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

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

REPORT AND RECOMMENDATION OF
THE AD HOC HEARING COMMITTEE

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I. INTRODUCTION

Respondent Evan J. Krame is charged in a four-count Specification of Charges with multiple violations of the Rules of Professional Conduct for the District of Columbia ("Rules"). The charges arise out of Respondent's actions in the course of administering three trusts, known as Special Needs Trusts (which are explained in Section III. B of this Report), in the Probate Division of the Superior Court of the District of Columbia between approximately January 15, 1997 and November 19, 2010. Respondent is charged with one or more violations of Rules 1.15(a) and (c) and D.C. Bar Rule XI, §19(f) (misappropriation of trust funds, mishandling of disputed funds, commingling, and/or failure to maintain complete records of entrusted funds), 1.5(a) (unreasonable fee), 3.3(a)(1) (knowingly making a false statement of material fact to a tribunal or failing to correct a false statement of material fact or law), 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal without an open refusal based on an assertion that no valid obligation exists), 8.4(c) (dishonesty), and 8.4(d) (serious interference with the administration of justice).

As fully discussed hereinafter, the Hearing Committee unanimously recommends that the

Board conclude that Respondent violated Rule 3.4(c) in two instances in connection with a fee request in one of the trusts, violated Rules 3.3(a)(1), 8.4(c), and 8.4(d) in one instance in an appellate brief in the same trust, and violated Rules 8.4(c) and 8.4(d) in four time entries filed in post-appeal fee requests in two of the trusts. The Hearing Committee, either unanimously or through a majority, concludes that Disciplinary Counsel has not met its burden of proving by clear and convincing evidence any additional charges beyond those unanimously agreed upon.[1] One member of the Hearing Committee would find more numerous and extensive instances of violations of Rules 3.3(a)(1), 3.4(c), and 8.4(c), and also a violation of Rule 1.5(a). *See* Separate Statement of Hal Kassoff. A different member of the Hearing Committee would find two violations of Rule 1.15(a) (negligent misappropriation). *See* Separate Statement of Buffy Mims.[2]

In light of the Hearing Committee members' differing conclusions concerning which and how many rule violations were proven, and despite consensus on much of the sanctions analysis, there is no majority consensus with respect to a recommended sanction. Warren Anthony Fitch, the Chair, would recommend a six-month suspension with either four months or all of the suspension

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[1] The specific charges, including the pertinent factual circumstances in the specific trust from which each charge arose and the applicable case law, are discussed in Section IV, Recommended Conclusions of Law, *infra*. The complete array of charges and recommended dispositions is summarized in Section VI, Conclusion, *infra*.

[2] Disciplinary Counsel did not argue or brief the commingling or record-keeping allegations in Counts I, II, and III, *see* Specification of Charges, ¶¶ 54(a), 87(a), 87(b), 105(a) (charging a violation of Rule 1.15(a) ("failed to . . . hold trust property . . . separate from the lawyer's own property" and "failed to maintain and/or to preserve records") and D.C. Bar Rule XI, §19(f)), or the Rule 3.4(c) allegation in Count IV, *see id*., ¶ 139(c), but we must address them. Disciplinary Counsel does not have the authority to decline to pursue charges that have been approved by a Contact Member. *See In re Reilly*, Bar Docket No. 102-94 at 4 (BPR July 17, 2003). Having considered the evidence, we conclude that Disciplinary Counsel has not proven these charges.

stayed depending upon the Board's view of one mitigation issue discussed hereinafter. Ms. Mims would recommend a fifteen-month suspension with three months of that suspension stayed. Mr. Kassoff would recommend an eighteen-month suspension with six months of that suspension stayed. All three members recommend a narrow supervisory condition.

II. PROCEDURAL HISTORY

A. THE INVESTIGATORY/DISCOVERY PERIOD[3]

Disciplinary Counsel sent Respondent an inquiry letter dated February 7, 2007 requesting that he respond to questions of possible ethical violations raised by an Order that had been issued by the Honorable Peter Wolf in the *De'Shawn Brown* Special Needs Trust on January 18, 2007 and published on February 5, 2007 in the Daily Washington Law Reporter. DX A6, A7.[4] The investigatory/discovery phase of this proceeding continued over the next nine years.

Respondent, through counsel, responded to Disciplinary Counsel's initial inquiry by letter of February 13, 2007. DX A8. In that letter, he noted, *inter alia*, that the January 18, 2007 Order in *Brown* and another Order of September 28, 2006 in the *Dion Baker* Special Needs Trust involving similar issues were being appealed and requested that the investigation be held in abeyance until

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[3] This unusually detailed summary of pre-hearing matters is submitted in order to provide information related to Respondent's undue delay contention. *See* R. Br. at 184-85; ODC Reply Br. at 23-24; Section V.B.5, *infra* at 146-147.

[4] "DX" refers to Disciplinary Counsel's exhibits, and "RX" refers to Respondent's exhibits. "ODC Br." refers to Disciplinary Counsel's Proposed Findings of Fact, Conclusions of Law and Recommended Sanction. "R. Br." refers to Respondent's Proposed Findings of Fact, Conclusions of Law and Recommended Sanction. "ODC Reply Br." refers to Disciplinary Counsel's Reply Brief. "AA" refers to admissions by Respondent in his Answer; "UF at ¶ __" (uncontested fact) refers to proposed factual findings by Disciplinary Counsel on its post-hearing briefing that Respondent has admitted. "1st Preh. Tr." refers to the transcript of the prehearing conference on June 23, 2016, and "2nd Preh. Tr." refers to the transcript of the prehearing conference on September 30, 2016. "Tr." refers to the transcript of the hearing on December 5-7, 12-15, and 19-21, 2016.

the appeal was decided. DX A8 at 1, 3. Disciplinary Counsel consented to Respondent's deferral request. DX A8 at 4. The District of Columbia Court of Appeals issued its ruling in the consolidated appeals approximately two and one-half years later, on August 20, 2009. DX A10.

Disciplinary Counsel thereupon resumed its investigation. Over the following 45 months between approximately August 20, 2009 and approximately May 15, 2013, Disciplinary Counsel sought the production of voluminous documentation, other information and statements of position from Respondent both informally and by subpoena. *See, e.g.*, DX A13, A17, A20, A27, A28, A29, A53, A54, A57, A61, A64, A66. For reasons such as the volume of responsive material and Respondent's and his counsel's other professional and personal obligations, Respondent sought and received from Disciplinary Counsel numerous extensions of time in which to do the necessary review and production, to respond to requests for information and for statements of positions, and to respond to filing deadlines. *See, e.g.*, DX A15, A24, A30, A41, A53, A54, A55, A56, A57, A58. Disciplinary Counsel appears to have consented to most or all such requests. *See, e.g.*, DX A17, A28, A34, A42, A43, A44, A53, A58, A71, A79. Respondent also objected to certain of Disciplinary Counsel's requests and subpoenas, filed motions to quash two subpoenas *duces tecum* (one seeking the hard drive on Respondent's office computer and one seeking co-counsel's client file pertaining to Respondent), and appealed certain rulings concerning the production of documents. DX A29, A30, A31, A32, A33, A37, A45, A58; these motions and appeals were resolved largely adversely to Respondent. DX A46, A62, A68, A75. Following disagreement about the scope of an Ad Hoc Hearing Committee's ruling on one issue, DX A48, A49, Disciplinary Counsel filed a motion for enforcement in the Court of Appeals, which was granted in early 2013. DX A50, A62.

Respondent and Disciplinary Counsel appear to have engaged in discussions and a hearing

regarding a possible negotiated disposition over a period of approximately eighteen months between approximately September 13, 2013 and March 20, 2015. *See* DX A85-A89.

B. THE FORMAL PROCEEDING STAGE

Disciplinary Counsel's Specification of Charges was approved for filing on March 31, 2016. DX A2 at 1. In Count I, Disciplinary Counsel charged Respondent with violating Rules 1.15(a), 3.3(a)(1), 3.4(c), 8.4(c), and 8.4(d) in the course of administering the *Vernice Seay* Special Needs Trust between January 15, 1997 and November 17, 2006. In Count II, Disciplinary Counsel charged Respondent with violating Rules 1.15(a), 1.15(c), 3.3(a)(1), 3.4(c), 8.4(c), 8.4(d), and D.C. Bar Rule XI, §19(f), in the course of administering the *De'Shawn Brown* Special Needs Trust between August 2003 and November 10, 2010. In Count III, Disciplinary Counsel charged Respondent with violating Rules 1.15(a), 1.15(c), 3.3(a)(1), 3.4(c), 8.4(c), and 8.4(d) in the course of administering the *Dion Baker* Special Needs Trust between March 7, 2005 and September 18, 2009. In Count IV, Disciplinary Counsel charged Respondent with violating Rules 1.5(a), 3.3(a)(1), 3.4(c), 8.4(c), and 8.4(d) in the course of preparing and submitting Petitions for Compensation in the *Brown* and *Baker* trusts. Disciplinary Counsel served Respondent with the Specification of Charges on approximately April 6, 2016. DX A3 at 2-3. Respondent filed his Answer to Specification of Charges on May 10, 2016. DX A4 at 1.

A prehearing conference was held on June 23, 2016, before the Chair of the Ad Hoc Hearing Committee, Mr. Fitch, Esq., with the following persons present: Assistant Disciplinary Counsel Becky Neal, Esq., for the Office of Disciplinary Counsel; Disciplinary Counsel's Forensic Investigator Charles Anderson; Barry E. Cohen, Esq., and Edward G. Varrone, Esq., as Respondent's co-counsel; and Respondent. Respondent's counsel requested a hearing date of October 26, 2016 on the basis of his and Respondent's personal and/or professional schedules, and

Disciplinary Counsel joined in that request. The Hearing Chair acquiesced in that request, 1st Preh Tr. 24, 27-30, and issued an Order on July 1, 2016 that memorialized the hearing dates and preceding deadlines agreed upon at the prehearing conference.

Disciplinary Counsel filed an Amended Specification on July 14, 2016, clarifying that as to Counts II, III, and IV, the charged violation of Rule 3.3(a) relates to conduct both before and after February 1, 2007, when the language of the Rule changed.[5] On July 25, 2016, Respondent filed a Motion to Strike Disciplinary Counsel's Witness Disclosures as being insufficiently detailed and not in compliance with the Chair's July 1, 2016 Order. Disciplinary Counsel conceded Respondent's Motion to Strike and filed its First Amended Witness List on July 29, 2016.

On July 26, 2016, Disciplinary Counsel filed a Memorandum Concerning a Potential Conflict of Interest Involving Respondent's Counsel, Mr. Varrone. On August 22, 2016, Respondent filed a Motion in *Limine* to Exclude the Testimony of Judge Wolf; Disciplinary Counsel subsequently removed Judge Wolf from its witness list. *See* 2nd Preh. Tr. 34. On September 12, 2016, the Chair issued an amended scheduling order which directed Disciplinary Counsel to

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[5] Until January 31, 2007, Rule 3.3(a)(l) provided:

> (a) A lawyer shall not knowingly:
>
> (1) Make a false statement of material fact or law to a tribunal.

Beginning on February 1, 2007, Rule 3.3(a)(l) provided:

> (a) A lawyer shall not knowingly:
>
> (1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer, unless correction would require disclosure of information that is prohibited by Rule 1.6.

make additional disclosures concerning some of its witnesses and to produce certain documents. Amended Order at 2 (i-m).

As noted in the preceding paragraph, a second prehearing conference was conducted before the Chair and Ad Hoc Hearing Committee attorney member Ms. Mims, Esq., on September 30, 2016. Disciplinary Counsel, Respondent's co-counsel, and Respondent were present. The hearing was necessitated primarily by Respondent's Motion to Quash Disciplinary Counsel's Subpoena *Duces Tecum*; that motion was denied. 2nd Preh. Tr. 28. Because of the additional production necessitated by the subpoena *duces tecum*, the commencement date for the evidentiary hearing was continued from October 26, 2017 to December 5, 2017, and other adjustments were made to the previously adopted prehearing schedule. *Id*. at 54-61.[6]

On October 26, 2016, Disciplinary Counsel filed additional information concerning the expected testimony by Havard Jones, an auditor in the Superior Court's Probate Division, concerning his conversations with Respondent. In the same filing, Disciplinary Counsel notified the Chair and Respondent that, in light of Respondent's objections to the authenticity of exhibits in Notebook J, it would be calling as a witness John Simek from Sensei Enterprises, Inc.

On November 7, 2016, the Chair granted Disciplinary Counsel's Motion to Present the Testimony of Witness Neil Manne by Video-Conference. Disciplinary Counsel and Respondent filed their respective Final Witness Lists on November 21, 2016.

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[6] In light of Disciplinary Counsel's July 26, 2016 Memorandum Concerning a Potential Conflict of Interest Involving Respondent's Counsel Mr. Varrone, as well as Disciplinary Counsel's expressed intention of calling Mr. Varrone as a witness, the Chair *voir dired* Respondent at the second prehearing conference as to his knowledge and understanding of the potential conflict of interest and his waiver of the conflict in light of his continued desire for Mr. Varrone's representation in this matter. 2nd Preh. Tr. 39-43. Ultimately, neither party called Mr. Varrone as a witness.

The hearing in this matter was conducted on December 5-7, 12-15, and 19-21, 2016, before an Ad Hoc Hearing Committee consisting of the Chair, Mr. Fitch, public member Hal Kassoff, and attorney member Ms. Mims. Disciplinary Counsel was represented at the hearing by Ms. Neal. Respondent appeared at the hearing and was represented by Mr. Cohen and Mr. Varrone. Disciplinary Counsel called as witnesses John Simek, Constance Starks, Havard W. Jones, Respondent, and Neil Manne. Respondent testified on his own behalf and called as witnesses Marsha Swiss, Lynn Wilson, Yolanda Mazyck, James Klein, Charles Weinberg, and Steven Weinberg. The following exhibits offered by Disciplinary Counsel were admitted into evidence: DX A-E, G-I (entirety) and DX J2, J7, J11, K1, K2, K4, K8, K10, K14-17, K19-21, K23-27. *See* Tr. 1755, 1877-1880, 2420-22, 2553. The following exhibits offered by Respondent were admitted into evidence RX 1-14, 16-19, 101-110. Tr.1903-04, 2348-2358.

Upon the conclusion of the evidentiary hearing, the Committee made a preliminary non-binding determination that Disciplinary Counsel had proved one or more Rule violations as set forth in the Specification of Charges. Tr. 2694; *see* Board Rule 11.11. Because of the size of the record and the Assistant Disciplinary Counsel's other professional obligations, Disciplinary Counsel was given 72 days to file its brief; Disciplinary Counsel complied with that schedule and filed its brief on March 3, 2017. Respondent's brief was scheduled for filing on April 14, 2017, but that deadline was extended by a week upon Respondent's request for a three-week extension; Respondent's brief was filed on April 21, 2017. Disciplinary Counsel filed its Reply brief on May 5, 2017.

III. FINDINGS OF FACT

A. RESPONDENT EVAN J. KRAME

1. Respondent is a member of the Bar of the District of Columbia Court of Appeals, having been admitted by examination on June 20, 1983 and assigned Bar number 370772;

Respondent also is or has been licensed to practice law in Maryland, New York, and New Jersey. AA; DX A1 at 1; DX B66 at 2, ¶ 4. Tr. 1966. After finishing law school Respondent joined the U.S. Patent and Trademark Office. While working there, he earned a Master of Laws in taxation. He then joined the Internal Revenue Service, where he worked for approximately a year. DX D3 at 23; Tr. 1953-54. Respondent joined the firm of Marx & Krame in late 1986 and focused there on estate planning, trusts and guardianships. DX D3 at 23; Tr. 1954-55. Respondent joined the firm of Margolius Mallios in 1997 and received his first appointment as a trustee in a special needs trust in January 1997. Tr. 1955-56, 2026, 2097. Respondent appears to have left Margolius Mallios at the end of 2000 to join the estates and trusts group of Miller, Miller & Canby. Respondent and another attorney established Altman & Krame in mid-2001. Tr. 914, 922, 1955-57; DX A69 at 5. Respondent established his own firm, Evan J. Krame, P.C. (now Krame & Biggin, P.C.) in the Fall of 2003. DX B59 at 1; Tr. 1956-59, 2022-24, 2027.

2. When Respondent established his own firm in 2003, his assistant Pat Cohen moved with him to the new firm, where she generally "kept track of things" and "continued to help me administer and manage the trusts with the same systems that we had been using before." UF at ¶ 48; Tr. 1957, 1964-65, 2027; *see also* DX B59 at 1. Respondent hired Ed Biggin as an associate in his firm in 2004 as well as additional clerical staff to assist with trust administration. UF at ¶48; Tr. 1958-59, 2032, 2037-39. By 2006, Respondent was administering approximately 42 trusts in Maryland and the District of Columbia. Tr. 2057. Respondent engaged a CPA, Chuck Weinberg, in approximately 2007 on an on-going basis to review bookkeeping procedures and sometimes prepare accountings. Tr. 2040-42. He also engaged other accountants to assist with preparation of annual trust accountings. Tr. 1629, 1440.

3. Respondent utilized various accounting systems to administer the trusts for which

he served as trustee. At the beginning of his trust practice in the 1990s, he managed with paper and calculators and a trained bookkeeper but adopted computer software as his trust practice grew, first using a software product known as PCLaw beginning in 2001 when Altman & Krame was established. Tr. 2019-2021. He also made use of Excel and Outlook computer programs. Tr. 1964-65, 2019-2021, 2027-28, 2033, 2037.

4. Respondent is an experienced practitioner and recognized expert in the Probate Division of the District of Columbia Superior Court. DX A4 at 2; DX B73 at 2; DX C27 at 9; DX I5 at 6-7. He has handled hundreds of cases as a trustee, guardian, conservator, or personal representative in D.C. Superior Court and Maryland Circuit Courts. AA; DX A25 at 1, 6-7; DX C27 at 7-8, ¶¶ 12-13; DX E38 at 36. The Office of Disciplinary Counsel retained Respondent to testify as an expert in the following matters: *In re Fair*, 780 A.2d 1106 (D.C. 2001); *In re Ford*, 797 A.2d 1231 (D.C. 2002) (per curiam); *In re Long*, 902 A.2d 1168 (D.C. 2006) (per curiam); *In re Alexander*, 865 A.2d 541 (D.C. 2005) (per curiam); *In re Hoage*, Bar Docket No. 433-99 (BPR July 29, 2005), *disability suspension, matter pending before the Court*; *In re Edwards*, 990 A.2d 501 (D.C. 2010); *In re Bach*, 966 A.2d 350 (D.C. 2009). DX C27 at 9; DX D3 at 24; Tr. 1888.[7]

[7] These exhibits, which consist of the transcripts of Respondent's testimony as an expert witness, were admitted by stipulation as evidence only of the fact of Respondent's service as an expert witness on behalf of Disciplinary Counsel in the identified matters; by agreement of the parties, the content of Respondent's testimony was not admitted into evidence. The record contains additional information about Respondent's professional and personal history. Respondent's view of that information is set forth in his Brief at 3-6; Disciplinary Counsel does not dispute that information. ODC Reply Br. at 32. We consider that additional information as relevant only to the sanction issue and therefore address it in Section V of this Report.

B. SPECIAL OR SUPPLEMENTAL NEEDS TRUSTS AND THE PROBATE DIVISION'S ADMINISTRATION OF THOSE TRUSTS

The Purpose of Special Needs Trusts

5. A Special Needs Trust (SNT), also known as a Supplemental Needs Trust, enables a disabled person to collect, retain and expend proceeds from certain litigation recoveries without forfeiting Medicaid and Social Security benefits. DX A4 at 3; Tr. 126-27; *see also* 42 U.S.C. § 1396p(d). SNTs were created by federal legislation that became effective in the mid-1990s. Tr. 333-34.

The Probate Division's Administration of Special Needs Trusts

6. Special Needs Trusts, the form of trust underlying the events in this matter, "did not initially fall under any of the probate division rules." Tr. 337. Special needs trusts began to be transferred to the Probate Division in the early to mid-1990s to ensure adequate judicial oversight of those trusts. Tr. 333-34, 341-42.

7. The review of trustee compensation in SNTs continued to be inconsistent until at least 2006: Probate Division judges "were inconsistent in their orders" including "even . . . in the same case." Tr. 404-05, 450; *see also* Tr. 131. This situation arose at least in part from the fact that pertinent legislation has not been enacted in the District of Columbia, Tr. 342, 1036, and also from the absence in the District of Columbia of "very much case law" with respect to probate, trusts and estates generally, let alone with respect to SNTs. Tr. 1033.

8. Reviews of accountings and fee petitions, which were usually filed annually in each trust being supervised by the Probate Division, could not be assigned to the same judge year after year because active and senior Superior Court Judges rotated through the Division. Tr. 310-15.

9. Rulings by individual judges in individual trusts, including SNTs, while binding in

that trust, are not binding on other judges in other trusts, including SNTs, and serve, at most, as information sources and possible guidance. Tr. 132-33, 342-44, 402-03, 1163. There is no court rule addressing trustee compensation in SNTs, and "the court rulings were all over the lot; often by the same judge, they were all over the lot." Tr. 1071, 1068; *see also* Tr. 1147.

10. In 2001, after considering the expert testimony of the then Register of Wills (who also testified in this case as an expert witness in her role as the former Register of Wills) and the testimony of an experienced practitioner in the Probate Division, the Court of Appeals observed that "in mid-1994," about two and one-half years before the events in this matter commenced, there was not only "an ambiguous probate culture" in which even the scant statutorily specified compensation requirements for some aspects of Probate Division practice were routinely ignored but also a compensation setting with respect to estates that was altered by a significant statutory change – eliminating any prior approval requirement – "within the very next year." *Fair*, 780 A.2d at 1112-13.

11. Beginning in approximately 2005, at least one judge began to question the basis of trustee compensation, in special needs trusts, an inquiry that Respondent considered reasonable. Tr. 2259-2260. In a lengthy letter dated May 10, 2005 to the Probate Division's Presiding Judge at time, Respondent provided a detailed review of trustee compensation practices in the Probate Division and elsewhere and proposed a guideline for the handling of SNT trustee compensation. DX I5; *see also* FF 121. There is no evidence that any such guideline was ever adopted by any individual judge or by the Probate Division.

12. In his Memorandum Order of January 18, 2007 in connection with one of the trusts giving rise to some of the events and issues in this matter, Judge Wolf reported that to "'get a handle' on these court created trusts, the Probate Division is currently considering a rule to cover

them." DX A6 at 3. There is no evidence that any such rule has ever been adopted, and there are no such rules in the Probate Division Rules. Thus, little seems to have changed after the Court of Appeals decision in 1994 or between 1997 and 2010, the relevant time frame in this matter.

13. In the relevant period in this proceeding, there were no consistent and reliable understandings among judges, administrators, and practitioners in the Probate Division about specific requirements, general standards, accepted or even acceptable practices – let alone formal, express rules – regarding SNT trustee compensation requirements and procedures. FF 6-12.[8]

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[8] The following observations seem in order at this point to explain the relatively limited parameters of our Findings of Fact in this subsection of our Report, notwithstanding the substantial amount of time spent by the parties on Probation Division circumstances in the hearing and in their briefs. *See* ODC Br. at 8-12; R. Br. at 6-31. With a few exceptions, we simply have not found the extensive testimony of the parties' expert witnesses or the parties' voluminous proposed findings of fact on such matters as "Governing Law," R. Br. at 6-21, to be necessary to our analysis and resolution of the specific ethical Rules violations that Disciplinary Counsel has charged. The parties' respective expert witnesses – a respected, experienced former Clerk of the Probate Division and a respected, experienced Probate Division practitioner, both of whom in our judgment were totally truthful in their testimony – differed frequently in their recollections of and understandings about the standards, practices and operations of the Probate Division of the Superior Court in the relevant time frame of January 15, 1997 - November 19, 2010 – issues that the parties considered important at the time of the hearing. The expert witnesses also disagreed in part or entirely on such questions as the fiduciary duty, for and, if so, the timing of paying interest on amounts erroneously disbursed from a trust as trustee compensation and subsequently returned to the trust, *cf*. Tr. 309 and Tr. 1173-1180; the scope of the law of the case doctrine with respect to compensated-related rulings, *cf*. Tr. 357-58 and Tr. 1165; the interpretation of ambiguous compensation provisions in one of the trust instruments at issue here and in an order in one of the trusts, *cf*. Tr. 144-45, 190-91, 441-446 and Tr. 1108-1110; and acceptable methods for determining and reporting time spent on trust matters for the purpose of receiving court approval of trustee compensation where and as required. *Cf*. Tr. 143 and Tr. 1083, 1104-10, 1160. (There is also disagreement in the record as to whether the court or its Probate Division is a party to a trust. *Cf*. Tr. 331 and Tr. 1187, a question with potential bearing on issues in Sections IV. K. and IV. N. of this Report.) In addition, Disciplinary Counsel's expert witness, while admitted as an expert in D.C. Superior Court Probate Division practices, procedures and governing law and statutes, does not consider herself an expert with respect to SNTs. Tr. 121-22, 131-32. Similarly, Respondent's expert witness, while admitted as an expert with respect to estates, trusts and fiduciary law and practice in the Probate Division, has had little

C. THE VERNICE SEAY SPECIAL NEEDS TRUST (COUNT I IN THE SPECIFICATION OF CHARGES)[9]

Establishment of the Trust

14. Vernice Seay suffers from severe neurodevelopmental problems resulting from birth trauma. UF at ¶14; DX A4 at 3, ¶ 4; DX B3 at 1; DX G4 at 2-3. A civil action was filed on her behalf in the Superior Court and eventually settled in November 1996. DX A4 at 3, ¶ 4. The court thereupon ordered the parties to establish a special needs trust in the Probate Division. DX B2 at 4-5.

15. Seay's mother, Corinthia Seay, retained Respondent to draft the special needs trust, and he did so. AA; UF at ¶15; DX B6 at 6-7; Tr. 2074.

16. The incipient *Seay* trust was one of the first SNTs to be transferred from the Civil

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experience with special needs trusts and, in fact, often declined appointment in such cases. Tr. 1026, 1024.

Thus, we are able to find only a very few of the matters covered in the extended, conflicting expert testimony and in the equally disparate proposed findings of fact in the parties' briefs about Probate Division operations in the time period at issue in this case to have been established by clear and convincing evidence; those few proven facts have been set forth in this subsection. Our critical findings of fact and credibility determinations, as well as our ensuing recommendations of law and as to sanction, need not and do not depend on the expert witnesses' conflicting recollections and understandings.

[9] In the remainder of this Section III setting forth our Findings of Fact relating to the four Counts in Disciplinary Counsel's Specification of Charges (as particularized in its brief and reply brief), we have attempted to do just that – set forth findings of fact without, as is pervasive in the parties' briefs, embellishment, proposed inferences, and/or legal argument disguised as proposed findings of fact. Despite the parties' often distracting and sometimes unsupported elaborations, we have attempted in this Section III to give full consideration to the parties' often uncontested proposed findings of actual fact and to include all the proposals, disputed and undisputed, and other facts that we find to have been established by clear and convincing evidence, so that the Board will have a complete factual record from which to evaluate our factual findings and recommendations of law and draw its own conclusions. We set forth in Section IV our analysis of the legal significance of our hopefully objective and non-argumentative findings of facts.

Division to the Probate Division. Tr. 145, 185-86; DX A69 at 1.

17. On November 6, 1996, Respondent filed a Petition to Establish a Supplemental Needs Trust in the Probate Division of Superior Court with respect to Vernice Seay and attached a copy of the proposed trust. UF at ¶17; DX B2. With respect to trustee compensation, Article Five F of the proposed trust instrument provided:

> A Trustee shall be entitled to reasonable compensation for his or her services as Trustee hereunder. The Trustee shall also be compensated for **legal** work performed on behalf of the Trust at his or her normal hourly rate for similar matters.

AA; UF at ¶17; DX B2 at 13 (emphasis added); Tr. 145.

18. In her Order of January 22, 1997, Judge Christian established the *Seay* SNT and appointed Respondent as trustee. AA; UF at ¶18; DX B4 at 1-2. Judge Christian's Order provided that "the Vernice Seay Supplemental Needs Trust shall now and hereafter remain subject to modification by the Probate Division of the Superior Court . . ." AA; UF at ¶18; DX B4 at 2. Judge Christian further ordered "that the Vernice Seay Supplemental Needs Trust attached to the Petition is hereby approved." DX B4 at 1. In the copy of the trust instrument attached to Judge Christian's Order, Article Five F provides:

> A Trustee shall be entitled to reasonable compensation for his or her services as Trustee hereunder. The Trustee shall also be compensated for work performed on behalf of the Trust at his or her normal hourly rate for similar matters.

DX B4 at 9; *see also*, Tr. 2074-76. The word "legal" does not appear before the word "work" in the second sentence of Article Five F of the trust instrument attached to Judge Christian's January 22, 1997 Order. Neither version of the *Seay* trust instrument contains any other provisions regarding the trustee's compensation. DX B4. The version attached to Judge Christian's January 22, 1997 Order is signed by Respondent but is not signed by Judge Christian. DX B4 at 13. Respondent

prepared both the trust document attached to the petition and, he theorizes, the trust document attached to Judge Christian's order. Tr. 2075-76. Respondent does not remember why the word "legal" was not included in the trust document attached to Judge Christian's order, but he testified that he was not asked by the court to make that change. Tr. 2076-77. In the Register of Wills (ROW) transmittal memorandum in which the trustee compensation is reviewed, the ROW quotes the trustee compensation provision as including, in the second sentence, the word "legal." DX B26 at 2. The same is true for Judge Wolf's January 24, 2005 Order (*see* FF 49), in which he sets out the terms of the compensation provision of the *Seay* Trust and includes, in the second sentence, the word "legal." DX B65 at 2.

Respondent's Initial Accounts and Petitions for Compensation

19. Respondent filed his first Petition for Compensation in the Trust on May 8, 1997. AA; UF at ¶19; DX B6 at 1-4. In support of the Petition, Respondent submitted a statement of services from September 3, 1996 through March 10, 1997 containing the following information: (1) a description of the services rendered; (2) the dates that services were performed; (3) the amount of time spent; and (4) the hourly rate. AA; UF at ¶19; DX B6 at 6-9. This petition sought compensation for Respondent's services as counsel for Ms. Seay in drafting the *Seay* trust instrument and preparing and filing the application for its establishment. Tr. 2127-28. As reflected in the description of services therein, the Petition did not seek compensation for services in his capacity as trustee administering the trust. *Id.* The Petition provides, "Petitioner has spent 34.50 hours on this matter assisting the minor, Vernice Seay, and her mother by establishing the supplemental needs trust in lieu of a guardianship." DX B6 at 2.

20. In an Order dated July 30, 1997, Judge Haywood authorized fees in the amount of $3,634, denying $225 for Respondent's travel time to court. Respondent disbursed the approved

fees from the trust to his firm on July 31, 2007. AA; UF at ¶20; DX B8 at 1, DX B10 at 8.

21. On or shortly before December 31, 1997, Respondent prepared a statement of services "for professional services rendered" from April 1, 1997 through December 5, 1997 that included (1) dates of services rendered, (2) description of services rendered, (3) amount of time spent expressed in six-minute increments, (4) applicable hourly rate, and (5) total amount billed. DX G6 at 1-9; G7 at 1-5. Respondent disbursed $5,295 from the trust to his firm on the same day. AA; UF at ¶21; DX B10 at 8. Respondent did not file a fee petition or the statement of services at this time. AA; UF at ¶21. From the inception of the *Seay* trust in 1997, Respondent's trustee fees were based on time charges. Tr. 2049. The Seay trust instrument did not require the filing of a fee petition or a detailed statement of services by the trustee before withdrawal of the trustee's compensation. DX B4 at 9. Tr. 413; 1058-59. Nor did any statute or court rule require such filing before withdrawal of trustee fees. Tr. 341-342, 356-58, 362, 1071.

22. Respondent filed the First Account in the *Seay* trust, covering the period of January 15, 1997 – May 9, 1998, on August 13, 1998. (Subsequently, the First Account was twice amended for reasons unrelated to the fees.) AA; UF at ¶22; DX B10 at 1; DX B13 at 1; B16 at 1. In the First Account, Respondent identified the $5,295 payment as for "attorney fees"; Respondent did not file a separate fee petition. AA; UF at ¶22; DX B10 at 8.

23. Accounts do not provide the same information about trustee fees as is required in fee petitions filed with the court. "In the accounting, you just show the fee. It's a figure, and you state it as a fee. In a petition for approval of a fee, you have to set forth what it is you are taking and why you claim this is reasonable. . . . [It] would require a detailed statement of services . . ." UF at ¶23; Tr. 1072-74, 1084-86, 2125.

24. In December 1998, an auditor asked Respondent to explain the authority for the

disbursement of $5,295.00 in attorney's fees as set forth in the First Amended First Account. AA; UF at ¶24; DX B13 at 1, 6; DX B14 at 1-2, question 8. In a letter dated January 5, 1999, Respondent answered, "The fees paid in December 1997 were paid by the trust without prior approval as the trust instrument does not require an Order of the court before payment." AA; UF at ¶24; DX B15 at 2.

25. In August 1999, after Respondent filed the Second Amended First Account, the auditor again asked Respondent to explain the authority for the $5,295 disbursement. UF at ¶25; DX B16 at 1, 9; DX B22 at 1. Respondent spoke to the auditor and subsequently memorialized the conversation in a letter dated August 18, 1999. Respondent stated:

> The authority to pay compensation to the trustee lies in the trust document. [The auditor] predicted that the Court would not approve the account without the filing of a petition for compensation. I believe that the format used is correct, given that there is no statute or rule directing otherwise. However, I have prepared a petition for fees (a copy of which is attached hereto).

UF at ¶25; DX B23 at 1; *see also* B24 at 2, ¶ 7.

26. On August 26, 1999, Respondent filed a Petition for Compensation *Nunc Pro Tunc* "for allowance of attorney fees," seeking approval for his December 1997 disbursement of $5,295 from the trust to his firm. DX B24 at 1. Respondent attached his previously prepared statement of services describing his services and corresponding times. AA; DX B24 at 1, 7-14.

27. In an Order dated, October 13, 1999, Judge Christian approved $5,227.50 of the $5,295.00 in fees that Respondent had collected, disallowing fees for travel to court. Judge Christian also made the following ruling:

> ORDERED, that a request for compensation, accompanied by a detailed statement of services, shall be submitted by the trustee for the Court's consideration prior to the payment of any fees to the trustee in this matter, such that the reasonableness of the compensation claimed can be determined consistent with Article Five, item F of the terms of the trust herein.

AA; DX B27 at 1-2.

28. Respondent testified as follows regarding his understanding of the provision set forth in FF 27:

> Q. What did you understand that your obligations were going forward in obtaining compensation in the Seay trust?
>
> A. In obtaining compensation for the Seay trust? I was required to prepare and deliver a detailed statement of services, and that once that was delivered to the court, I could pay myself the fees stated therein.
>
> That's in the nature of the way trusts operate.

Tr. 2118; *see also* Tr. 2116-17. The Hearing Committee does not find by clear and convincing evidence that Respondent's testimony regarding his interpretation of the October 13, 1999 Order is not credible. (One member of the Hearing Committee, Mr. Kassoff, believes that while Respondent's interpretation is conceivable, it was not the likely intent of the Court, and since Respondent himself interpreted the order both ways in first awaiting court approval before disbursing his fee, and then in a succeeding year disbursing his fee prior to court approval, he must have recognized the ambiguity and therefore should have sought clarification from the court.)

29. On or about March 2, 2000, Respondent filed the Third Account, covering the period of January 15, 1999 – January 15, 2000. On the same day, he filed a Petition for Compensation seeking $6,579.68 in "attorneys fees" and expenses "For Professional Services Rendered" from January 4, 1999 through February 14, 2000; he attached a statement of services to the Petition. AA; UF at ¶29; DX B30; DX B31.

30. Respondent did not disburse the fees requested in the March 2, 2000 Petition for Compensation when he filed the Petition. Tr. 882.

31. Judge Haywood approved the Third Account on November 21, 2000 and approved

the Petition for Compensation on November 27, 2000. AA; UF at ¶31; DX B34 at 1; DX B36 at 1. Respondent disbursed the approved compensation from the trust to his prior firm and current firm (*see* FF 1) between December 4 and December 13, 2000. AA; UF at ¶31; DX K8 at 4; Tr. 882.

The Duplicate Disbursement of Fees for Services Rendered Between February 3, 2000 and January 21, 2001

32. On February 8, 2001, Respondent filed the Fourth Account, covering January 15, 2000 – January 15, 2001, and a Petition for Compensation "for allowance of attorney fees" in the amount of $7,178.80 in fees for services rendered from February 3, 2000 through January 21, 2001, while he was still affiliated with Miller, Miller & Canby. DX B38; *see also* FF1.

33. On February 21, 2001, Respondent disbursed $7,090.05 ($88.75 less than the total amount he had requested) from the trust to Miller, Miller & Canby, with which he was still associated. AA; UF at ¶33; DX A69 at 5; DX B44 at 17; DX K10 at 4.

34. The court approved Respondent's February 8, 2001 fee petition approximately eleven months later, on December 20, 2001, and authorized payment of fees in the amount of $7,178.80. AA; UF at ¶35; DX B42 at 1.

35. On or about January 2, 2002, Respondent disbursed $7,178.50 from the trust to his firm, Altman & Krame, which had been established in mid-2001. AA; DX B57 at 16; DX K14 at 4; *see also* FF1. Respondent acknowledges that this was a duplicate disbursement for the fees sought in the February 8, 2001 fee petition. AA; DX A4 at 10, ¶31 ("Admitted that Respondent paid himself twice for the same services. The second fee payment was a mistake."); DX A69 at 1, 5; Tr. 892. Respondent testified at the hearing regarding this duplicate disbursement, noting the passage of time between the February 12, 2001 and January 2, 2002 disbursements, the administrative processes for handling the numerous payment authorizations coming into the firm

in this period, and the personal and administrative difficulties that had arisen in the Altman & Krame firm since its May 2001 establishment. Respondent further explained at the hearing that he likely made the disbursement from the trust when "instructed" by a staff person at the Altman firm to do so, following receipt of the court's order approving the fee request about 6 months after the petition and initial payment. Tr. 2025, 2148; *see also* Tr. 1957, 2021-24, 2026, 2147. The Hearing Committee credits Respondent's statements and testimony in this regard.

36. Respondent returned funds from his firm's account to the trust in the amount of $7,090.05 on or about November 30, 2010, upon discovering the duplicate disbursement while reviewing his records during the investigatory phase of this proceeding. AA; DX K27 at 2; DX A69 at 5-6. Respondent stated or testified that the duplicate payment was not discovered until November 2010, that the second, $7,178.50 duplicate payment was a mistake that occurred during an unsettled period in his law firm and after the almost nine-month delay between submission of the Fourth Account and the court's approval of it, and that ". . . I paid it back immediately upon finding that error." Tr. 892, 902-04; DX A69 at 5-6. The Hearing Committee credits Respondent's statements and testimony in this regard. When Respondent reimbursed the $7,090.05 to the trust, he did not include at that time interest covering the approximately nine years that had elapsed from the initial $7,090.05 disbursement from the trust to his firm in February 2001. DX A69 at 6, 12; Tr. 892-96, 905. There is no specific court statute or court rule requiring the payment on interest under these circumstances or specifying how a fiduciary should calculate interest under these circumstances. Tr. 304-07. The Division's auditors would not advise the court on whether interest was paid on erroneous payments. Tr. 304. When interest was paid, it would be based on specific court orders requiring that interest be paid. *Id.* Payment of interest on erroneous payments was not always required. Tr. 304-05. The statutory provision in decedent estates requiring repayment of fees

determined to be unreasonable, *see* D.C. Code Sec. 20-753, does not have any requirement for payment of interest. Tr. 1175. Respondent explained his failure to pay interest as an "oversight" and a "mistake;" he testified at the hearing that "I didn't have to pay interest. It would have been nice if I paid interest, and looking back on it, I wish I had paid interest, but there was no requirement that I pay interest." DX A69 at 1, 6; Tr. 892-97, 905-06, 944-45. The Hearing Committee credits Respondent's statements and testimony in this regard.

37. Respondent disbursed $2,424.75 in interest from his firm's account to the *Seay* trust in February 2013, during the investigatory period of this matter. DX A69 at 6, 32; Tr. 897-901, 905.

