was transferring to himself were his own or his client's. FF 7, 11-12, 63, 75-81. In doing so, he "reveal[ed] an unacceptable disregard for the safety and welfare of entrusted funds . . . ." *Anderson*, 778 A.2d at 338 ("hallmarks" of reckless misappropriation include, among other factors, "total disregard of the status of accounts into which entrusted funds were placed, resulting in a repeated overdraft condition" and "the disregard of inquiries concerning the status of funds"); *see also Carlson*, 802 A.2d 348-49.

Accordingly, the Committee finds that Respondent violated Rule 1.15(a) and 1.15(e) in the Howard matter.

[22] As noted above, for several of those transfers, he was aware that he had not earned the funds he took; he had received the advance-paid fees the same day or within a few days of when he transferred them to himself without doing any work on the matter. FF 63, 77-78, 80-81, 86.

D. Respondent Violated Rule 1.15(a) by Failing to Maintain Complete Records of Entrusted Funds

Rule 1.15(a) requires lawyers to keep "complete records of . . . account funds and other property" and preserve them "for a period of five years after termination of the representation." *See Edwards*, 990 A.2d at 522.

The *Edwards* decision explained that "[f]inancial records are complete only when an attorney's documents are 'sufficient to demonstrate [the attorney's] compliance with his ethical duties.'" 990 A.2d at 522 (quoting *In re Clower,* 831 A.2d 1030, 1034 (D.C.2003) (finding Rule 1.15(a) and § 19(f) violations)); *see also In re Pels*, 653 A.2d 388, 396 (D.C. 1995) (finding Rule 1.15(a) violation when attorney showed a "pervasive failure" to maintain contemporaneous records accounting for the flow of client funds within various bank accounts). Thus, "[t]he records themselves should allow for a complete audit even if the attorney or client is not available." *Edwards*, 990 A.2d at 522.

Respondent failed to maintain any records of funds that he deposited and withdrew from his client trust account. FF 7. Although he claimed he had a bank register for the account, he never produced that register. FF 8. Respondent made multiple withdrawals from the account without recording the purpose of the withdrawal or whether it related to a client matter. FF 9-10. He also failed to document the purpose of client payments he deposited into the account. FF 61.

The account was overdrawn at least three times within a ten-month period (August 2014, December 2014, and May 2015). FF 11. Despite those overdrafts, Respondent did not take steps to implement better recordkeeping practices or

otherwise safeguard funds in the account. FF 11. Respondent acknowledged that his recordkeeping was a "mess" and that "[t]here were times where [he] didn't know what was in the account." FF 11-12. He did not even regularly open the statements for the account. FF 12. This conduct violated Rule 1.15(a).

E. Respondent Violated Rule 1.16(d)

Rule 1.16(d) provides:

> In connection with any termination of representation, a lawyer shall take timely steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by Rule 1.8(i).[23]

"Rule 1.16(d) requires a lawyer, in connection with the termination of a representation, to 'take timely steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled[.]'" *Edwards*, 990 A.2d at 521 (quoting *Hallmark*, 831 A.2d at 372).

Failure to refund any unearned portion of a fee violates Rule 1.16(d). *See, e.g.*, *In re Samad*, 51 A.3d 486, 497 (D.C. 2012) (per curiam) (finding a violation where the respondent claimed that he did some work on the case, but did not "suggest

[23] Rule 1.8(i) provides that:

> A lawyer may acquire and enforce a lien granted by law to secure the lawyer's fees or expenses, but a lawyer shall not impose a lien upon any part of a client's files, except upon the lawyer's own work product, and then only to the extent that the work product has not been paid for. This work product exception shall not apply when the client has become unable to pay, or when withholding the lawyer's work product would present a significant risk to the client of irreparable harm.

that he earned the entire flat fee or that he returned any portion of the fee"); *In re Carter*, 11 A.3d 1219, 1223 (D.C. 2011) (per curiam) (finding a violation of Rule 1.16(d) where the attorney failed to pay an ACAB award for unearned fees); *In re Kanu*, 5 A.3d 1, 10 (D.C. 2010) (finding a violation of Rule 1.16(d) where the attorney failed to abide by a clause in her retainer agreement promising a refund if she failed to meet her clients' objectives).