The Duplicate Disbursement of Fees for Services Rendered Between December 11, 2000 and January 28, 2002

38. On February 5, 2002, Respondent filed a Petition for Compensation "for allowance of attorney fees" with an attached statement "For Professional Services Rendered," seeking court approval of $6,835.38 for services he provided from December 11, 2000 through January 28, 2002. AA; DX B45 at 7, 11; Tr. 940-41. On the same day, Respondent disbursed $6,835.38 from the trust to his firm. AA; UF at ¶40; DX B57 at 16; DX K15 at 4.

39. On July 30, 2002, the court approved Respondent's February 2002 fee petition only in the amount of $6,770.38. AA; UF at ¶41; DX B52 at 1.

40. On September 18, 2002, Respondent disbursed $6,770.38 from the trust to his firm. AA; UF at ¶42; DX B57 at 16; DX K16 at 4; Tr. 942.

41. In February 2003, while preparing the Sixth Account, covering the period of January 1, 2002 - December 31, 2002, Respondent discovered the September 18, 2002 second payment. UF at ¶43; DX A69 at 6-7.

42. Respondent filed the Sixth Account on February 24, 2003, along with a detailed list

of disbursements. AA; DX B57 at 1, 16. He listed three payments he made to himself for "legal fees":

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

AA; UF at ¶44; DX B57 at 16.

43. On February 26, 2003, Respondent returned $6,835.38 to the Seay Trust and notified the probate auditor that the deposit "represents a payment erroneously taken for fees on February 6, 2002." AA; UF at ¶45; DX B54 at 1; Tr. 2149. Concurrently with filing his Sixth Account, Respondent submitted a separate letter advising the court of his error and attached a copy of the reimbursement check. DX B54. Respondent did not pay interest on the amount of unauthorized fees that he collected. Tr. 944-45. On May 14, 2003, Respondent received a Notice of Complete Audit requesting that he explain why he had claimed payment of $6,835.38 when the court had only authorized a payment of $6,770.38. DX B55; DX 56 (June 4, 2003 Letter from Respondent explaining that he had incorrectly included $65 in costs when he took the $6,835.38 payment).

44. In Respondent's February 2013 written response to Disciplinary Counsel, Respondent characterized the duplicate payment as an "error" and attributed the error to his "continued press of heavy work, combined with the difficulties of obtaining adequate supporting services in an increasingly troubled partnership arrangement." UF at ¶47; DX A69 at 6-7. Respondent provided much the same information at the hearing. Tr. 2152-53. The Hearing Committee credits Respondent's statements and testimony in this regard.

45. Respondent did not pay interest on the $6,835.38. UF at ¶46; Tr. 944-45. At the hearing, Respondent testified that his failure to pay interest was "an oversight sort of mistake" and that he did not have an obligation to pay interest - there was "no law, regulation or rule that requires

the repayment of interest." Tr. 945-47, 2151. The Hearing Committee credits Respondent's statements and testimony in this regard.

Respondent's November 2004 Fee Petition and Ensuing Orders and Filings

46. On November 19, 2004, Respondent filed a Petition for Compensation "for allowance of attorney fees" seeking authorization of $13,141.81 for services provided between January 1, 2002 and December 31, 2003. UF at ¶49; DX B63 at 4. In this Petition, Respondent requested a fee calculated as one percent of the total value of the trust. AA; UF at ¶49; DX B63 at 1, 4. Respondent did not attach or subsequently submit a statement of services. AA; DX B27 at 1-2; DX B63 at 1-7; *see also* FF 25. At this time, Respondent's fees in most of the other special needs trusts that he was administering were being determined as a percentage of trust assets with the amount of the compensation reported in the annual account; when Respondent filed this Petition, *Seay* was the exception. RX 7, RX 8.

47. The November 19, 2004 Petition was the first time that Respondent asked the court to authorize trustee fees for the *Seay* trust based on one percent of the trust assets. UF at ¶50; Tr. 2085-86; DX B63; DX B73 at 1, 3; DX B4 at 1, 9. In the Petition, Respondent quoted the trust document as providing: "A trustee shall be entitled to reasonable compensation for his or her services as Trustee hereunder." AA; UF at ¶43; DX B63 at 1, ¶2. Respondent did not quote the second and final sentence of the trustee compensation provision: "The Trustee shall also be compensated for work performed on behalf of the Trust at his or her normal hourly rate for similar matters." AA; UF at ¶50; DX B4 at 1, 9; *see also* FF 17, 18. When asked about the drafting and subsequent interpretation of this provision and about the contents of the Petition, Respondent testified:

> The second sentence of the Seay trust [compensation provision] wasn't

applicable to this argument. So, no, I didn't include it.

* * * *

The first sentence refers to reasonable compensation, because that is the language that appears in other cases, in other treatises, referring to compensation for trustees, which in almost all cases means percentage compensation.

The second sentence was written to distinguish from the first sentence that I could be compensated in another matter for other sorts of work . . . .

MR. KASSOFF: . . .[I]s it your testimony that a person not familiar with the intent of the drafter, picking this up and reading that, would be misinterpreting it to say the first establishes the principal [*sic*] of reasonable compensation and the second explained how that would be arrived at?

THE RESPONDENT: I don't know. I would suggest that the words "the trustee shall also be compensated" distinguishes the first sentence completely. It's an additional thought. It's a new thought apart from the first sentence.

* * * *

This is my first special needs trustee [*sic*]. I was serving as trustee of other trusts, but this was my first special needs trust. In fact I don't think there have been special needs trusts approved by the DC court to this date. They were a really rare and unusual bird.

* * * *

Now the first sentence doesn't say "hourly" and it doesn't say "percentage." It says "reasonable compensation." That was the common-law standard for compensation. And as I said, this was a time in history where these things were new. We weren't quite sure how things would play out, operate, and I drafted what addressed work as trustee and then work as not trustee, even if the trustee was providing that other work.

MR. KASSOFF: Why would you have included just the first sentence and not the second?

THE RESPONDENT: Only the first sentence applies.

Tr. 966, 978-979, 2079, 2082-83, 2105; *see also* Tr. 2103, 2135-38. A majority of the Hearing

Committee credits Respondent's testimony in this regard.[10]

48. In the November 19, 2004 Petition, Respondent stated, "Compensation has been previously allowed [to] the trustee as reported on an hourly basis . . . ." DX B63 at 2, ¶4. Respondent asked the court to order: (1) that "fees be based upon a percentage fee of the assets," (2) "that no further fee petitions be submitted," and (3) that his fees be reviewed in the annual accounts filed with the court. AA; UF at ¶51; DX B63 at 2-4. Respondent knew that the October 13, 1999 Order required him to file fee petitions with a detailed statement of services for court review. UF at ¶51; Tr. 2134-35. Respondent did not refer in his November 19, 2004 Petition to the final paragraph of the October 13, 1999 Order. DX B63; *see* DX B27 at 1-2. Respondent also stated in the Petition, "Yet, as part of the auditing process administered by the Probate Division, the trustee was previously *asked* to submit a petition for approval of fees . . . presumably to comply generally with SCR Civil 305(c)." DX B63 at 1-2, ¶ 2 (emphasis added).

49. In a Memorandum Order docketed on January 24, 2005, Judge Wolf denied Respondent's fee request but granted him the opportunity to refile his petition "with the customary statement of services rendered." AA; UF at ¶52; DX B65 at 1, 3. Judge Wolf posited that Respondent was "really asking for a commission" and quoted the entire text of the proposed compensation provision of the trust, including the proposed version of the second sentence with the word "legal," rather than the sentence approved by Judge Christian. UF at ¶52; DX B65 at 2; *see*

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[10] One member of the Hearing Committee is troubled by this testimony. This member suspects that Respondent's omission of the second sentence was likely to have been intentionally misleading, if not downright deceitful, since the change being requested was from an hourly basis to a percentage basis; because, in this member's view, the second sentence of the compensation provision refers to the hourly basis of trustee compensation, it should have been included to allow the court to decide whether it applied to all fees or only to fees for non-legal services. *See* Separate Statement of Mr. Kassoff.

also FF 17-18. Judge Wolf did not refer in this Memorandum Order to Judge Christian's October 13, 1999 Order. DX B65.

50. In the January 24, 2005 Memorandum and Order, Judge Wolf denied Respondent's request that he be permitted to calculate his fees as one percent of the total trust assets or as an "automatic commission" and required Respondent to file a fee petition for court approval because "the quoted trust language [in the compensation provision], on balance in this case, does not allow for a commission form of compensation." *Id*. at 3 (emphasis in original). Judge Wolf also denied Respondent's request that he merely notify the court of trustee fees in the annual accounts. UF at ¶53; DX B65 at 1, 3.

51. Respondent moved for reconsideration on January 26, 2005. UF at ¶54; DX B66 at 1. He reiterated his request that the court permit him to calculate his fees as one percent of the total trust assets, allow him to notify the court of his fees by reporting the amount in an accounting, and receive authorization for collecting the fees "through the [court's] approval of the annual accounting." UF at ¶54; DX B66 at 6, ¶12. Respondent cited court orders issued in two trusts in the Civil Division in support of his request and urged Judge Wolf to recognize those orders as "controlling precedent;" Respondent's motion did not refer to Judge Christian's October 13, 1999 Order. UF at 54; DX B66 at 1 ¶3, 4 ¶7, 5-6 ¶¶10-12.

52. In a Memorandum Order docketed on May 17, 2005, Judge Wolf denied Respondent's motion for reconsideration, reaffirmed the January 24, 2005 Order, and directed Respondent to refile a request for compensation with "the customary, complete, and verified statement of services rendered." AA; UF at ¶55; DX B73 at 3-4. Judge Wolf stated:

> (a) "[T]ime records are the norm for attorneys, and for this Division. They were the norm for this trust for the first six years." DX B73 at 3.

(b) "Prior to the years petitioned-for, [Respondent] had petitioned the court, filing and serving a full, verified statement of services as part of each request." DX B73 at 1 (emphasis in original).

(c) "[Respondent's] Petition for Compensation filed November 19, 2004, and his pending Motion for Reconsideration, sought primarily to benefit him and not the trust beneficiary." DX B73 at 3.

AA; UF at ¶55.

53. Respondent filed a Petition for Compensation on May 24, 2005 "for allowance of attorney fees" and costs, along with a "Pre-Bill" "For Professional Services Rendered," in the amount of $20,699.08 for services rendered and costs incurred from January 2002-December 2004. UF at ¶56; DX B74 at 1-2; Tr. 2091.

54. Judge Wertheim approved the fee petition on September 12, 2005 and authorized the total amount of fees that Respondent sought. B82 at 1. Respondent disbursed $20,635.00 (he did not include the approved $64.08 for costs) from the trust to his firm on September 20, 2005. AA; DX K19 at 5.

55. In a Praecipe docketed on August 30, 2006, Respondent notified the Probate Division that "[t]he Circuit Court for Prince George's County, Maryland has assumed jurisdiction of the Vernice Seay Supplemental Needs Trust . . . ." DX B92. At this time, the beneficiary was receiving public assistance from Maryland, her continued eligibility was being administered and reviewed by the Maryland Department of Health and Mental Hygiene, and the Respondent trustee had his office in Maryland and therefore was administering the trust in Maryland. DX B91; Tr. 1038-1040 (Swiss). In an Order docketed on September 22, 2016, Judge Wertheim terminated the bond Respondent had filed with the Superior Court and therefore terminated its supervision of the Seay Trust, which continued in Maryland. DX B94.

D. THE DE'SHAWN MECCO BROWN SPECIAL NEEDS TRUST (COUNT II IN THE SPECIFICATION OF CHARGES)

Establishment of the Trust

56. De'Shawn Mecco Brown, a child, suffers from spastic cerebral palsy and quadriplegia with neurological damage and requires 24-hour care. In 2000, his mother, LaToya Brown, filed a civil action in Superior Court on his behalf. DX C2 at 1, 26. The parties settled in 2003. AA; UF at ¶59; DX C2 at 1.

57. In July 2003, the Civil Division ordered the distribution of settlement proceeds for Brown's benefit and wrote that considering in part "the concept of *parens patriae*, it would be improper for the Court to approve a settlement that contains no provision for judicial oversight of fiduciary compensation as well as periodic auditing of accounts." UF at ¶60; DX C3 at 1-2; *see also* Tr. 329-30; Tr. 1184.

58. On August 5, 2003, Ms. Brown, through counsel Bruce Klores, filed a petition in the Probate Division in the matter of *In re Brown*, Case No. 2003 GDN 39, seeking to establish a special needs trust and appoint Respondent as trustee. AA; DX C4 at 1-9. Respondent drafted most or all of the proposed trust document attached to the petition. AA; UF at ¶62; DX A4 at 17, ¶ 57; DX C4 at 2, ¶ 5; Tr. 1189; 1185-86 ("I believe I suggested language for this petition, but I don't recall drafting it in the entirety."). The petition argued that "[t]he standard provisions for compensation of a Guardian of a Minor under the Code and rules should be inapplicable to this case" and that the court should not "set compensation of a Trustee where the parties to the Trust have entered into an agreement they deem to be fair and reasonable." DX C4 at 7. The petition reported that Ms. Brown and "the proposed Trustee [Respondent] have agreed upon a fee of one percent of the assets owned by the Trust" and concluded, "Therefore it is respectfully submitted

that it is appropriate for the Court to provide judicial oversight of fiduciary compensation, but not to set compensation of a Trustee where the parties to the Trust have entered into an agreement they deem to be fair and reasonable." *Id.* at 6-7.

59. Article Seven, Section B, relating to trustee compensation provided:

> Compensation of Trustee. A Trustee shall be entitled to reasonable compensation for his or her services as Trustee hereunder, consistent with industry standards which may be expressed as a percentage of Trust assets, but all trustee compensation must be approved by the Probate Division of the Superior Court.

AA; UF at ¶62; DX C4 at 22, ¶ B.

60. Judge Christian considered the petition for the establishment of the Brown SNT at a hearing on October 8, 2003, AA; UF at ¶63; DX C9 at 1. With respect to the question of the court's supervision of the proposed trust, Judge Christian observed:

> [S]ince there seems to be an expectation that there will be some oversight of the, at least, a Special Needs Trust that [is] coming out of the Civil Division, the Court sitting in the Probate Division feels that she cannot do violence to that expectation and must, at lease [*sic*] set a framework within which to have oversight or monitoring of the trust.

DX C9 at 5, lines 3-8. In a colloquy with the court, Respondent asked whether the court contemplated that judicial review of the reasonableness of trustee fees would require the trustee to file an annual petition for trustee compensation. Judge Christian – then the Presiding Judge of the Probate Division – answered: "No sir." DX C9 at 17. When Respondent further asked whether this review of the fee would proceed based on "includ[ing it] in the accounting" alone, Judge Christian agreed, stating "That's right. So, it could be modified in some way . . . if there was a recommendation for no approval and if the Court held a hearing and decided that it should not be approved, there could be some sense of modification of that fee." *Id*. After considering Respondent's position that the trustee should be permitted to collect a fee calculated as one percent

of the total value of trust assets, the court directed the parties to modify the compensation provision to establish that the court had authority to review the reasonableness of the trustee's compensation. AA; UF at ¶63; DX C9 at 11-13, 15-17; DX E38 at 10. Judge Christian did not require Respondent to file a fee petition for approval of his compensation. UF at ¶63; DX C9 at 17, lines 4-11.

61. Judge Christian entered the order establishing the *Brown* special needs trust and appointing Respondent as trustee on October 14, 2003. AA; UF at ¶64; DX C11 at 1-2. In the Order, she ordered that Article 7 of the trust instrument, the Article relating to trustee compensation, provide:

> A Trustee shall be entitled to reasonable compensation for his or her services as Trustee hereunder, consistent with industry standards, which may be expressed as a percentage of Trust assets. ***All trustee compensation is subject to review by the Superior Court, to be approved if reasonable and modified if unreasonable. In considering the reasonableness of fees reported in the accounting by the Trustee, the Court may consider the industry practice and any other factors.***

AA; DX C11 at 1-2, 14 (emphasis in original). Article 6, "Administrative Provisions," authorized the trustee

> to prosecute or defend any action for the protection of the Trust, the Trustee in the performance of the Trustee's duties, or both, and to pay, contest or settle any claim by or against the Trust or the Trustees.

DX C11, at 12. In the order, Judge Christian further specified that trustee compensation "may be established with the assistance of standards of local trustee practice, subject to approval by the Court." AA; UF at ¶64; DX C11 at 2.

Respondent's First and Second Accounts and Ensuing Orders and Filings

62. Respondent filed the First Account, covering October 1, 2003 – September 30, 2004, on or about December 13, 2004. In this Account, he reported two payments to his firm as "quarterly fees." AA; UF at ¶65; DX C14 at 1, 12. Respondent calculated his quarterly fees as a percentage of

the total trust assets. AA; UF at ¶65; DX A4 at 18, ¶60.

63. In a letter dated December 28, 2004, probate auditor Julieta Diamante asked Respondent to explain the authority for his disbursement of funds to his firm. AA; UF at ¶66; DX C15 at 1-2. By letter dated January 3, 2005, Respondent replied, "The trustee's fee is set as one percent (1%) of the value of the trust, paid quarterly." AA; UF at ¶66; DX C16 at 2. He cited in support of his fees Judge Christian's October 14, 2003 Order, the terms of the trust, and the standards of financial institutions. UF at ¶66; DX C16 at 1-2. A week later, Respondent sent the auditor another letter explaining that "[t]he fees are computed quarterly at .25% of the fair market value of the estate." UF at ¶66; DX C18; *see also* Tr. 1206.

64. An Amended First Account, along with a cover sheet from the Office of the Register of Wills that included the terms of Article Seven of the trust instrument authorizing a trustee fee calculated as a percentage of trust assets, was assigned to Judge Wertheim, who approved the Amended First Account on March 2, 2005, including Respondent's fees calculated as a percentage of the total value of the trust, paid quarterly. UF at ¶67; DX C19 at1; DX C20 at 1.

65. On or about December 5, 2005, Respondent filed the Second Account covering October 1, 2004 through September 30, 2005. AA; DX C22 at 1. In Schedule H of the Second Account, Respondent provided a list of disbursements for administrative expenses, including five payments totaling $6,737.88 disbursed from the trust to his firm as trustee fees:

10/13/2004	Evan J. Krame, PC	quarterly fees	$1,663.81
01/21/2005	Evan J. Krame, PC	bal. Sept quart fees	$186.43
01/21/2005	Evan J. Krame, PC	quarterly fees	$1,939.86
05/16/2005	Evan J. Krame, PC	quarterly fees	$1,468.15
08/03/2005	Evan J. Krame, PC	quarterly fees	$1,479.63

AA; UF at ¶68; DX C22 at 15.

66. In a Memorandum Order signed on January 20, 2006 and recorded on January 24, 2006, Judge Wolf deferred approval of the Second Account and ordered Respondent to file "a thorough explanation of the 'quarterly fees' totaling $6,737.88 specified in Schedule H so that the court may determine their reasonableness." AA; UF at ¶69; DX C26 at 1-2. Judge Wolf noted that Judge Wertheim had approved quarterly fees reported in the First Account "before this Division began focusing on the recent attempts by various trustee-counsel to operate on a commission system, essentially without court approval of fees or commissions." UF at ¶69; DX C26 at 1-2; *but see* FF 12 (finding that there is no evidence in the record in this matter that any such rule has ever been adopted and that there are no such rules in the Probate Division Rules); *see generally* FF 6-13. At the hearing, Respondent explained his understanding of the context of Judge Wolf's statement as follows:

> What he seemed to be referring to was his upset in the Allen case that he refers to here where attorney Donna Wilkin asked the court for both percentage fees and legal fees for work she had performed.
>
> Now I wasn't a party to that, I was only hearing about it secondhand, and I did not have a copy of the Allen order from Judge Wolf when he issued it. It wasn't made public. So, again, this was one of those things you hear about and you're not really sure exactly what's going on.
>
> But that seemed to be the triggering point for Judge Wolf as to his concern and his, frankly, misstatement that all of a sudden attorneys were asking for percentage fees. Not true. It had been going on for many years before.

Tr. 1280.

67. On February 23, 2006, Respondent filed a 20-page Response to Memorandum Order arguing that his fees calculated as one percent of the trust assets and paid quarterly were reasonable. AA; UF at ¶70; DX C27 at 1-20. The submission included analysis of the numerous factors set out

in the comments in the District of Columbia Uniform Trust Act; Respondent argued that information regarding these factors demonstrated the reasonableness of the requested compensation determined as one percent of the trust's assets. DX C27 at 4-15 ¶¶ 8-27. Respondent also argued, "No court approval of trustees fees has been regularly required, until recent Orders were issued as noted in the January 20th Memorandum Order. Such approval is not required under the law." DX C27 at 1-2 ¶ 3 (citations omitted). Respondent also "urge[d] that no emphasis be placed upon time records as a measure of reasonableness. Time spent is merely one indicator of value but it may be a poor indicator in these circumstances." DX C27 at 15 ¶29.

68. Respondent also argued:

> A percentage fee was agreed upon by the parties and the Trust was approved as drafted by the Court. Further, a percentage fee of one percent was previously approved by this Court when it approved the first accounting. Therefore, it has not been necessary to keep detailed time records for this Trust.

UF at ¶71; DX C27 at 15 ¶ 28 (emphasis in original omitted). With regard to the last sentence in the foregoing statement in his Response, Respondent testified: "I didn't say I wasn't keeping time records. I said it wasn't necessary for me to keep time records. I do sometimes keep time records in trust cases as a reminder to myself of how a case is going . . ." Tr. 1313-14. Respondent did not provide a detailed time statement of services with his response. UF at ¶71; DX C27.

69. Judge Wolf did not approve the Second Account, and in his Memorandum Order docketed on May 11, 2006 he required Respondent:

> [t]o file a petition for compensation herein, with full documentation of time expended and hourly rates as required by Probate Rule 308. He has at no time clearly said he is unable to do so.

UF at ¶72; DX C28 at 2, 4-5. Judge Wolf incorporated the reasons set forth in the May 17, 2005 order he had entered in the *Sea*y trust. UF at 72; DX C28 at 2; *see also* FF 52.

70. Judge Wolf also wrote in the May 11, 2006 Memorandum Order, "The court will not compensate Mr. Krame for the preparation of his response, and he is directed not to submit any future request for compensation that includes it." AA; UF at ¶73; DX C28 at 4, ¶ 6; DX E38 at 13.

71. On June 21, 2006, Respondent's counsel Edward Varrone filed a pleading on behalf of Respondent entitled "Trustee's Explanation of Services" for the period covered in the Second Account. UF at ¶74; DX C29 at 1, 23. Mr. Varrone prepared this filing. Tr. 1327. Respondent verified "that the facts therein stated are true and correct to the best of my knowledge, information and belief." UF at ¶74; DX C29 at 24. The Explanation did not include a detailed statement of services. UF at ¶74; DX C29 at 1-25; Tr. 1328. The Explanation stated that Respondent had "not kept time for specific services as trustee in this case." UF at ¶74; DX C29 at 13, ¶3a. In his testimony, Respondent observed that, in hindsight, Mr. Varrone's sentence could have been more artfully "wordsmith[ed]." Tr. 1336. He further testified as follows:

> Q. Had you kept no time for specific services as trustee in this case?
>
> A. Double negative. I had not kept no time. In other words, I had kept some time.
>
> Q. Had you kept some time for specific services?
>
> A. With some specific services I had not kept time, and for some specific services I had kept time.

Tr. 1329; s*ee also* Tr. 1313-14. Respondent's Client Ledger pertaining to the *Brown* trust includes time entries for the period covered by the Second Account that were at issue in Judge Wolf's ensuing orders and Respondent's submissions in response thereto. DX J7, at 1-3. Respondent further testified:

> . . . [A]fter 2005 in the District of Columbia, at that point, noticing that Judge Burgess was interested in the issue, and then that Judge Wolf was demanding it of me, you bet I started to keep track of my time.

> Was I absolutely complete in my recording of my time in PCLaw? No. I relied on other things.

Tr. 1332-33. Respondent added that he did not withhold time records and that he believes his statement to the court that he had "not kept time for specific services" was "a completely truthful statement" because "[f]or *specific* services I had not kept track" and therefore it "was not an all-inclusive statement." Tr. 1334-35 (emphasis added). A majority of the Hearing Committee credits Respondent's testimony in this regard.[11]

72. In a Memorandum Order signed on July 20, 2006 and docketed on July 21, 2006, Judge Wolf stated that the only "additional information" in the Trustee's Explanation of Services was that Respondent "cannot provide an hourly statement of services, as he 'has not kept time for specific services as trustee in this case.'" DX C30 at 1, 3. In the Memorandum Order, Judge Wolf "incorporate[d], and reiterate[d], for its decision herein – rejecting a commission form of compensation in this or any special needs trust . . ." seven rulings with respect to other trusts, including the *Seay* trust. DX C 30 at 1-2.

73. With regard to why he did not tell the court that he could prepare a detailed statement of services, Respondent testified:

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

---

[11] One Member does not credit Respondent's explanation and believes that Respondent made a false statement to Judge Wolf and then intentionally failed to correct Judge Wolf's misimpression. *See* Separate Statement by Mr. Kassoff.

UF at ¶76; Tr. 1330-31.

74. In the July 20, 2006 Memorandum Order, Judge Wolf approved $5,320.41 of Respondent's $6,737.88 request for fees and ordered him to repay to the trust disallowed fees of $1,417.47 no later than September 15, 2006, AA; UF at ¶77; DX C30 at 2-3.

75. On August 18, 2006, Mr. Varrone, Respondent's counsel, filed a notice of appeal of Judge Wolf's orders of January 20, May 9, and July 20, 2006. AA; UF at ¶78; DX C31 at 1. Mr. Varrone drafted the ensuing brief and Respondent reviewed the brief before it was filed. Tr. 1372. Respondent's brief was filed in November 28, 2007. DX E38 at 1.

76. Respondent's brief in the Court of Appeals stated, "[Respondent] did not submit a detailed accounting of time spent on specific tasks because he did not have such time records . . . . [H]e did not keep time records for that trust, as well as others, for the period covered by the second accounting." DX E38 at 14. A subsequent portion of the brief stated, "[Respondent] did not provide detailed time records because, relying on the terms of the trust, he did not have detailed time records." *Id.* at 41 (footnote omitted). In this regard, Respondent testified:

> Q. In your briefing to the Court of Appeals, did you ever notify the Court of Appeals that you could have provided a time statement but you did not?
>
> A. Since the appeal was about abuse of judicial discretion, that would not have been an appropriate place for me to bring this to the appellate court's attention.
>
> * * * *
>
> We told the court we did not have such time records. I didn't tell the court that I could have produced them.

Tr. 1371, 1373-74.

Disbursement of $1,447.17 from the Trust to Respondent's Firm and Ensuing Filings and Orders

77. Judge Wolf's July 20, 2006 Memorandum Order required Respondent to reimburse

the trust $1,417.47 in disallowed fees. AA; UF at ¶80; FF 74; DX C30 at 3. Respondent knew he was obligated to follow a trial court's order pending the Court of Appeals' decision. UF at ¶80; DX C29 at 6; Tr. 970.

78. On September 15, 2006, through Mr. Varrone, Respondent moved to stay the order requiring him to return the $1,417.47 while the appeal was pending. AA; DX C32 at 1; Tr. 1462. After Respondent's counsel filed a notice of appeal, he advised Respondent that returning the specified amount to the Brown Trust during the pendency of the appeal might negatively affect the appeal. DX E16. Respondent offered to deposit $1,417.47 into the Registry of the court until the appeal had concluded, and he attached to the motion a $1,417.47 check dated September 14, 2006, issued from Respondent's operating account and made payable to Superior Court. AA; DX C32 at 2-4. The memo on the check identified it as "Filing Fee – De'Shawn Mecco Brown." DX C32 at 4. The proffered check was never negotiated. Tr. 1466-67, 1504-05.

79. At the disciplinary hearing, Respondent explained his rationale for moving to stay:

> . . . I believed that Judge Wolf was being arbitrary. I believed that he wasn't understanding the issues, that he was ignoring all the other cases, all the other orders, all the other trusts.
>
> I was zealous in being principled about compensation as an issue for trustees. Perhaps a little too zealous, but I really believed at the time [Judge Wolf] wasn't getting it and that it was up to me to stand up and say, I'm appealing this and I'm going to do my damndest to make sure everybody gets to hear the issues.
>
> * * * *
>
> When almost every other state in this land allows a trustee a percentage, and this one judge decide[]s he's going to rewrite the way trusts are handled in the District of Columbia, there's a profound princip[le] there.

Tr. 1458, 1477.

80. On September 24, 2006, $1,447.17 was disbursed from the *Brown* trust to

Respondent's firm – $29.70 more, because of a transposition of a 4 and a 1, than the $1417.47 the court had ordered Respondent to deposit into the *Brown* trust. AA; DX A4 at 21-22; ¶75; DX K40 at 1, 6, 25; Tr. 1466-1471. The memo line of the trust check noted: "misc. expense reimb." AA; DX K40 at 25.

81. Respondent testified that Ms. Stewart drew the check for his signature and that he "didn't double-check her work carefully . . . ." Tr. 1470-71. "It was a complete mistake on her part, and it was my failure, unfortunately, in not double-checking her work that day and signing the check." Tr. 1505; *see also* Tr. 1498-99, 1620. The Hearing Committee credits Respondent's testimony in this regard.

82. Judge Wolf denied Respondent's motion for a stay on October 30, 2006, observing that "the trust is denied the beneficial use of the money the court feels it should have, and ordered it to have. Registry funds do not bear interest." UF at ¶85; DX C33 at 2. The court stated further that Respondent's tender of the check for deposit in the court registry rather than in the trust "is making a mountain out of a molehill that is not worth the time and trouble, does not validate some matter of profound principle, and does not impose a financial hardship on the trustee." UF at ¶85; DX C33 at 2. The court ordered Respondent to repay the Brown trust $1,417.47, plus interest for a total of $1,429.12. UF at ¶85; DX C33 at 2.

83. Respondent disbursed $1,429.12 from his firm's operating account into the *Brown* trust on November 3, 2006. DX K41 at 5. On November 14, 2006, Respondent filed a *praecipe* stating that he had returned the disallowed fees. AA; DX C34 at 1.

84. On November 17, 2006, Respondent filed the Third Account, listed the $1,447.17 disbursement as a reimbursement, and described it as "misc.expens..." in Schedule K, the "Maintenance and Care Expenses" category, rather than Schedule H, the "Administrative

Expenses" category. DX C36 at 1, 8, 10. Respondent explained:

> As you can see on Schedule H there's [*sic*] things like filing fees, postage reimbursement, trustee fees, bond premiums and tax return preparation. Schedule K is for things that are typically requested by the beneficiary but are general sorts of expenditures made by the trustee.

Tr. 1488-89.

85. In a letter dated December 14, 2006, a probate auditor asked Respondent to provide "information along with documentation in support of the reimbursement of expenses to the Trustee the sum of $1,447.17. . . ." AA; UF at ¶88; DX C37 at 1-2.

86. In a letter dated December 19, 2006, Respondent answered:

> I cannot substantiate the reimbursement of expenses to the Trustee in the amount of $1,447.17, as noted on [S]chedule K of the account. As such, I must assume that the reimbursement was made in error, and have repaid that amount back to the Trust.

UF at ¶89; DX C39 at 1. Respondent had a Quicken Report identifying the disbursement as "Trustee Fees." DX H19 at 2. Respondent testified that in December 2006, he "looked in the records, had a meeting with Lynn Stewart . . . described to her what had happened, among some other things that she was doing wrong. She quit that day, because this kind of mistake can't be sustained in a law firm of my practice as trustee." Tr. 1474; *see also* Tr. 791-92; 1470-71, 1500-02, 2029. Respondent testified that Ms. Stewart "left a bit of a mess and Chuck Weinberg came in and cleaned it up for us." Tr. 851, 1513. At the hearing, Respondent produced records and testified that his current office manager, Lynn Wilson, whom he hired in April 2007, was able to "reconstruct what happened" based on his records. RX 101-109; Tr. 1472-73; 1490-91. The Hearing Committee credits Respondent's testimony in this regard.

87. Respondent deposited a check for $1,447.17 from his firm's operating account into the *Brown* trust account on December 20, 2006. AA; UF at ¶90; DX A4 at 21-22; DX K42 at 2, 4.

88. On November 2, 2007, Respondent filed the Fourth Account, which he reviewed and signed. DX C46 at 1, 20-23; Tr. 1510-11. In the Fourth Account, Respondent incorrectly identified "Aviva Life Insurance," and not his law firm, as the entity issuing the check for $1,447.17. DX C46 at 10; Tr. 1510-11. The check for $1,447.17 showed it being issued from "Evan J. Krame, P.C." – not "Aviva Life Insurance." DX K42 at 1, 4. Respondent testified: "When you prepare an accounting, you look at all of the checks, not just check statements, not just what somebody's entered into Quicken. You actually look at the checks, because you have to deliver the checks to the court . . . . I would review the accounting." Tr. 1621-22.

89. In its August 20, 2009 decision, the Court of Appeals affirmed Judge Wolf's July 20, 2006 order requiring Respondent to reimburse the trust for $1,417.47 in disallowed fees. UF at ¶92; DX A10 at 6-8.

Respondent's August 25, 2006 Disbursement From the Trust to His Attorney of Funds for Payment of a Filing Fee Incurred in the Trustee Fee Litigation and November 22, 2006 Petition for Compensation that Included Time Spent on Trustee Fee Litigation and Ensuing Filings and Orders

90. In his May 11, 2006 Order (*see* FF 69-70), Judge Wolf stated, "The court will not compensate Mr. Krame for the preparation of his response" and he "directed [Respondent] not to submit any future request for compensation that includes it." UF at ¶73; DX C28 at 4, ¶ 6.

91. In an e-mail dated August 1, 2006, Respondent inquired of Mr. Varrone:

> I've been thinking about the repayment of fees as ordered by Judge Wolf. It's probably easier for me to repay the fees from my personal account into the trust account rather than pay the fees into the court's registry after filing a motion. Is there a disadvantage to repaying the trust that will harm our appeal? Is there any hope that we can get a stay of the repayment?

DX E16. *See also*, FF 78. Mr. Varrone filed an appeal on Respondent's behalf on August 18, 2006. AA; UF at ¶94; DX C31 at 1. On August 21, 2006, Mr. Varrone sent Respondent a receipt for

payment of the costs for filing the appeal. UF at ¶94; DX E17. In the accompanying letter, Mr. Varrone requested that Respondent send him $200 for the filing fee. DX E17. In that same letter Mr. Varrone wrote:

> []I believe that these are costs which are properly incurred by the trustee, and therefore can be paid from the trust, but you may use your own judgment on that[].

UF at ¶94; DX E17. On August 25, 2006, Respondent disbursed $200 to Mr. Varrone from the *Brown* trust. AA; UF at ¶94; DX K39 at 2-3.

92. On or about November 17, 2006, Respondent filed the Third Account in which he listed the payment of $200 as an administrative expense to Mr. Varrone, which he described as "filing fees DC Superior Court." UF at ¶87; DX C36 at 1, 8. Five days later, on November 22, 2006, Respondent also filed a Petition for Compensation which included time spent in February 2006 on work done on his February 23, 2006 Response to Judge Wolf's January 20, 2006 Memorandum and Order; these entries totaled $4,500. DX C35 at 5-6.

93. In a letter dated December 18, 2006, Mr. Varrone observed, "I believe that there is case law which says that a fiduciary may properly seek compensation and may incur costs for that purpose . . . . In short, while legally I think that your opinion that you are able to pay my fees from the trust as you determine is correct, it is your neck which is on the line and therefore your call as to whether you should make payment without first getting court approval." DX E23 at 1; *see also* Tr. 1425-26.

94. In a Memorandum Order signed and docketed on January 18, 2007 and subsequently published, Judge Wolf disallowed Respondent's payment of $200 in filing fees. AA; UF at ¶96; DX C40 at 12, ¶ 3; DX A6 at 1, 4; Tr. 1430. Judge Wolf ordered Respondent to reimburse the $200 filing fee "forthwith" and to file a *praecipe* with the court reflecting the reimbursement. AA; UF at

¶96; DX C40 at 12, ¶ 4. Respondent did not deposit the $200 into the *Brown* trust or file a *praecipe*. AA; UF at ¶96; DX A4 at 23, ¶ 80; Tr. 1429-1431.

95. Respondent testified that he understood "forthwith" to mean "quickly" but that he did not pay the $200 "[b]ecause I believed that that went to the heart of my ability as a trustee to file an appeal and get some clarity about Judge Wolf's orders." UF at ¶96; Tr. 1431. Respondent knew that his refusal to pay the $200 violated the court's order: "I knew I wasn't in compliance because I believed [Judge Wolf] was wrong and it went to the ability to – it denied my ability – that was the core issue that I was appealing, the power of the trustee . . . . In hindsight, I think I should have paid it back. At the time I thought I was right." UF at ¶97; Tr. 1432. Respondent also testified, with respect to Mr. Varrone's December 18, 2006 letter; (FF 93), that the decision not to restore the $200 filing fee to the trust forthwith was his decision "[a]bsolutely." Tr. 1426.

96. On February 12, 2007, Mr. Varrone filed Respondent's appeal of the January 18, 2007 order requiring the $200 reimbursement. UF at ¶98; DX C43 at 1. Respondent did not seek a stay of the court's order or permission to place the $200 in disputed funds into the court registry, or otherwise notify the court that he had not complied with the court's order. UF at ¶98; DX A4 at 23, ¶80.

97. In a transmittal memorandum dated February 13, 2007, an auditor adjusted the Third Account, which Respondent had filed on November 17, 2006 (FF 92) and removed the $200 disbursement "pursuant to paragraph 3 of Court order dated January 18, 2007." DX C42.

98. On November 2, 2007, Respondent filed the Fourth Account, covering the period of October 1, 2006 – September 30, 2007. UF at ¶100; DX C46 at 1. In the Fourth Account, Respondent listed several refunds to the trust under a "Miscellaneous Income" category, but he did not account for the $200 as either a deposit or as an account receivable. UF at ¶100; DX C46 at 1,

10; Tr. 1433-34.

99. Several days after Respondent filed the Fourth Account, an accountant whom Respondent had retained to prepare the account, discovered, and informed Respondent that he would need to account for, the $200 in order for the Fourth Account to balance. UF at ¶101; DX H22 at 1-2; Tr. 1440-41. Respondent's associate, Ed Biggin, sent Respondent an email on November 7, 2007 that read:

> The auditor disallowed the $200 payment to Ed Varrone, as directed by J. Wolf in an order dated 1/18/07: 'the payment of $200.00 on 8/25/05 reflected in Schedule H, is disallowed, and the auditor shall adjust the account accordingly before submission to the Court.' That amount will have to be paid back to the Trust in order for the accounting to balance.

UF at ¶101; DX H22 at 1. Respondent replied: "Unfortunately, I don't recall this. However, if we need Varrone to restore the $200 he will do it. Upon what basis could the auditor reverse a payment? Is there any more detail?" UF at ¶101; DX H22 at 1. In his testimony, Respondent acknowledged that he, not Mr. Varrone, was obligated to return the $200 to the *Brown* trust. UF at ¶101; Tr. 1437. Respondent did not promptly deposit the $200 into the trust nor promptly file the restated account with the court. UF at ¶101; Tr. 1438.

100. On January 17, 2008, a Probate Division auditor sent Respondent a letter asking him to explain the discrepancy in the ending balance of the Third Account and the beginning balance of the Fourth Account. UF at ¶102; DX C47 at 1-2; Tr. 1439-1440.

101. Respondent answered the auditor's letter by filing a "Restated Fourth Accounting." UF at ¶103; DX C48 at 2, 20. In the Account showing the trust's "Beginning Assets," Respondent added a category, "Notes and Other Receivables," where the only item that was listed was the amount of $200 which was described as:

> Asset receivable (See prior account–deleted payment to Edward Varrone for

DC Superior Court filing fees - $200.00).
On appeal

UF at ¶103; DX C48 at 4 *cf.* DX C46 at 3; *see also* C41 at 9 (Third Account). Respondent identified the $200.00 as an asset of the trust – specifically, a receivable pending appeal – on every account filed prior to the appeal, on both the schedule showing the assets of the trust at the beginning of the accounting period (Schedule A) and the schedule showing assets of the trust at the end of the accounting period (Schedule L), as follows: Amended 4th Account: DX C48 at 4 and 18; 5th Account: DX C50 at 3 and 18; 6th Account: DX C52 at 2 and 11. The court approved the 4th, 5th and 6th accounts by order dated October 25, 2010, after the disposition of Respondent's appeal. DX C60. Respondent's 7th account, showed the receivable as an asset of the trust at the beginning of the accounting period, and then showed the repayment, plus interest, on the collections schedule, Schedule F. DX C63 at 2 and 5. That account was approved by the court. DX C67.

102. In its August 20, 2009 decision, the Court of Appeals affirmed Judge Wolf's May 9, 2006 order disallowing payment of the $200 filing cost from the trust and requiring Respondent to return the funds "forthwith." UF at ¶104; DX A10 at 7-8.

103. On September 1, 2009, after Mr. Varrone confirmed that Respondent had not returned the $200 to the Brown trust, he advised Respondent in an email:

> [With regard to] the $200.00, on which the fate of the Western World hangs in the balance, I have calculated interest on that amount based on the D.C. judgment interest rate. The interest is calculated through Friday, 9/4. The worksheet is attached. You should pay the amount shown into the trust by Friday, and file a praecipe to that effect, per Judge Wolf's 1/18/07 Order.
>
> Please note that, the order required the $200.00 to be paid 'forthwith'. I hope that this does not become an issue going forward.

UF at ¶105; DX E53; *see also* E52 at 1. Mr. Varrone attached a work sheet that showed interest in the amount of $25.01. UF at ¶105; DX E54 at 2; Tr. 1446-47. Respondent did not return the amount

or file a *praecipe* before Friday, September 4, 2009. UF at ¶105.

104. A check drawn on his law firm's account, signed by Respondent and dated September 10, 2009 in the amount of $225.01 was credited to the *Brown* trust on October 14, 2009. UF at ¶106; DX H41 at 1-3; H45 at 6; DX K43 at 4-5; Tr. 1448. Respondent did not file a *praecipe* with the court. Tr. 1448-49.

Respondent's Fee Petition Seeking Authorization for Payment of His Fees Related to Litigation of the Trustee Fee Issue and Ensuing Filings and Orders

105. Judge Wolf's May 11, 2006 order "directed [Respondent] not to submit any future request for compensation [for time spent preparing responses to the court's disallowance or reduction of requests for payment] that includes it." UF at ¶107; DX C28 at 4, ¶ 6; *see also* FF 70.

106. On November 22, 2006, Respondent filed a Petition for Compensation seeking $17,943.58 for trustee services rendered from October 1, 2005 through September 30, 2006, the same period covered by the Third Account. AA; UF at ¶108; DX C35 at 1-2; C36 at 1. In paragraph 1 of the Petition, Respondent listed approximately eleven categories of work for which he sought compensation but did not refer in this discussion to his work with respect to the fee litigation. DX C35 at 1. The five-page (un-paginated) attachment to the Petition contains approximately 75 time entries for work by Respondent and others in his firm on the trust. (UF at ¶110; DX C35 at 4-8; DX A4 at 22, ¶ 78; Tr. 1386, 1389-1394, 1581-88). These entries included the following 11 entries reporting time spent on the fee litigation:

Feb 2/2006	work on response to court re: fees	1.5	$450	EJK
Feb 3/2006	work on response to court	2.0	$600	EJK
Feb 13/2006	research and drafting of response to court	4.0	$1,200	EJK
Feb 15/2006	research compensation, additional drafting	3.5	$1,050	EJK
Feb 21/2006	revise response to Order	4.0	$1,200	EJK
May 16/2006	review court order, t/c L. Tenenbaum re: home, legal research, consult with attorneys re: appeal	4.5	$1,350	EJK

May 23/2006	legal research	1.0	$300	EJK
Jun 7/2006	t/c Ed Varrone re: order regarding handling of special needs trusts	2.0	$600	EJK
Jun 8/2006	work on response to Judge Wolf, review time records and files	2.0	$600	EJK
Jun 19/2006	review and revise response	1.5	$450	EJK
Jun 20/2006	review response and revise	3.0	$900	EJK

UF at ¶110; DX A4 at 22, ¶78; DX C35 at 5-7; Tr. 1391-94, 1581-88. Respondent's requested fee amounted to approximately 2.3 percent of the value of the trust. DX C35 at 2.

107. Respondent knew that issues for the court's consideration should be highlighted in the fee petition. UF at ¶109. Respondent testified:

> I wish I had perhaps highlighted or circled or grouped together those fees I was asking for with regard to the response to Judge Wolf. I could have done that better . . . . I – I was [a] zealous advocate for my case, maybe a little too zealous and it colored the way I approached it.

UF; Tr. 2173-74.

108. In his January 18, 2007 Memorandum Order, Judge Wolf determined that $8,700 of the fees covered compensation for 29 hours of Respondent's, or his staff's, time spent litigating trustee fee issues. UF at ¶111; DX C40 at 4. He found Respondent's request for these fees to be "a direct violation of a court order" and for "time spent solely to benefit himself and not the trust beneficiary." UF at ¶111; DX C40 at 4. Judge Wolf disallowed $8,700 and imposed the "stiff" sanction of reducing the remaining fees by 15 percent. UF at ¶111; DX C40 at 4, 8.

109. Respondent knew that his November 22, 2006 Petition compensation violated the court's May 9, 2006 order. UF at ¶112. In his testimony, he acknowledged that he "was directed not to submit any future requests, and I did submit a future request. I did." Tr. 1593; *see also* Tr. 1591-97; 1602. Respondent testified he did so because

> My judgement at that time was in the context of the totality of this order and the prior order, which ordered me or asked me or directed me to give an

> explanation of my services to the court. That one order said, [g]ive an explanation. The other order says, much later, [d]on't report what you did, we're not going to pay you for it.
>
> It was my judgment at the time that that was conflicting and I needed to show the court this is the time I spent answering the court's question.
>
> * * * *
>
> For me, we can take sentences out of context and evaluate whether I got them right or wrong, but I'm asking you to look at the thing in the full context.
>
> Here he says that, "[t]his issue was decided adversely again as early as in Seay." It's just not accurate.
>
> Then the next sentence, "The court will not compensate for the preparation of his response." I was asked to give that response and it seemed to me that the court needed to see that, if you ask an attorney to do work, and it was a substantial amount of work, there it is.
>
> Now that we're sitting here talking about it, given the totality of what I've been through, I guess I wish I had thought differently.

Tr. 1591-93. Respondent further explained that he included time for fee litigation in his November 22, 2006 Petition

> [b]ecause I was being too strong an advocate for my position and disturbed by the judge's order that I spen[t] all this time answering his question and then having him say afterward, Oh, we're not going to pay you for that. It didn't seem reasonable to me at the time.
>
> * * * * *
>
> Given the circumstances here, I was pretty sure that Judge Wolf would be looking at the billing statement very carefully. I wasn't trying to hide anything.

Tr. 1602-04.

110. In the January 18, 2007 Order, Judge Wolf amended the compensation provision of the trust instrument to require the trustee to file a fee petition with a statement of services showing time spent on each service that was rendered. UF at ¶113; DX C40 at 13; D.C. SCR-PD Rule 308.

111. On February 12, 2007, Mr. Varrone, on Respondent's behalf, filed a notice of appeal of the January 18, 2007 order. UF at ¶114; DX C43.

112. In August 2009, the Court of Appeals affirmed Judge Wolf's decision to disallow $8,700 of requested fees, to sanction Respondent, and to modify the compensation provision of the trust instrument. UF at ¶115; DX A10 at 7-8.

E. THE DION BAKER SPECIAL NEEDS TRUST (COUNT III IN THE SPECIFICATION OF CHARGES)

Establishment of the Trust

113. Dion Baker was a child with cerebral palsy who required assistance in every aspect of daily living. AA; UF at ¶116; DX D7 at 4.

114. Dion's mother, Christine Baker, filed a civil action in Superior Court on his behalf, *Christine Baker v. Kaiser Foundation Health Plan*, Case No. 03-2365, which settled. UF at ¶116; DX D2. On February 25, 2005, the Civil Division ordered that settlement proceeds from the action be distributed for Dion's benefit and referred the matter to the Probate Division. AA; UF at ¶117; DX D2 at 1-2; Tr. 703. Ms. Baker, who was represented by Kim Keenan, Esq. in the civil suit, retained Respondent to draft a special needs trust and to serve as trustee. AA; UF at ¶117; DX I2 at 1.

115. Respondent provided Ms. Baker with a written memorandum titled "Trust Operation and Guidelines For The Dion Baker Special Needs Trust," which set forth the "details of how I administer the Trust and the principals [*sic*] guiding that administration." RX2 at 1-3. The memorandum discussed Bonding, Investments, Special Needs Trusts, Disbursements, Vehicles, Homes, and Taxes. AA; UF at ¶118; RX2 at 1-3.

116. Ms. Keenan, on behalf of Ms. Baker, filed a Petition to Establish a Special Needs

Trust in the Probate Division on March 7, 2005. AA; UF at ¶119; DX D3 at 1; Tr. 703-04. Respondent drafted the proposed trust instrument attached to the petition. UF at ¶119; Tr. 705; DX D3 at 4-22. The petition was signed by Ms. Keenan and by Ms. Baker, Dion's mother. DX D3 at 3.

117. Article Seven, Section B of the proposed trust instrument, "Trustee Compensation," provided that the trustee would be entitled to reasonable compensation consistent with industry standards, that the fee could be expressed as a percentage of trust assets and that the trustee's compensation was subject to court review upon petition by an interested party. AA; UF at ¶120; DX D3 at 17; Tr. 707. These proposed terms essentially incorporated the original compensation provision of the *Brown* trust. *See* DX C11 at 14; FF 59. The proposed terms of the *Baker* trust also mirrored Respondent's requests filed in November 2004 in connection with the *Seay* trust which Judge Wolf had rejected a few months before, although stating in his January 24, 2005 Memorandum Order in *Seay* that it was applicable only to the *Seay* Trust. DX B65 at 3; FF 49, 50, 52.

118. Judge Burgess held the first of two hearings to consider the proposed *Baker* special needs trust on May 3, 2005. AA; UF at ¶121; DX D7 at 1; DX D9 at 1. Judge Burgess focused on the trustee compensation provision of the proposed trust instrument, which he characterized as "probably a major issue here." UF at ¶121; DX D7 at 7, line 5-7; DX D7 at 11, line 12-20; Tr. 709-711. Respondent and Ms. Keenan appeared at both hearings. UF at ¶121; DX D7 at 1-2; DX D9 at 1-2; Tr. 710.

119. Respondent urged the court to adopt the proposed compensation provision which provided for the trustee:

(a) to calculate his fee as one percent of the corpus of the trust annually. DX D7 at 8, line12-16;

(b) to report trustee fees in the annual accounts. DX D7 at 8, line 16-20; and

(c) to disburse fees before court approval. DX D7 at 27, line 24 - D7 at 28, lines 1-8; D7 at 34, line10 - D7 at 35, line 21.

UF; Tr. 717-18.

120. At the conclusion of the substantive portion of the first hearing, Judge Burgess suggested that the draft compensation provision be revised:

> . . . I think the trustee shall be entitled to reasonable compensation for his or her services as trustee upon petition to the court – upon approval of the court and then just list the appropriate factors. Actually, we could probably just go back to our own rule in terms of the familiar standards that we have here and use those, because those are the ones we're familiar with working with.

DX D7 at 34, lines 10-16.

121. After the hearing, Respondent sent an eleven-page letter dated May 10, 2005 to Judge Lopez, who at this time was the presiding judge of the Probate Division. UF at ¶124; DX I5 at 1; Tr. 718-720. Regarding this letter, Respondent observed at the hearing:

> There was so much confusion in the probate division among the judges, I thought this was an opportunity to settle the terms of the Baker trust and other trusts that were under court supervision by reaching out to the chief judge at that time.

Tr. 743. At another point in his testimony, Respondent elaborated:

> Something changed at the court. I wasn't party to those conversations, but somewhere around 2005, the court started to ask about time records.
>
> I believed then, and I believe very strongly now, that services of the trustee of a special needs trust should be compensated on a special needs basis, because trying to keep track of the kinds of work that I do as a trustee is not merely the way an attorney keeps track of their time.
>
> I am sometimes [a] social worker, psychologist, travel agent, procurement officer . . . .

Tr. 760-61.

122. In his letter to Judge Lopez, Respondent proposed "a guideline for the establishment of special needs trusts with recoveries in tort cases." UF at ¶124; DX I5 at 1; Tr. 720. Respondent's letter reiterated the arguments he had presented at the May 3 hearing before Judge Burgess and in the November 2004 fee petition filed in *Seay* considered by Judge Wolf. UF; DX I5 at 1-2, 4; FF 46, 48.

123. Judge Burgess conducted a second hearing on May 24, 2005, in two sessions. UF at ¶125; DX D9 at 1, 25; Tr. 724. Judge Burgess had obtained a copy of Respondent's letter to Judge Lopez and had read and considered Respondent's arguments. UF at ¶125; DX D9 at 13, lines 4-10 (Judge Burgess: "He wrote a very long memorandum where he set forth very articulately some of the considerations he thinks goes [*sic*] into what decisions we're called on to make here.").

124. The following exchanges regarding the trust compensation provision occurred at the second session (which was conducted telephonically) of the May 24, 2005 hearing:

> THE COURT: The issue is this one percent and the language in the provision about compensation. You say – well, let me give you my bottom line here. I believe that for reasons I stated at the other hearing, I think that the trustee's compensation ought to be judged on the standard of reasonableness . . . .
>
> . . . I assume by that [a percentage of trust assets] you mean by the trustee shall – may take up to one percent . . .
>
> MS. KEENAN: Not to exceed one percent.
>
> THE COURT: Right. Shall be entitled to reasonable compensation consistent with industry standards which may be expressed as a percentage of trust assets not to exceed one percent of trust corpus determined annually.
>
> * * * *
>
> THE COURT: . . . [W]hat's reasonable compensation for a trustee, in my opinion, is going to differ from year to year . . . partly depending on what the trustee actually does.

MS. KEENAN: . . . it doesn't say he has to take one percent but it says it won't exceed one percent . . . .

THE COURT: Well, that's fine, if you want to do that. And you draft it and say the trustee shall be entitled to reasonable compensation which shall not exceed one percent. That's fine, if you want to do that.

MS. KEENAN: Okay. But isn't that what is says now?

THE COURT: No, it says – it says which may be expressed as a percentage of trust assets –

* * * *

THE COURT: . . . reasonable compensation not to exceed one percent of the trust corpus, that's fine with me.

MR. CRANE [*sic*]: Your Honor, you say you don't want a percentage, you want . . . the petition to be filed each and every year?

THE COURT: No, I don't – I don't necessarily say that . . . I don't want the compensation to be fixed at a percentage or to be assumed . . . you may use whatever criteria you wish in terms of reasonableness . . . . [T]he Court will determine whether it's reasonable using that combination of factors . . . .

* * * *

THE COURT: . . . [I]f you want to put that into the language here, say that reasonableness shall be determined by, and list those factors, that's fine with me. . . . I don't think we need this expressed as a percentage, see what I'm saying.

* * * *

MR. CRANE [*sic*] As a practical matter, if this rotates to another area of the court and another judge reviewing this or another auditor receiving this familiar, they're only going to be amenable to it based on hours not expenses . . . . [N]obody in the future will know . . . that a percentage is an acceptable way of compensating a trust – a trustee of this trust.

THE COURT: Well, I'm not say that . . . . I don't – I don't think it ought to be just expressed as a percentage.

. . . [W]e're not going to say one way or the other in this. We're just going to say reasonableness [*sic*] compensation.

. . . [I]t probably will be more than one percent in the initial year . . . . I don't

> think, myself, reasonableness is necessarily determined by a percentage.
>
> * * * *
>
> And I don't want that expressed as a percentage. I don't think I want that, see what I'm saying?

DX D9 at 25-29, 32-37.

125. Ms. Keenan filed a Praecipe on June 1, 2005. DX D10 at 1. A revised trust instrument was attached to the Praecipe. DX D10 at 3-21. In a Memorandum and Order signed on June 13, 2005 and docketed on June 16, 2005, Judge Burgess ordered "that a special needs trust for Dion Baker is hereby created, that trust to be the same instrument as proposed to the Court in the praecipe submitted to the Court on June 1, 2005 . . . ." DX D11 at 1-2. The trustee compensation provision in that instrument, Article Seven, Section B, provides:

> A Trustee shall be entitled to reasonable compensation for his or her services as Trustee hereunder, consistent with industry standards, not to exceed one percent (1%) of the trust corpus, determined annually. The Trustee shall prepare a statement of fees which shall be attached to the accounting and delivered to the interested persons. Unless the interested persons object to the compensation by filing an objection with the Court and serving the Trustee, within thirty (30) days of service of the accounting upon the interested persons, the trustee may pay his or her compensation without Order of the Court. Upon petition by an interested person or in connection with the review of the account, Trustee compensation is subject to further review by the Court, to be approved if reasonable and modified if unreasonable. **In considering the reasonableness of fees reported in the accounting by the Trustee, the Court shall consider the custom of the community; the trustee's skill, experience and facilities; the time devoted to trust duties; the amount and character of the trust property; the degree of difficulty, responsibility and risk assumed in administering the trust, including in making discretionary distributions; the nature and costs of services rendered by others; and the quality of the trustee's performance and any special skills in support of that performance.**

UF at ¶128; DX D10 at 15 (bolding in the original); DX D11 at 1-2; Tr. 733-36, 2254.

126. Respondent testified at the hearing that he understood the cap of one percent constituted permission to calculate his fees at a one percent rate rather than on an hourly basis:

> [P]ercentage compensation would be permissible. Otherwise, why would we have a one-percent cap? It would be irrelevant if we were billing on an hourly basis. There is no need to mention a one-percent cap if it was an hourly basis only compensation system.

Tr. 2286-87; *see also* Tr. 775-76. With respect to the "time devoted to trust duties" factors, Respondent testified:

> . . . I did take that to mean I needed to be cognizant of the hours I was spending and have that information available if the fees were questioned.

Tr. 2264. A majority of the Hearing Committee credits Respondent's testimony regarding his interpretation of the provision, even though our own interpretation(s) may differ from Respondent's. The dissenting member, Mr. Kassoff, includes his analysis of this testimony in his Separate Statement.

Respondent's First Account, Notice of Payment of Fees and Related Actions

127. Respondent filed the first Account on June 23, 2006, covering the period of June 13, 2005 through May 31, 2006. DX D15. On June 24, 2006, Respondent served on Ms. Baker, Respondent's mother, a "Notice of Payment of Trustee's Fees" which stated:

> Pursuant to Article Seven [Section] B of the Dion Baker Special Needs Trust, you are hereby notified that compensation for the fiscal year ending May 31, 2006 is $17,264.18, calculated at 1% of the value of the trust, which is one percent 1% of $1,726,418.
>
> You may file written exceptions or objections to the Petition for Payment of Attorney's Fees with the Register of Wills and serve a copy thereof on the trustee, within 30 calendar days of the mailing to you of this Notice of Compensation. Reasons for your exceptions or objections should be stated.

AA; UF at ¶130; DX D15 at 1; DX D16 at 1; *see* DX A4 at 28, ¶ 95; Tr. 737, 740-41.

128. On July 25, 2006, Respondent generated a document, titled "*For Professional Services*," from PCLaw, his time-keeping software at the time, setting forth the date services were rendered in the *Baker* trust, a description of the services, the individual performing the services, the

hourly rate, and the time spent on each service. DX I8 at 1-4; Tr. 741. The document showed a total of $12,350.59 for fees and costs, $4,913.59 less than the $17,264.18 of fees Respondent had reported in the Notice of Payment of Fees filed with the first Account. DX I8 at 4; DX D16 at 1. With respect to the document, Respondent testified at the hearing:

> . . . [T]he statement that is included in these documents is not even a complete statement of all the time that I expended on behalf of Dion Baker in that period of time. That's why it's not a billing statement. It wasn't complete. It was way more that I did.

Tr. 781, *see also* Tr. 1333-35 ("It was not an all-inclusive statement."). Respondent further testified:

> No, it's not complete. It's accurate as to the entries generally, but it wasn't complete. This is one of the toughest cases I ever worked on, and just glancing at it, I'm sure I spent way more time than I ever recorded in PC Law.

Tr. 2269; *see also* DX E55 at 1 (September 15, 2009 email from Respondent to his staff: "July 25, 2006 – check is dated for $12,350.59 drawn on Schwab Bank Account. Amount reflects our time records for a year of work."); Tr. 782-83. Respondent did not file with the court, or send Ms. Baker, a copy of the document. Tr. 770-71, 2284. A majority of the Hearing Committee credits Respondent's testimony. One member, Mr. Kassoff, does not credit Respondent's testimony about his recollection that he worked many more hours than the time reflected in the document.

129. On the same day, July 25, 2006, Respondent disbursed $12,350.59 in fees from the Baker Trust account to his law firm and noted on the check that the payment was for "fees – per fee petition." AA; UF at ¶132; DX I8 at 5. Respondent testified at the hearing:

> I didn't pay myself the full 17 because I knew there was this unstable situation between fees and the court's approval of them, and so when I paid myself that time, I thought, [d]on't pay the full amount; hold back some; let's see what happens.

UF at ¶132; Tr. 2249; *see also* Tr. 2269

Ensuing Rulings and Filings With Respect to the First Accounting, a Notice of Payment of Fees, and a $12,350.59 Disbursement

130. In an Order signed on August 21, 2006, Judge Wertheim, referring to the first Account and the Notice, wrote, ". . . the payment of such fees is disapproved without prejudice to reconsideration with accompanying information establishing the reasonableness of such fees in accordance with the factors specified in Article Seven, Section B of the trust instrument as amended following the May 24, 2005 hearing." UF at ¶133; DX D18 at 1; Tr. 750-51.

131. Respondent filed a Response to Order dated August 21, 2006, on August 30, 2006. In his Response, Respondent argued that the fee request of $17,264.18, calculated as one percent of the trust assets, was reasonable, stating:

> Respondent (serving as Trustee and hereinafter referred to as 'Trustee'), receives compensation for his services, set by agreement of the parties at one percent (1%) of the trust corpus, per year, payable quarterly. One percent is reasonable compensation for the Trustee of a Special Needs Trust. The Trustee's fee of 1% has been approved by this Court in dozens of accountings filed in a number of other cases where the Trustee serves as Trustee.
>
> . . . Therefore, in accordance with the provisions of Article 7, paragraph B, of the Trust, the Trustee paid himself the 1% fee without Order of [the] Court.

DX D19 at 1-2, ¶ 2, 2 ¶3.

132. At the hearing, Respondent testified about the reasons for the position he took as follows:

> I was entitled to take a percentage fee, because I was doing that in so many cases and the language of there [*sic*] trust allowed for a percentage fee, and that was proper.
>
> Everything about my claim to the $17,000 amount to me was absolutely in accordance with the trust, with the law, with the custom of the community, with the industry standards, and Judge Wertheim having previously approved percentage fees just months earlier, now changing his mind . . . I took a somewhat righteous stand, drew a line and said, [e]nough

> of this; I'm getting ready to appeal.
>
> A system doesn't work well when there's chaos. It's not fair to any of the parties, and I wanted to draw that line at this time in the history of special needs trusts.
>
> It wasn't that I needed the money. It was that I was standing up for a princip[le]. I was doing a good job. Other judges had acknowledged that this was an appropriate compensation for that. The same judge acknowledged that. I was outraged, and I was in my mind serving the justice that I thought I was being denied.

Tr. 2282-83. The Hearing Committee credits Respondent's testimony about his reasons for taking the position that he took.[12]

133. In his August 30, 2006 Response to Order, Respondent stated that "[a]ccording to records maintained by the trustee, at least 40 hours of service was devoted to this trust in the first accounting period." UF at ¶136; DX D19 at 7-8; Tr. 769. Respondent based his representation of the number of hours on the July 25, 2006 detailed statement of services. UF; Tr. 770; *see also* DX I8 at 3. Respondent's Response to Order addressed each of the factors set out in the *Baker* trust instrument's compensation provision as follows:

> custom of the community, DX D19 at 2-3;
>
> the trustee's skills, experience and facilities, DX D19 at 3-7;
>
> the time devoted to trust duties, including an itemization of specific services, DX D19 at 7-9;
>
> the amount and character of the trust property, DX D19 at 9;
>
> the degree of difficulty, responsibility and risk assumed in administering the trust, including in making discretionary distributions, DX D19 at 9-11;

[12] One member of the Hearing Committee believes that the evidence is clear and convincing that Respondent knew that he was not complying with what this member considers Judge Burgess' clear intent as expressed in the two hearings and in his Order. *See* separate statement of Mr. Kassoff.

> the nature and costs of services rendered by others, DX D19 at 11-12; and
>
> the quality of the trustee's performance and any special skills in support of that performance, DX D19 at 12.

134. Respondent did not file the July 25, 2006 detailed statement with the court, tell the court of its existence, or disclose that he had collected $12,350.59 in fees based on the detailed statement of services. DX D19 at 1-16; DX D20 at 5; Tr. 769-771, 2264.

135. In a published Memorandum and Order dated September 28, 2006, Judge Wertheim denied Respondent's request for trustee fees in the amount of $17,264.18. AA; UF at ¶138; DX A9 at 1. Judge Wertheim found that Respondent acted contrary to Judge Burgess's direction:

> Contrary to the Court's plain direction, the Trustee has calculated his proposed compensation by starting with his requested one percent and then reasoning backwards to justify it as reasonable, instead of starting with the factors specified by the Court to arrive at a reasonable amount which is then subject to a one percent limitation. The Trustee's request and reasoning are presented as though his original draft proposal had been approved by the Court and the trust instrument never amended, i.e., as though the Court's hearings of May 3 and May 24, 2005 had never occurred.
>
> * * * * *
>
> The terms of the trust as amended by Judge Burgess' comments on May 24, 2005 make it clear that although time devoted to the Trust by the trustee is a relevant factor, it need not be the only factor.

UF at ¶138; DX D20 at 6, 8; *see also* DX D20 at 7. Judge Wertheim also stated that Respondent's 'set by agreement of the parties' representation was "inaccurate." DX D20 at 1; *see also id.* at 2.

136. In the same Memorandum and Order, Judge Wertheim stated that Respondent had "provided scant information about his time in this matter," that "[t]he Trustee does state that at least 40 hours of service was devoted to this trust," that "[n]o breakdown is given for any particular task or service" and that "[t]he requested compensation of $17,264.18 thus amounts to $431.60 per hour for 40 hours." UF at ¶139; DX D20 at 8-9. Judge Wertheim authorized $8,400, which he

characterized as "generous under all the circumstances," in compensation to Respondent for services he rendered from June 13, 2005 to May 31, 2006. AA; UF at ¶139; DX D20 at 10.

137. Respondent had disbursed $12,350.59 from the trust to his firm before the September 28, 2006 Memorandum and Order. UF at ¶140; FF 129. Respondent did not at this time return to the *Baker* trust the $3,950.59 difference between the $12,350.59 disbursement and the $8,400 that Judge Wertheim authorized upon receipt of the Memorandum and Order. Tr. 778.

138. Respondent did not seek a stay of the court's order or seek permission to place the disputed $3,950.59 into the court registry because, he explained:

> Judge Wertheim did not order the return of the funds in his order and I had filed my appeal, which put the issue before the Court of Appeals, which I thought was sufficient at the time.
>
> * * * *
>
> [I]f I returned the funds, the appeal would have lost its potency.

AA; UF at ¶141; Tr. 779-780, 2277; *see also* DX A63 at 6. The Hearing Committee (although not necessarily agreeing with Respondent's reasoning) credits Respondent's testimony regarding his reasons for not returning the $3,950 to the trust at this point in time.

139. Respondent's Notice of Appeal from the September 28, 2006 Memorandum and Order was filed on October 27, 2006; this appeal was consolidated with Respondent's appeal in *Brown*. DX D23 at 1; E38 at 1-2; *see also* FF 111.

140. Respondent filed the Second Account on November 20, 2007. UF at ¶143; DX D24 at 1. In the itemization of administrative expenses, Respondent listed the $12,350.59 payment of trustee fees. UF at ¶143; DX D24 at 1, 38; DX I25 at 1, 8; DX I44 at 1, 4; Tr. 555-56. Judge Hamilton approved the Second Account on December 28, 2007. DX D27 at 1.

141. The Court of Appeals affirmed Judge Wertheim's September 28, 2006 order in its August 20, 2009 decision. UF at ¶145; *In re D.M.B. et al.*, 979 A.2d 15 (D.C. 2009); DX A10 at 8.

142. A check drawn on his law firm's account, signed by Respondent and dated September 18, 2009 payable to the *Baker* trust in the amount of $4,522.56, the difference between the fees he had collected and the amount Judge Wertheim had authorized, plus interest, was deposited on the same date. UF at ¶146; DX K57 at 7; Tr. 842-43. In the Fifth Account, filed on August 12, 2010 and covering the period of June 1, 2009 through May 31, 2010, Respondent identified the return of fees as a "Refund" and the "Payor" as "Legal fees." UF at ¶146; DX D39 at 2, 14.

F. RESPONDENT'S BILLING RECORDS AND FEE REQUESTS IN THE *BROWN* AND *BAKER* TRUSTS IN 2009, FOLLOWING THE COURT OF APPEALS' RULING (COUNT IV IN THE SPECIFICATION OF CHARGES)

Respondent's Administrative Records Procedures and Practices

143. At various points in his testimony, Respondent described as follows his general methods of keeping track of his work on the trusts that he administers:

> I'm not the best lawyer at entering time into PCLaw.
>
> For the part of my practice where I billed as an attorney, guardianship, probate, yes, I would maintain my time on a regular and weekly if not daily basis.
>
> Q. What about the trust where the judge has ordered you to keep your time?
>
> A. In the Seay case I was doing just that, sometimes a little later, sometimes the same day.
>
> Q. And if you were doing a little later, what were you doing in terms of keeping track of how much time you actually spent performing services?
>
> A. To determine the amount of time that I worked on something, if I didn't keep the time contemporaneously, because I do the same kind of work over and over and over, I can tell from a letter that I might look at, if it was a one page letter, it wouldn't have taken ten hours. It would have taken a certain amount of time. If it was a ten-page letter, it certainly would have taken more than an hour. If it was a memo, I could tell by the length of the memo how much time I would have expended. If it was a phone call and I remembered the

phone call, I might remember approximately how long it took. If I was reviewing an accounting, I would know a minimum amount of time it took. If I was meeting with an investment advisor and it was out of the office, I would know I had spent a certain amount of time.

Most of the activities that I do as a trustee are done repetitively and fall into similar patterns as to how much time would be expended and it would be a fairly straightforward process for me to know the amount of time needed to prepare the items to prepare or to perform the services that I performed.

* * * *

I do sometimes keep time records in trust cases as a reminder to myself of how a case is going. Sometimes I adjust my fees. I don't always take a one-percent fee. I have cases where [I] take a .8 percent fee because there is less work to be done in that case. I have a few where I actually take a 1.2 percent fee because the work is so onerous. I have cases where I take no fee. I do a lot of cases pro bono.

I do keep track of time records as a human resource approach for example, so I can know what I'm doing. And I don't look at [m]y [] PCLaw as my only way of keeping time records. I look at my calendar. I look at the emails. I look at the documents. I look at the memos. I look at the letters. And I get a sense of what have I been doing? How many checks did I write this month? How many phone calls were there from this client?

So, time records for me in my understanding as a trustee, wasn't limited to just the times that I wrote down, typed into PCLaw. I can get a sense of how much time I'm expending on a case from a lot of factors.

* * * *

. . . [A]fter 2005 in the District of Columbia, at that point, noticing that Judge Burgess was interested in the issue, and then that Judge Wolf was demanding it of me, you bet I started to keep track of my time.

Was I absolutely complete in my recording of time in PCLaw? No. I relied on other things.

* * * *

PCLaw was used by my office both for billing purposes and as an HR tool. If you wanted to know what you did on a certain day, you might enter the time into PCLaw. When you didn't find the bill, you review your entries, you say, Oh, I'm going to bill for this, or I'm not going to bill for that, this

> doesn't look accurate; I'm going to go look at my documents for today and see if this is right.
>
> Trusts where I was on a percentage basis I generally had no regular practice of keeping time for the purposes of reporting time.

Tr. 862-63, 1314-15, 1332-33, 1651; 2073; *see also*, Tr. 2310-11.

144. Respondent began using PCLaw, a billing software program, in approximately 2001. AA; UF; FF 3; s*ee also* Tr. 856, 914, 922, 1965, 2021. The PCLaw software allows entries for (1) dates of services rendered; (2) initials of the professional performing the services, (3) descriptions of services rendered, (4) amounts of time spent expressed in six minute increments, (5) applicable hourly rates, (6) total amounts billed, and (7) costs. DX A4 at 32 ¶ 108; AA; UF at ¶148; Tr. 1314-15, 2310-11.

145. Neil Manne, the co-creator of the PCLaw software program, testified as an expert witness. UF at ¶149; Tr. 1696, 1698. Mr. Manne reviewed data stored in Respondent's PCLaw software program and printed hard copies of Respondent's PCLaw reports for the *Baker* trust. UF at ¶149; Tr. 1698-99, 1704-05. Respondent's version of PCLaw had a built-in audit trail feature which assigned a unique Entry ID Number in sequential order for each time entry into the data base. AA; UF at ¶149; Tr. 1698, 1701-02, 1706-07. If an existing entry is edited or altered, a new entry is created and automatically assigned its own unique Entry ID number. AA; UF at ¶149; Tr. 1702.

146. Once the Entry ID Number is established for a given entry, that Entry ID Number cannot be altered. UF at ¶150; Tr. 1707.

147. Any information in Respondent's PCLaw program with an Entry ID Number above 45019 was entered after September 15, 2009. UF at ¶151; Tr. 1704, 1711-12; DX I43 at 20, 38-39.

Respondent's Record-Keeping Practices During the Pendency of the *Brown* and *Baker* Appeals

148. The consolidated appeals in *Brown* and *Baker* were pending between October 2006 and August 2009. UF at ¶152. Respondent testified about this period as follows:

> Q. At that point, after May of 2006, did you change the way that you were tracking your time or keeping time records?
>
> A. I tried to be more attentive to recording time in PCLaw on a regular basis in some trust cases that were supervised by or reviewed by the DC courts.
>
> * * * *
>
> [W]e didn't file petitions for fees for over two years, because the case was on appeal and we didn't know if we were going to win or lose. We thought we would win, otherwise I wouldn't have filed the appeal. So, we were hoping that I would be back on [the] percentage basis. In the meantime we had all agreed that we better keep track of time, and we did keep track of time, not perfectly, but we did.
>
> * * * *
>
> . . . I thought it['s best to wait [–] it turned out [to be] a few years before filing a petition for compensation.

Tr. 1326, 1665, 2287. Respondent and his colleagues contemporaneously recorded time during the appellate period. DX J7 at 6-23 ("Client Ledger" for the *Brown* trust) and DX J10 at 5-31 ("Client Ledger" for the *Baker* trust); s*ee also* FF 150 and DX C53; FF 157 and DX D31, 35.

Respondent's Steps Following the Court of Appeals' Decision

149. The Court of Appeals issued its opinion in the *Brown* and *Baker* appeals on August 20, 2009. DX A10. Respondent thereupon began reviewing his firm's PCLaw time records to prepare his fee petition. UF at ¶153; DX I31; I42 at 1. With respect to this process, Respondent testified:

> When we lost the appeal and it was time to file a petition for compensation, we went through the usual process of looking back now over two years of time entries, looking at all the documents, the correspondence, the pleadings, the emails, the calendar, and double-checking.

> Because at that point, filing a petition for compensation with that court, I wanted to make sure everything was accurate.
>
> * * * * *
>
> . . . I had to go back and look at what time records I had and [in] looking at those time records saw that I had not kept full-detailed, contemporaneous time records, but I had done an awful lot of work, so I went back to look at my calendar, emails, correspondence, memos, invoices, court filings, look through the entire file both physical and virtual on the computer, noted dates when I had performed services.
>
> Given that I was doing this kind of work at that point for over ten years, I had a really good command of how long it took to do most of those activities, and I entered from those records amounts into PCLaw corresponding to the dates on the documentation that I reviewed.
>
> * * * *
>
> It had been a couple of years since I'd been paid in those cases, but we actually – it was a process. We did it over weeks, and I think we finally submitted the fee petition in these cases in November with a process of amending, and then I gave it to my partner, I believe, to review.

UF at ¶153; Tr. 1665, 2288, 2309; *see also* Tr. 862-63, 1666-68.

Respondent's Post-Appeal Fee Petition With Respect to the *Brown* Trust

150. Respondent filed his Petition for Compensation in the *Brown* trust on December 15, 2009. DX C53. In the Petition he sought approval of $43,055.00 in trustee's fees for "the three-year period from October 1, 2006 until September 3[0], 2009." UF at ¶159; DX C53 at 1. The remainder of the seven-page Petition described the services provided by Respondent and his staff and also included argument as to the reasonableness of the requested fee. DX C53 at 2-7. Respondent attached to the Petition a PCLaw-generated document titled *Pre-Bill*, which is dated December 11, 2009 and contains entries from October 10, 2006 through September 24, 2009. DX C53 at 10-26.

151. The following entries in the *Brown* trust *Pre-Bill* are characterized by Disciplinary

Counsel as "vague[]" and "estimated."[13]

11/13/06	review investments	0.3	$ 90	Entry ID 48163
08/03/07	work with IRS to correct EIN data	1.0	$350	Entry ID 48160
08/30/07	work on accounting	1.0	$350	Entry ID 48164
11/14/07	review accounting	0.5	$175	Entry ID 48175
02/20/08	review contracts for renovations at home	0.5	$175	Entry ID 48191
12/03/08	review and revise accounting	1.0	$350	Entry ID 48213
12/04/08	review financial records, investment statements, accounting prepared	1.5	$525	Entry ID 48214

ODC Br. ¶161 (citing DX J7 at 7, 11, 13, 15, 18, 21; Tr. 1748).

152. The original entry in the PC Law Client Ledger for the *Brown* trust for September 7, 2007 read:

09/07/07	t/c Varrone re: status of appeal, t/c M. Pavlides	0.2	$70	Entry ID 25594

DX J7 at 13. In the *Pre-Bill*, the entry for September 7, 2007 reads as follows:

09/07/07	t/c M. Pavlides re: Seard fraud matter	0.2	$70	Entry ID 48231

DX C53 at 15.

153. The original entry in the PCLaw Client Ledger for the *Brown* trust for March 25, 2008 read:

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[13] We assess Disciplinary Counsel's characterizations and implicit inferences later in this Report. As is true of all of our Findings of Fact we intend here only to set forth our factual findings, without any express or implicit embellishment.

03/25/08	discuss appeal with Varrone, t/c Latoyia re: Seard, review electrical problem at house	0.5	$175	Entry ID 29134

DX J7 at 18. The corresponding March 25, 2008 entry in the *Pre-Bill* reads:

03/25/08	t/c Latoyia re: Seard, review electrical problems at house	0.5	$175	Entry ID 48237

DX J7 at 18; DX C53 at 20; Tr. 2298-99, 2305-08, 2312-15. With respect to the entries for March 25, 2008 (Nos. 29134 and 48237), Respondent testified:

> Q. [By Respondent's counsel] Can you tell us what the change was and why it was made?
>
> A. Yes. Well, first of all after the appeal, I was not going to be asking for fees regarding the appeal, so that time entry had to be deleted. It also turned out that, in reviewing my documents, I found on that day I had been working with Latoiya Brown, De'Shawn's . . . mother, regarding electrical problems at the house, so there must have been an invoice from a company like Cold Electric. There might have been a meeting, which would be in my calendar. There could be a number of sources about that. And also it says, "Telephone conversation regarding Seard," and that was John Seard, who was the builder who did not perform under the contract that we had with him, and eventually we had to bring in the Attorney General's Office of Maryland to get a refund of our money.
>
> Q. At the time you made the change, did you have a belief that the revised entry was accurate?
>
> A. Absolutely.
>
> MR. KASSOFF: So, I'm a little confused, because the original entry acknowledged the electrical problem, had the discussion with Varrone, then the revised deleted discussion with Varrone, but there was no change to the $175 amount.
>
> So are you saying that when you deleted Varrone, you coincidentally found other documentation that had not previously been entered that matched exactly the amount you deleted for Varrone?
>
> THE RESPONDENT: What I'm saying is that in reviewing the documents in my file, I believe that was an accurate representation, a reasonably accurate representation of the amount of time it would have taken

me to have a conversation with Latoiya Brown about the status of our case regarding Mr. Seard and to review electrical problems at her home.