Respondent violated Rule 1.16(d) in both the Azzam and Howard matters. Respondent formally withdrew from the Azzam matter on January 21, 2015, although for some time before that he had failed to provide services or respond adequately to his client's inquiries about the matter's status. FF 44. On January 21, he notified Ms. Azzam that he would return her file and "a portion" of her retainer. FF 44. He took no steps to do so, although she contacted him to request the file on January 22 and again on February 9. FF 47. Respondent did not return the file until February 20, after failing to appear at a previously-scheduled meeting with Ms. Azzam the day before. FF 49-50. Respondent knew that Ms. Azzam needed a quick return of the documents she had provided to him to pursue the suit against Chase that she had filed pro se in January (after Respondent failed to produce a complaint or take other steps in the matter). FF 48. His delay in returning her documents and the rest of her file violated Rule 1.16(d) under the circumstances. *See In re Thai*, 987 A.2d 428, 430 (D.C. 2009) ("'a client should not have to ask twice' for his file").

Respondent also failed to refund unearned fees to Ms. Azzam in a timely manner. On January 21, Respondent told Ms. Azzam he would return "a portion"

of the retainer. FF 44. He did not do so until August 20, 2015. FF 58. Between those dates, Ms. Azzam repeatedly requested a refund; the attorney who referred Ms. Azzam to Respondent repeatedly contacted Respondent about the refund; Ms. Azzam filed a bar complaint complaining, among other issues, that Respondent failed to refund her unearned retainer; and Respondent stated to Disciplinary Counsel that he was "prepared" to provide a refund. FF 51-53, 57. He did not return any part of the retainer until Disciplinary Counsel asked him to provide proof that he had done so. FF 58. Ms. Azzam needed the funds to pursue the case against Chase for which Respondent had failed to provide services, and Respondent acknowledged that he returned the money "very late." FF 48, 58. That delay violated Rule 1.16(d).

In the Howard matter, Respondent did not communicate with his client after December 2015. FF 88. By March 2015 he had failed to prepare for or appear at the EEOC hearing and he had taken no further steps in the matter, despite Ms. Howard's repeated efforts to contact him. FF 92-95. When Ms. Howard filed a disciplinary complaint in July 2015 that requested return of her funds, he still had not communicated with her about her matter or returned her unearned retainer. FF 97. In August 2015, Respondent claimed in a response to Disciplinary Counsel that he was "fully prepared to return" the funds (which he had taken for himself soon after receiving them), but he did not do so until late September or early October despite Disciplinary Counsel's repeated inquiries. FF 98-100. At that time, he sent Ms. Howard a refund from his personal account. FF 100. This delay was

unreasonable and violated Rule 1.16(d). In addition, there is no evidence that Respondent ever returned Ms. Howard's file to her, including the documents he received from her former employer. FF 90.

IV. RECOMMENDED SANCTION

In this case, Disciplinary Counsel has asked the Hearing Committee to recommend the sanction of disbarment. Citing *In re Addams*, 579 A.2d 190, 191 (D.C. 1990) (en banc), Disciplinary Counsel argues that because Respondent's misconduct included knowing misappropriation of client funds, the only appropriate sanction is disbarment.

Respondent has requested that the Hearing Committee, if it finds a rule violation, recommend a sanction of a suspension ranging from a minimum of 30 days to a maximum of 6 months along with a requirement that Respondent (1) meet with the Lawyer Advising Service Program, (2) undergo and or maintain mental health counseling, and (3) consult with a Practice Monitor. For the reasons described below, we recommend the sanction of disbarment.

A. Standard of Review

The sanction imposed in an attorney disciplinary matter is one that is necessary to protect the public and the courts, maintain the integrity of the legal profession, and deter the respondent and other attorneys from engaging in similar misconduct. *See, e.g.*, *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc); *In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013); *In re Cater*, 887 A.2d 1, 17 (D.C. 2005). "In all cases, [the] purpose in imposing discipline is to serve the public and

professional interests . . . rather than to visit punishment upon an attorney." *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (en banc) (citations omitted); *see also In re Goffe*, 641 A.2d 458, 464 (D.C. 1994) (per curiam).