The total time is point – half an hour, .5 hours, and my recollection now, refreshed by this document, is that that is a reasonable, if not too small amount of time to report for the kind of work that was being done that day.

MR. KASSOFF: So, is it your testimony that the original entry understated the amount of time you spent on Latoiya regarding the electrical problem, and that when you made the change to delete Varrone, you decided, since you were under charging, you would add back in the amount of time that would more accurately reflect what you spent with Latoiya.

Is that correct?

THE RESPONDENT: The first entry was in my opinion under charging. That's something I had done frequently. Often when I'm entering time I enter too little time. Because not all the activity for the trust happen[s] in a distinct amount of time. It's not like I start at 12:00 o'clock and at 12:30 I'm done with the Brown case.

And so, often I'll enter time for what I've done and go back and think about it and say, oh, but I forgot what I did at 1:00 o'clock for the Brown case, or what I did at 9:00 a.m. Brown case.

You don't get it all in, and in these trust cases, at first, I didn't think it would matter because I thought I was going to be compensated on a percentage basis.

So I was more concerned about getting in the topics rather than reporting large amounts of time. It didn't seem as necessary.

MR. KASSOFF: . . . Are you saying that when you made the change to Varrone by deleting his name, you went back through records that were two years old and you had records to substantiate that you had under charged? Or did you just make that judgment at the same time that you deleted Varrone without the benefit of prior records in terms of your interaction with Latoiya?

THE RESPONDENT: I believe that my records were sufficient to refresh my memory and to give me a good indication, based on now ten years of doing this kind of work, of what it would have taken to assist a trust beneficiary, or to complete a conversation, or to review a situation.

* * * *

MR. KASSOFF: Can you provide any evidence, any records, any indication, A, that you had gone back to refresh your memory, because this was a couple of years later, and B, what that material would have been comprised of that enabled you to refresh your memory two years later that you spent the additional time . . .?

THE RESPONDENT: First of all, it wasn't a full two years. . . . Second of all, with all due respect to Mr. Varrone, there is no way you can have a phone conversation with him for that short a period of time. It doesn't happen. . . . So, I don't remember the full extent of what we have offered you in the book [of exhibits]. There's a lot of documents. But I would not have made any changes to this document without looking at a piece of paper, looking at a computer screen, and feeling a hundred percent certain that I had backup information to justify that change.

I was under the microscope by Judge Wolf and Judge Wertheim. I wasn't going to take any chances. I was being as accurate as I could possibly be under the circumstances.

MR. KASSOFF: So, what I've been asking about, in my last question anyway is, can you provide that backup information that you have?

THE RESPONDENT: For that particular item?

MR. KASSOFF: Yes.

THE RESPONDENT: I don't – in this moment I just don't – I don't know.

I didn't attempt to back up every change that Mr. Manne spoke about or that Ms. Neal has put in her Specification of Charges. We've addressed a lot of them, and it takes a lot of hours to go through the many boxes of files, and unfortunately my calendar system changed, so I don't have calendars for these dates any more.

So ten years later – well, this is eight years later, I just don't have all the paper that I might have had back then. But I think if you look through [Respondent's Exhibits] 16 and 17, you'll see a lot of documentation that relates to the changes that Mr. Manne highlighted.

Tr. 2299-2303, 2305-2308.

154. The total charges in the *Pre-Bill* for the three-year period of October 1, 2006 – September 30, 2009 exceeded the total amount of the earlier PCLaw entries by $10,800.

UF at ¶164. Over a three-year period, this additional amount equates to approximately 0.5% annually of the original corpus of the *Brown* trust. *See* DX C11 (noting $730,000 as original amount of bond). Judge Campbell approved Respondent's December 2009 fee petition on November 9, 2010, in the amount of $43,055. DX C62. Over a three-year period, this award equates to approximately 2% annually of the original corpus of the *Brown* trust. *See* DX C11.

155. Respondent disbursed the authorized amount of his fees from the *Brown* trust on November 19, 2010. UF at ¶166; DX K45 at 1, 5.

Respondent's Post-Appeal Fee Petition With Respect to the *Baker* Trust

156. Respondent filed his Petition for Compensation in the *Baker* trust on December 15, 2009 and an Amended Petition for Compensation on January 8, 2010. UF at ¶167; DX D31, D35 at 1, 8. In the Amended Petition he sought approval of trustee fees in the amount of $47,642.50 for "three years of service" between July 1, 2006 and May 31, 2009. DX D35 at 1. The remainder of the eight-page Amended Petition described the services provided by Respondent and his staff and also included argument as to the reasonableness of the requested fees. DX D35 at 2-8. Respondent attached to the Amended Petition a PCLaw-generated document titled *Pre-Bill*, which is dated January 6, 2010 and contains entries from July 3, 2006 through May 20, 2009. DX D35 at 13-31.

157. The following entries in the *Baker* trust *Pre-Bill* are characterized by Disciplinary Counsel as "vague[]" and "estimated:"

07/13/06	review status of accounting and fees	0.2	$60	Entry ID 47941
08/21/06	review medical status of Dion	0.3	$90	Entry ID 47942
09/08/06	work on invoice for trust services	0.5	$150	Entry ID 47943

09/25/06	confirm filing of income tax return for 2005	0.2	$60	Entry ID 47944
10/03/06	work on confirmation of residence for Dion	0.3	$90	Entry ID 47945
11/30/06	request to meet Chris Baker	0.2	$60	Entry ID 47947
05/15/07	email Chris re: Dion's care at group home, discharge meeting date set	4.0	$1,400	Entry ID 47953
08/29/07	updates on status	0.2	$70	Entry ID 47966
12/11/07	work on accounting	0.3	$105	Entry ID 47979
12/14/07	work on accounting	0.5	$175	Entry ID 47980

ODC Br. ¶169 (citing DX J11 at 3-4, 6, 11, 16, 20; Tr. 1731-36).

158. The original entry in the PCLaw Client Ledger for the *Baker* trust for November 29, 2006 read:

11/29/06	review status of appeal and fee petitions	0.3	$90	Entry ID 18469

DX J11 at 6; DX I43 at 7; Tr. 1736-37. The corresponding entry (Entry ID 48128) in the *Baker* trust *Pre-Bill* reads:

11/29/06	review accounting entries, statements and Fees payable	0.3	$90	Entry ID 48128

DX D35 at 15; Tr. 2336-40; s*ee also* DX J11 at 6; DX I43 at 7. With respect to the entries for November 29, 2006 (Nos. 18469 and 48128), Respondent testified as follows:

> Q. MR. KASSOFF: So, in this case, Mr. Krame, can you explain the change in the characterization of this item?
>
> A. Yes. It's the same explanation I offered before. We were not going to petition for fees for anything related to the appeal. In reviewing my records, I found that on that same day I had also done some work on reviewing accounting

entries, and I entered that description into PCLaw for that day and that amount of hours, which was minimal, .3 hours.

MR. KASSOFF: Would you say that it was a coincidence that the amount of hours involved in the deletion of "appeal, status of appeal and fee" was the exact amount that you found?

THE RESPONDENT: The only could [*sic*] coincidence would be that, as you can see from looking through these, most of the entries are .2, .3 hours. But it would have been in my considered opinion that whatever work I did on that day took approximately .3 hours, because as I've said at that point, I was doing this kind of work for almost ten years, and whatever documents I was looking at, or things on my computer screen that I was looking at, would have given me an indication of how much time it took to do that work.

MR. KASSOFF: So it would really be helpful to me anyway, and just speaking for myself, if the records that you went back to look at to get a better sense of your time on November 29th, if you had those records to substantiate the change in this case and in the previous one that I was asking about fairly extensively a few minutes back?

THE RESPONDENT: So, Mr. Kassoff, as I'm sure my attorney will now want to go through, Exhibit[s] 16 and 17 in great detail, so you can see all of the examples that I was able to produce regarding time changes, I don't have documentation for – at this time, for every time change made in this document.

This is going back to what happened in 2009, and in the passage of time, I don't have every single item that I ever looked at, especially knowing that my calendaring system is gone. When we changed Outlook from one system to another, it wiped out my prior calendar, and I was unable to recover it.

So one of my best sources of information is no longer available to me, but we have given you what I hope you'll find to be a lot of evidence to show that I was looking at good documentation [in] making a majority of the changes discussed by Mr. Manne.

MS. MIMS: When did that calendaring change occur?

THE RESPONDENT: I think it was 2010.

MS. MIMS: And the change was what exactly?

> THE RESPONDENT: Something happened when we switched from, you know, the Word system seven to Word 10 or whatever, wiped out my calendar history.

Tr. 2336-39.

159. The original entry in the PCLaw Client Ledger for the *Baker* trust for October 16, 2007 read:

> 10/16/07 t/c Ora Perry, review taxi service 0.3 $105 Entry ID 25915

DX J11 at 17; DX I43 at 12. The corresponding entry (47973) in the *Baker* trust *Pre-Bill* reads:

> 10/16/07 email re: summary of status 0.3 $105 Entry ID 47973

DX J11 at 17; DX D35 at 22; Tr. 1750-52.

160. The original entry in the PCLaw Client Ledger for the *Baker* trust for November 13, 2007 read:

> 11/13/07 quarterly review with N. Simon 0.3 $105 Entry ID 27025

DX J11 at 19. In the *Baker* trust *Pre-Bill*, the entry for November 13, 2007 reads:

> 11/13/07 quarterly review with N Simon 0.50 $175 Entry ID 48131

DX D35 at 23; DX J11 at 19; Tr. 1738-40. With respect to the entries for November 13, 2007 (Nos. 27025 and 48131), Respondent testified as follows:

> Q. [By Respondent's counsel] How did that come about?
>
> Well, when I was reviewing this petition – when I was reviewing this time record to prepare the petition for compensation, I noticed that I had entered .3 hours with Neil Simon and noted that it was impossible for me to have spent as little as .3 hours with Neil Simon. He's the investment advisor for the trust. I have to travel to his office. We review all of the investments. We review what's going on in the world, economic issues. We talk about the needs of the beneficiary. We predict future spending. We review past [s]pending. We look at the trajectory of the trust assets in terms of the investments. We re-jigger the allocation model.
>
> The conversations are extensive. I couldn't have gotten to his office

and returned back in .3 hours, no less completed a conversation with him about this trust in .3 hours.

So I increased the amount of hours to .5.

CHAIRMAN FITCH: Why didn't you increase it to 2.5? I mean his office is not next door, I assume?

THE RESPONDENT: It's not next door and I meet with Neil Simon quarterly, so I know how long a conversation takes about a trust and its investments, because I've done it dozens of times. I know it's not .3 hours. .5 hours is about right.

Tr. 2320-22; *see also* 2369-72.

161. The original time in the PCLaw Client Ledger for the *Baker* trust for November 14, 2007 read:

11/14/07	review memo, review file, t/c Bullock re: Dion Baker placement and averting discharge	1.2	$420	Entry ID 27137

DX J11 at 19; 2372-75. The corresponding entry in the *Baker* trust *Pre-Bill* reads:

11/14/07	review memo, review file, t/c Bullock re: Dion Baker placement and averting discharge, legal research	2.2	$770	Entry ID 48134

DX J11 at 19; DX D35 at 23; Tr. 1742-43. With respect to the entries for November 14, 2007 (Nos. 27137 and 48134), Respondent testified as follows:

Q. [By Assistant Disciplinary Counsel]: What records would you have seen in your file that would have indicated that you conducted legal research?

This would have been two years after you had done the work, two years later. What would you have seen that would indicate you had conducted legal research?

A. In [DX] I 17 there is a memorandum. It is to Robert Bullock from Abby Bullock dated 9/28/20[0]6, and then updated on November 14th, 2007, and was shared with me that day.

After that document, because they go together, we have, from Abby

Bullock, we have an email from Abby Bullock.

MS. NEAL: It's actually R 17.

THE RESPONDENT: R 17. . . . In conjunction with that there is an email from Abby Bullock to me, "Subject: Dion Baker Update for Dion Baker Case," and it says, "This morning Second Chance withdrew their threat of discharge. They agreed to give us more time to get everything under control. Also please send us a copy of his trust."

That indicated to me and reminded me that on that day, when his group home threatened to kick him out, I started to do some legal research to see what the law in the District of Columbia was and what the law in Maryland was as to the ability of a group home to discharge somebody without precautions or procedures.

That was the legal research that day.

Q. I guess my next question is, two years after the fact, how could you possibly know how much time you spent conducting legal research on that issue on that day?

A. So, as I indicated earlier, I remember this incident very well. This is one of those seminal incidents in the history of a trust that is hard to forget. It's a day when a mother is calling you, panicked that her child is going to be discharged from a group home. So I have a good memory of the day, and I'm guessing that I probably did way more research than one hour, because I'm not familiar with the laws in DC and Maryland both on discharge.

The child was technically a DC resident placed in a group home in Maryland, so I would have been looking at the laws of two jurisdictions and trying to figure out what the rules and regulations and laws might be governing a group home.

I would imagine that's a full-day project and I was very conservative in estimating only an hour.

Tr. 2373-76.

162. Respondent's employee for a brief time, Deb Taylor (DST), originally entered 1 hour into PCLaw, for services rendered on January 8, 2007 (Entry ID 20150) but left the description of services blank. DX I43 at 8; J11 at 7. In 2009, Respondent added the description, "work on trust

operations and guidelines, with cover letter" (Entry ID 47951). DX J11 at 7; DX D35 at 16. The "Trust Operations and Guidelines in the *Baker* trust dated 2005, RX 2, is a memorandum that Respondent routinely provided to families of the beneficiaries of special needs trusts in which Respondent served as trustee. Tr. 1999-2000. The 2007 "cover letter" was thus a transmittal of the previously created document.

163. The original entry in the PCLaw Client Ledger for the *Baker* Trust for February 13, 2008 read:

2/13/08	work on notice and petition for fees	1.5	$525	Entry ID 28233

DX J11 at 22. The corresponding February 13, 2008 entry in the *Baker* trust *Pre-Bill* reads:

2/13/08	work on accounting	1.5	$525	Entry ID 48035

DX J11 at 22. With respect to the entries for February 13, 2008, (Nos. 28233 and 48035), Respondent testified as follows:

> Q. [by Respondent's Counsel] Can you explain how that change came to be?
>
> A. Yes, I must have been reviewing my records and realized that I had worked on the accounting that day, and that was a better description of the time that I offered in this document.
>
> Q. You see that the original entry read "Work on notice and petition for fees"?
>
> A. Yes.
>
> Q. Then you changed that to "Work on accounting"?
>
> A. Yes.
>
> Q. Can you explain again what the reason for the change was?
>
> A. So, in working on accounting, that would have been a day when I – the Baker trust was fairly new at that point. Usually in the first year or two my work on an accounting is going to be more extensive [than] in later years

when things are in a flow. So I would have noticed something in my files that indicated that I had maybe received the accounting from Pat Cohen or Tom Burns that day and was reviewing their work, or perhaps it was a day when I shipped out to them documents to prepare the accounting, so I would have been reviewing documentation that was necessary to prepare an accounting. And the other entry was "Work on notice and petition for fees," and in the Baker case, I was required to provide a notice and I might have been working on those things, but in reviewing the entry, it seemed that "Work on accounting" was a better description of what I did that day.

MR. KASSOFF: So you're saying, if I heard correctly, you were not working on the notice and petition for fees, or not working on an appeal about the fees?

THE RESPONDENT: Well, that instance doesn't refer to the appeal. This is something totally different. I'm saying that when I went back in 2009 to prepare a petition for compensation, I went back and looked at all my files, and if in my files on February 13th I found evidence that I was working on the accounting but maybe didn't find evidence that I was working on a notice and petition for fees, I would have thought to myself, I'm going to be careful here; I'm only going to report what I can prove or what I have a good memory on; here's a document that tells me I was working on the accounting that day; I know how long it takes me in the early stages of a trust to work on an accounting. It seems like my original description is not the right description of the work performed for that day.

MR. KASSOFF: So I'm understanding that your recollection, some lengthy period of time later, was better than your contemporaneous entry at the time?

THE RESPONDENT: I'm not comparing the two. I didn't say that at all. What I said was that, in some cases where I had a document that told me exactly what I did, versus even a contemporaneous time entry that described what I did, I thought it better to use the documentary evidence to support my time rather than whatever was entered in PC Law.

* * * *

MS. MIMS: Then moving on to the next two entries, just one with number 4896, it appears to me that Mr. Biggin – and look at it and tell me if you think it is incorrect – deletes the one entry but then adds it back, which I just don't understand the four entries beginning with the first two that we highlighted. So if you could look at all four of those, and they're all for $1,200. The first three entries are on J11-3, and the last entries are on J11-4.

THE RESPONDENT: Yes. So ultimately the last entry is an entry of four hours at $300 an hour, which is consistent throughout those four entries, regarding the preparation of a response to the court's order regarding reasonable fees. That was the result of a debate that we were having within the office as to whether or not I was prohibited from asking for fees. So responding to Judge Wertheim's order, he did not tell me I couldn't be compensated for my work. That was something Judge Wolf did. So since this wasn't directly related to the appeal, we resolved this by saying, Wertheim did not say I could not be compensated for this; it's not part of appeal. It was important information shared with the court and ultimately it looks like we believed that the entry should say.

* * * *

Q. [By Assistant Disciplinary Counsel] So, this entry, which you were questioned about earlier, this entry was a change from "work on notice and petition for fees" to "work on accounting," correct?

A. Correct. . . .

Q. Mr. Krame, between the time you filed the appeal . . . I believe it was in 2006, between that time and the petition you filed in 2009, didn't you testify that you didn't file any fee petitions, correct?

A. Correct.

Q. So in that original entry, the notice and petition for fees, what would you be doing in February 2008 working on the notice and petition for fees if you didn't file the fee petition?

A. I can only answer by speculating. I can't recall exactly. It's been almost nine years.

Tr. 2323-28, 2377-78.

164. The total charges in the *Baker* trust *Pre-Bill* exceed the total amount of the earlier PCLaw entries by $8,775. This additional amount equates to approximately 0.5% of the original corpus of the *Baker* trust or a bit less than 0.2% annually over a three-year period. *See* DX D13.

165. Judge Hamilton approved Respondent's January 2010 amended fee petition on February 16, 2010 in the amount of $47,642.50. DX D37. Over a three-year period, this award

equates to approximately 1% annually of the original corpus of the *Baker* trust. *See* DX D13. Respondent disbursed $47,642.50 from the Baker trust to his firm account on February 23, 2010. UF at ¶178; DX K58 at 8.

IV. RECOMMENDED CONCLUSIONS OF LAW

A. OVERVIEW OF THE CHARGES AGAINST RESPONDENT

In Count I, relating to Respondent's administration of the *Seay* trust, Disciplinary Counsel charges that Respondent violated Rule 1.15(a) twice when he disbursed duplicate fees on two occasions from the trust to his firm, violated Rule 3.4(c) twice when making the second of each of the two duplicate disbursements, and violated Rules 3.3(a)(1), 8.4(c) and 8.4(d) by not making certain disclosures in his November 4, 2004 fee request.

In Count II, relating to Respondent's administration of the *Brown* trust, Disciplinary Counsel charges that Respondent violated Rule 1.15(a) twice when he transferred $1,447.17 from the trust to his firm on September 14, 2006 and when he did not return a filing fee after Judge Wolf's January 18, 2007 Memorandum Order (*see* FF 95) to do so, violated Rule 3.4(c) twice when he sought compensation for time spent on fee litigation in 2006 and when he did not return to the trust a filing fee that he had disbursed from the trust (Respondent has acknowledged these two violations), and violated Rules 3.3(a)(1), 8.4(c) and 8.4(d) when he made certain statements or omitted certain information in certain submissions in the trial and appellate stages of the long-running compensation methodology dispute.[14]

In Count III, relating to Respondent's administration of the *Baker* trust, Disciplinary

[14] In its evidentiary presentation, closing argument, and post-hearing briefing, Disciplinary Counsel did not pursue the D.C. Bar Rule XI, §19 charge listed in its Amended Specification of Charges. *See* n.2, *supra*, at 2.

Counsel charges that Respondent violated Rules 1.15(a) and 1.15(c) when he did not return certain funds previously disbursed from the trust to his firm until after the DCCA opinion in 2009; violated Rules 3.4(c) and 8.4(c) when he sought a percentage-based commission and when he omitted certain information from his June 24, 2006 Notice of Payment; and violated Rule 3.3(a)(1) by certain statements in his August 30, 2006 filing. Disciplinary Counsel also generally charges a violation of Rule 8.4(d) in Count III.

In Count IV, relating to Respondent's preparation of the Petitions for Compensation in connection with the *Brown* and *Baker* trusts, Disciplinary Counsel charges that Respondent violated Rules 3.3(a)(1), 8.4(c) and 8.4(d) when he included certain entries in the *Pre-Bills* attached to the Petitions and violated Rule 1.5(a) because the fees Respondent sought were unreasonable *per se*.

B. OVERVIEW OF THE APPLICABLE CASE LAW

In this section, in order to avoid undue repetition in our ensuing analysis of the various Rules at issue in each of the various sets of circumstances, we set out the general guidance that the Court of Appeals has provided with respect to five Rules that are each at issue in one or more of the charges in this proceeding.

Rule 1.5(a)

Rule 1.5(a) provides that:

> A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
>
> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) The fee customarily charged in the locality for similar legal services;

(4) The amount involved and the results obtained;
(5) The limitations imposed by the client or by the circumstances;
(6) The nature and length of the professional relationship with the client;
(7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) Whether the fee is fixed or contingent.

The Court of Appeals has held that "Rule 1.5(a) can be violated by the act of charging an unreasonable fee without regard to whether the fee is collected." *In re Cleaver-Bascombe*, 892 A.2d 396, 403 (D.C. 2006), ("*Cleaver-Bascombe I*"). "The prototypical circumstance of charging an unreasonable fee is undoubtedly one in which an attorney did the work that he or she claimed to have done, but charged the client too much for doing it." *Id*. And of course, "[i]t cannot be reasonable to demand payment for work that an attorney has not in fact done." *Id.*

Rule 1.15(a)

Misappropriation has been defined by the Court of Appeals as "'any unauthorized use of client's funds entrusted to [a lawyer], including not only stealing but also unauthorized temporary use for the lawyer's own purpose, whether or not he [or she] derives any personal gain or benefit therefrom.'" *In re Addams*, 579 A.2d 190, 194 n.9 (D.C. 1990) (en banc) (quoting *In re Harrison*, 461 A.2d 1034, 1036 (D.C. 1983)). "[M]isappropriation is essentially a per se offense, and 'proof of improper intent is not required.'" *In re Cloud*, 939 A.2d 653, 660 (D.C. 2007), *as amended* (Mar. 13, 2008) (citing *In re Anderson*, 778 A.2d 330, 335 (D.C. 2001); *see also In re Evans*, 578 A.2d 1141, 1142 (D.C. 1990) (per curiam) (misappropriation where personal representative had "objectively reasonable, albeit erroneous, belief that his actions were proper[.]").

"Rule 1.15(a) applies where 'the fiduciary relationship [bears] a reasonable relationship to [a] [r]espondent's conduct in his professional capacity as an attorney admitted to practice in the District of Columbia.'" *In re Green,* Board Docket No. 13-BD-020, at 9-10 (BPR Aug. 5, 2015)

(quoting *In re Confidential*, 664 A.2d 364, 367 (D.C. 1995) (construing Disciplinary Rule (DR) 9-103(A), the predecessor to Rule 1.15(a)), *recommendation adopted*, 136 A.3d 699 (D.C. 2016) (per curiam). The Court of Appeals has applied Rule 1.15(a)'s prohibition of misappropriation to attorneys serving in fiduciary roles where a traditional attorney-client relationship does not exist, concluding that the disciplinary rules "should apply whenever an attorney assumes a fiduciary relationship and violates his duty in a manner that would justify disciplinary action if the relationship had been that of attorney and client." *In re Burton*, 472 A.2d 831, 837 (D.C. 1984) (per curiam) (appended Board Report) "Although no conventional attorney-client relationship existed, respondent owed a fiduciary obligation to both the Superior Court which appointed him as trustee, and the beneficiaries of the trust account."); *see also In re Wilson*, 953 A.2d 1052 (D.C. 2008) (per curiam) (applying Rule 1.15(a) to guardian); *In re Soininen*, 889 A.2d 294 (D.C. 2005) (per curiam) (applying Rule 1.15(a) to guardian and conservator); *In re Utley*, 698 A.2d 446 (D.C. 1997) (applying Rule 1.15(a) to conservator); *In re DeWitt*, 683 A.2d 456 (D.C. 1996) (per curiam) (applying Rule 1.15(a) to personal representative); *In re Patkus*, 654 A.2d 1291 (D.C. 1995) (per curiam) (applying Rule 1.15(a) to guardian). Thus "an attorney-client relationship is not a precondition for a finding of misappropriation under Rule 1.15(a)." *Green*, Board Docket No. 13-BD-020, at 9 (citing *Burton*, 472 A.2d at 837 (lawyer serving as a court-appointed trustee for sale of realty).

Misappropriation requires proof of two distinct elements. First, Disciplinary Counsel must establish the unauthorized use of the entrusted funds. *Anderson*, 778 A.2d at 335; *In re Harrison*, 461 A.2d 1034, 1036 (D.C. 1983). An unauthorized use includes "a legitimate but premature claim . . . against funds which would ultimately be expected to be utilized for that purpose." *Fair*, 780 A.2d at 1112; *In re Abbey* 169 A.3d 865, 872 (D.C. 2017) (citing *Anderson*, 778 A.2d at 335)

(internal quotation marks and citation omitted). "Misappropriation happens when the balance in [the attorney's] trust account falls below the amount due [to] the client." *Abbey*, 169 A.3d at 872 (citing *In re Ahaghotu*, 75 A.3d 251, 256 (D.C. 2013) (internal quotation marks and citation omitted)). The performance of compensable legal services does not excuse taking a fee from funds that are not properly available for that purpose. *See, e.g.*, *In re Bach*, 966 A.2d 350, 350-52 (D.C. 2009) (unauthorized use element satisfied where the respondent took estate funds to pay his fee without prior court approval, even though the probate court later approved the amounts); *In re Berryman*, 764 A.2d 760, 761-62, 773-74 (D.C. 2000) (unauthorized use element satisfied even though the probate court ruled that the respondent had earned the fee she had taken without prior court approval).

Second, Disciplinary Counsel must establish whether the misappropriation was intentional, reckless, or negligent. *Anderson*, 778 A.2d at 336, 339. Intentional misappropriation most obviously occurs where an attorney takes entrusted 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, the Hearing Committee must ascertain whether the act "reveal[s] an unacceptable disregard for the safety and welfare of entrusted funds . . . ." *Id.* at 338. Reckless misappropriation has been found in probate cases where a trustee deliberately withdraws fees without the required prior court approval. *See, e.g.*, *In re Hewett*, 11 A.3d 279, 286 (D.C. 2011) (respondent "knew withdrawal of the [attorney] fees prior to court approval was improper"). In *In re Pleshaw*, 2 A.3d 169 (D.C. 2010), the D.C. Court of Appeals found reckless misappropriation of conservator funds where the respondent twice paid himself commissions without the required prior judicial approval. In *Bach*, 966 A.2d at 350,

the Court of Appeals found reckless misappropriation where respondent, while serving as conservator for the estate of a 92-year-old woman, wrote himself a check for his services even though he was aware it required advance court approval. *See also In re Soininen*, 889 A.2d at 295-96 (reckless misappropriation where guardian and conservator paid herself legal fees without knowledge or approval of the court but *Kersey* mitigation).

In *Utley*, the Board also recognized the fiduciary's obligation to return unauthorized fees: "[W]hen a [conservator] pays herself a commission prior to court approval, she risks the possibility that the commission, or at least a portion of it, will not be approved. Should that occur, she would have to repay at least a portion of the commission to the estate." Bar Docket No. 395-92, at 13 (BPR July 22, 1996). The Court of Appeals saw "no reason to depart from [the Board's] analysis" and adopted it. *Utley*, 698 A.2d at 449. After notice of the excess fees, a long delay in returning excess attorney fees to a trust or estate is also "tantamount to recklessness." *See, e.g.*, *Utley*, 698 A.2d at 450 ("unreasonabl[e] long delay" and refusal to repay a duplicated fee when notified by the auditor constitutes reckless misappropriation); *Cloud*, 939 A.2d at 661-63 (reckless misappropriation where the respondent "refused to disgorge [excess fees he had paid himself] with anything like reasonable promptness after he learned he was not entitled to keep them").

Negligent misappropriation occurs where "the unauthorized use was inadvertent or the result of simple negligence." *Anderson*, 778 A.2d at 339 (citations omitted). Where Disciplinary Counsel establishes the first element of misappropriation (unauthorized use), but fails to establish that the misappropriation was intentional or reckless, "'then [Disciplinary] Counsel proved no more than simple negligence.'" *Anderson*, 778 A.2d at 338 (quoting *In re Ray*, 675 A.2d 1381, 1388 (D.C. 1996)).

Rule 1.15(c)/(d)

In 2006 Rule 1.15(c) provided, and beginning on February 1, 2007, Rule 1.15(d) provided, *in pari materi*:

> When in the course of representation a lawyer is in possession of property in which interests are claimed by the lawyer and another person . . . the property shall be kept separate by the lawyer until there is an accounting and severance of interests in the property. . . . Any funds in dispute shall be deposited in a separate account meeting the requirements of paragraph (a) and (b).[15]

Unlike clients, third parties enjoy the protection of Rule 1.15(c)/(d) only when they have a "just claim" to property in the lawyer's possession.[16] That is, applicable law outside the ethics rules must impose on the lawyer a duty to distribute the property to the third party or to withhold distribution. *See* Rule 1.15, Cmt. [8]; *In re Bailey*, 883 A.2d 106, 116-17 (D.C. 2005) (citing D.C. Legal Ethics Opinion No. 293 at 164) (internal citation omitted); *In re Lee*, 95 A.3d 66, 74-76 (D.C. 2014) (applying the "just claim" analysis in *Bailey* to a Rule 1.15(c)/(d) charge). A "just claim" must relate to the particular property in the lawyer's possession; a lawyer need not protect the interests of the client's unsecured creditors. *Bailey*, 883 A.2d at 116-17; D.C. Ethics Op. 293.

Essentially, a just claim must be legally enforceable against the lawyer by operation of law, court order or agreement. The most common examples include (1) an attachment or garnishment arising from a money judgment against the client, (2) a statutory lien, (3) a court order covering the specific funds held by the lawyer, or (4) a contractual agreement between the client and a third party

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[15] Hereinafter, we refer to this Rule as Rule 1.15(c)/(d) because the situations discussed in subsections IV.K and IV.N arose prior to February 1, 2007 and carried over after that date.

[16] A lawyer must respect a client's instruction or claim to property held by the lawyer, even if the claim is completely groundless. *In re Haar*, 667 A.2d 1350, 1353 (D.C. 1995) ("*Haar I*").

regarding the disposition of the funds, which the lawyer has voluntarily assumed or ratified. *Bailey*, 883 A.2d at 117 (quotations and citation omitted). The "just claim" concept thus limits the class of third parties to whom a lawyer is ethically responsible.

Rule 3.4(c)

Rule 3.4(c) provides that a lawyer shall not "[k]nowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists . . . ." The "knowledge" element requires proof of "actual knowledge of the fact in question," which "may be inferred from circumstances". *See* Rule 1.0(f). It is a violation of Rule 3.4(c) to disobey any direction from the court, whether made orally or in writing. *In re Samad*, Bar Docket Nos. 120-04, *et al*., at 10-12 (BPR June 24, 2011) (attorney who failed to appear at 11 AM as orally instructed by the court violated Rule 3.4(c)), *recommendation adopted*, 51 A.3d 486, 489-90 (D.C. 2012) (per curiam); *In re Wemhoff*, Board Docket No. 14-BD-056 (BPR Nov. 20, 2015), appended HC Rpt. at 13 (Sep. 15, 2015) (attorney who failed to appear at status hearing as directed in written order violated Rule 3.4(c)), *recommendation adopted*, 142 A.3d 573, 574 (D.C. 2016) (per curiam).

Rule 3.3(a)(1)

Rule 3.3(a)(1) prohibits a lawyer from knowingly making a false statement of fact to a tribunal. Omission of information can be "the equivalent of an affirmative misrepresentation." Rule 3.3, Cmt. 2; s*ee also Samad*, Bar Docket No. 120-04 at 9 n.7 (agreeing with Hearing Committee that technically true but evasive statements can violate Rule 3.3(a)), *recommendation adopted*, 51 A.3d at 490. The obligation under Rule 3.3 to speak truthfully to a tribunal is one of a lawyer's "fundamental obligations." *In re Ukwu*, 926 A.2d 1106, 1140 (D.C. 2007) (appended Board Report). As the Board noted in *Ukwu*, the Hearing Committee must determine (1) whether Respondent's statements or evidence were false, and (2) whether Respondent knew that they were

false. *Id*. at 1140-41.

Rule 8.4(c)

Rule 8.4(c) prohibits a lawyer from engaging "in conduct involving dishonesty, fraud, deceit, or misrepresentation." "Rule 8.4(c) is not to be accorded a hyper-technical or unduly restrictive construction." *Ukwu*, 926 A.2d at 1113; *see also In re Hager*, 812 A.2d 904, 916 (D.C. 2002); *Cleaver-Bascombe I*, 892 A.2d at 404. Each of the terms encompassed within Rule 8.4(c) "should be understood as separate categories, denoting differences in meaning or degree." *In re Shorter*, 570 A.2d 760, 767 (D.C. 1990) (per curiam). Each category requires proof of different elements. *See In re Romansky*, 825 A.2d 311, 315 (D.C. 2003). Disciplinary Counsel alleges that Respondent violated Rule 8.4(c) by failing to disclose in his *Seay* fee petition either the existence of a prior court order by another judge in the same matter or the complete trust provision relating to compensation, ODC Br. at 64-65; by failing to inform the court that he had maintained time records for services he performed for the *Brown* trust and not correct[ing] the court when it concluded that Respondent could not produce a detailed time statement, ODC Br. at 68-70; by failing to inform Judge Wertheim that Judge Burgess had rejected his arguments concerning the percentage fee and for withholding the detailed statement of services in the *Baker* trust, ODC Br. at 72-74; and by recklessly maintaining inadequate time records in the *Brown* and *Baker* matters, ODC Br. at 77-78. Accordingly, the relevant categories for the 8.4(c) charges are dishonesty and deceit.

The term "dishonesty" includes not only fraudulent, deceitful, or misrepresentative conduct, but also "conduct evincing 'a lack of honesty, probity or integrity in principle; [a] lack of fairness and straightforwardness.'" *Shorter*, 570 A.2d at 767-768 (quoting *Tucker v. Lower*, 434 P.2d 320, 324 (Kan. 1967)). "Honesty is basic to the practice of the law. . . . [Courts] must be able to rely

unquestioningly on the truthfulness of [] counsel." *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (en banc) (internal citation omitted). Dishonesty under Rule 8.4(c) extends further than conduct that might '"legally be characterized as an act of fraud, deceit or misrepresentation . . . ."' *In re Slattery*, 767 A.2d 203, 213 (D.C. 2001) (quoting *Shorter*, 570 A.2d at 768). Dishonesty includes suppression of the truth, not just affirmative misrepresentations. *See Samad*, 51 A.3d at 499; *see also In re Carlson*, 745 A.2d 257, 258 (D.C. 2000) (per curiam) (dishonesty may consist of failure to provide information where there is a duty to do so).

Deceit is the "suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact." *Shorter*, 570 A.2d at 767 n.12 (citation omitted). To establish deceit, the respondent must have knowledge of the falsity, but it is not necessary that the respondent have intent to deceive or defraud. *In re Schneider*, 553 A.2d 206, 209 (D.C. 1989) (finding deceit where attorney submitted false travel expense forms but did not intend to deceive the client or law firm); see also *Shorter*, 570 A.2d at 767 n.12.

Rule 8.4(c) does not require that a respondent act intentionally; when a respondent acts in reckless disregard of the truth, he has violated Rule 8.4(c). *Ukwu*, 926 A.2d at 1113-14; *see also Cleaver-Bascombe I*, 892 A.2d at 404; *In re Rosen,* 570 A.2d 728, 729-30 (D.C. 1989) (per curiam). "[A]n attorney who recklessly maintains inadequate time records, and consciously disregards the risk that she may overcharge a client . . . engages in dishonesty within the meaning of Rule 8.4(c)." *Cleaver-Bascombe I*, 892 A.2d at 404.

Rule 8.4(d)

Like its predecessor, DR 1-102(A)(5), Rule 8.4(d) is '"a general rule"' that is '"purposely broad to encompass derelictions of attorney conduct considered reprehensible to the practice of

law."' *In re Hopkins*, 677 A.2d 55, 59 (D.C. 1996) (quoting *In re Alexander*, 496 A.2d 244, 255 (D.C. 1985) ("*Alexander II*"). Comment [2] to 8.4 provides: "Paragraph (d) is to be interpreted flexibly and includes any improper behavior of an analogous nature to these examples." Rule 8.4(d) is violated if the attorney's conduct causes the unnecessary expenditure of time and resources in a judicial proceeding. *See In re Cole*, 967 A.2d 1264, 1266-67 (D.C. 2009).

To violate Rule 8.4(d), the lawyer's conduct must (1) be "improper"; (2) "bear directly upon the judicial process (i.e., the 'administration of justice') with respect to an identifiable case or tribunal"; and (3) "taint the judicial process in more than a *de minimis* way; that is, at least potentially impact upon the process to a serious and adverse degree." *Hopkins*, 677 A.2d at 60-61; *In re Uchendu*, 812 A.2d 933, 936 (D.C. 2002). A Rule 8.4(d) violation does not require an actual interference with judicial decision-making, but rather requires only that the conduct "taint" the process or "potentially impact upon the process to a serious and adverse degree." *Hopkins*, 677 A.2d at 61 (emphasis added).

Dishonesty to the court necessarily amounts to a serious interference with the administration of justice in violation of Rule 8.4(d). *See Cleaver Bascome I*, 892 A.2d at 404-405 (submitting false vouchers to the court violated 8.4(d)); *In re Anya*, Bar Docket Nos. 200-02 et al. (BPR June 1, 2004), appended HC Rpt. at 31 (March 8, 2004) (false statements to the court violated 8.4(d)), *recommendation adopted*, 871 A.2d 1181 (D.C. 2005) (per curiam).

We turn now to applying the foregoing general authority, along with additional specifically pertinent case law, to our findings of fact.

COUNT I OF THE SPECIFICATION OF CHARGES

C. DISCIPLINARY COUNSEL HAS NOT PROVED BY CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT, IN THE COURSE OF ADMINISTERING THE *SEAY* TRUST, RECKLESSLY MISAPPROPRIATED TRUST FUNDS AND THEREBY VIOLATED RULE 1.15(a) WHEN DUPLICATE FEE PAYMENTS WERE DISBURSED FROM THE TRUST TO HIS FIRM ON TWO OCCASIONS – JANUARY 2, 2002 IN THE AMOUNT OF APPROXIMATELY $7,100 AND SEPTEMBER 18, 2002 IN THE AMOUNT OF APPROXIMATELY $6,800[17]

In its opening brief, Disciplinary Counsel contends that the original payments on February 21, 2001, and February 5, 2002 (FF 33, 38) and the duplicate fee payments on January 2, 2002, and September 18, 2002 (FF 35, 40), in the *Seay* trust "were not authorized by the court and therefore constituted an unauthorized use of entrusted funds." ODC Br. at 58; *see also id.* at 60-61. Disciplinary Counsel cites ten decisions of the Court of Appeals setting forth broad, general principles of the District of Columbia's misappropriation jurisprudence and establishing the undisputed applicability of Rule 1.15 to attorneys serving in fiduciary roles but provides no particularized analysis of how those cases might inform resolution of the specific contested factual and legal issues in this matter.

We address in this subsection only the two *duplicate* payments. Resolution of the misappropriation charges arising out of the two *original* disbursements turns on the analysis set forth in subsection D.

Respondent does not dispute the basic legal principles summarized by Disciplinary Counsel. Instead, Respondent contends that the disbursements at issue here arose out of mistakes made by administrative staff in Respondent's office. R. Br. at 145-53.

In its longer discussion in its Reply, Disciplinary Counsel cites two additional cases and

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[17] One member of the Hearing Committee recommends a finding of negligent misappropriation. *See* Separate Statement of Ms. Mims.

contends that even mistaken disbursements, purportedly like those at issue here, constitute misappropriations if they were unauthorized. ODC Reply Br. at 5-9 (citing *In re Gregory*, 790 A.2d 573, 579 (D.C. 2002) (per curiam) and *In re Thompson*, 579 A.2d 218 (D.C. 1990)). Disciplinary Counsel also relies on its view of "the practices of the probate division." *Id*. at 5-8.

A majority of the Hearing Committee concludes that Disciplinary Counsel's position is flawed in four respects and that Respondent has the better of this particular Rule 1.15(a) dispute.

We think that the first flaw in Disciplinary Counsel's position is its equation of the circumstances at issue in *Fair*, *Pye*, *Utley* and other cases with the mistakes that we have found to have been made by Respondent's staff. FF 35, 44. We have reached the same conclusions as Respondent with respect to the determinative facts in the cases relied upon by Disciplinary Counsel and their important differences from and consequent inapplicability to the factual circumstances here. *Cf.* R. Br. at 147-50 and ODC Br. at 58-59. We reach the same conclusion with respect to the recent decision in *In re Abbey*, *supra*, another case involving, in our view, materially and dispositively different facts from those here. The respondent in *Abbey* withheld portions of settlement funds owing to medical providers, despite numerous requests for payment and even after one medical provider's filing of a complaint with Disciplinary Counsel. *Abbey* therefore obviously did not have "a good-faith, genuine, or sincere, but erroneous belief that entrusted funds were properly safeguarded and paid" . . . "while making . . . unexplained withdrawals from the entrusted funds and allowing the balance of entrusted funds to fall below the level needed to pay the medical providers." 169 A.3d at 873-74. *Abbey* thus provides scant guidance to the resolution of the issue here. We likewise think that *In re Thompson* is inapposite because, unlike Respondent here, Thompson "dribbled the withdrawn money back into his ward's bank account" over the course of nearly a year and a half, did not properly account for it, and provided a *post hoc* rationalization that,

in the view of the hearing committee and Board "was implausible and unworthy of belief" and in the view of the Court of Appeals was "implausible on its face." 579 A.2d at 219, 221. Here, we have credited Respondent's entirely reasonable explanations. FF 35-36, 44. Thus Disciplinary Counsel has adduced, and we have found, no cases that provide us with useful direct guidance in the circumstances present in this matter.[18]

Second, the mistakes in every one of the cases relied upon by Disciplinary Counsel were personally made by the respondents in those proceedings. In contrast, we have credited Respondent's testimony that the errors were made not by Respondent but by his employees, and we have found that the pertinent circumstances further support his testimony. FF 32-35, 38-44. Indeed, in the view of a majority of the Hearing Committee (and apparently also in Ms. Mims' view, since she seems to agree with the majority that this is ". . . a case where the mistake was the careless mistake of another"), Respondent appears to have been essentially an amanuensis and nothing more in each of the two instances at issue. There may be cases with very broad wording that could be construed to establish the "mistake equals misappropriation" rule that Disciplinary Counsel urges and the conclusion that, in Ms. Mims' view, "[u]nfortunately, under the law, an innocent, good-faith mistake of fact or law is not a defense to misappropriation." *See* Separate Statement of Ms. Mims at 193. In the view of the majority, however, the cases cited by Disciplinary Counsel and Ms. Mims do not say that; if they did say or were construed to say that, such a postulate would be non-binding *dictum*, since, as demonstrated in the proceeding discussion and in Respondent's brief and as conceded by Ms. Mims, none of those cases involved solely an innocent

[18] Ms. Mims acknowledges the apparent absence of "any case law that falls squarely within the facts of Respondent's case. . . ." *See* Separate Statement of Ms. Mims at 195.

mistake. If the Disciplinary Counsel-Mims interpretation of the Court of Appeals' instruction were to prevail (*i.e.* if, as Ms. Mims reads the cases, ". . . the law require[s] a finding of misappropriation even in a case where the mistake was the careless mistake of another"), then every partner in every law firm – a solo practice or a firm with a thousand partners — will have to be found liable for misappropriation every time a careless mistake – an erroneous transfer from an IOLTA or other trust account or whatever – occurs. (We incorporate here our discussion *infra* at 110-111 of *In re Gregory*, 790 A.2d 573 (D.C. 2002) (per curiam).

Third, we have not found that Respondent had inadequate bookkeeping systems and related procedures in place at any point in time. *See* FF 2-3. Except for a glancing jab in its Reply without any supporting authority, Disciplinary Counsel has not contended to the contrary (despite spending substantial time on this question at the hearing). ODC Reply Br. at 9. More fundamentally, Disciplinary Counsel did not charge that Respondent violated Rule 5.1(a) or 5.3(a), (b) or (c) by some failure to make "reasonable efforts" in the supervision of his staff. Thus cases such as *In re Cater*, 887 A.2d 1 (D.C. 2005) and *In re Robinson*, 74 A.3d 688 (D.C. 2013) are inapposite here, where Respondent has not been charged with inadequately supervising his administrative or professional staff.[19] Moreover, in *Robinson* the respondent admitted that, following "a serious

[19] A majority of the Hearing Committee believes that Disciplinary Counsel's cursory reference to *In re Haar*, 698 A.2d 412, 422 (D.C. 1997) ("*Haar II*"), as standing for the proposition that "'mistake' amounts to misappropriation" is unpersuasive. ODC Reply Br. at 6. *Haar* plainly is inapposite to this matter in general, and the "mistake" discussed by the Court of Appeals was Haar's mistake about and misunderstanding of "a known legal doctrine . . . (. . . accord and satisfaction)." 698 A.2d at 422. Disciplinary Counsel's reliance on *Fair*, 780 A.2d at 1113-14 for the same proposition is equally unavailing. Unlike *Fair*, who "'did not keep records and tried to keep the numbers in her head,'" 780 A.2d at 1113, Respondent here had adequate records that in fact enabled him to discover each of the two mistaken disbursements. FF 36, 41. A majority of the Hearing Committee has also reviewed and considered numerous other cases not addressed by Disciplinary

wake-up signal" from his bank regarding the problem with the trust account that "mandated his continuing personal attention," he "never followed up with the matter and essentially washed his hands of the matter." 74 A.3d at 695. Here, in contrast, Respondent, immediately upon learning of the staff person's mistake, inquired fully into the situation himself, determined what had happened, and promptly returned the funds to the trust. FF 36, 41-43.

Fourth, in its Reply Disciplinary Counsel points out that ". . . the elements of misappropriation, as applied to a trustee, are 1) unauthorized 2) use 3) of trust funds." ODC Reply Br. at 5. Disciplinary Counsel has adduced no evidence that Respondent made or intended to make any use, financial or otherwise, of the erroneously disbursed duplicate funds – since he did not know that the disbursements duplicated prior disbursements — unlike the respondents in every case discussed by the parties including, for example, the initially mistaken disbursement in *Utley* that "arose out of inadvertence" – *i.e.* "an honest mistake resulting from respondent's inadequate records" but "ripened into misappropriation because of the unreasonably long delay in repaying . . ." [factors neither alleged nor present here]. *Utley*, 698 A.2d at 448-49.[20] There is no evidence that Respondent had any knowledge or any reason to know that the two disbursements at issue duplicated earlier disbursements until they were discovered, at which time, as previously pointed

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Counsel involving mistakes of law and/or mistakes of fact, such as *In re Kline*, 11 A.3d 261 (D.C. 2011); *In re Bailey*, 883 A.2d 106 (D.C. 2005); *In re Travers*, 764 A.2d 242 (D.C. 2002); and *In re Choroszej*, 624 A.2d 434 (D.C. 1992) (per curiam); one or more of the three determinative and distinguishing factors that we have discussed above is absent from each of those cases.

[20] We visit again the "use . . . for the lawyer's own purpose" element in Sections IV. K and N, *infra*.

out, they were each promptly restored to the SNT.[21] FF 36, 41-43.[22]

Accordingly, on the basis of the foregoing factual and legal analysis and also the case law summarized *supra* at 81-84, a majority of the Hearing Committee recommends that the Board find as a matter of law that Disciplinary Counsel has not proved by clear and convincing evidence that Respondent violated Rule 1.15(a) in either instance.[23] The dissenting member's views are set forth in her Separate Statement. *See* Separate Statement of Ms. Mims.

D. DISCIPLINARY COUNSEL HAS NOT PROVED BY CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT, IN THE COURSE OF ADMINISTERING THE *SEAY* TRUST, MISAPPROPRIATED TRUST FUNDS IN VIOLATION OF RULE 1.15(a) OR KNOWINGLY DISOBEYED THE OCTOBER 13, 1999 ORDER AND THEREBY VIOLATED RULE 3.4(c) WHEN HE DISBURSED APPROXIMATELY $7,100 FROM THE TRUST TO HIS FIRM ON FEBRUARY 21, 2001 AND APPROXIMATELY $6,800 ON FEBRUARY 5, 2002 WITHOUT THE PRIOR APPROVAL OF THE COURT IN EITHER INSTANCE

This charge involves each of the original disbursements made prior to the duplicate disbursements addressed in the preceding subsection, Section IV.C. Disciplinary Counsel argues that the October 13, 1999 Order, FF 27, clearly requires court approval of trustee fees prior to their disbursement because such was the general practice in the Probate Division. Disciplinary Counsel

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[21] The only way that we can think of that these staff errors could have been detected before they occurred would have been a bookkeeping and administrative requirement in the firm that issuance of every one of the thousands of checks generated by the trust firm be preceded by a check-by-check review of every one of the previous checks issued from a given trust over the preceding years or decades. The absence of such an unheard of and impossibly burdensome system cannot possibly be considered reckless or negligent.

[22] We reject Disciplinary Counsel's "practices in the probate division" assertion for the reasons set forth in n.8, *supra* at 13-14, and on the basis of FFs 5-13, *supra* at 11-13.

[23] Because a majority of the Hearing Committee finds that no misappropriation occurred in either of the two instances at issue here, the majority does not consider whether the reckless misappropriation charged by Disciplinary Counsel might have instead constituted negligent misappropriation.

further argues that Respondent must have known that the October 13, 1999 Order required prior approval because on two previous occasions he disbursed trustee fees from the trust to his firm only after the court had approved those fees. FF 20, 30, 31. Disciplinary Counsel argues finally that Respondent's explanation regarding the circumstances of the second duplicate fee disbursement is not credible. ODC Br. at 59-61; ODC Reply Br. at 4-5.

Respondent argues that the October 13, 1999 Order did not require approval of his trustee fee prior to its disbursement and points to three circumstances as supporting his position – that in prior years the question of a prior approval requirement had been raised by the Probate Division Clerk but not resolved, that subsequently at least one other trust at issue here was established without a prior approval requirement for trustee compensation, and that most other SNT trusts did not have a prior approval requirement. Respondent also points out, citing Rule 1.0(f), that the "knowingly" element of Rule 3.4(c) requires "actual knowledge of the fact in question." R. Br. at 141-45. (We are aware, of course, that "[a] person's knowledge may be inferred from circumstances" Rule 1.0(f).)

In its Reply, Disciplinary Counsel relies upon its expert witness's testimony about compensation approval requirements in the Probate Division in the relevant period. Disciplinary Counsel also argues briefly that Respondent had to know what the October 13, 1999 Order required. ODC Reply Br. at 4-5.

Disciplinary Counsel does not contend at any point that the October 13, 1999 Order is unambiguous. ODC Br. at 59-61; ODC Reply Br. at 4-5. Making such an argument would be difficult since even Disciplinary Counsel's expert witness, former Probation Division Clerk Constance Starks, Esq., testified that the wording of the Order is ambiguous:

A. It can be read either way, but that is not how I would have read it.

Q. But you would agree that it can be reasonably read in another way?

A. Absolutely. . . . [I]n relying on just the wording of this order, one could read this to require the filing of a petition, then the payment of the fee and the approval coming afterwards, just based on the wording.

Tr. 441-43. Ms. Starks then reiterated that she personally would interpret the Order to require approval prior to payment based on her recollections and understanding of general Probate Division practices at the time in question. Tr. 442-46. We have not found Ms. Starks' personal interpretation to be persuasive by clear and convincing evidence. *See* n.8, *supra* at 13. Respondent's expert witness, Marsha Swiss, Esq., testified that she understood the Order to require only submission, not approval, of a fee petition prior to disbursement of the requested fees:

> This Order says that a request for compensation with a detailed statement of services must be submitted for the court's consideration prior to the payment of any fees to the trustee
>
> So, before you take a fee, you have to submit the request for compensation. It doesn't mean you can't take a fee after you submit the request for compensation.

Tr. 1104. Ms. Swiss maintained her position despite skeptical cross-examination by all three of the Hearing Committee members. Tr. 1105-10. Ms. Swiss also maintained that "[t]here was no common practice that I am aware of at this time." Tr. 1109. And, as discussed in n.8, *supra*, based on this divergence in the expert witnesses' testimony on this and numerous other issues, as well as on FF's 6-12, we have found by clear and convincing evidence that, contrary to Ms. Starks' recollection, in the period at issue in this proceeding, there were no agreed-upon, "consistent and reliable understandings among judges, administrators and practitioners in the Probate Division about specific requirements, general standards, accepted or even acceptable practices — let alone formal, express rules — regarding SNT trustee compensation requirements and procedures." FF 13. In light of all of the foregoing, a majority of the Hearing Committee concludes that the meaning of the

October 13, 1999 Order as to when trustee compensation may be disbursed has not been established by clear and convincing evidence.

We also take very seriously our responsibility to find an ethical violation only if it has been established, not by a preponderance of the evidence, but by clear and convincing evidence. In addition to our conclusion, as just discussed, that the October 13, 1999 Order has not been shown by clear and convincing evidence to require judicial approval prior to payment of the requested fee, we also conclude that Disciplinary Counsel has not proved by clear and convincing evidence that Respondent knew that he was violating the Order as Disciplinary Counsel interprets it. As reflected by the absence of any such finding of fact as part of FF 28 and by our crediting in FF 28, after intensive analysis and deliberation, Respondent's testimony as to his understanding of the Order, the majority cannot find by clear and convincing evidence that Respondent's testimony regarding his understanding of the Order was not credible, regardless of what we might have concluded under a preponderance of the evidence standard. Consequently, since an objective, "reasonably should have known" standard is not applicable here as a possible basis for finding a knowing violation of a court order, the majority of the Hearing Committee concludes that Disciplinary Counsel has not proved by clear and convincing evidence that the Respondent knew that he was disobeying the October 13, 1999 Order when he made each of the two disbursements at issue here.

Accordingly, on the basis of the foregoing factual and legal analysis and also the case law summarized *supra* at 81-84, 86, the Hearing Committee recommends that the Board find as a matter of law that Disciplinary Counsel has not proved by clear and convincing evidence that Respondent violated Rule 3.4(c) in this instance in the course of administering the *Seay* trust. The Hearing Committee also concludes that Disciplinary Counsel has not proved by clear and convincing

evidence that Respondent violated Rule 1.15(a) by disbursing trust funds to his account in knowing violation of the October 13, 1999 Order.

E. DISCIPLINARY COUNSEL HAS NOT PROVED BY CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT, IN THE COURSE OF ADMINISTERING THE *SEAY* TRUST, VIOLATED RULES 3.3(a)(1), 8.4(c) AND 8.4(d) WHEN HE (i) DID NOT DISCLOSE IN THE NOVEMBER 19, 2004 FEE PETITION THE PROVISION IN THE OCTOBER 13, 1999 ORDER THAT DISCIPLINARY COUNSEL CONTENDS REQUIRED APPROVAL OF THE REQUESTED FEES PRIOR TO THEIR PAYMENT AND INSTEAD STATED ONLY THAT HE HAD BEEN "ASKED [BY THE AUDITOR] TO SUBMIT A PETITION FOR APPROVAL OF FEES" AND (ii) DID NOT DISCLOSE IN HIS NOVEMBER 19, 2004 FEE PETITION THE FULL TEXT (*i.e.* THE SECOND SENTENCE) OF THE TRUST INSTRUMENT'S COMPENSATION PROVISION[24]

(i) Disciplinary Counsel argues that Respondent's omission of any reference to Judge Christian's October 13, 1999 Order, FF 27, was dishonest because he had been ordered in that Order to submit fee petitions, not just when asked by the auditor to do so. Thus, Disciplinary Counsel concludes, "it was incumbent upon Respondent [in the November 19, 2004 fee petition, FF 46] to tell Judge Wolf that he was asking to *change* the October 13, 1999 Order's requirements for approving and paying trustee compensation." ODC Br. at 64-65 (emphasis in original). Disciplinary Counsel theorizes in its Reply that Respondent had a motive to refer only to the auditor's request because omitting any reference to the Order would improve the chances of success for his request in the fee petition that trustee compensation be changed to a percentage basis. ODC Reply Br. at 9.

Respondent argues that the Petition for Compensation sought a change in "how" trustee compensation should be determined, while the Order dealt with the issue of "when" it should be disbursed and therefore was not relevant to the "how" issue raised in the Petition. Respondent adds that the October 19, 1999 Order did not require prior approval of fee disbursements and thus there

[24] One member of the Hearing Committee recommends a finding that Respondent violated Rule 8.4(c) in each of the two instances at issue here. *See* Separate Statement of Mr. Kassoff.

was no prior approval requirement to disclose. R. Br. at 155.

Respondent informed the court in paragraph 4 of the fee Petition that trustee compensation had theretofore been "**allowed** [to] the trustee as reported on an hourly basis . . ." FF 48 citing DX B63 at 2, ¶4 (emphasis added). There is no evidence that any entity other than the court can allow (*i.e.*, approve) trustee compensation. In the very next paragraph 5 of the Petition, Respondent commenced his argument that "an hourly billing system and the annual filing of a petition for fees are neither efficient nor appropriate for this trust case." DX B63 at 2, ¶5. Respondent then adduced at some length his arguments as to why the compensation process in the *Seay* trust should be changed to a percentage commission basis. *Id*. at 2-3.

Thus, any judge reviewing the Petition must be presumed to have understood that trustee compensation in the *Seay* trust was subject to court review of the time records submitted by the trustee. Indeed, Judge Wolf stated in his ensuing Memorandum Order that Respondent was ". . . . **asking** for a commission." FF 49 (citing DX 65 at 2) (emphasis added). A majority of the Hearing Committee cannot find on this record that the court was so ill informed, let alone intentionally misled, as not to know, as it was reviewing the November 2004 petition, that Respondent was required in the *Seay* trust to submit trustee compensation requests in the form of time records and that he was requesting a change in that regimen.

Further, because of the obviousness of Respondent's quest for a change and the absence of any question about Judge Wolf's understanding, a majority of the Hearing Committee is not convinced by Disciplinary Counsel's motive contention that Respondent was trying to imply that the current compensation basis was the result solely of an auditor's request and to conceal that it was a legally binding requirement. The majority also agrees with Respondent's "how" (*i.e.*, time or percentage commission) vs. "when" (*i.e.* submission or approval prior to disbursement) analysis

and the corollary point that the October 13, 1999 Order is ambiguous as to the timing requirement, as we have concluded in subsection D, *supra*. However, we do not consider this issue central to Disciplinary Counsel's broader charge that omission of the Order, regardless of its meaning, dishonestly concealed the *Seay* trust's current mandatory trustee compensation procedure.

(ii) Disciplinary Counsel argues that omission of the second sentence of the trust instrument's compensation provision caused Judge Wolf to rely on the provision in the original draft that included the word "legal" before "work." Disciplinary Counsel adds that a reckless disregard of the truth, even without proof of intent, can violate Rule 8.4(c). ODC Br. at 63-65; ODC Reply Br. at 9-10. Respondent argues that the second sentence of the compensation provision dealt only with compensation for non-trustee work, an interpretation that Respondent says is re-enforced by the word "also" at the beginning of the second sentence, and that therefore it too was irrelevant to a petition to change the method of trustee compensation. R. Br. at 156-57 (emphasis in original).

A majority of the Committee agrees with Respondent's reading of the second sentence as applying only to non-trustee work, not trustee services at issue in the Petition, an interpretation reinforced by the word "also" near the beginning of the second sentence; there is no basis in the record for a finding to the contrary by clear and convincing evidence. Also, the majority has credited Respondent's testimony about his corresponding understanding of the second sentence. FF 47. Mr, Kassoff, while not necessarily crediting Respondent's testimony regarding the second sentence, is also unable to find by clear and convincing evidence that failure to include the second sentence has established that Respondent "knowingly" made a false statement to a tribunal in violation of Rule 3.3(a)(1), but he finds a violation of Rule 8.4(c).

Accordingly, on the basis of the foregoing factual and legal analysis and also the case law summarized *supra* at 86-89, a majority of the Hearing Committee recommends that the Board find

as a matter of law that Disciplinary Counsel has not proved by clear and convincing evidence that Respondent violated Rules 8.4(c) in these two instances in the course of administering the *Seay* trust, and we unanimously agree that a violation of Rule 3.3(a)(1) and Rule 8.4(d) have not been proven. The dissenting member's reasons for finding a Rule 8.4(c) violation in Respondent's handling of the *Seay* Trust are set forth in his Separate Statement. *See* Separate Statement of Mr. Kassoff.

COUNT II OF THE SPECIFICATION OF CHARGES

F. DISCIPLINARY COUNSEL HAS NOT PROVED BY CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT, IN THE COURSE OF ADMINISTERING THE *BROWN* TRUST, VIOLATED RULES 3.3(a)(1), 8.4(c) AND 8.4(d) WHEN HE (i) STATED IN HIS FEBRUARY 23, 2006 RESPONSE THAT "IT HAS NOT BEEN NECESSARY TO KEEP DETAILED TIME RECORDS FOR THE TRUST," (ii) FAILED TO CORRECT JUDGE WOLF'S CONCLUSION IN THE JULY 20, 2006 MEMORANDUM ORDER THAT RESPONDENT COULD NOT PRODUCE A DETAILED STATEMENT, (iii) STATED IN THE JUNE 21, 2006 EXPLANATION THAT HE "HAD NOT KEPT TIME FOR SPECIFIC SERVICES AS TRUSTEE IN THIS CASE" AND (iv) DID NOT CORRECT JUDGE WOLF'S STATEMENT IN THE JULY 20, 2006 MEMORANDUM ORDER THAT HE "CANNOT PROVIDE AN HOURLY STATEMENT OF SERVICES, AS HE HAS NOT KEPT TIME FOR SPECIFIC SERVICES AS TRUSTEE IN THIS CASE"[25]

Disciplinary Counsel asserts first that Respondent violated Rules 3.3(a)(1), 8.4(c), and 8.4(d) when "he failed to inform the court that he maintained time records for services he performed for the *Brown* trust and failed to correct the court when it concluded that he could not produce a detailed time statement [items (i) and (ii) above]." ODC Br. at 68. Disciplinary Counsel then mentions items (iii) and (iv) above. *Id.* at 69. Although not specifically laid out in its brief, presumably Disciplinary Counsel asserts that each of the four instances referenced above violate

[25] One member of the Hearing Committee dissents from this recommendation. *See* Separate Statement of Mr. Kassoff.

all three Rules and we proceed on that basis.[26] As noted earlier, Rule 3.3(a)(1) is violated by knowingly making a false statement of fact [or law] to a tribunal or failing to correct a false statement of material fact or law previously made to the tribunal by the lawyer. Rule 8.4(c) and 8.4(d) are violated when a lawyer engages in conduct involving dishonesty, fraud, deceit, or misrepresentation or engages in conduct that seriously interferes with the administration of justice.

As with the instances discussed in subsection G, *infra*, regarding statements made in Respondent's Explanation of Services and his appellate brief, Disciplinary Counsel relies primarily on *Samad*, 51 A.3d at 498-99 & n.8 (the portion of the opinion addressing Samad's actions before Judges Bartnoff and Cushenberry in his representation of criminal defendant Hill). ODC Br. at 69. Disciplinary Counsel adduces *Shorter*, 570 A.2d at 768, for the first time with respect to the *Brown* matter in its Reply. ODC Reply Br. at 11. Respondent argues that *Samad* is inapposite. R. Br. at 162. Both parties otherwise propose reasons as to why or why not Respondent should be found to have acted dishonestly in the four instances set out above. ODC Br. at 68-70; R. Br. at 160-162; ODC Reply Br. at 11-12.

A majority of the Hearing Committee agrees with Respondent that *Samad* is inapposite. *Samad* turned on "substantial evidence" that Samad "intentionally failed to correct" Judge Bartnoff when she was affirmatively "'seeking to verify the nature of [Samad's] obligation [trial or status conference] to Judge Cushenberry'" and "could not have reasonably believed that Judge

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[26] A majority of the Hearing Committee shares respondent's concern that Disciplinary Counsel's precise contentions here are unclear. R. Br. at 160. Prior to closing arguments, the Hearing Committee expressly noted the lack of specificity in the Specification of Charges as to which Rules allegedly apply to which alleged facts and asked Disciplinary Counsel to be prepared to provide that particularization with respect to each trust, a request that the Assistant Disciplinary Counsel considered "helpful." Tr. 2507. Nevertheless, Disciplinary Counsel just broadly asserts the Rule violations by including numerous statements made by Respondent that related to his disagreement with Judge Wolf regarding compensation for trustee services on a percentage-of-assets basis versus hourly rates, and his recording of time related thereto. ODC Br. at 68-70. The Hearing Committee was thus left to guess as best as we could which specific statements are alleged to have been false and which Rules Disciplinary Counsel asserts were violated in each instance.

Cushenberry would have converted [the nature of the hearing before him from a trial] into a status hearing without advising him directly.'" 51 A.3d at 499. Neither of these material elements are present here. There is no evidence of any intentionality on Respondent's part; indeed, Disciplinary Counsel has not alleged or argued that Respondent was intending to mislead Judge Wolf, relying instead only on a conclusory assertion that Respondent "failed" to, apparently, meet some unspecified duty. ODC Br. at 70. There is also no evidence that Judge Wolf was seeking to verify anything or that Respondent could not reasonably not know of any material misunderstanding on Judge Wolf's part.

A majority of the Hearing Committee finds *Shorter* equally inapposite because Shorter engaged in a prolonged, intentional pattern of evasive statements to IRS agents over a period of five years or more, circumstantial evidence showed indisputably that he intended those statements to be misleading, and he expressly acknowledged that he had made those statements with the intention of misleading the investigating agents. 570 A.2d at 763-64, 768. There is no such evidence here.

Turning to the four specific instances of alleged violations, a majority of the Hearing Committee believes Respondent's statement regarding whether he was required to keep time records (*i.e.*, "it had not been necessary to keep detailed time records," FF 68) and Judge Wolf's conclusion that Respondent could not produce a detailed time record, FF 72, (items (i) and (ii) above) are not comparable in any way to the extreme circumstances in *Samad*. A majority of the Hearing Committee believes the same is true of Respondent's statement that he had not kept time for specific services as a trustee in the *Brown* trust, FF 71, and Judge Wolf's statement that Respondent could not provide an hourly statement of services because he had not kept time for specific services, FF 72 (items (iii) and (iv)) above. In the view of the majority, Disciplinary Counsel has thus adduced no direct or circumstantial evidence with respect to any of the four instances that might establish that they were, in fact, false or inaccurate, let alone that Respondent

was aware of any such inaccuracies, as Samad was.

Accordingly, on the basis of the foregoing factual and legal analysis and also the case law summarized *supra* at 86-89, a majority of the Hearing Committee recommends that the Board find as a matter of law that Disciplinary Counsel has not proved by clear and convincing evidence that Respondent violated Rules 3.3(a)(1), 8.4(c) or 8.4(d) in any of these four instances in the course of administering the *Seay* trust. The dissenting member sets forth his views on this charge in his Separate Statement. *See* Separate Statement of Mr. Kassoff.

G. DISCIPLINARY COUNSEL (i) HAS NOT PROVED BY CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT, IN THE COURSE OF ADMINISTERING THE *BROWN* TRUST, VIOLATED RULES 3.3(a)(1), 8.4(c) AND 8.4(d) WHEN HE STATED IN HIS NOVEMBER 2007 BRIEF IN THE APPEAL ARISING OUT OF THE 2006 DISPUTE THAT "[RESPONDENT] DID NOT SUBMIT A DETAILED ACCOUNTING OF TIME SPENT ON SPECIFIC TASKS BECAUSE HE DID NOT HAVE SUCH TIME RECORDS" AND (ii) HAS PROVED BY CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT VIOLATED THOSE RULES WHEN HE STATED IN THE SAME BRIEF THAT "HE DID NOT KEEP TIME RECORDS FOR THAT TRUST, AS WELL AS OTHERS, FOR THE PERIOD COVERED BY THE SECOND ACCOUNTING."[27]

Here also, as with the instances discussed in subsection F, *supra*, Disciplinary Counsel relies primarily on *Samad*, 51 A.3d at 499 and *Shorter*, 570 A.2d at 768. ODC Br. at 68-70; ODC Reply Br. at 11-12. Respondent argues that *Samad* is inapposite. R. Br. at 162. Both parties otherwise rely on adducing reasons as to whether Respondent should be found to have acted dishonestly in the two instances at issue here.

As a preliminary matter, we note that Mr. Varrone, not Respondent, drafted the appellate brief (as well as the June 21, 2006 Explanation). FF 75; *see also* FF 71. However, Respondent verified the brief and testified that he reviewed the brief before it was filed. FF 75. And, even though we are concerned that these two statements in the appellate brief may be the result of Mr. Varrone's

[27] One member of the Hearing Committee dissents from subsection (i) of this analysis and the associated recommendation. *See* Separate Statement of Mr. Kassoff.

careless drafting and/or Respondent's careless review, Respondent seems not to dispute that the statements in the appellate brief (and the Explanation in the trial court) are attributable to him. Also, Respondent adduced no testimony or other evidence that might shed light on our concern. Therefore, notwithstanding our substantial reservation, we proceed in this analysis on the basis that the two statements in the appellate brief at issue here are attributable to Respondent.

(i) With respect to the first statement in the appellate brief – "did not submit a detailed accounting . . . because he did not have such time records" – a majority of the Hearing Committee has concluded that Respondent's inclusion of the words "detailed" and "such" within the context of his statements can lead to different interpretations of his statements. Indeed, the three members of the Hearing Committee differ among themselves as to the meaning of Respondent's statements. Therefore, a majority of the Hearing Committee members cannot conclude by clear and convincing evidence that Respondent violated Rules 3.3(a)(1), 8.4(c) or 8.4(d) when he made statements regarding the type of time keeping records he was maintaining. (Our preceding discussions of *Samad* and *Shorter*, *supra* at 103-104, are fully applicable here and are incorporated by reference.)

(ii) In the second statement at issue here, Respondent asserted in the appellate brief without any qualification, that he "did not keep time records for that trust . . . for the period covered by the second accounting." However, Respondent testified that "for some specific services I had kept time." FF 71. He also testified that he could go back to look at his calendar, emails, correspondence, memos, invoices, court filings, and electronic files. FF 71, 73; *see also* FF 149. Moreover, there are some time entries in the *Brown* Client Ledger. FF 71.

Accordingly, on the basis of the foregoing factual and legal analysis and also the case law summarized *supra* at 86-89, a majority of the Hearing Committee recommends that the Board find as a matter of law that Disciplinary Counsel has not proved by clear and convincing evidence that Respondent violated Rules 3.3(a)(1), 8.4(c) or 8.4(d) in the instance addressed in subsection (i) of this Section; the dissenting member of the Hearing Committee sets forth his view on this issue in

his separate statement. *See* Separate Statement of Mr. Kassoff. The Hearing Committee unanimously recommends that the Board find as a matter of law that Disciplinary Counsel has proved by clear and convincing evidence that Respondent violated Rules 3.3(a)(1), 8.4(c) and 8.4(d) in the instance identified in subsection (ii). Respondent kept time records for the period covered by the second accounting (and admitted to this fact during the hearing) so his representation to the Court of Appeals that he "did not keep time records for that trust, as well as others, for the period covered by the second accounting" was a false statement in violation of 8.4(c). This false statement was also made intentionally, in violation of Rule 3.3(a)(1). The violation of Rule 8.4(d) is based on this misconduct; the improper false submission in the appellate brief bore upon the administration of justice in more than a *de minimis* manner because the Court of Appeals "'might be expected to rely and act upon'" the document. *Uchendu*, 812 A.2d at 933.

H. DISCIPLINARY COUNSEL HAS NOT PROVED BY CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT, IN THE COURSE OF ADMINISTERING THE *BROWN* TRUST, VIOLATED RULE 1.15(a) WHEN $1,447.17 WAS DISBURSED FROM THE TRUST TO HIS FIRM ON SEPTEMBER 24, 2006[28]

Disciplinary Counsel states that "Respondent withdrew $1,447.17" (*see* FF 80) and that "Respondent admitted at [the] hearing that he was not entitled to those funds and that he should not have made the disbursement." ODC Br. at 68. Disciplinary Counsel also argues that *In re Pye*, 57 A.3d 960 (D.C. 2012) (per curiam), is analogous to the circumstances here and requires a finding of misappropriation. ODC Br. at 67-68. Respondent argues that Disciplinary Counsel "confabulates" two distinct factual occurrences involving very similar amounts and then explores those circumstances at some length, concluding that the incident resulted from "human error in the use of an appropriate office system" by an employee whose "deteriorating performance of her work

[28] One member of the Hearing Committee dissents from this recommendation. *See* Separate Statement of Ms. Mims.

duties . . . caused Respondent to act to terminate her employment." R. Br. at 162-65. In its Reply Disciplinary Counsel points to additional circumstantial evidence. ODC Reply Br. at 15-16.

In *Pye*, a personal representative withdrew without explanation $20,000 in entrusted funds from the estate he was administering and deposited the funds into his personal account. 57 A.3d at 967. He returned the funds 10 days later, describing the transaction as a mistaken withdrawal. *Id.* The Board found misappropriation in those circumstances, rejecting Pye's argument that it should be excused due to the *de minimis* amount of time involved. *Id.* at 972-73.

A majority of the Hearing Committee agrees with Respondent's counsel that *Pye* is inapposite. The transaction at issue in *Pye* was effected following an unsuccessful attempt by the attorney, who was a personal representative of the estate, to coerce estate heirs into agreeing to reduce their inheritances in order to pay the attorney compensation that the court had found unreasonable. *Pye*, in other words, involved **intentional** misconduct that the trial court, the Board, and the Court of Appeals found to be egregiously wrongful. The situation in *Pye* was thus entirely different from the circumstances present here.

We are also guided in this respect by the recent decision of the Court of Appeals in *In re Abbey*, *supra.* We have already summarized the *Abbey* decision in Section IV.C, *supra* at 91; we conclude that the observations there are equally applicable with respect to the instance at issue here, and we therefore incorporate that analysis here.

The circumstances in this matter also differ materially from the other cases analyzed in *Abbey*. Under the criteria summarized in *Abbey*, Disciplinary Counsel has not established by clear and convincing evidence that Respondent acted deliberately or recklessly; the actions taken by Pye, Abbey and the others were not replicated by Respondent in any respect. *See also* n.19, *supra* at 93.

We also think that the circumstances here do not rise even to the level of negligent misappropriation. Judge Wolf's July 20, 2006 Memorandum Order required Respondent to reimburse the trust $1,417.47 in disallowed fees. AA; UF at ¶77, 80; FF 74, 77. Respondent filed a notice of appeal. He also moved to deposit $1,417.47 into the Registry of the Superior Court until the appeal had concluded, and he attached to the motion a $1,417.47 check dated September 14, 2006, issued from his operating account and made payable to the Superior Court. FF 75, 78, 79. The check was never negotiated but there is no evidence that Respondent caused that otherwise unexplained circumstance; it was Judge Wolf who denied Respondent's motion to deposit the funds in the Probate Division's registry. FF 82. Tr. 1466-67, 1504-05. Thus Respondent did not at any time take any unauthorized action, even negligently, to disburse or keep the $1,417.47 and we think that Disciplinary Counsel ultimately has not charged that he did (although, here also, we are not completely certain of Disciplinary Counsel's precise allegations in this regard).

The $1,447.17 disbursement on September 24, 2006 was the result of a careless mistake primarily by one of Respondent's employees during their transition from one law firm to another (with the difference between the $1,447.17 and $1,417.47 figures likely due to an erroneous transposition of a 4 and a 1). FF 80. We have credited Respondent's testimony that "[i]t was a complete mistake on her [the employee's] part" – an employee whom Respondent terminated shortly thereafter because of her poor work in this and other instances. FF 81, 86. Respondent also acknowledged that when the employee presented the check to him for his signature, he "fail[ed] . . . in not double-checking her work that day [before] signing the check," and we have credited that testimony also. FF 81; *see also* FF 86 (reconstruction of the terminated employee's mistake by succeeding employee). Respondent essentially did exactly the same thing that a check-writing machine would have done upon receiving the check from the employee to be signed. In other words,

there is no evidence of any conscious, knowing or purposeful action by Respondent. We have found no case in which such a ministerial, *de minimis* role by the attorney resulted in a finding of even a negligent misappropriation.

Gregory, 790 A.2d 573, is informative at this point. There, the respondent was found to have violated Rule 5.3(b) when he inadequately supervised his employee and paramour and did not terminate or otherwise discipline her. 790 A.2d at 578-79. Respondent here has not been charged with a Rule 5.3(b) violation, and he terminated the employee who was at fault. FF 86. In addition, Gregory was found to have compounded the employee's theft of client funds in several ways: The Hearing Committee found that Gregory had misappropriated funds owing to medical providers "because he allowed the funds in his [IOLTA] account to dip below the amount required to pay . . . [the] medical providers." 790 A.2d at 577. The Board added that:

> . . . [Gregory] did not check the account balance or the case records to make sure that entrusted funds were secure and delivered to the medical providers, even after he was told that his assistant was writing unauthorized checks on the account. He wrote checks himself on the account without checking the bank records. He was advised repeatedly by at least one of the medical providers that payment had not been made and he did not check records to determine the source of the problem. When he did check the bank records in January of 1997, he gave up when he could not evaluate them. Even after there can be no doubt that Respondent was fully aware that the medical providers had not been paid, by August of 1997, he still did not pay them.

Id. at 579. Respondent's actions stand in stark contrast to Gregory's. FF 81, 83, 85-87. Most significantly, the Board stressed in *Gregory*:

> **This is not a case where all of the conduct resulting in a misappropriation was caused by someone else.** Respondent wrote checks on the account that depleted the escrowed funds and he failed to act where he had a duty to act-he ignored repeated requests by the medical providers for information and payment. Thus, we need not address the circumstances under which a lawyer may be found to have engaged in "unauthorized use" of entrusted funds where his only conduct was a failure adequately to supervise someone to whom he has delegated responsibility for entrusted

> funds. *See* Rule 5.3(c) (lawyer responsible for conduct of nonlawyer if he knew of the conduct and ratified or failed to prevent or mitigate harm); *In re Moore*, 704 A.2d 1187 (D.C. 1997) (per curiam) (misappropriation found where lawyer responsible for and aware of checks written by wife, who managed the trust account); *In re Osborne*, 713 A.2d 312 (D.C.1998) (per curiam) (Respondent knew of bookkeeper's practices and took no action to correct them).

790 A.2d 579, n.1 (emphasis added). In the view of all three of the Hearing Committee members, Respondent's situation falls squarely within the circumstances which the Board stressed that it did not face or rule upon in *Gregory* or any previous case and which it expressly reserved for future consideration. This **is** in fact "a case where all of the conduct resulting in a misappropriation was caused by someone else."[29] And, of course, as noted previously, Respondent's situation presents an even stronger set of circumstances than those in *Gregory* since he has not been charged with inadequately supervising his non-attorney staff.