B. Presumptive Sanction of Disbarment

The law regarding misappropriation is clear and consistent: absent "extraordinary circumstances," disbarment is the presumptive sanction for intentional or reckless misappropriation. *Addams*, 579 A.2d at 191; *In re Hewett,* 11 A.3d 279, 286 (D.C. 2011); *see also In re Mayers*, 114 A.3d 1274, 1279 (D.C. 2015) ("'In virtually all cases of misappropriation, disbarment will be the only appropriate sanction unless it appears that the misconduct resulted from nothing more than simple negligence.'") (quoting *Addams*, 579 A.2d at 191). The Court further held that "it is appropriate . . . to consider the surrounding circumstances regarding the misconduct and to evaluate whether the mitigating factors are highly significant and [whether] they substantially outweigh any aggravating factors such that the presumption of disbarment is rebutted." *Id*. at 195. The Court recognized that extraordinary circumstances are present when a respondent is entitled to mitigation under *In re Kersey,* 520 A.2d 321, 326 (D.C. 1987), but the Court warned that "mitigating factors of the usual sort" are not sufficient to rebut the presumptive sanction of disbarment, and "[o]nly the most stringent of extenuating circumstances would justify a lesser disciplinary sanction." *Id*. at 191, 193.

C. Insufficient Mitigating Factors to Warrant a Lesser Sanction

The physical and mental illness claimed by Respondent cannot be considered as *Kersey* mitigation. A lawyer who seeks *Kersey* mitigation on the grounds of disability must follow certain procedural rules to notify disciplinary authorities of his intention, and Respondent failed to do so. *See* Board Rule 7.6 ("failure to file a notice of intent to raise an alleged disability in mitigation shall operate as a waiver of the right to raise the alleged disability in mitigation, subject to the provisions of [Board Rule 7.6(d)].)"

Moreover, even if we overlook the failure to give proper notice, and examine the merits of the disability claim, there is no evidence that Respondent's alleged disabilities substantially caused him to take Ms. Howard's funds before he earned them, and thus, his physical and mental illness cannot mitigate Respondent's misconduct. *See In re Stanback,* 681 A.2d at 1111-15 (a respondent seeking *Kersey* mitigation must prove by a preponderance of the evidence that the disability or addiction substantially caused him to engage in that misconduct). Respondent claimed that in August through October 2014 he was "essentially incapacitated" by a back injury, and that he was severely depressed from November 2014 through January 2015. FF 107-08. Before his testimony on the second day of the hearing, Respondent had not offered any evidence related to the alleged back injury or the effect on his practice apart from a general reference to his back pain in his response to Disciplinary Counsel's Azzam investigation. FF 109. Even if the back injury or depression had some effect on his ability to practice after August, there is no reason

to believe that it affected his ability to handle entrusted funds appropriately. FF 22, 27. The alleged disabilities did not prevent him from taking on new clients (including expanding the scope of his representation of Ms. Howard) and continuing to represent existing clients in December 2014. FF 42, 45. There is no evidence that his alleged injuries and illness caused his failure to safeguard entrusted funds. Thus, his alleged disabilities do not constitute "extraordinary circumstances" sufficient to mitigate the presumptive sanction of disbarment for intentional or reckless misappropriation under *In re Addams*, 579 A.2d 190, 191 (D.C. 1990) (en banc).

V. CONCLUSION

For the foregoing reasons, the Committee finds that Respondent violated Rules 1.3(a), 1.3(c), 1.4(a), 1.4(b), 1.15(a), 1.15(e), and 1.16(d), and should receive the sanction of disbarment.

AD HOC HEARING COMMITTEE

/LHS/
Leslie H. Spiegel, Chair

/CDC/
Curtis D. Copeland, Jr., Public Member

/AJS/
Arlus J. Stephens, Attorney Member

Dated: May 19, 2017