No member of the Hearing Committee is persuaded by Disciplinary Counsel's argument that Respondent's "relatively quick return of the misappropriated funds shows nothing more than the auditor quickly caught him," ODC Br. at 68, rather than being just an inadvertent and unintentional mistake. The court ordered Respondent on October 30, 2006 to repay the *Brown* trust $1,417.47, plus interest for a total of $1,429.12. FF 82. Respondent promptly disbursed $1,429.12 from his firm's operating account into the *Brown* trust seven days later, on November 3, 2006. FF 83. On November 14, 2006, Respondent filed a *praecipe* stating that he had returned the disallowed fees. *Id.* In December 2006, when the probate auditor asked Respondent to provide information and documentation in support of the reimbursement of expenses, Respondent informed the auditor that

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[29] *Gregory* is not addressed by Disciplinary Counsel or Ms. Mims, and Ms. Mims acknowledges that she would "find a Rule 1.15(a) violation only because the law dictates [in her view] that it is a *per se* violation."

he could not substantiate the reimbursement of the expense. FF 86.

Accordingly, on the basis of the foregoing factual and legal analysis, the case law summarized *supra* at 81-84, and the analysis of Section IV. C, *supra* at 90-95, which is incorporated here by reference, a majority of the Hearing Committee recommends that the Board find as a matter of law that Disciplinary Counsel has not proved by clear and convincing evidence that Respondent violated Rule 1.15(a) in this instance. The dissenting member sets forth her views in her Separate Statement. *See* Separate Statement of Ms Mims.

I. RESPONDENT HAS ACKNOWLEDGED AND DISCIPLINARY COUNSEL HAS PROVED BY CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT, IN THE COURSE OF ADMINISTERING THE *BROWN* TRUST, VIOLATED RULE 3.4(c) WHEN, DESPITE THE MAY 9, 2006 ORDER, HE INCLUDED IN HIS NOVEMBER 22, 2006 FEE PETITION $4,500 IN TIME SPENT WORKING ON, AND $200 IN COURT COSTS INCURRED IN CONNECTION WITH, LITIGATING HIS FEES

In the Memorandum Order dated May 9, 2006 (docketed on May 11, 2006), Judge Wolf again withheld approval of Respondent's Second Account. FF 69. In the Memorandum Order, Judge Wolf stated, "The court will not compensate [Respondent] for the preparation of his response, and he is directed not to submit any future request for compensation that includes it." FF 70. Respondent concedes that he violated Rule 3.4(c) when he subsequently included the fees and costs associated with trustee fee litigation, and we have so found. R. Br. at 157; FF 77. In his testimony before the Hearing Committee, Respondent acknowledged that he knew that his November 22, 2006 Petition for compensation violated the May 9/11, 2006 order. FF 95. Respondent has added that he violated Rule 3.4(c) "in a misguided attempt to preserve his contentions for consideration by the Court of Appeals." R. Br. at 159.

Accordingly, on the basis of the foregoing factual and legal analysis and also the case law summarized *supra* at 86, the Hearing Committee recommends that the Board find as a matter of law that Disciplinary Counsel has proven by clear and convincing evidence that Respondent

violated Rule 3.4(c) in this instance. *See, e.g.*, *Wemhoff*, Board Docket No. 14-BD-056, at 13.

J. RESPONDENT HAS ACKNOWLEDGED AND DISCIPLINARY COUNSEL HAS PROVED BY CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT, IN THE COURSE OF ADMINISTERING THE *BROWN* TRUST, VIOLATED RULE 3.4(c) WHEN HE DID NOT RESTORE THE $200 TO THE TRUST "FORTHWITH" AFTER JUDGE WOLF'S JANUARY 18, 2007 RULING

Respondent concedes that he knowingly disobeyed Judge Wolf's January 18, 2007 Memorandum Order when he did not return the $200 filing fee "forthwith" and did not file a *praecipe* even after he finally returned the filing fee to the trust. R. Br. at 159; *see also* FF 103, 104. In testimony before the Hearing Committee, Respondent noted that "[i]n hindsight, I think I should have paid [the $200] back." FF 95. Respondent further testified that he understood that "forthwith" meant "quickly" and that "I knew I wasn't in compliance because I believed [Judge Wolf] was wrong. . . ." *Id.*

Accordingly, on the basis of the foregoing factual and legal analysis and also the case law summarized *supra* at 86, the Hearing Committee recommends that the Board conclude as a matter of law that Disciplinary Counsel has proved by clear and convincing evidence that Respondent violated Rule 3.4(c) when he knowingly failed to comply with this aspect of Judge Wolf's January 18, 2007 order. *See* Rule 3.4(c); *Wemhoff*, Board Docket No. 14-BD-056, at 13.

K. DISCIPLINARY COUNSEL HAS NOT PROVED BY CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT, IN THE COURSE OF ADMINISTERING THE *BROWN* TRUST, VIOLATED RULE 1.15(a) AND RULE 1.15(c)/(d) WHEN HE DID NOT RESTORE THE $200 FILING FEE TO THE TRUST "FORTHWITH" AFTER JUDGE WOLF'S JANUARY 18, 2007 RULING

Disciplinary Counsel contends that Respondent's failure to return the $200 to the trust with reasonable promptness after Judge Wolf's January 18, 2007 ruling, FF 103, 104, constitutes intentional misappropriation. ODC Br. at 65-67. Disciplinary Counsel relies heavily upon *In re Cloud*, 939 A.2d 653, 661 (D.C. 2007). ODC Br. at 66. Disciplinary Counsel argues further that Respondent's concession that "his failure promptly to comply with Judge Wolf's order was a

violation of Rule of Professional Conduct 3.4(c)," *see* R. Br. at 166, establishes "Respondent's intentional state of mind." ODC Reply Br. at 12; *see also* FF 94, 95. Disciplinary Counsel also notes that *Bach*, *Evans* and *Robinson* establish that a small dollar amount being at issue is irrelevant and concludes with the proposition that the failure to return the fee to the trust on grounds of principle "demonstrates Respondent's intransigent attitude toward his fiduciary and ethical obligations." ODC Br. at 67.

Respondent -- while conceding that he was mistaken in believing that, during the appellate period, return of the $200 was not required by Judge Wolf's non-stayed January 18, 2007 ruling -- counters that the original disbursement was not an unauthorized withdrawal, that Respondent "did not show an intent to treat the funds as his own" because he "clearly listed the $200 as an asset of the trust . . . [in] three successive accountings," and that *Cloud* and *Utley* are inapposite. R. Br. at 165-67.

Neither party addresses the specific authority on which we ultimately rely in resolving the Rule 1.15(a) charge.

It is important to note that Disciplinary Counsel does not charge that Respondent's initial disbursement of the $200 for payment of the filing fee constituted an unauthorized misappropriation *ab initio*. As Disciplinary Counsel properly recognizes, Judge's Wolf's May 9, 2006 Order, *see* FF 90, "did not specify whether it precluded payments from the trust for the costs of [fee] litigation." ODC Br. at 66. Thus, Respondent cannot be found to have made an unauthorized disbursement of the $200 on August 25, 2006 when he disbursed it to Mr. Varrone, especially after Mr. Varrone had advised, "I believe that these are costs which are properly incurred by the trustee, and therefore can

be paid from the trust, but you may use your own judgment on that." FF 91.[30]

We find several of Disciplinary Counsel's contentions unpersuasive. To begin with, we think that Disciplinary Counsel's reliance on *In re Cloud* is misplaced. *Cloud* involved markedly more extreme circumstances than those occurring in this matter. Cloud refused to disgorge the disputed funds until long "after he learned [through a correction and acknowledgement of his misreading and misunderstanding of pertinent information] that he was not entitled to keep them"; this was a period that lasted "more than four years" and that included numerous instances of delay, avoidance, reneging on promises and agreements, and other financial machinations. 939 A.2d at 661; *see also id.* at 657-58. No such circumstances are present here. Respondent did not concede that he had erred, and he timely appealed Judge Wolf's order. FF 96.

Other cases relied upon by Disciplinary Counsel in its Reply seem equally inapposite. *See* ODC Reply Br. at 13-14. *In re Bach* turned on the determinative fact that Bach "wrote himself a check from the estate for his services knowing that he was not authorized to do so. . . ." 966 A.2d at 350. *In re Pleshaw*, 2 A.3d 169, 171 (D.C. 2010) turned on a disbursement that was unauthorized *ab initio*.

Disciplinary Counsel appears to contend that an intentional misappropriation is at least

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[30] Disciplinary Counsel, correctly in our view, also does not contend that Respondent unduly delayed repayment of, and therefore misappropriated, the $200 after August 20, 2009, the point at which he knew from the Court of Appeal's ruling that his position had been rejected. Respondent issued a check to the *Brown* trust on September 10, 2009. That check was not deposited until October 14, 2009, FF 104, but there is no evidence that Respondent (as opposed, for instance, to his staff) was responsible for that unexplained delay, on which there is no evidence in the record. We note that Respondent did immediately refund the *Baker* trust on September 18, 2009, by signing the $4,522.56 check which was deposited that same day. FF 142.

partially evidenced by (and perhaps established by) Respondent's alleged failure to provide adequate notice to the Probate Division of "his refusal to return the funds for over a year." ODC Br. at 66-67; ODC Reply Br. at 13. We think that Disciplinary Counsel's view of the pertinent facts and its reading of the cases it relies on are both unsupportable stretches. On or about February 13, 2007, an auditor removed the disbursement from and then adjusted the recently filed Third Account; Respondent's associate filed a Restated Fourth Account on February 5, 2008 listing the $200 as an asset of the trust. FF 97-101.[31] Thus we think that the Probate Division must be charged with notice of the dispute. In any event, we have not found that Respondent was attempting at any point in time to cover up the $200 disbursement or the attendant dispute and thus do not find sufficient basis for Disciplinary Counsel's circumstantial evidence theory.

We turn finally to Disciplinary Counsel's argument that the alleged Rule 1.15(a) violation is established by, and was demonstrably intentional in light of, Respondent's acknowledgment of violating Rule 3.4(c) in not obeying Judge Wolf's "forthwith" repayment directive in his January 18, 2007 Memorandum and Order. ODC Reply Br. at 12; FF 94, 95. Indeed, Respondent has acknowledged not only that "I knew I wasn't in compliance" with the requirement in Judge Wolf's January 18, 2007 Memorandum and Order but also that the decision not to restore the $200 filing fee to the trust forthwith was his decision entirely. FF 95. Thus, Respondent has conceded that he knew that he was holding $200 of the trust's funds without judicial or other authorization; this seems plainly to constitute a failure to "hold property of clients or third persons . . . separate from the lawyer's own property," as is required by Rule 1.15(a).

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[31] We also note that this is not a situation involving an inexcusable mistake of law or fact, except possibly in one respect that we discuss below; thus that body of cases is not applicable here.

We have noted earlier that Respondent arguably did not derive any financial or other tangible benefit from not returning the $200 promptly after Judge Wolf's order to do so. In *Harrison*, *Anderson*, and *Pye*, *supra*, the Court of Appeals has repeatedly described Rule 1.15(a) as consisting of "any unauthorized use of a client's funds entrusted to him, including not only stealing but also unauthorized temporary use for the lawyer's own purpose, whether or not [the lawyer] derives any personal gain or benefit therefrom.'" *In re Harrison*, 461 A.2d 1034, 1036 (D.C. 1983); *see also Anderson*, 778 A.2d at 335; *Pye*, 57 A.3d at 961 n.2. We have found no case involving circumstances equivalent to those here, where Respondent reaped no tangible benefit from not returning the filing fee when ordered to do so.[32] Nevertheless, since we are bound by the Court of Appeals' broad expostulation of Rule 1.15(a) as including "**any** unauthorized use of . . . funds entrusted to" the lawyer (emphasis added) and since we know of no limitations or exceptions to that construct, we must conclude that the "use . . . for the lawyer's own purpose" element, if required at all, is established here because Respondent testified that returning the $200 would have been, in his view, inconsistent with "the core issue I was appealing, the power of the trustee." FF 95. Thus, under the Court of Appeals' elaboration of Rule 1.15(a), Respondent's self-indulgence in his solipsistic principle appears to us to constitute an impermissible temporary use of the *Brown* trust assets for Respondent's "own purposes," a use that is not excused or justified – indeed, is underscored – by his attorney's flippant attitude toward and belated advice about the duty to remit ". . . the $200, on which the fate of the Western World hangs in the balance." FF 103.

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[32] The closest analogy might arguably be *Gregory*, 790 A.2d at 573, but even there the lawyer allowed the balance in the trust account to fall below the amount needed for the client's outstanding medical bills. Thus, since such a situation like the one here was not actually at issue in *Harrison*, *Addams*, and *Pye* or any other prior case that we have found, we are concerned that the instruction that "use" for the lawyer's "own purpose" can consist of non-tangible uses is *dictum*.

Although Respondent's concession and our finding that he knowingly and intentionally held onto the disputed filing fee obviate any need for a recklessness or negligence analysis, we note that the crucial factor of willfully not returning the funds promptly after Judge Wolf's order distinguishes Respondent's situation from that of the respondents in *Travers*, 764 A.2d at 242, *Evans*, 578 A.2d at 1141, *In re Haar*, 698 A.2d 412 (D.C. 1997) ("*Haar II*"), *Bailey*, 883 A.2d at 106; *Fair*, 780 A.2d at 1106, or *In re Ray*, 675 A.2d 1381 (D.C. 1996), each of whom was found to have misappropriated client funds. In each of those cases, the respondent believed, for one reason or another, that he or she was legally entitled to distribute the funds at issue to himself or herself. The Court of Appeals found in each instance that while the erroneous mistakes of law did not obviate or excuse the improper distribution or withholding, the respondents had handled their respective situations only in a negligent manner. Here, Respondent had no such erroneous understanding of his legal obligation, for he has conceded that he knew he was not entitled to the funds once Judge Wolf had issued the January 18, 2007 Memorandum and Order. FF 95.[33]

Accordingly, if it were not for one more factor, we would likely recommend a finding of an intentional violation of Rule 1.15(a) in this instance. However, we believe that, ultimately, the Court of Appeals' decision in *In re Martin*, 67 A.3d 1032 (D.C. 2013) is determinative. Martin was charged, *inter alia*, with violating Rules 1.15(a) and (c) when he failed to place disputed funds in a separate account when the fee dispute arose in 2003. 67 A.3d at 043. The Court of Appeals held:

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[33] In the Amended Specification of Charges, Disciplinary Counsel also charged a Rule 1.15(c) violation. However, in its Brief, Disciplinary Counsel states that it is not pursuing a Rule 1.15(c) charge because it did not elicit sufficient evidence in that regard. ODC Br. at 58 n. 2. The Hearing Committee is required to make findings on all charged violations. *See In re Drew*, 693 A.2d 1127 (D.C. 1997) (per curiam) (appended Board Report). The Hearing Committee has examined the record and recommends that the Board find that Disciplinary Counsel has not established a violation of Rule 1.15(c) in this instance by clear and convincing evidence.

> We also agree with the Hearing Committee's alternative holding that even if Martin was unaware of a fee dispute when the settlement funds were disbursed, he violated Rules 1.15(a) and (c) by failing to restore disputed funds to a separate trust account after becoming aware of a dispute. We conclude, however, that we should not apply that ruling to Martin because of the uncertainty surrounding the scope of these rules at the time of the events described.
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> * * * *
>
> For these reasons, we hold that if a client in any future matter, with reasonable promptness, disputes an attorney's fee after the attorney has already withdrawn his fee from the client trust account, the attorney must place the disputed amount in a separate account in accordance with Rule 1.15(a) [and presumably Rule 1.15(c)/(d)].

67 A.3d at 1044-46 (emphasis added). The filing fee disbursement and the ensuing period of litigation at issue here occurred between August 25, 2006 and August 20, 2009 – well before the Court of Appeals' 2013 decision in *Martin*. FF 91, 102. Consequently, even though we might otherwise recommend a finding of a negligent violation of Rule 1.15(a), we think we are precluded by the ruling in *Martin* from recommending such a conclusion in light of its prospective application.

Accordingly, on the basis of the foregoing factual and legal analysis and also the case law summarized *supra* at 81-86, we recommend that the Board conclude that Disciplinary Counsel has not proved by clear and convincing evidence that Respondent violated Rule 1.15(a) or (c)/(d) in connection with his handling of the $200 filing fee disbursement from the *Brown* trust.

COUNT III OF THE SPECIFICATION OF CHARGES

L. DISCIPLINARY COUNSEL HAS NOT PROVED BY CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT VIOLATED RULES 3.4(c) AND 8.4(c) WHEN, IN HIS JUNE 23, 2006 FIRST ACCOUNT IN THE *BAKER* TRUST, HE SOUGHT APPROVAL OF TRUSTEE FEES CALCULATED AS ONE PERCENT OF THE CORPUS OF THE TRUST AND DID NOT SUBMIT THE *FOR PROFESSIONAL SERVICES* DOCUMENT THAT HE HAD PREPARED [34]

[34] One member of the Hearing Committee dissents from this recommendation. *See* Separate Statement of Mr. Kassoff.

Disciplinary Counsel does not specify whether it is charging that Respondent's alleged disobedience of an obligation under the rules of a tribunal consisted of a violation of Judge Burges's verbal directions during the second hearing on the trust compensation provision, FF 124, or a violation of Judge Burgess's June 2005 order, FF 125, or both, when he sought approval of a fee calculated at one percent of the corpus of the trust and did not submit a *For Professional Services* statement with time entries in his First Accounting for the *Baker* trust, FF 127, 128. ODC Br. at 72. After recounting the pertinent evidence, ODC Br. at 72-73, Disciplinary Counsel points out Judge Wertheim's statements in his September 28, 2006 Memorandum and Order, FF 135. ODC Br. at 74. Disciplinary Counsel argues further that the phrase "statement of fees" in the trust instrument's compensation provision, FF 125, and Judge Burgess's statements, FF 120, 124, establish that Respondent was required to file "a detailed report of time." ODC Reply Br. at 17.

Respondent argues that "there was only one court order governing [the *Baker*] trust: the one entered by Judge Burgess. . . . The court's order did not say anything about trustee compensation; it approved the trust instrument . . . ." R. Br. at 168. From there, Respondent argues that "[u]nder the terms of the trust, the trustee could set reasonable compensation 'consistent with industry standards' but not to exceed one percent . . . ." *Id.* at 169. Respondent then concludes, "Whatever concerns Judge Burgess expressed about fixed percentage compensation . . . were never memorialized in the trust instrument or the Court's order approving the trust instrument. . . . Judge Burgess' comments therefore did not establish 'an obligation under the rules of [the] tribunal.'" *Id.* at 170.

In the majority's view, resolution of this Rule 3.4(c) and Rule 8.4(c) charge turns entirely on the question of what compensation system was permitted in the *Baker* SNT. We have repeatedly reviewed and discussed Judge Burgess' comments in the two hearings and have also studied and

discussed the trust instrument's compensation provision. *See* FF 120, 123-25.

As a factual matter, a majority of the Hearing Committee has been unable to reach any conclusion by clear and convincing evidence as to what compensation regimen(s) Judge Burgess meant to allow or not allow.[35] Consequently, his possible views and intentions provide us no guidance in determining the legal question of what the compensation provision might specify. Our analysis is also hampered by the absence of specific requirements, general standards, or accepted or even acceptable practices regarding SNT trustee compensation requirements and procedures in the Probate Division during the relevant period of time. FF 13. We are equally at a loss to determine the meaning of the compensation provision -- arguably a legal question -- solely from the wording itself of the provision.

Not being able to say as a factual or legal matter what compensation method was required, permitted or not permitted, a majority of the hearing committee cannot find that Respondent knowingly violated an obligation under the rules of a tribunal or that he acted dishonestly in taking and reporting a percentage-based fee in June 2006. Accordingly, on the basis of the foregoing factual and legal analysis and also the case law summarized *supra* at 86-88, a majority of the Hearing Committee recommends that the Board conclude as a matter of law that Disciplinary Counsel has not proved by clear and convincing evidence that Respondent violated Rule 3.4(c) or 8.4(c) in this instance. The dissenting member sets forth his view on this issue in his separate statement. *See* Separate Statement of Mr. Kassoff.

M. DISCIPLINARY COUNSEL HAS NOT PROVED BY CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT, IN THE COURSE OF ADMINISTERING THE *BAKER* TRUST, VIOLATED RULES

[35] Thus, we do not reach the legal question of whether Judge Burgess' verbal statements, if they had been clear, would have the force of law as to the permissible or requisite compensation method regardless of what the actual compensation provision in the trust instrument might or might not say.

3.3(a)(1), 8.4(c) AND 8.4(d) WHEN, IN HIS AUGUST 30, 2006 RESPONSE TO JUDGE WERTHEIM'S AUGUST 21, 2006 ORDER, (i) HE DID NOT INFORM JUDGE WERTHEIM THAT JUDGE BURGESS HAD, DISCIPLINARY COUNSEL ALLEGES, REJECTED A PERCENTAGE FEE AND INSTEAD REPRESENTED THAT TRUSTEE COMPENSATION HAD BEEN "SET BY AGREEMENT OF THE PARTIES AT ONE PERCENT" AND (ii) HE STATED THAT HE "PAID HIMSELF THE 1% FEE WITHOUT ORDER OF THE COURT" WITHOUT DISCLOSING THAT THE WITHDRAWN FEES HAD BEEN CALCULATED ON THE BASIS OF TIME RECORDS RATHER THAN ON THE BASIS OF A PERCENTAGE OF TRUST ASSETS.[36]

(i) Disciplinary Counsel argues only that Judge Wertheim "characterized . . . as 'inaccurate'" Respondent's statement in the August 30, 2006 Response, FF 131, that trustee compensation was "set by agreement of the parties at one percent. . . ." ODC Br. at 74; FF 130, 133; *see also* ODC Reply Br. at 18-19. Respondent argues that his "set by agreement of the parties" statement was "accurate" because the parties, Respondent and Dion Baker through his mother, had indisputably so agreed. Respondent also argues that, in any event, the statement was not material. R. Br. at 172.

A majority of the Hearing Committee concluded in the preceding subsection IV.L that Judge Burgess's observations, his Order, and the Trust instrument's compensation provision did not clearly establish a solely time-based trustee compensation system. We also think that the "parties" to the trust are most reasonably understood to be the beneficiary (through his representative, his mother) and that the trustee and, in any event, we have not been able to conclude by clear and convincing evidence that the "parties" include the court, a contention by Disciplinary Counsel at the hearing on which conflicting evidence was presented but a contention that Disciplinary Counsel does not attempt in its brief to develop or support by any legal authority and, in fact, seems to abandon. ODC Br. at 74; ODC Reply Br. at 18. For both these reasons, a majority of the Hearing

[36] One member of the Hearing Committee dissents from this recommendation. *See* Separate Statement of Mr. Kassoff.

Committee cannot find that Respondent spoke dishonestly when he stated in his August 30, 2006 Response that trustee compensation had been "set by agreement of the parties at one percent." The majority has, of course, taken into consideration Judge Wertheim's "Contrary to the Court's plain direction" statement. FF 135. We note however that he did not state that he had reached that conclusion by clear and convincing evidence and, in any event, he acknowledged that Respondent had in fact included in his submission some information about the amount of time he had spent on the matter in the preceding period. FF 136.

(ii) Disciplinary Counsel theorizes that Respondent's "paid himself the 1% fee" statement was a conscious strategem "because such disclosures [of the time-entry record] would reveal that the time charges supported a fee that was $5,000 less than a fee calculated at one percent of trust assets" and "undermine[d] Respondent's argument that it was reasonable to rely on a percentage calculation of trust assets to determine trustee fees." ODC Br. at 74; ODC Reply Br. at 18-19. Respondent admits that the statement was incorrect but contends that the statement was simply a mistake and, in any event, not material because "[t]he real issue before the court at that time was not the *amount* of compensation; it was the *method* of compensation . . . ." R. Br. at 172-73 (emphasis added). Respondent also disputes Disciplinary Counsel's strategy or motive argument on the ground that compensation amounts are not logically relevant to the payment method dispute and therefore incomplete time entries would not have undermined his methodology (percentage vs. time) contention. *Id*. at 173.[37]

During the hearing, Disciplinary Counsel adduced no evidence (such as examination of

[37] Both parties argue that the circumstantial context at the time supports their contentions. R. Br. at 172-73; ODC Reply Br. at 19.

Respondent) or argument directly or circumstantially supporting the stratagem theory that it subsequently asserts in its briefing. In addition, even if Disciplinary Counsel had proposed its stratagem theory as a finding of fact, a majority of the Hearing Committee believes that we would not be able to conclude by clear and convincing evidence that Respondent made the "paid himself the 1% fee" statement purposefully and strategically, rather than carelessly and in a rush. Additionally, a majority of the Hearing Committee agrees with Respondent that the technically inaccurate statement was completely immaterial, as there is no evidence in the record that the statement affected any action by the court. For all these reasons, a majority of the Hearing Committee cannot find by clear and convincing evidence that Respondent's "paid himself the 1% fee without Order of the Court" statement was intentionally misleading or even recklessly dishonest.

Accordingly, on the basis of the foregoing and also the case law summarized *supra* at 86-89, a majority of the Hearing Committee recommends that the Board conclude that Disciplinary Counsel has not proved by clear and convincing evidence that Respondent violated Rules 3.3(a)(1), 8.4(c) or 8.4(d) in the instances analyzed in subsection (i) and (ii), *supra*. The dissenting member's views are set forth in his Separate Statement. *See* Separate Statement of Mr. Kassoff.

N. DISCIPLINARY COUNSEL HAS NOT PROVED BY CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT, IN THE COURSE OF ADMINISTERING THE *BAKER* TRUST, VIOLATED RULE 1.15(a) OR 1.15(c)/(d) WHEN, FOLLOWING JUDGE WERTHEIM'S PARTIAL APPROVAL AND PARTIAL DENIAL ON SEPTEMBER 28, 2006 OF THE FEE REQUESTED IN THE JUNE 24, 2006 NOTICE OF FEE PAYMENT, HE DID NOT RETURN THE $3,950.59 DIFFERENCE BETWEEN THE AMOUNT OF FEE DISBURSED AND THE AMOUNT APPROVED BY JUDGE WERTHEIM UNTIL AFTER THE DECISION OF THE DISTRICT OF COLUMBIA COURT OF APPEALS ON AUGUST 20, 2009

Disciplinary Counsel, relying on *Utley*, 698 A.2d at (D.C. 1997) argues that "[i]t is irrelevant that Judge Wertheim did not order Respondent to return the excess fee" because "[t]he

misappropriation analysis hinges on whether the use of funds is authorized," and the excess amount over that approved by Judge Wertheim was thereby an unauthorized use as in *Utley*. ODC Br. at 76; *see* FF 137, 138. Respondent responds that Judge Wertheim did not expressly direct repayment and thus there was no reason to file a motion to stay. R. Br. at 175. Respondent distinguishes *Utley* on the ground that the misappropriation there consisted of not repaying the erroneously paid fee despite repeated requests and notices to do so, even though Utley knew that the fee at issue was unauthorized. *Id.* Respondent also relies on *In re Estate of King*, 769 A.2d 771 (D.C. 2001) for the proposition that disallowed trustee compensation may be applied to other compensation, at least when there is a continuing relationship, as there is in this trust. *Id.* at 174. Disciplinary Counsel distinguishes *King* as involving only a situation where King was both the trustee and the ensuing estate's personal representative and reduced his undisputed, pending personal representative fee by the amount of the disallowed portion of the trustee compensation. ODC Reply Br. at 19-20. Neither party separately addresses the Rule 1.15(c) charge.

This is another instance in which Disciplinary Counsel's evidence and arguments fall short of convincing us by clear and convincing evidence that Respondent violated Rule 1.15(a). Disciplinary Counsel has adduced no authority to support its contention that Respondent had an obligation to return the amount in issue upon receipt of Judge Wertheim's August 30, 2006 Memorandum and Order, which he appealed in a timely manner. Specifically, Disciplinary Counsel has adduced no case law from the District of Columbia or, for that matter, from any other jurisdiction holding that the losing party in the trial court must pay over a disputed sum to the prevailing party even though the losing party has noted and then pursues an appeal (unless, of course, the prevailing party obtains and enforces a judgment and the appellant does not obtain a stay). Thus, we are not convinced by clear and convincing evidence (and associated legal argument)

that the funds in dispute had been established to be "property of clients or third persons," Rule 1.15(a), until the Court of Appeals had ruled.[38] There also is no evidence (direct or circumstantial – such as overdrawn accounts) that Respondent spent or otherwise utilized, directly or indirectly, the $3,950.59 for his own purposes (other than the necessity, in his view, correctly or incorrectly, of preserving his appeal, a good faith legal judgment which we have credited, FF 137, 138 and that surely cannot constitute a misappropriation for a lawyer/litigant's own use).

We also agree with Respondent that *Utley* is inapposite to this situation. Respondent's conduct and situation were far different from Utley's. As Respondent points out, over the course of approximately two-three years, Utley, unlike Respondent, was repeatedly placed on notice by "requirement letters" from the auditor, a delinquency notice from the court, and summary hearing notices from the court that she was expected to return the mistakenly-paid compensation and, further, failed to appear at hearings where she clearly would have been ordered to do so. *Utley*, 698 A.2d at 448. Indeed, Utley expressly "acknowledged her error and promised . . . to re-deposit the duplicate fee and the unapproved commission . . . [but] failed to do so." *Id.* Here, the question whether Respondent needed to return the $3,950.59 was not finally resolved until the Court of Appeals rendered its decision. Moreover, unlike Utley, who "knew [the disputed fee] was unauthorized," and unlike the situation in connection with the *Brown* trust where Respondent "knew that I wasn't in compliance" with Judge Wolf's order, Respondent certainly did not concede that he was not entitled to the amount in question, and we have credited Respondent's testimony regarding his reasons for asserting his position and for not returning the $3,950.59 until after the

[38] This point is also potentially pertinent to the Rule 1.15(c)/(d) issue. *But see* n. 40, *infra*.

appeal was resolved (even if we may not agree with his reasoning). *See Id*. at 449 (emphasis added); FF 131, 137, 138.[39]

We turn now to the Rule 1.15(c)/(d) charge. Respondent kept in his own account the $3,950.59 difference between the amount of fee disbursed on July 25, 2006 from the trust to his firm and the fee approved by Judge Wertheim on September 28, 2006. FF 129, 137, 142. He did not return the funds to the trust until after the August 20, 2009 Court of Appeals' ruling. FF 141-42. We have found no authority precisely addressing the applicability of this Rule 1.15(c)/(d) requirement to such circumstances as present in this matter, and neither party directly addresses the Rule 1.15(c)/(d) issue separately from the Rule 1.15(a) issue, except for Disciplinary Counsel's quotation of Rule 1.15(c)/(d) in its brief. ODC Br. at 75.[40]

The question thus arises at this point whether, if there is a Rule 1.15(c)/(d) violation here, this dereliction was intentional, reckless or negligent. We have already noted that there is no evidence that Respondent spent or otherwise used the filing fee disbursement for his own financial

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[39] Disciplinary Counsel also asserts that, unlike Utley, Respondent "expressly testified that he knew he was obligated to return the money but refused to do so." ODC Reply Br. at 20 (citing Disciplinary Counsel's Proposed Finding of Fact 140 in ODC Br. at 46-47, quoting Tr. 2282-83). We have not adopted DC PFF 140 as one of our Findings of Fact because the testimony cited by Disciplinary Counsel plainly does not expressly or implicitly support Disciplinary Counsel's interpretation and corresponding assertion. *Cf*. our FF 131, 138138. We agree with Disciplinary Counsel that Respondent's reliance on *In re Estate of King*, 769 A.2d 771 (D.C. 2001), is misplaced and unavailing but, as discussed below, we reach a recommended conclusion of law regarding the Rule 1.15 charges different from the one sought by Disciplinary Counsel because of other considerations.

[40] We recognize without deciding that the $3,950.59 at issue on appeal also involves the question whether it was a "just claim" by someone, either the Probate Division's auditor staff or the court in discharging its obligation of protecting a trust beneficiary. *See supra* at 85-86 and 117-118. We note a potentially crucial difference between Judge Wolf's express directive in the *Brown* matter to return the $200 filing fee "forthwith" as discussed *supra* at 116, and the absence of any such directive in Judge Wertheim's Order at issue here.

purposes. There also is no evidence that Respondent conducted himself in any respect as the respondent in *Cloud* had. *See supra* at 115. Thus, we see no basis for a finding of intentional misappropriation, as in *Cloud*, *Anderson*, 778 A.2d at 339 or *Utley*, 698 A.2d at 448-49. *See also In re Saint-Louis*, 147 A.3d 1135, 1149-50 (D.C. 2016) (Rule 1.15(d) violation arose from intentional Rule 1.15(a) violation when attorney repeatedly withdrew client funds despite client objections); *In re Johnson-Ford*, 746 A.2d 308, 309 (D.C. 2000) (per curiam), ((Rule 1.15(c)/(d) violation arose from intentional Rule 1.15(a) violation when attorney repeatedly withdrew client funds and concealed same through false statements and misrepresentations); *Berryman*, 764 A.2d at 760 (respondent intentionally violated Rule 1.15 (a) when, after client's death, she deposited client's funds with a backdated deposit slip into checking account that attorney and client shared and then withdrew funds from that account for personal use despite being their being part of client's estate and also knowing of claims by third-parties to the funds, thereby failing to keep the funds in separate account until claims could be resolved). In sum, we find no circumstantial evidence from which one might conclude that Respondent violated Rule 1.15(d) intentionally (unlike the Rule 1.15 (a) violation).

With respect to the question of possible reckless misappropriation, the record is devoid of any evidence that Respondent had a "conscious indifference to the consequences of his behavior for the security of the funds," exhibited "an unacceptable disregard for the safety and welfare" of the funds or "d[id] not care about the consequences of his . . . action." *Anderson*, 778 A.2d at 339. Here, Respondent timely filed a Notice of Appeal, FF 96, and we have already noted that the Probate Division was immediately on notice of the issue even before the Notice of Appeal was filed. *Supra* at 115-16; *see* also FF 97-98. Thus, we see no basis for a finding of a reckless violation of Rule 1.15(d) as that standard is explicated in *Anderson*. We think that these circumstances are most

similar to those in *In re Midlen*, 885 A.2d 1280 (D.C. 2005), where the respondent had a long-running fee dispute with the client and withdrew disputed amounts from a royalties escrow account but did not place them in a separate account pending resolution of the dispute despite "the duty to keep the funds '"separate . . . until the dispute [was] resolved."' 885 A.2d at 1282. The Court of Appeals observed that *Midlen* was

> the first case to reach the court in which misappropriation arose from a dispute about ownership of entrusted funds and failure to segregate them under Rule 1.15(c). (*Haar I* and *II* were issued in 1995 and 1997, respectively, midway through or toward the end of Midlen's relationship with JSM.) Disputed ownership thus distinguishes this case from those in which the court has found reckless (or worse, intentional) misappropriation because the lawyer had engaged in concealment or similar acts demonstrating that he clearly knew the funds did not belong to him, *see, e.g., In re Berryman,* 764 A.2d 760 (D.C.2000); *Addams, supra,* or because a court order to return the fee unmistakably had given him such notice. *See In re Utley,* 698 A.2d 446 (D.C.1997).
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> [9] This is not to say that a dispute over ownership of funds — resulting in a Rule 1.15(c) rather than a Rule 1.15(a) violation — insulates an attorney without more from a finding of reckless misappropriation. As will be apparent, our conclusion that Midlen was not reckless follows from the combination of factors we cite in this part of the opinion.

Id. The Court of Appeals then went on to summarize a set of circumstances, including repeated fee withdrawals, pertinent to the Rule 1.15(c)/(d) charge that, in our view, are materially more extreme than those in this matter. *Id.* at 1288-89. Nevertheless, the Court of Appeals concluded that Midlen's "conduct did not rise to the level of intentional or reckless misappropriation." *Id*. We think that the same conclusion would therefore be mandated here, where the circumstances are not nearly so extreme as they were in *Midlen*. Thus, on the basis of the foregoing considerations, and keeping in mind the assumptions identified above, we might well recommend a finding of a negligent violation of Rule 1.15(d) if it were not for one more factor.

However, as in our discussion in Section IV.K *supra* at 118-119, we must finally turn here to *In re Martin*, *supra*. As in *Martin* and as with the filing fee disbursement in connection with the *Brown* trust, the trustee fee disbursement and the ensuing period of litigation at issue here in connection with the *Baker* trust occurred before the Court of Appeals' 2013 decision in *Martin* – specifically between July 25, 2006 and August 20, 2009. FF 129, 141. Consequently, even though we might otherwise recommend findings of negligent violations of Rules 1.15(a) and 1.15(c)/(d), we are precluded, for the reasons discussed *supra* at 118-119, by the ruling in *Martin* from recommending such a conclusion.

Accordingly, on the basis of the foregoing factual and legal analysis and also the case law summarized *supra* at 81-86, we recommend that the Board conclude as a matter of law that Disciplinary Counsel has not proved by clear and convincing evidence that Respondent violated Rules 1.15(a) or (c)/(d) in this instance.

COUNT IV OF THE SPECIFICATION OF CHARGES

O. DISCIPLINARY COUNSEL HAS PROVED BY CLEAR AND CONVINCING EVIDENCE THAT FOUR ENTRIES IN THE ITEMIZED TIME RECORDS THAT RESPONDENT SUBMITTED IN HIS DECEMBER 15, 2009 AND JANUARY 8, 2010 FEE REQUESTS IN THE *BROWN* AND *BAKER* TRUSTS FOLLOWING THE DECISION OF THE DISTRICT OF COLUMBIA COURT OF APPEALS CONTAINED FALSE STATEMENTS THAT CONSTITUTED VIOLATIONS OF RULES 8.4(c) AND 8.4(d), BUT NOT RULE 3.3(a)(1)[41]

Disciplinary Counsel asserts that "[w]hen [Respondent] lost on appeal, he improperly added services, deleted descriptions he knew the court would prohibit, inflated times he had previously entered . . . .[,] estimated times for the services he had added . . . [and] included estimated times for

[41] One member of the Hearing Committee has concluded that a finding of a knowingly false statement in violation of Rule 3.3(a)(1), as well as a greater number of dishonest entries should be recommended. *See* Separate Statement of Mr. Kassoff; *see also* n.45, *infra*, at 140-41.

generic services added months after the date they were supposedly performed." ODC Br. at 77. Disciplinary Counsel further theorizes that Respondent knew that the court expected and assumed that the listed services and times were not estimates and, instead, were created contemporaneously with the service date, thus reflecting the actual time expended. *Id*. We infer from the absence of any further factual analysis in Disciplinary Counsel's opening brief that Disciplinary Counsel is suggesting that the entries set forth in its brief and the accompanying tables speak for themselves and constitute proof of dishonesty by clear and convincing evidence. Disciplinary Counsel emphasizes that Respondent could have and should have informed the court of the manner in which he prepared the *Brown* and *Baker* fee petitions. ODC Br. at 78; ODC Reply Br. at 21. Disciplinary Counsel also contends that "[n]othing in his file demonstrates the accuracy of any added or modified entry" and further argues that the absence of any reductions in the modified time entries and other "implausible coincidences" further demonstrate the falsity of the modified time entries. ODC Reply Br. at 22. Disciplinary Counsel also summarizes principles from *Cleaver-Bascombe*, *McClure* and other cases. ODC Br. at 77-78; ODC Reply Br. at 20-21. Disciplinary Counsel argues for the first time in its Reply that Respondent's preparation of his fee petitions, even if found to be "a good-faith reconstruction," nevertheless "amount[s] to a reckless disregard for the accuracy of a court-filing." ODC Reply Br. at 22-23.[42]

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[42] In Count IV of its Specification of Charges and Amended Specification of Charges, Disciplinary Counsel additionally charged that Respondent's filing of and/or actions relating to his May 24, 2005 and September 21, 2006 fee petitions in the *Seay* SNT and his December 5, 2005 Second Account and November 22, 2006 fee petition in the *Brown* SNT violated, *inter alia*, Rules 3.3(a)(1), 8.4(c) and 8.4(d). Specification of Charges at 25-30; DX A2 at 29-34; Amended Specification of Charges at 26-31, DX A5 at 28-33. However, Disciplinary Counsel did not adduce any evidence or argument in support of these allegations at the hearing and did not tender in its briefing any proposed findings of fact or argument addressing these matters. Consequently, we recommend that the Board conclude

Respondent relies upon his "very detailed testimony" about the preparation of the post-appeal fee petitions, the breadth of his "contemporaneous records [such as] his emails, letters, annual accountings and other written records of services he had performed" and his "many years of experience serving as a special needs trustee. . . ." R. Br. at 176. Respondent also addresses the authorities relied upon by Disciplinary Counsel. *Id*. at 177-78.

Knowingly filing an inflated bill with the court does, of course, violate Rule 3.3(a)(1). *Cleaver-Bascombe I*, 892 A.2d at 403 (filing inaccurate voucher with the court violated Rule 3.3(a)(1)); *In re McClure*, Board Docket No. 13-BD-018, at 24 (BPR Dec. 31, 2015) (filing with the court inaccurate bill based on estimates rather than contemporaneous time records violated Rule 3.3(a)(1)), *recommendation adopted*, 144 A.3d 570, 572 (D.C. 2016) (per curiam). Additionally, it is incumbent upon the attorney submitting a fee request to inform the court if a bill is based substantially on "unsupported recollection, without the benefit of contemporaneous time records." *Id.* at 26-27. (We consider *Cleaver-Bascombe* and *McClure* in the ensuing discussion.) But this general authority cited by Disciplinary Counsel is only the beginning of the analysis.

Preliminarily, we reject Disciplinary Counsel's apparent theory that submitting time records after a substantial passage of time (up to three years in this matter) and using terms such as "review," "work on" or "update" constitute dishonesty *ipso facto*. *See* FF 151, 157. There is no basis in the record for reaching that conclusion. Disciplinary Counsel adduced no expert testimony from legal billing advisers, consultants or academics who have written on professional billing methodologies

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that Disciplinary Counsel has not proven additional violations of Rule 3.3(a)(1), 8.4(c), and 8.4(d) or other Rules related to those entries by clear and convincing evidence. *See In re Reilly*, Bar Docket No. 102-94, at 4 (BPR July 17, 2003) (concluding that Disciplinary Counsel did not have the authority to dismiss charges approved by a Contact Member).

and associated issues that might have supported such a conclusion. The members of this Hearing Committee are all familiar with professional billing on an hourly basis and may very well have (like many in-house counsel at many corporations) strong views on the reliability or unreliability of time data entered at the end of the month (or longer) or the week or even at the end of the day after providing the services in question. However, these personal views have no place in our analysis of the record pertaining to these disciplinary charges against Respondent, and we therefore have no basis, in light of the silent record in this regard, for finding by clear and convincing evidence that respondent committed an ethical violation by the very fact of preparing and editing entries in the fall of 2009 after the Court of Appeals' ruling. The same is true with respect to Disciplinary Counsel's apparent theory that terms like "review" or "work on" are inherently improper (again, notwithstanding our possible personal views on the issue).

The Hearing Committee members have each reviewed carefully and repeatedly all of Respondent's testimony set forth in FF 143, 148-149, 153, 158, 161, and 163, have discussed it at length in the course of several post-hearing conferences, have considered it in the context of the other evidence in this matter, and have reflected upon Respondent's demeanor during this and other testimony. In addition to the relatively sparse points in the parties' briefs as set forth above, we have also taken into consideration the following factors.

First, Respondent presented two character witnesses. One reported that she has never observed any dishonesty on Respondent's behalf, and the other testified that he has "the highest regard for [Respondent's] integrity, his honesty." Tr. 1865, 1872. A third witness, a probate attorney who has known Respondent professionally and personally for approximately 20 years, considers Respondent "an incredibly honest, trustworthy person." Tr. 2478, 2489. We are confident that these witnesses testified truthfully and also believe, on the basis of the entire record,

that their testimony is accurate.

Second, Respondent testified that RX 16 contains "a lot of documentation that relates to the charges [*i.e.* specific entries] that Mr. Manne highlighted." FF 153. Respondent also stated that "my attorney will now want to go through Exhibits 16 [pertaining to the *Brown* trust] and 17 [pertaining to the *Baker* trust] in great detail." FF 158. Respondent's counsel did not do so. We have examined the 10-page RX 16 and have found no documents pertaining to the September 7, 2007 or March 25, 2008 entries in the *Brown* fee petition that Respondent was examined about. We have also examined the 33-page RX 17 (pertaining to the *Baker* trust). We found there substantial documentation (approximately 12 pages) relating to the mid-November 2007 crisis situation that Respondent testified to as set forth in FF 160; we found little else. On balance, in light of Respondent's assertions regarding his reliance on such materials, we are troubled by the failure of Respondent and his attorneys to adduce substantial, specific, relatively detailed evidence pertinent to his work on the *Brown* and *Baker* trusts during the appeals period.

Third, Respondent adduced no testimony from Edward Biggin, his associate at the time and now his partner, or from others in his office regarding the preparation of the two post-appeal fee petitions. We find this evidentiary lacuna troubling in light of Respondent's assertion that he and his office colleagues worked after the appellate decision to complete and document the time they spent on the *Brown* and *Baker* trusts after the Court of Appeals' decision. FF 149.

Fourth, the evidentiary hearing in this matter took place approximately seven years after the entries were finalized and submitted and 7-10 years after the work reported in the entries. The Hearing Committee is sympathetic to the difficulty of remembering specific tasks (the actual work) after the passage of 1-3 years (between the actual work and the reporting of that work). But we are also concerned about the unlikelihood that anyone could reliably testify with specificity about brief

actions (the work and the reporting) after 7-10 years, as Respondent purported to do in some instances. *E.g.*, DX J7 at 18; DX C53 at 20; Tr. 2298-99, 2305-09, 2312-15, 2323-28, 2377-82.

Fifth, Respondent's testimony regarding the preparation of specific entries and of the fee petitions generally was frequently vague. Respondent repeatedly fell back on phrases such as "I suspect," "it may have been," "I would not have," "I just don't have all the paper that I might have had back then," "I gave it to my partner, I believe, to review," "there must have been," "there might have been," "I might have found," "it makes sense," "I had to have," "I must have been," "I would have noticed something," "perhaps it was a day when," "I would have been," and "I might have been." Tr. 2304, 2307-08, 2309, 2313-14, 2323-24. We recognize that Respondent can be said to be caught between a rock and a hard place with respect to the vagueness and the purported specificity of his testimony but this vagueness nevertheless has given us pause.

Sixth, the "implausibility" of one or more revised time entries pointed out by Disciplinary Counsel is troubling. *See* FF 152-53, 158, 161.

Seventh, Respondent testified that his calendar for the 2007-2009 period was lost during an update of his computer system's software. FF 158; Tr. 2338-39. Neither Respondent nor Disciplinary Counsel adduced any further testimony or other evidence on this potentially important claim.

Eighth, the value of the time reported in the *Brown* fee petition based on the *Brown* trust *Pre-Bill* was $10,800 (about 25%) higher than the value of the time shown in the *Brown* PCLaw report. *See* FF 154. The value of the time in the *Baker* fee petition based on the *Baker* trust *Pre-Bill* was $8,775 (about 20%) higher than the value of the time shown in the *Baker* PCLaw report. *See* FF 164. The value of the additional time in the *Brown* petition amounted to about 0.5% (*i.e.*, one half of one percent) annually of the original corpus of the *Brown* trust, and the total

compensation requested and approved for the *Brown* trust equated to about 2% of the original corpus of the *Brown* trust when annualized. FF 154.The value of the additional time in the *Baker* petition also amounted to about 0.5% of the original corpus of the *Baker* trust (a bit less than 0.2% annually over the approximately three-year period) and the total compensation requested and approved for the *Baker* trust equated to about 1% of the original corpus of the *Baker* trust when annualized. We think that these calculations, some of which have been pointed out by Disciplinary Counsel and others of which follow therefrom, suggest, as Disciplinary Counsel argues, that Respondent was trying to increase his remuneration beyond that shown in the PCLaw Client Ledgers but, contrary to Disciplinary Counsel's implicit contention, we think, after careful consideration, that these calculations do not further inform our analysis.

Ninth, there is no evidence that Respondent or his firm had any financial problems in the time period relevant to this matter up to and including the hearing in this matter.

After weighing all of these conflicting and complicated considerations, the Hearing Committee cannot conclude by clear and convincing evidence that Respondent knowingly or purposely testified falsely about the preparation of the *Pre-Bills* attached to the post-appeal fee request submissions. In other words, we think that at some points Respondent testified inaccurately about his preparation of some of the entries in the *Pre-Bills*, but we cannot conclude by clear and convincing evidence that he intentionally testified falsely, with the purpose of covering up the taking from the trusts of more than he arguably had earned over the multi-year appeal period.

However, we are convinced by clear and convincing evidence that the September 7, 2007 entry in the *Brown* Trust *Pre-Bill* (FF 152), the March 25, 2008 entry in the *Brown* Trust *Pre-Bill* (FF 153), the November 29, 2006 entry in the *Baker* Trust *Pre-Bill* (FF 158), and the February 13, 2008 entry in the *Baker* Trust *Pre-Bill* (FF 163) are not supported by available documentation,

other information, and/or Respondent's experience.[43] We think that Respondent's inflated self-esteem, intellectual arrogance and anger over Judge Wolf's, Judge Wertheim's and the Court of Appeals' rulings in the 2007-2009 time period – manifested several times in his testimony – clouded his judgment in the fall of 2009, not only to the point of irresponsibly and baselessly inflating the entries identified above, but also to the point of not seeking advice about and review of the *Pre-Bills* from his counsel, his accountant, or some other independent, objective professional without a stake in the battle that Respondent and Judge Wolf had waged in the Probate Division.

On the other hand, a majority of the Hearing Committee concludes that there is not clear and convincing evidence that the October 16, 2007 entry (FF 159), the November 13, 2007 entry (FF 160), the November 14, 2007 entry (FF 161), or the January 8, 2007 entry (FF 162) were not supported by available documentation, other information and/or Respondent's experience. Mr. Kassoff dissents from this latter determination, as set forth in his Separate Statement.

We turn now to the legal significance of the inaccurate entries described in FF 152, 153, 158, and 163. In its Reply Brief, Disciplinary Counsel suggests for the first time that ". . . even if the Hearing Committee were to accept that Respondent did attempt a good-faith reconstruction," the preparation and submission of the entries "would still have amounted to a reckless disregard for the accuracy of a court filing." ODC Reply Br. at 22 (citing *Cleaver- Bascombe I*, 892 A.2d at 404). Pursuing Disciplinary Counsel's theory, we are guided less by *Cleaver-Bascombe I*, which

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[43] The amounts involved in these four entries total $1,035. *See* FF 152, 153, 159, 164. Mr. Kassoff has concluded that two other specific entries fall into this category – the September 7, 2007 ($140) and November 12, 2007 ($280) entries for the *Baker* Trust *Pre-Bill* – in addition to the numerous other non-contemporaneous entries that were made after the D.C. Court of Appeals decision. *See* Separate Statement of Mr. Kassoff at 178-179.

involved egregious circumstances, and more by *In re Romansky*, 825 A.2d 311 (D.C. 2003), where the Court of Appeals observed,

> Although **we have suggested that a showing of recklessness can sustain a violation of the Rule [8.4(c)]**, we have yet to squarely apply the standard in cases such as this.. . . . If Romansky violated the fee agreements knowingly, **or if he did so recklessly — *i.e.,* consciously disregarding the risk** that the agreements did not permit premium billing **– then his conduct was dishonest and did violate Rule 8.4(c).**

825 A.2d at 316-17 (emphasis added). The Court of Appeals confirmed and applied the "'consciously disregarding the risk'" test in *In re Romansky*, 938 A.2d 733, 740 (D.C. 2007) ("*Romansky II*") (quoting *Anderson*, 778 A.2d at 339).

We have examined *Cleaver-Bascombe I* and *In re Cleaver-Bascombe*, 986 A.2d 1191 (D.C. 2010) ("*Cleaver-Bascombe II"*) and also the arguably pertinent cases cited in the Disciplinary Counsel's opening Brief. *See, e.g*., ODC Br. at 63, 77. A majority of the Hearing Committee believes the "reckless disregard" here is not equivalent to the factual circumstances in cases pointed out by Disciplinary Counsel. *See id.* at 63 (citing *Ukwu*, 926 A.2d at 1113-14 (evidence suggested intentional dishonesty but the Court of Appeals added ". . . even if Respondent's conduct was in reckless disregard of the truth rather than specifically intended to deceive – a rather dubious hypothesis on the state of facts . . . he would have violated Rule 8.4(c)")), and *Cleaver-Bascombe I*, 892 A.2d at 404 ("An attorney who recklessly maintains inadequate time records, and consciously disregards the risk that she may overcharge a client . . . engages in dishonesty within the meaning of Rule 8.4(c)."). Here, a majority of the Hearing Committee finds that there is no pattern of inaccurate submissions as in *Ukwu,* 926 A.2d at 1111-1114, and no flagrant misconduct as in *Cleaver-Bascombe II*, whose fee submission was ultimately determined to be "a fraudulent attempt to obtain public funds by submitting a sworn CJA voucher, under pains and penalties of

perjury, which was false and fraudulent, compounded by Cleaver-Bascombe presenting false testimony in support of the fraudulent voucher." 926 A.2d at 1200. One member of the Committee dissents from this position, viewing the inaccurate billing and failure to disclose as deliberate. *See* Separate Statement by Mr. Kassoff (finding both a Rule 8.4(c) and Rule 3.3(a)(1) violation).

On the other hand, the same majority of the Hearing Committee agrees that the finding in *Romansky II* that recklessness had not been established by clear and convincing evidence because the facts there were "virtually in equipoise," 926 A.2d at 742, is not controlling here because, in *Romansky*, there was concrete, undisputed evidence of factors that could reasonably be seen as indicating the lack of any risk of material inaccuracy. 926 A.2d at 741-42. There is no such evidence in this matter.

In re Rosen, 570 A.2d 728 (D.C. 1989) (per curiam), seems more analogous to the majority, because there the attorney carelessly and inaccurately "endorsed a written oath" on February 5, 1982 that incorrectly asserted that the facts contained in his prior affidavit and questionnaire for the Maryland Bar Application were "still true and correct." 570 A.2d at 729. The respondent signed the oath without adequately checking and reflecting upon what he had stated in his original May 26, 1980 application, even though in the interim two formal disciplinary charges had been filed against him. *Id*. Here, Respondent's handling of his post-appeal fee petitions covering approximately the preceding 36 months, FF 148, 150, 156, 159, seems to us substantively indistinguishable from Rosen's written oath made 20 months after his original application affidavit. Consequently, based on the facts the Hearing Committee has found to have been established by clear and convincing evidence, one Committee member believes Respondent was deliberate in his false billing and two members agree with Disciplinary Counsel's fallback argument that, in light of *Rosen*, four of Respondent's post-appeal fee petitions must be deemed

to have resulted from and to reflect a reckless disregard of the truth. *Rosen*, 570 A.2d at 729 ("We are satisfied that respondent acted in reckless disregard of the truth, in that his casual treatment of the oath evinced an obvious and culpable contempt for an attorney's duty to be candid.").[44]

Accordingly, on the basis of the foregoing factual and legal analysis and also the case law summarized *supra* at 87-89, the Hearing Committee recommends that the Board conclude as a matter of law that Disciplinary Counsel has proved by clear and convincing evidence that Respondent recklessly prepared four inaccurate entries in the *Pre-Bills* submitted with his post-appeal fee petitions and thereby violated Rules 8.4(c) and 8.4(d). A majority of the Hearing Committee, however, does not believe that Disciplinary Counsel has proven by clear and convincing evidence that Respondent knowingly prepared the four inaccurate entries. In his Separate Statement, Mr. Kassoff sets forth his views on why he believes a violation of Rule 3.3(a)(1) was also proven and why several other entries in the Pre-Bills violated Rules 8.4(c) and Rule 3.3(a)(1).[45]

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[44] *In re Tun*, Board Docket No. 14-BD-099 (BPR July 14, 2017), is informative by contrast. Tun asserted that his erroneous statements in a submission were the result of poor drafting and proof-reading and thus negligent, but the Hearing Committee did not credit Tun's testimony and found that he had made the false statements in the pleading knowingly and intentionally. *Id.*, appended HC Rpt. at 12-16. The Board adopted the majority's credibility determination and its recommendation of a finding of intentional dishonesty. *Id.* at 4-5. The dissenting member of the *Tun* Hearing Committee had credited Tun's testimony about the drafting of the pleading and recommended a finding of reckless dishonesty. *Id.*, appended HC Rpt., Separate Statement of Mr. Fox at 1-3. Here, a majority of this Hearing Committee has credited Respondent's testimony regarding the preparation of the *Pre-Bills*, *supra* at 57-58, and has concluded that the *Pre-Bills* were prepared recklessly, as in *In re Rosen*. Indeed, even the majority of the Hearing Committee in *Tun* agreed that, absent intentional falsity, such a pleading would constitute reckless dishonesty under *Rosen*. *Id.*, appended HC Rpt. at 15.

[45] A word is in order here regarding the scope of what we have and have not considered, especially in light of Mr. Kassoff's Separate Statement. As reflected in the preceding text, we have analyzed

P. DISCIPLINARY COUNSEL HAS NOT PROVED BY CLEAR AND CONVINCING EVIDENCE THAT THE FEES SOUGHT BY RESPONDENT IN HIS DECEMBER 15, 2009 AND JANUARY 8, 2010 FEE REQUESTS IN THE *BROWN* AND *BAKER* TRUSTS FOLLOWING THE DECISION OF THE DISTRICT OF COLUMBIA COURT OF APPEALS WERE UNREASONABLE *PER SE* AND THEREFORE IN VIOLATION OF RULE 1.5(a)[46]

Disciplinary Counsel asserts, "Inherently a fee is unreasonable if it inaccurately inflates the time that the lawyer spent working on the client's behalf or if it fails to disclose it is based on unsupported estimates of time charges made long after the fact." ODC Br.at 78 (citing Rule 1.5(a)(1) as listing "the time and labor required" as the first factor in considering reasonableness). Disciplinary Counsel then provides terse, parenthetical summaries of the general rulings in *Cleaver-*

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whether specific entries in the two *Pre-Bills* which Disciplinary Counsel introduced evidence on or otherwise put Respondent on notice of were inaccurate and submitted to the court recklessly. A majority of the Hearing Committee has not reached any conclusion regarding any other entries in or the overall character of the *Pre-Bills*. Although Disciplinary Counsel's position is not entirely clear, it appears to be contending that the *Pre-Bills* contained numerous dishonest entries, for Disciplinary Counsel stated in closing argument at the hearing, "The listed entries that we listed in the specification of charges as noted in the language, these were examples or they included things. That, you know – there may be others that we'll throw in to support that . . . ." Tr. 2641. Additionally, Disciplinary Counsel attached to its Brief documents entitled "Brown Entries Added After 9/15/09 (pages 1-3 of Attachment 6), "Brown Entries Modified After 9/15/09" (page 4 of Attachment 6), "Baker Entries Added After 9/15/09" (pages 1-3 of Attachment 7) and "Baker Entries Modified After 9/15/09" (pages 4-5 of Attachment 7); these documents purport to show $10,555 in additional charges in the *Brown* trust and $8,775 in additional charges in the *Baker* trust. Thus, Disciplinary Counsel may well be contending that every one of these entries is recklessly inaccurate. Disciplinary Counsel had ample opportunity in the ten-day hearing (and undoubtedly would have been granted additional time if requested) to adduce evidence on entries in addition to the ones covered in the parties' briefs and/or in testimony and documentary evidence if it had chosen to do so. Without such evidence, like that recounted in our Findings of Fact based on the parties' discussions in their briefs and/or testimony and documentary evidence at the hearing, a majority of the Hearing Committee simply cannot reach any conclusion regarding any other entries. Doing so would, in the view of the majority, be the sheerest speculation, not to mention a gross violation of Respondent's Due Process right to know of and present his own evidence on any other entries that Disciplinary Counsel might consider false. This concern accounts also for the majority's decision not to address the time entries and related circumstances set forth in FF 149, 154, 164.

[46] One member of the Hearing Committee dissents from this recommendation. *See* Separate Statement of Mr. Kassoff.

Bascombe I and *In re McClure,* Bar Docket No. 2010-D152144 A.3d 570 (D.C. 2016). See ODC Br. at 78. Respondent, although not expressly addressing the Rule 1.5(a) charge separately, contests the applicability of *Cleaver-Bascombe I* and *II* and *McClure* and also questions whether Rule 1.5(a) is applicable to fees charged to a trust. R. Br.at 177-79.

Disciplinary Counsel provides no analysis of the eight factors set forth in Rule 1.5(a). Disciplinary Counsel also adduced no expert evidence and no convincing circumstantial evidence that any particular entry in the post-appeal fee requests reported an unreasonable amount of time for the specified task(s) in that entry; indeed, Judges Campbell and Hamilton approved the fee requests *in toto*, without any reduction to the overall amount requested or to any individual entry. FF 154, 165. Thus, a majority of the Hearing Committee simply does not see any basis on which we could find that the total amounts in each fee petition or any individual entries in the petitions were unreasonable in and of themselves.

We turn now to the cases cited by Disciplinary Counsel and its associated theory of inherent unreasonableness. In *McClure*, the fee submission entries at issue were intentionally overstated and therefore "demonstrably false . . . " [a]nd even if true . . . clearly disproportionate to the services provided and "intentionally false," and an expert witness testified that Respondent's fee submission was "'unequivocally an unreasonable fee demand.'" *In re McClure*, BDN 2010-D152 at 23. (BPR December 31, 2015). A majority of the Hearing Committee, however, has not found that Respondent intentionally overstated the amount of any specific entry or either of the two total amounts. In *Cleaver-Bascombe I*, as Respondent points out, Cleaver-Bascombe knew that her voucher included services that she knew she had not rendered; nevertheless she "knowingly submitted a false voucher. . . ." Thus, her "submission of the voucher was more than an exercise of

mere recklessness; she knew full well that she had no reliable basis for reconstructing the services she had rendered and so she made it up." *In re Cleaver-Bascombe*, Bar Docket No. 182-02, Supplemental Report at 5 (July 21, 2006). Again, the facts in this matter as the majority has found them differ decisively from those in *Cleaver-Bascombe*.

Disciplinary Counsel provides no other case law support for its sweeping "inherently . . . unreasonable" theory, an assertion which seems to us to treat every inaccurate fee entry in any circumstance as a *per se* offense, a proposition for which we can find no authority. Nor has Respondent been charged with utilizing a "fee . . . prohibited by . . . law" in violation of Rule 1.5(f), a fee that would be unreasonable *per se.*

Finally, the majority of the Hearing Committee has considered whether the time entries that we have found to be recklessly dishonest must be considered to be unreasonable *per se*. We have found no District of Columbia authority for that proposition. The Court of Appeals may conclude that such an interpretation of Rule 1.5(a) is supported by its current Rule 1.5(a) jurisprudence or that such an interpretation should be adopted prospectively. The majority of the Hearing Committee, however, feels that a hearing committee cannot expand the current Rule 1.5(a) jurisprudence in the District of Columbia, as we understand it, in that manner.

Accordingly, on the basis of the foregoing factual analysis and also the case law summarized *supra* at 80-81, a majority of the Hearing Committee recommends that the Board conclude as a matter of law that Disciplinary Counsel has not proved by clear and convincing evidence that Respondent violated Rule 1.5(a) in this instance. Mr. Kassoff sets forth his views on this issue in his Separate Statement.

V. SANCTION

A. THE FACTORS TO BE CONSIDERED

The Court of Appeals has instructed that, in determining the appropriate sanction for a disciplinary infraction, the factors to be considered include (1) the seriousness of the misconduct, (2) the presence of misrepresentation or dishonesty, (3) Respondent's attitude toward the underlying conduct, (4) prior disciplinary violations, (5) mitigating circumstances, (6) whether counterpart provisions of the Rules of Professional Conduct were violated, and (7) prejudice to the client. *See, e.g.*, *Martin*, 67 A.3d at 1053; *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc).

The Court of Appeals has further instructed that the discipline imposed in a matter, although not intended to punish a lawyer, should serve to maintain the integrity of the legal profession, protect the public and the courts, and deter future or similar misconduct by the respondent-lawyer and other lawyers. *Hutchinson*, 534 A.2d at 924; *Reback*, 513 A.2d at 231. Additionally, the sanction imposed must not "foster a tendency toward inconsistent dispositions for comparable conduct or . . . otherwise be unwarranted." D.C. Bar Rule XI, § 9(h)(1),

B. ANALYSIS

1. Seriousness of the Misconduct

Respondent has admitted and we recommend findings of two Rule 3.4(c) violations; these are mitigated to some extent by the circumstances discussed in subsection V.B.5(b) (the mitigation analysis) *infra*. The single violation of Rule 3.3(a)(1) and the two dishonesty violations of Rule 8.4(c), and associated serious prejudice to the administration of justice in violation of Rule 8.4(d), that we have recommended – the "did not keep time records" statement in the appellate brief that Respondent's attorney prepared and the four recklessly dishonest time entries in the post-appeal

Pre-Bills – are obviously more serious. Ms. Mims' recommendation for findings of two instances of negligent misappropriation and Mr. Kassoff's recommendation for additional knowing false statements and dishonesty findings increase the seriousness level in their view, as set forth in each of their Separate Statements.

A majority of the Hearing Committee does not see any indication of prolonged, repeated, or pervasive misconduct. Mr. Kassoff perceives a pattern of dishonesty. *See* Separate Statement of Mr. Kassoff (recommending findings of multiple violations of Rules 3.3(a)(1) and/or 8.4(c) in the handling of the *Seay*, *Brown* and *Baker* trusts, a violation of Rule 3.4(c) in the handling of the *Baker* trust (Counts I, II and III), and more extensive violations of Rules 3.3(a)(1), 8.4(c) and 8.4(d) and a violation of Rule 1.5(a) related to the altering of time entries (Count IV)).

2. Misrepresentation or Dishonesty

The Hearing Committee unanimously recommends a finding of one false statement in the appellate brief that Respondent's attorney prepared and a finding that four entries in the post-appeal fee submissions must be considered recklessly dishonest. Mr. Kassoff would recommend additional findings of dishonesty related to Respondent's November 19, 2004 fee petition and Motion for Reconsideration in the *Seay* trust; repeated instances of knowingly making false statements to a tribunal and dishonesty in Respondent's February 23, 2006 Response to Judge Wolf and subsequent appellate brief in the *Brown* trust; knowing disobedience of an obligation and knowing false statements to a tribunal and dishonesty related to Respondent's June 23, 2006 First Accounting and his August 30, 2006 Response to Judge Wertheim in the *Baker* trust; and multiple instances of dishonesty (beyond the four found by the majority), knowing false statements, and the charging of an unreasonable fee in the post-appeal fee requests in the *Brown* and *Baker* trusts. Mr. Kassoff explains in his Separate Statement his view of the significance of the additional Rule violations that

he would find.

In regard to Respondent's appearance before the Hearing Committee, we are unanimous in deciding that Disciplinary Counsel has not proven, by clear and convincing evidence, that Respondent intentionally provided false testimony. We also unanimously agree that this case is not one involving flagrant dishonesty as delineated in the Court of Appeals' attorney dishonesty jurisprudence.

3. Respondent's Attitude Towards the Underlying Misconduct

We are by no means unsympathetic to the situation that Respondent found himself in in the roughly 2005-2007 period, as discussed in our mitigation analysis in subsection 5, *infra*. But when all is said and done, Respondent strikes us as having been his own worst enemy at various points in this saga. As we received his testimony and subsequently reviewed and discussed it repeatedly, we were uncertain at times whether he fully understands and acknowledges that he failed in his over-weening self-confidence even to think about seeking objective advice about the steps he might take, stepped out of bounds on the occasions we have identified above, and came perilously close to doing so on several others. On the other hand, toward the end of the hearing, Respondent convincingly expressed his remorse over certain of his missteps. Tr. 2173 -75, 2179-2180.

4. Prior Discipline

Respondent has no prior disciplinary history in the District of Columbia, as confirmed by Disciplinary Counsel. ODC Br. at 87.

5. Mitigating Circumstances

(a) Respondent's Undue Delay Contention. Respondent argues that Disciplinary Counsel's alleged delay in bring this proceeding should be treated as a mitigating factor. *See* R. Br. at 184-85. We agree that the controlling authority cited by Respondent permits such a consideration,

but we disagree with the premise of Respondent's contention. Respondent charges that "Disciplinary Counsel still delayed this proceeding for years for reasons not fairly attributable to Respondent," R. Br. at 184, but he has not adduced a single such actual "reason." We independently have looked for, but not found, any information suggesting that Disciplinary Counsel either dithered or purposely moved unreasonably slowly during the nine years preceding the filing of the Specification of Charges, and we see ample indication that Respondent and his legal team were responsible for significant portions of that passage of time. *See supra* at 3-4. Accordingly, we do not consider the very long pendency of this matter to be a mitigating factor.

(b) The Context of Respondent's Rule Violations. Respondent and his counsel are on stronger ground when they point to the context in which Respondent sometimes overstepped the bounds. Respondent described his reaction to "the way Judge Wolf was addressing me and the tone of this situation" as follows, in response to inquiry from the Hearing Committee:

> . . . I felt like, here's a judge who had three years earlier said to me, Don't file any fee petitions. Then he comes back and he says, in the Seay case, File fee petitions but only in this case. And then he comes back and he says, You've been on notice from the Seay case that you're always supposed to file fee petitions in every case, and your [*sic*] scheming to get around the court. My head was spinning from Judge Wolf.
>
> So your suggestion is right. I could have done it better. I could have done it better. But I'm asking you to take notice of the circumstances. It felt like Alice in Wonderland to me. I didn't understand how a judge could change his mind and then make up statements that had no basis in proof, didn't take notice of the facts.
>
> He just made things up, and I reacted, and that's the problem. I reacted without thinking it through completely.

Tr. 2179-2180.

In our view, Respondent seemed to acknowledge at the end of the foregoing observations that he was clearly on a crusade, and he points in his brief to his "good-faith dispute with certain

Probate Division judges over compensation for his SNT work on a percentage-of-assets basis, rather than on the basis of time charges" and to his "principled defense, in the Probate Division of the District of Columbia Superior Court, of his percentage fee compensation for special needs trustee work." R. Br. at 1, 183. Respondent provided additional insight in a memorandum that he distributed to a list serv of members of the Bar's Estates, Trusts and Probate Section during the period in which the June 21, 2006 Trustee's Explanation of Services was being prepared in the *Brown* proceedings. DX C29; *see also* FF 71. Respondent wrote:

> . . . [T]here are two judges who may believe that an individual trustee should keep time records of services performed as trustee to prove the reasonableness of their fees even if they are accustomed to a percentage fee. It is not the law of the DC and it is not a rule of the Court in DC but it is the holding of two judges, and a new holding in my experience. I have also three orders of Superior Court judges directing that no petition for fees be filed in such trust cases where a percentage fee is permissible under the trust document.
>
> * * * *
>
> Perhaps the DC judges are applying a different standard to those [SNT] cases and not to others – I don't know, because they have not articulated a single policy applicable to the probate division and there is, as yet, no law specifically addressing these kinds of trusts.
>
> * * * *
>
> Judges and Trustees will forever clash over the issue of fees in DC without additional law and rules to give effect to that law. To that end, the ad hoc committee established by the DC Bar, Estates, Trusts and Probate Section . . . has drafted proposed legislation which, in part addresses this issue. . . .

DX E10 at 1. At the hearing, Respondent added:

> The ad hoc committee was fashioned initially to address the problem of guardianships for minors in the District of Columbia, and we, a few of us members of the Bar, took the initiative to try to draft proposed legislation, and once we began that process we decided that it would be good to draft the special needs trust law for the District of Columbia, since most states have one and the District [of] Columbia doesn't. And boy would it help if we had a special needs trust law in the District of Columbia, so everyone knew how to operate the special needs trusts.

> And so, it was pretty clear on that ad hoc committee who was going to draft that law. That would be me, because I was the purported expert in the special needs trusts . . . and I think it's pending before the DC Council, and way these many years later, ten years later, and still it hasn't gotten very far. But we tried. I tried. I tried to make the system better.

Tr. 2200-01.

Two days after Respondent's June 14, 2006 memorandum, Mr. Varrone likely reflected accurately his and Respondent's mindset regarding their crusade when he wrote to Respondent, regarding additional research for preparation of the Trustee's Explanation of Services:

> I'm not sure whether this will make a difference in the ultimate outcome, but it will require the judge to break a sweat if he wants to continue to beat up on you. . . . Sorry for the delay, but as this may be the one shot we have to make a record, I'd like to take our best shot.

DX E11 at 1.

We are sympathetic to the pressure that Respondent found himself under, but we think that Respondent and Mr. Varrone should have sought a broader perspective and objective advice in the course of their dispute with Judge Wolf. Nevertheless, and on balance, we consider the difficult situation in which Respondent found himself to be a significant mitigating factor, even if Respondent could have handled the situation better and thereby avoided committing ethical violations stubbornly, unthinkingly and apparently without advice of objective counsel who was not equally caught up in the Probate Division battle.

(c) Other Mitigating Factors. The four rule violations that we conclude to have been proven and the underlying circumstances occurred many years ago. *Cf. In re Schneider*, 553 A.2d 206, 212 (D.C. 1989) (sanction mitigated in light of an "unblemished record over a considerable period of professional life subsequent to the event").

Respondent appears to have cooperated with Disciplinary Counsel throughout the long investigatory period of this matter. He and his counsel mounted a vigorous and inevitably time-consuming defense but there is no indication that they did so to purposely delay the resolution of the matter. *See* DX A7-A90.

We agree with Respondent that there are numerous other and even more significant mitigating factors. We set them forth here at some length because of their extraordinary nature overall and their importance to a balanced sanctions determination.[47]

Respondent has a long history of service to the disabled and elderly communities, including volunteer work during his high school, college and law school years; service on the board of directors of the Legal Counsel for the Elderly; establishment of the Academy of Special Needs Planners; membership in the Special Needs Alliance, a national invitation-only consortium of lawyers serving the special needs community; and the presidency of Shared Horizons, Inc., a District of Columbia not-for-profit organization that administers a pooled special needs trust (*i.e.*, a trust that manages the combined assets of individual special needs trusts that cannot be

[47] We have also weighed carefully Disciplinary Counsel's views with respect to sanction but, understandably, Disciplinary Counsel does not explore the complex sanctions determination in depth because of its contentions that Respondent intentionally violated Rule 1.15(a) and engaged in flagrant dishonesty and therefore must be disbarred – allegations that we have not found to have been proven and contentions that we have not found persuasive. *See* ODC Br. at 79-89; ODC Reply Br. at 23-24. As reflected in the foregoing discussion, we agree with Disciplinary Counsel's position on Respondent's delay contention, ODC Reply Br. at 23-24, after confirming it with our own review of the record, *supra* at 3-4. We have carefully considered Disciplinary Counsel's observations in its discussion of "Respondent's Attitude," ODC Reply Br. at 87-88, but we think that Disciplinary Counsel's advocacy on this point fails to address offsetting factors, as previously discussed, and we do not agree with its analogy of this case to *In re Stanton*, 470 A.2d 272 (D.C. 1983) (per curiam), where the respondent's puritanical refusal to plea bargain demonstrably threatened to prejudice his clients, a circumstance not present in this matter.

individually managed cost effectively because of limited assets or other reasons). *See* Tr. 1966-1977.

Respondent has devoted significant amounts of time to the profession, serving as a member of the steering committee of the Bar's Estates, Trusts and Probate Section and later as the co-chair of the section. Tr. 1966. As noted earlier, his work for the bar included the drafting of a special needs statute and a recommended revision to the District of Columbia's guardianship of minors statute; thus he attempted at least to enlarge his own trustee compensation crusade into badly needed improvements in the District's trust law and the Probate Division's operating procedures and decision-making. *See* Tr. 2200, 2480, 2484. He is a regular lecturer on probate and special needs trusts, and he has been retained by the Office of Disciplinary Counsel to serve as an expert witness in disciplinary matters. Tr. 1967-1971, 2053, 2486.

Respondent has also been active in the larger community. He is a founding member of the American Friends of the Anne Frank House, has served on the board of directors of the Olney Theater, and has received national recognition for his service to the Hillel organization at George Washington University. Tr. 1975-77. He was ordained as a rabbi in 2015 and established The Jewish Studio, a community organization serving persons over the age of 40 in the Washington, D.C. area who are not affiliated with a specific synagogue. Tr. 1978.

Finally, Respondent contends that "[a]ny sanction that would prevent him from continuing to serve as a trustee of special needs trusts would deprive the needy beneficiaries of those trusts of the vast store of skills that Respondent brings to bear to serve their physical needs and preserve their access to public benefits," and he asks us to conclude that "a suspension of Respondent would do more harm than good, as it may lead to his removal as trustee from special needs trusts for which he does important work serving the needs of their disabled beneficiaries." R. Br. at 183, 185. We

share this concern and we would add that the burden on these beneficiaries and their guardians of establishing a relationship with a new trustee would likely be substantial. However, we note that we are not certain of the premise of this contention – *i.e.* that a suspension from the practice of law would preclude service as a trustee since, as Respondent himself observed several times, much of a trustee's service consists of work that is not legal in nature and that is performed by many trustees who are not attorneys. Moreover, a trustee can always retain an attorney to provide legal services for the trust. On the other hand, since the court-established SNTs are all judicially supervised, one or more judges might remove a suspended attorney from his or her court-appointed trusteeships; indeed, this possibility might arise from any finding of a disciplinary infraction by an attorney who serves as a trustee in judicially supervised SNTs, regardless of whether the attorney/trustee is suspended from the practice of law. Notwithstanding the inescapable uncertainties of predictions, the impact on a class of clients of a potential suspension has previously been given significant weight by the Court of Appeals. In *In re Mance*, 980 A.2d 1196, 1208 (D.C. 2009), the Court of Appeals observed:

> As we have previously recognized, respondent has a "lengthy and well-reputed history of providing an important service" to the community by serving as one of the few members of the bar engaged in the practice of street crime defense. *In re Mance,* 869 A.2d 339, 342 n. 10 (D.C.2005). Any suspension has a greater impact on a solo practitioner, or a lawyer in a very small firm, than on a lawyer who is part of a larger practice where other attorneys can more easily step in during the period of suspension.

These observations seem even more salient in this situation than in *Mance*, and therefore we believe on the basis of *Mance* as well as our own judgment that significant (but not determinative) mitigating weight should be given not only to Respondent's record of diligent service to the beneficiaries of his trusts and their families and exemplary service to the disabled community, to the legal profession and to the community at large but also to what we predict would be a very

substantial impact on his beneficiaries and their families resulting from a suspension or disbarment.

6. Number of Violations

The Hearing Committee, either unanimously or through a majority, recommends that the Board find that Respondent committed four of the ethical violations charged by Disciplinary Counsel. Specifically, the Hearing Committee recommends that the Board find that Respondent violated Rule 3.4(c) in two instances that he has admitted (*see* Sections IV.I and IV.J, *supra*), violated Rules 3.3(a)(1), 8.4(c) and 8.4(d) when his attorney made a statement in an appellate brief for which Respondent apparently must be held responsible (*see* Section IV.G, *supra*), and violated Rules 8.4(c) and 8.4(d) by including four recklessly inaccurate time entries in his post-appeal fee petitions (*see* Section IV.O, *supra*).[48]

7. Prejudice to the Client

A majority of the Hearing Committee finds there is no evidence of any financial or other prejudice to the *Seay*, *Baker* and *Brown* trust beneficiaries or their guardians or to any other present or former client, beneficiary or guardian. No pattern or course of misconduct in Respondent's law practice or trust practice, including his approximately 60 SNTs in the period relevant to this proceeding, was alleged or suggested during the hearing. Prospectively, a majority thinks that Respondent is correct in observing, "Though one key purpose of attorney discipline is to protect the public, there is no evidence whatsoever that the public generally, or any of Respondent's special-needs families or other trust beneficiaries specifically, need protection from Respondent." R. Br. at 179. One member of the Hearing Committee, however, finds prejudice to the trusts. *See*

[48] Mr. Kassoff would find additional Rule violations, as set forth in subsection V.B.2, *supra*, and in his Separate Statement. Ms. Mims would find two instances of negligent misappropriation, as set forth in her Separate Statement.

Separate Statement of Mr. Kassoff.

C. RECOMMENDED SANCTION OF MR. FITCH

Disciplinary Counsel has asked the Hearing Committee to recommend the presumptive sanction of disbarment for reckless or intentional misappropriation as well as for the other Rule violations it has charged, with reinstatement conditioned on Respondent's payment of restitution in the amount of $10,800 to the *Brown* trust, and $8,775 to the *Baker* trust, with interest at the legal rate from the dates of unearned fees, to the trusts and/or to the Clients' Security Fund ("CSF"), should the CSF make payment on any claim by the trusts. Respondent has requested that the Hearing Committee recommend a sanction of public censure based on a finding of two Rule 3.4(c) violations. Since each party's proposal is based upon that party's view of the evidence and the legal consequences ensuing therefrom, the two proposals understandably do not provide us with any significant guidance or even parameters for a recommended sanction for the violations that we believe occurred here.

The foregoing sanctions-related analysis in Sections V.A and V.B, *supra* at 143-153, is agreed to and adopted by the Hearing Committee either unanimously or by a majority. Because of the differing views of the Hearing Committee members on certain recommendations of law, the Hearing Committee has not been able, either unanimously or through a majority, to agree upon a sanctions recommendation. The sanctions recommendation of the Chair, who is part of the majority or unanimous resolution of every alleged Rule violation, is set forth here. The sanction recommendation of each of the other two Hearing Committee members is included in their respective Separate Statements, which are attached hereto.

I look first at what sanction each of the violations might in and of itself normally result in if there were no significant aggravating or mitigating factors and no other violations. Rule 3.4(c)

violations involving no other serious misconduct have resulted, *inter alia*, in a 30-day suspension stayed in favor of one year of probation to address related concerns with the assistance of the Practice Management Advisory Service ("PMAS"), *Wemhoff*, 142 A.3d at 574; a six-month suspension with all but sixty days suspended in favor on one-year probation and PMAS assessment, *In re Murdter*, 131 A.3d 355, 357-58 (D.C. 2016) (per curiam); and a six-month suspension with all but two months suspended in favor of one year of probation and PMAS assessment. *In re Askew*, 96 A.3d 52, 59-62 (D.C. 2014) (per curiam). Thus, each of Respondent's two violations not involving dishonesty would seem normally to call for no more than a very short and probably stayed suspension, and possibly even just a public reprimand, even before taking into consideration the strongly mitigating factors present here. However, the Hearing Committee has recommended findings of not one but two violations of Rule 3.4(c). In addition, I must take into consideration Respondent's attitudes at the time leading to the Rule 3.4(c) violations, notwithstanding Respondent's convincing expression of remorse and more mature perspective at various points in his testimony approximately ten years after the Rule 3.4(c) violations. *See* Tr. 2173, 2179.

The two findings of dishonesty that the Hearing Committee has recommended raise, of course, greater concerns, and I must also take into consideration the associated Rule 8.4(d) violations. *In re Martin* again provides a useful summary and guide:

> . . . [D]ishonesty in violation of Rule 8.4(c) and interference with the administration of justice in violation of Rule 8.4(d), however, warrant imposition of a more severe sanction. The violation of these two rules warrants severe sanction because "honesty is 'basic' to the practice of law." *In re Mason,* 736 A.2d 1019, 1024 (D.C.1999). The Board noted that we have generally imposed relatively short periods of suspension for isolated instances of dishonesty, *see In re Hawn,* 917 A.2d 693, 693 (D.C.2007) (per curiam) (thirty-day suspension for falsifying transcript); *In re Owens,* 806 A.2d 1230, 1231 (D.C.2002) (per curiam) (thirty-day suspension for making false statements to administrative law judge); *In re Schneider,* 553 A.2d 206, 212 (D.C.1989) (thirty-day suspension for falsifying receipts),

> whereas we have imposed relatively longer suspensions where dishonesty is accompanied by other serious violations or is protracted, *see In re Wright,* 885 A.2d 315, 316–17 (D.C.2005) (per curiam) (one-year suspension for pattern of dishonesty in several matters); *In re Ukwu,* 926 A.2d 1106, 1120 (D.C.2007) . . . .

67 A.3d at 1053. In *Martin*, the Court of Appeals imposed an eighteen-month suspension "because his dishonesty was both protracted and was intended to conceal or excuse earlier misconduct." *Id*. at 1054. The Court of Appeals went on to summarize the numerous serious, even "egregious" and "blackmailing" aggravating factors in the case before it. *Id.* at 1055. No such factors are present here. The Court of Appeals also summarized a number of other disciplinary actions resulting in eighteen-month suspensions, and I have reviewed and carefully considered those dispositions. *Martin*, 67 A.3d at 1055. All of those cases, like *Martin*, involved markedly more serious and/or extended misconduct than at issue here.

In the years since *Martin* was decided, the Court of Appeals has ordered a 90-day suspension with a fitness requirement where the attorney repeatedly had met surreptitiously with a blind and otherwise extremely impaired 89-year-old woman in order to effect a change in her estate plan that would benefit his client, *In re Rogers*, 112 A.3d 923, 924 (D.C. 2015) (per curiam); a one-year suspension with a fitness requirement where the attorney had made false statements to Disciplinary Counsel, *In re Fitzgerald*, 109 A.3d 619, 620 (D.C. 2014); and a three-year suspension with a fitness requirement where the attorney had made multiple misrepresentations to clients and Disciplinary Counsel, forged clients' signatures, and knowingly made false statements to immigration service personnel, *In re Vohra*, 68 A.3d 766, 771-73 (D.C. 2013). As with *Martin* and the cases discussed there, the serious circumstances in *Roger*, *Fitzgerald* and *Vohra* are not present in this matter.

The Court of Appeals has suggested, with respect to reckless submissions, that

> [i]f the gravamen of Respondent's violation is that she was recklessly

> sloppy in her timekeeping practices, and if there has been no proof of intent to defraud or of subsequent perjury, a recommendation that a relatively short suspension be imposed, with reinstatement conditioned on completion of the CLE course, may arguably be defensible.

Cleaver-Bascombe I, 892 A.2d at 404, 411.[49] On the other hand, even the careless affidavit filing by Rosen resulted in a nine-month suspension along with a fitness requirement. *In re Rosen*, 570 A.2d at 730. (I note, however, that there were no significant mitigating factors in the *Rosen* matter. Rosen also had prior dishonesty-based disciplinary infractions, *In re Rosen*, 481 A.2d 451 (D.C. 1984), but, oddly, the Court of Appeals appears not to have taken this prior disciplinary record into account in reaching its sanctions determination. 570 A.2d at 730.)

In sum, and before taking into consideration mitigating factors, I think that, at most, a suspension of approximately nine months with most of it stayed for the four instances of Rule violations here would be consistent with the dispositions in other comparable cases involving recklessly inaccurate court filings and other offenses, along with restitution to the *Brown* trust in the amount of $510 and restitution to the *Baker* trust in the amount of $525, for a total of $1,035.

However, Respondent's extraordinary record of professional and other public service, the extreme circumstances that surrounded the violations,[50] the absence of any material financial loss by or any other prejudice to any beneficiary or other person, the apparent absence of any problems in the intervening seven years and the unlikelihood of any future danger to clients or others all

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[49] As discussed previously, *supra* at 138-139, the Court of Appeals subsequently concluded that Cleaver-Bascombe, unlike Respondent here, knowingly submitted a false CJA voucher and knowingly testified falsely at the evidentiary hearing and, consequently, ordered her disbarment. *Cleaver-Bascombe II*, 986 A.2d at 1196-98, 1200-01 (D.C. 2010).

[50] In *Haar II*, the Court of Appeals considered the difficult situation engineered by the client to be "one of several *powerful* mitigating factors." 698 A.2d at 424 (emphasis added).

counsel to me a substantial reduction of the presumptive sanction in order to remain consistent here, under all the circumstances, with other dispositions in roughly similar overall circumstances while also deterring other attorneys from engaging in similar misconduct. I therefore recommend that Respondent be suspended from the Bar of the District of Columbia for a period of six months and that at least four months of that suspension be stayed. If I were confident that the likely even if not certain impact of any period of suspension on the beneficiaries of and others associated with the trusts that Respondent administers could be avoided if he were not suspended, I would recommend a stay of the entire six-month suspension. Out of an abundance of caution, I also recommend, in light of my appraisal of the quality of his judgment and decision-making during the events at issue and, in light of my concern, to a lesser extent, about Respondent's attitude at earlier stages of this proceeding, that Respondent be required during the full period of suspension and stayed suspension to notify Disciplinary Counsel of any litigation in which he is involved as an attorney or party and to respond promptly and fully to any inquiries from Disciplinary Counsel regarding such litigation or any steps taken or proposed to be taken in the litigation.[51]

Ms. Mims' and Mr. Kassoff's respective sanctions recommendations are included in their Separate Statements.

VI. CONCLUSION

The Hearing Committee unanimously recommends that the Board find the following Rule violations by Respondent:

> Disciplinary Counsel has proved by clear and convincing evidence that Respondent violated Rules 3.3(a)(1), 8.4(c) and 8.4(d) in Count II as discussed in Section IV.G.(ii), *supra* at 105-107.

[51] Disciplinary Counsel has not sought nor offered any evidence or argument with respect to a fitness requirement and, in any event, I see no need or basis for one.

Disciplinary Counsel has proved by clear and convincing evidence that Respondent violated Rule 3.4(c) in Count II as discussed in Section IV.I, *supra* at 112-113.

Disciplinary Counsel has proved by clear and convincing evidence that Respondent violated Rule 3.4(c) in Count II as discussed in Section IV.J, *supra* at 113.

Disciplinary Counsel has proved by clear and convincing evidence that Respondent violated Rules 8.4(c) and 8.4(d) in Count IV as discussed in Section IV.O, *supra* at 130-140.

The Hearing Committee further recommends, unanimously or by a majority, that the following allegations have not been proven as presented by Disciplinary Counsel:

Count I

Disciplinary Counsel has not proved by clear and convincing evidence that Respondent violated Rule 1.15(a) as discussed in Section IV.C, *supra* at 90-95.[52]

Disciplinary Counsel has not proved by clear and convincing evidence that Respondent violated Rule 3.4(c) and Rule 1.15(a) as discussed in Section IV.D, *supra* at 95-99.

Disciplinary Counsel has not proved by clear and convincing evidence that Respondent violated Rules 3.3(a)(1), 8.4(c) and 8.4(d) as discussed in Section IV.E, *supra* at 99-102.[53]

Count II

Disciplinary Counsel has not proved by clear and convincing evidence that Respondent violated Rules 3.3(a)(1), 8.4(c) and 8.4(d) as discussed in Section IV.F, *supra* at 102-105.[54]

Disciplinary Counsel has not proved by clear and convincing evidence that Respondent violated Rules 3.3(a)(1), 8.4(c) and 8.4(d) as discussed in

[52] Ms. Mims dissents as explained in her Separate Statement.
[53] Mr. Kassoff dissents as explained in his Separate Statement.
[54] *Id*.

Section IV.G(i), *supra* at 105-107.[55]

Disciplinary Counsel has not proved by clear and convincing evidence that Respondent violated Rule 1.15(a) as discussed in Section IV.H, *supra* at 107-112.[56]

Disciplinary Counsel has not proved by clear and convincing evidence that Respondent violated Rules 1.15(a) and 1.15(c)/(d) as discussed in Section IV.K, *supra* at 113-119.

Count III

Disciplinary Counsel has not proved by clear and convincing evidence that Respondent violated Rules 3.4(c) and 8.4(c) as discussed in Section IV.L, *supra* at 119-121.[57]

Disciplinary Counsel has not proved by clear and convincing evidence that Respondent violated Rules 3.3(a)(1), 8.4(c) and 8.4(d) as discussed in Section IV.M, *supra* at 121-124.[58]

Disciplinary Counsel has not proved by clear and convincing evidence that Respondent violated Rule 1.15(a) and 1.15(c)/(d) as discussed in Section IV.N, *supra* at 124-130.

Count IV

Disciplinary Counsel has not proved by clear and convincing evidence that Respondent violated Rule 3.3(a)(1) in Count IV as discussed in Section IV.O, *supra* at 139-140.[59]

Disciplinary Counsel has not proved by clear and convincing evidence that Respondent violated Rule 1.5(a) as discussed in Section IV.P, *supra* at 141-143.[60]

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[55] *Id.*
[56] Ms. Mims dissents as explained in her Separate Statement.
[57] Mr. Kassoff dissents as explained in his Separate Statement.
[58] *Id.*
[59] *Id.*
[60] *Id.*

Because of the divergence in view among the Hearing Committee members as to the specific charges that have been established, there is no Hearing Committee recommendation as to sanction.

Respectfully submitted,

Warren Anthony Fitch, Chair

Hal Kassoff, Public Member

Buffy Mims, Attorney Member

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

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

SEPARATE STATEMENT OF HAL KASSOFF

I write separately because, unlike the majority of the Hearing Committee, I find that Disciplinary Counsel has proven by clear and convincing evidence that Respondent repeatedly violated Rule 8.4(c) (dishonesty, fraud, deceit, or misrepresentation) in his handling of the *Seay*, *Brown*, and *Baker* Trusts (Counts I, II, III) and violated Rule 3.3(a)(1) (knowingly making a false statement of fact or law to a tribunal) on more than one occasion during his handling of the *Brown* and *Baker* Trusts (Counts II and III). I also find that Disciplinary Counsel has proven a violation of Rule 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal) during Respondent's handling of the *Baker* Trust (Count III).[1]

In addition, for Count IV of the Specification, I find that Disciplinary Counsel has established a pattern of inaccurate submissions in Respondent's fee requests in the *Brown* and *Baker* Trusts. Although the majority did find violations of Rules 8.4(c) and 8.4(d) in Count IV, I find the misconduct more serious and extensive than found by the majority. I do not credit Respondent's explanations and find the evidence is clear and convincing that he deliberately failed

[1] Respondent conceded two instances of violating Rule 3.4(c) in his handling of the *Brown* Trust (Count II).

to disclose to the probate court that the time claimed was based on retroactive modifications in his PCLaw entries and included time added by Respondent after he had lost his fee appeal in the D.C. Court of Appeals. Respondent purposely altered entries in the "Pre-Bills" to reach the percentage fee to which he believed he was entitled, despite the probate court's and Court of Appeals' rulings against him. Accordingly, I dissent from the majority's failure to find the Rule 3.3(a)(1) violation in Count IV. Finally, in light of Respondent's concession that the alterations resulted in a $10,800 increase in the *Brown* fee and $8,775 increase in the *Baker* fee (*see* FF 150, 154, 163, 164; R. Br. at 132, 140) and his failure to introduce evidence to support the reasonableness of or bases for these increases to rebut Disciplinary Counsel's clear and convincing evidence that his fees were unreasonable, I also dissent from the majority's finding that the Rule 1.5(a) (unreasonable fee) violation was not proven.

I. THE *SEAY* TRUST (Count I)

A. DISCIPLINARY COUNSEL HAS PROVEN RESPONDENT, IN THE COURSE OF ADMINISTERING THE *SEAY* TRUST, VIOLATED RULE 8.4(c).

I dissent from the majority's conclusion, *see* Report Section IV-E, that Disciplinary Counsel did not introduce sufficient evidence to support the charged Rule 8.4(c) violations concerning the *Seay* Trust. I find the evidence clear and convincing.

On November 19, 2004, Respondent filed a Petition for Compensation "for allowance of attorney fees" seeking authorization of $13,141.81 for services provided between January 1, 2002 and December 31, 2003. FF 46. These fees were calculated based on one percent of the total value of the *Seay* Trust. *Id*. Respondent's Petition for the first time was requesting payment by percentage of the *Seay* Trust value. FF 47. Respondent was asking the probate court to permit that compensation be by percentage, which would be approved as identified in the annual accountings, and that "no further fee petitions be submitted." FF 48.

In the November 19, 2004 Petition, Respondent knowingly failed to disclose the content of Judge Christian's October 13, 1999 Order concerning the *Seay* Trust. Judge Christian's order had admonished Respondent that "a request for compensation, accompanied by a *detailed statement of services* shall be submitted by the trustee for the Court's consideration prior to the payment of any fees to the trustee in this matter, such that the reasonableness of the compensation claimed can be determined . . . ." FF 27 (emphasis added). Such an omission or lack of disclosure was material because Respondent was asking a different judge, Judge Wolf, to permit him to be paid without a detailed statement of services, as his November 19, 2004 Petition did not include an attached statement of services. *See* FF 46. Respondent also stated that he had been asked by the auditor (as opposed to the Judge Christian) to submit a petition for approval of fees. FF 48. While there is no documentation of the auditor's request which Respondent cited, there is clear documentation of Judge Christian's order which he failed to cite or include in his request to Judge Wolf.

After Judge Wolf denied Respondent's November 19, 2004 Petition (Judge Wolf was still unaware of Judge Christian's order), Respondent moved for reconsideration on January 26, 2005. FF 51. He again requested that Judge Wolf permit him to calculate his fees as one percent of the total trust assets, allow him to notify the court of his fees in the accounting (without a detailed statement of services), and receive authorization for collecting the fees "through the [probate court's] approval of the annual accounting." FF 51. Especially disconcerting is the fact that Respondent cited *other* court orders issued in two trusts in the Civil Division, urging Judge Wolf to recognize those orders as "controlling precedent," while at the same time, continuing not to disclose Judge Christian's October 13, 1999 order involving the *Seay* Trust itself. *See* FF 51.

I also believe Respondent should have revealed the second sentence of the trust document when he sought to be paid a percentage of the trust value. In his November 19, 2004 Petition, Respondent quoted the trust document as providing: "A trustee shall be entitled to reasonable compensation for his or her services as Trustee hereunder." FF 47. Respondent, however, omitted and did not quote the second sentence of the trustee compensation provision: "The Trustee shall also be compensated for work performed on behalf of the Trust at his or her normal hourly rate for similar matters." *Id*. He had an obligation to disclose the second sentence and if it had been disclosed, Respondent would have had greater difficulty in arguing that the trust agreement justified a flat percentage fee.

B. MISREPRESENTATION AND DECEIT

The violation of Rule 8.4(c) is grounded in Respondent's misrepresentations before Judge Wolf. Misrepresentation is a "statement . . . that a thing is in fact a particular way, when it is not so." *In re Shorter*, 570 A.2d 760, 767 n.12 (D.C. 1990) (citation omitted); *see also In re Schneider*, 553 A.2d 206, 209 n.8 (D.C. 1989) (misrepresentation is element of deceit). The failure to disclose a material fact also constitutes a misrepresentation. *See In re Outlaw*, 917 A.2d 684, 688 (D.C. 2007) (per curiam) ("Concealment or suppression of a material fact is as fraudulent as a positive direct misrepresentation." (citations omitted)). Here, Respondent did not ever disclose Judge Christian's order, which as described *supra*, arose from his original dispute that a detailed statement of services was not required. I, accordingly, am not persuaded by Respondent's contention that Judge Christian's order dealt only "with the question of <u>when</u> a trustee could take compensation" as opposed to how. R. Br. at 155. I also am not persuaded by Respondent's contention that he had no ethical obligation to disclose the prior order because it was part of the court docket and, therefore, any judge could have found it on his own. *See id*. Respondent essentially admits his deliberate omission of any reference to Judge Christian's prior order. I agree

with Disciplinary Counsel that "particularly in the probate division where cases can last for decades and judges are constantly rotating in and out," Respondent had a duty of candor to the tribunal that he violated for the purpose of advancing his self-interest in obtaining his preferred method of compensation. *See* ODC Reply Br. at 9-10. His failure to disclose that order was, at a minimum, in "reckless disregard of the truth." *See, e.g.*, *In re Rosen*, 570 A.2d 728, 728-30 (D.C. 1989) (per curiam) (for Rule 8.4(c) violation, proof that the respondent "acted in reckless disregard of the truth" was sufficient to prove the material misrepresentation). Respondent's decision to move for reconsideration and to cite *other* court orders in other trusts as "binding precedent" erases any doubt in my mind as to the impropriety of his lack of forthrightness before Judge Wolf.

Respondent's decision not to include the second sentence of the trust document, which described compensation on an hourly rate, also helped to create a misimpression that a percentage fee was permitted for the *Seay* Trust.

Respondent's lack of disclosures additionally falls within the Court's definition of deceit. Respondent misled Judge Wolf when he represented that it was the auditor who had asked Respondent to submit a petition for approval of fees but failed to mention that the prior probate court judge, Judge Christian, had done so. FF 48. Deceit is the "suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead . . . ." *Shorter*, 570 A.2d at 767 n.12 (citation omitted). To establish deceit, the respondent must have knowledge of the falsity, but it is not necessary that the respondent have intent to deceive or defraud. *See Schneider*, 553 A.2d at 209.

Accordingly, I find that Disciplinary Counsel has proven by clear and convincing evidence that Respondent violated Rule 8.4(c) when he failed to disclose the content of Judge Christian's

order in his November 19, 2004 Petition for Compensation and his motion for reconsideration and when he failed to include the second sentence in the trust document.

II. THE *BROWN* TRUST (Count II)

A. DISCIPLINARY COUNSEL HAS PROVEN THAT RESPONDENT VIOLATED RULES 3.3(a)(1) AND 8.4(c) WHEN ADMINISTERING THE *BROWN* TRUST.

I also dissent from the majority's conclusion, *see* Report Sections IV-F and IV-G(i), that Disciplinary Counsel did not introduce sufficient evidence to support the charged Rule 3.3(a)(1) and 8.4(c) violations concerning the *Brown* Trust. I find that Respondent made multiple false statements to both Judge Wolf and to the Court of Appeals on the question of whether he had detailed time records of his representation of the *Brown* Trust.[2]

B. FALSE STATEMENTS TO JUDGE WOLF

Respondent knowingly made a false statement to the court when he represented to the probate court that "it has not been necessary to keep detailed time records for this Trust" because he implied he did not have time records. FF 68. Respondent argued:

> A percentage fee was agreed upon by the parties and the Trust was approved as drafted by the Court. Further, a percentage fee of one percent was previously approved by this Court when it approved the first accounting. Therefore, it has not been necessary to keep detailed time records for this Trust.

Id. Respondent denies that this statement was misleading. *See id.*; Tr. 1313 ("I didn't say I wasn't keeping time records. I said it wasn't necessary for me to keep time records.").

[2] The Committee is unanimous in finding, in Section IV-G(ii), however, that Respondent violated Rules 3.3(a)(1) and 8.4(c) by stating in the appellate brief that "[h]e did not keep time records for that trust, as well as others, for the period covered by the second accounting." *See* Report at 105. As to whether Rule 8.4(d) was also violated in Respondent's dishonest statement, I join the majority as well in finding that it was proven. In my additional findings of dishonesty for which I dissent from the majority, I limit my discussion to violations of 3.3(a)(1) and 8.4(c). I am not convinced that Rule 8.4(d) violations beyond those already found by the other members of the Committee have been proven.

Respondent again falsely claimed in his June 2006 Explanation that he "had not kept time for specific services as trustee in this case." FF 71. As noted in FF 71, Respondent had verified in the filing that "the facts therein stated are true and correct to the best of my knowledge, information and belief." Respondent conceded in his testimony before the Committee that the sentence "had not kept time for specific services as trustee in this case" could have been better "wordsmithed" because he had kept time for *some* specific services but not others. *See* FF 71. Finally, Respondent also *failed to correct* Judge Wolf's misimpressions, evidenced in Judge Wolf's July 2006 Order, which incorrectly stated that Respondent "cannot provide an hourly statement of services . . . as trustee in this case." *See* FF 72.

Respondent's testimony on why he did not produce the time records (that he knew he had) corroborates the point that he was being intentionally dishonest with the court:

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

FF 73.

C. FALSE STATEMENTS TO THE COURT OF APPEALS

The misrepresentation and lack of forthrightness continued in Respondent's litigation for his fees in the Court of Appeals. Respondent testified that he reviewed the appellate brief before it was filed. FF 75. In his November 14, 2007 appellate brief, Respondent knowingly misrepresented to the Court of Appeals that he "did not submit a detailed accounting of time spent on specific tasks because he did not have such time records" and that "he did not keep records for that trust, as well as others, for the period covered by the second accounting." FF 76. In my view, both representations violated Rules 3.3(a)(1) and 8.4(c). Finally, Respondent falsely represented

to the Court of Appeals that: "[Respondent] did not provide detailed time records because, relying on the terms of the trust, he did not have detailed time records." *Id.*

III. THE *BAKER* TRUST (Count III)

A. IN THE FIRST ACCOUNTING, RESPONDENT VIOLATED RULE 3.4(c) WHEN HE DISOBEYED JUDGE BURGESS'S ORDER AND SOUGHT APPROVAL OF FEES CALCULATED AS 1% BEFORE JUDGE WERTHEIM, AND HE VIOLATED RULE 8.4(c) WHEN HE FAILED TO DISCLOSE THE "FOR PROFESSIONAL SERVICES" DOCUMENT GENERATED FROM THE PCLAW TIME RECORDS.

I dissent from the majority's conclusion that Respondent did not violate Rules 3.4(c) and 8.4(c) in his First Accounting of the *Baker* Trust, *see* Report Section IV-L. By clear and convincing evidence, I find that Respondent knew he was not complying with Judge Burgess's June 2005 Order (which was consistent with Judge Burgess's repeated statements at the hearing that the fee could not be calculated as a percentage of the trust) when, in the First Accounting filed June 23, 2006, he sought approval of his fees calculated on a percentage basis and *not* an hourly rate as ordered. *See* FF 125, 127, 132. He also violated Rule 8.4(c) by withholding the PCLaw time-based document (titled "For Professional Services") which he knew justified a fee less than the 1% requested. *See* FF 128.

At the May 24, 2005 hearing addressing the basis for the fee in the *Baker* Trust, Judge Burgess reiterated half a dozen times that he did *not* want the fee based upon a fixed percentage. Judge Burgess stated at various points in the hearing:

- "The issue is this one percent and the language in the provision about compensation."
- "I don't want the compensation to be fixed at a percentage . . . ."
- "I don't think we need this expressed as a percentage . . . ."
- "I don't think it ought to be just expressed as a percentage."
- "I don't think, myself, reasonableness is necessarily determined by a percentage."

- "I don't want that expressed as a percentage. I don't think I want that, see what I'm saying?"

See FF 124.

Furthermore, Judge Burgess made it very clear, reiterating many times, that while setting a 1% cap on the fee was acceptable, the fee must still be reasonable (and in his June 13 Order, Judge Burgess spelled out the criteria that would be used to establish reasonableness in detail) and that reasonability may vary over time. At the May 24, 2005 hearing with Kim Keenan, Esquire, counsel for petitioner Christine Baker (Dion Baker's mother) and Respondent, the proposed trustee, Judge Burgess clearly set forth in the afternoon session:

> THE COURT: Good afternoon. I forgot to address something at the hearing I wanted to address before – before you started redrafting things. And I have a Court Reporter here, by the way, so this is on the record. And if you want to bring your client, Ms. – Ms. Keenan, we'll have to set up another hearing.
>
> MS. KEENAN: Oh, no, I'll call her and tell her we did this.
>
> THE COURT: I assume she's not here?
>
> MS. KEENAN: No.
>
> THE COURT: The issue is the one percent and the language in the provision about compensation. You say – well, let me give you my bottom line here. I believe that for reasons I stated at the other hearing, I think that the trustee's compensation ought to be judged on the standard of reasonableness.
>
> Now – and under those factors that were in that Michigan case I pointed to you, and there are other cases too, including the restatement of trust, I believe. And I don't – I don't – you say not – you say expressed as a percentage of trust assets, and I assume by that you mean by the trustee shall – may take up to one percent, is that what you mean to be – in other words – may be expressed as a percentage of trust [assets]?
>
> MS. KEENAN: Not to exceed one percent.
>
> THE COURT: Right. Shall be entitled to reasonable compensation *consistent with industry standards which may be expressed as a percentage of trust assets* not to exceed one percent of trust corpus determined annually.

I mean, I'm not sure quite what you're trying to say. Is it something different than just saying that it appears to be that the trust shall take reasonable – entitled to reasonable compensation.

MS. KEENAN: Are you saying that we don't need to say the one percent in there?

THE COURT: I'm saying – this was my theory last time, Mr. Krame[3], or whoever drafted this, I assume it's Mr. Krame, wants to take not less than one percent – not – something not to exceed one percent.

MS. KEENAN: Right.

THE COURT: As I said last time, what's reasonable compensation for a trustee, in my opinion, is going to differ from year to year depending on what kind of – partly depending on what the trustee actually does. There are other factors involved too, all of which are mentioned in the cases, but it doesn't necessarily correlate with one percent. So, in some years it might be below one percent and some years it might be above one percent.

MS. KEENAN: I guess I expect, Your Honor, from my client's point of view and when you look at what it costs to have this done having him say that it won't exceed – I mean, it doesn't say he has to take one percent but it says it won't exceed one percent and that protects my client for perpetuity of the trust.

THE COURT: Well, that's fine, if you want to do that. And you draft it and say *the trustee shall be entitled to reasonable compensation which shall not exceed one percent. That's fine*, if you want to do that.

MS. KEENAN: Okay. But isn't that what it says now?

THE COURT: No, it says – it says *which may be expressed as a percentage of trust assets* –

MS. KEENAN: Okay.

THE COURT: – which I don't understand. If it's simply reasonable compensation which shall not exceed one percent –

MS, KEENAN: Uh-huh.

THE COURT: – that puts a cap on it, but it doesn't tell you what it will be in any one year. That will depend on the factors that we mentioned in the last case.

MS. KEENAN: Exactly.

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[3] The transcript refers to Mr. Krame as "Mr. Crane." The references have been corrected herein.

> THE COURT: So, if you want to say the trustee shall be entitled to reasonable compensation not to exceed one percent of the trust corpus, that's fine with me.
>
> MS. KEENAN: Okay.

DX D9 at 25-28 (emphasis added).

* * *

> MR. KRAME: As a practical matter, if this rotates to another area of the court and another judge reviewing this or another auditor receiving this familiar, they're only going to be amenable to it based on hours not expenses –
>
> THE COURT: Mr. –
>
> MR. KRAME: – which may be expressed.
>
> THE COURT: You're saying we need that language for what reason, Mr. Krame?
>
> MR. KRAME: My theory is if you don't say that that [sic] nobody in the future will know of this conversation understanding that a percentage is an acceptable way of compensating a trust – a trustee of this trust.
>
> THE COURT: Well, I'm not saying that. I'm saying – I'm saying that I don't think we do have that understanding. I'm saying that in judging your own fee as – you know, when you decide your fee, you should be considering all those things just like a court would, in taking a reasonable fee. I don't – I don't think it ought to be just expressed as a percentage.

FF 124; DX D9 at 32-33.

Judge Burgess's June 13, 2005 Order is consistent with his statements at the May 24th hearing. *See* FF 125. There is no lack of clarity: the fee must be reasonable and could not exceed one percent. The following factors would be considered in determining whether the fee was reasonable:

> the trustee's skill, experience and facilities; *the time devoted to trust duties*; the amount and character of the trust property; the degree of difficulty, responsibility and risk assumed in administering the trust, including in making discretionary distributions; the nature of the costs and services rendered by others; and the quality of the trustee's performance and any special skills in support of that performance.

Id. (emphasis added).

When Respondent filed his First Accounting on June 23, 2006, he explained in the Notice filed and served on Dion Baker's mother, Ms. Baker, that:

> Pursuant to Article Seven, Section B of the Dion Baker Special Needs Trust, you are hereby notified that compensation for the fiscal year ending May 31, 2006 is $17,264.18, calculated at 1% of the value of the trust, which is one percent 1% of $1,726,418.

FF 127. Here, he clearly acknowledges that his fee is "calculated at 1% of the value of the trust" despite the fact that Judge Burgess had explained that is *not* how the trustee's fee was to be determined.

In his Memorandum and Order dated September 28, 2006, Judge Wertheim denied Respondent's request for trustee fees in the amount of $17,264.18. Judge Wertheim *specifically found* that Respondent acted *contrary* to Judge Burgess's direction:

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

FF 135. I agree with Judge Wertheim's characterization.

Before the Committee, Respondent testified about the reasons for the position he took (contrary to Judge Burgess's directions) as follows:

> I was entitled to take a percentage fee, because I was doing that in so many cases and the language of there [sic] trust allowed for a percentage fee, and that was proper.
>
> Everything about my [1%] claim to the $17,000 amount to me was absolutely in accordance with the trust, the law, with the custom of the community, with the industry standards and Judge Wertheim having previously approved percentage fees just months earlier, now changing his mind. I took a somewhat righteous stand,

> drew a line and said, enough of this; I'm getting ready to appeal. . . . I was outraged, and *I was in my mind serving the justice that I thought I was being denied.*

FF 132 (emphasis added). Respondent conceded in these statements that his requested fee was based upon a fixed 1%, notwithstanding Judge Burgess's clearly stated position against such an approach to setting his fee.

Finally, Respondent's failure to disclose to Judge Wertheim in the First Accounting that a time-based fee using PCLaw had justified a *lesser* payment than his requested $17,264.18 (1%), as well as the fact that he had already taken that lesser time-based fee of $12,350.59 from the trust without prior court approval. These failures to disclose constituted a violation of Rule 8.4(c). Respondent deliberately withheld the "For Professional Services" document generated from the PCLaw Time Records which supported a lower payment than the 1% he had requested. *See* FF 128, 134. The evidence of Respondent's Rule 8.4(c) violation is clear and convincing.

B. IN HIS AUGUST 30, 2006 RESPONSE TO JUDGE WERTHEIM, RESPONDENT VIOLATED RULES 3.3(a)(1) AND 8.4(c) WHEN HE DID NOT INFORM JUDGE WERTHEIM THAT JUDGE BURGESS HAD REJECTED A PERCENTAGE FEE AND WHEN HE FALSELY REPRESENTED THAT COMPENSATION HAD BEEN "SET BY AGREEMENT OF THE PARTIES AT ONE PERCENT," AND THAT HE WAS PERMITTED TO PAY HIMSELF A 1% FEE WITHOUT ORDER OF THE COURT.

I similarly dissent from the majority's conclusion concerning the charges of violation of Rules 3.3(a)(1) and 8.4(c), related to Respondent's August 30, 2006 Response to Judge Wertheim's August 21 Order, *see* Report Section IV-M. Judge Wertheim, referring to the First Accounting and the Notice, wrote that ". . . the payment of such fees is disapproved without prejudice to reconsideration with accompanying information establishing the reasonableness of such fees in accordance with the factors specified in Article Seven, Section B of the trust instrument as amended following the May 24, 2005 hearing." FF 130. Respondent's August 30, 2006 Response, or motion for reconsideration, violated both Rules 3.3(a)(1) and 8.4(c) because he told the probate court that he "receives compensation for his services, set by agreement of the

parties at one percent (1%) of the trust corpus, per year, payable quarterly" and that he had properly "paid himself the 1% fee." FF 131.

Respondent must have been aware he might have difficulty defending the reasonability of his $17,264.18 fee petition because his own time records did not justify that amount, but instead, his own calculations supported a fee of only $12,350.59, which, in fact, he withdrew on July 25, 2006. FF 129. However, Respondent did not share with the court his calculation for the approximately $12,000 versus the more than $17,000 amount he was attempting to collect. In fact, Respondent's own testimony before the Hearing Committee reflects his understanding that the court's order did not permit a 1% fee:

> I didn't pay myself the full 17 because I knew there was this unstable situation between fees and the court's approval of them, and so when I paid myself that time, I thought, don't pay the full amount; hold back some; let's see what happens.

Id. In other testimony before the Hearing Committee, Respondent said he understood the cap of 1% constituted permission to calculate his fees at a 1% rate rather than on an hourly basis. To quote:

> [P]ercentage compensation would be permissible. Otherwise, why would we have a one-percent cap? It would be irrelevant if we were billing on an hourly basis. There is no need to mention a one-percent cap if it was an hourly basis only compensation system.

FF 126. There is no basis in logic in this testimony. Judge Burgess ordered that Respondent could recover a "reasonable fee" based on the host of explicit factors he provided, but that fee could not exceed 1%. Judge Burgess, in accepting Ms. Keenan's recommendation that the trustee's compensation be capped at a limit of 1%, was *not* authorizing a flat fee of 1%. What he authorized was a fee based upon reasonability, calculated on the basis of factors which were discussed and then listed in the court order.

In his response to Judge Wertheim's Order disapproving the fees, Respondent on August 30, 2006 claimed his fee was properly based on a flat percentage when he stated:

> Respondent[4] (serving as Trustee and hereinafter referred to as "Trustee"), receives compensation for his services, set by agreement of the parties at one percent (1%) of the trust corpus, per year, payable quarterly. One percent is reasonable compensation for the Trustee of a Special Needs Trust. The Trustee's fee of 1% has been approved by this Court in dozens of accountings filed in a number of other cases where the Trustee serves as Trustee. . . . Therefore, *in accordance with the provisions of Article 7, paragraph B, of the Trust, the Trustee paid himself the 1% fee* without Order of the Court.

FF 131 (emphasis added). Again, Respondent did not disclose or address Judge Burgess's prior order when responding to Judge Wertheim.

Accordingly, Respondent violated Rules 3.3(a)(1) and 8.4(c) when he did not inform Judge Wertheim that Judge Burgess had rejected a percentage fee and Respondent further falsely represented that trustee compensation had been "set by agreement of the parties at one percent." FF 135 (Judge Wertheim finding that "set by agreement of the parties" was an inaccurate representation made by Respondent). He falsely stated that he had paid himself a 1% fee because to, instead, disclose the actual time-based PCLaw fee of a lesser amount ($12,350.59) would have undermined his personal mission and litigation for payment by a percentage of the trust corpus. FF 132. Finally, Respondent was dishonest in his Response to Judge Wertheim when he stated he was entitled to take a percentage fee pursuant to Article Seven, Section B of the trust instrument. *See* FF 125 (quoting Article Seven, Section B, which details several factors including "time devoted to trust duties" in assessing the reasonableness of a request for compensation). That

[4] In the pleading titled "Response to Order Dated August 21, 2006" (filed 8/30/2006), Respondent also identified himself as "Respondent" for the context of responding to the Judge Wertheim's Order and not relating to a disciplinary proceeding.

provision of the trust instrument, however, specifically highlighted the several factors that determined a trustee's compensation.

IV. BILLING RECORDS and UNREASONABLE FEE (Count IV)

A. CONCURRING ON THE FINDING OF RULE 8.4(c) AND 8.4(d) VIOLATIONS IN THE "PRE-BILLS," BUT ALSO FINDING A RULE 3.3(a)(1) VIOLATION AND MORE SERIOUS MISCONDUCT

Although the Hearing Committee is unanimous in finding violations of Rules 8.4(c) and 8.4(d) related to four entries in Respondent's December 15, 2009 fee requests in the *Brown* Trust and January 8, 2010 fee request in the *Baker* Trust, *see* Report Section IV-O, I write separately because, unlike the majority, I find Disciplinary Counsel has established clear and convincing evidence that when Respondent lost his appeal, he (1) retroactively altered at least six entries to PCLaw that had been made contemporaneously years earlier and (2) added numerous new entries in late 2009 that Respondent concedes increased his fee by $10,800 in the *Brown* fee petition and $8,775 in the *Baker* fee petition. After he lost the appeal, Respondent personally entered new time and fee entries in PCLaw[5] before submitting the December 15, 2009 *Brown* and January 8, 2010 *Baker* fee petitions. *See* FF 146-47, 149. Respondent added these non-contemporaneous entries for work allegedly completed more than two to three years earlier. When submitting the petitions, Respondent attached PCLaw-generated Pre-bills but did not notify the probate court that he had recently added numerous entries with estimated times. DX C53 (Brown Pre-Bill) at 10; DX D35 at 13 (Baker Pre-Bill); Tr. 871-72, 1678, 2288 (Respondent testifying about additions he made in late 2009); FF 150-54. Finally, I find that he was acting intentionally, and, therefore, violated Rule 3.3(a)(1) by knowingly making false statements to the probate court in these fee requests.

[5] The PCLaw program's audit feature does not allow a lawyer to change an Entry ID number so that subsequent edits, alterations, and additions are recorded sequentially by ID number. FF 145.

In at least six entries detailed below, contemporaneous entries that originally represented time spent *litigating* his fees (which he knew would no longer be approved) were modified to suggest time spent on only "non-fee litigating" matters.

For the *Brown* Trust, the PCLaw auditing feature showed that the following two entries were modified in late 2009 to remove references to work related in the appeal of the fees, but retained the *same* dates of service and amount charged in fees[6]:

Date of Service	Entry ID	Changes	Explanation	Hours	Fees
09/07/07	25594	Original Entry	**t/c Varrone re: status of appeal**, t/c M. Pavlides	.20	$70
09/07/07	48231	Changed To	t/c M. Pavlides re: Seard [sic] fraud matter	.20	$70

Date of Service	Entry ID	Changes	Explanation	Hours	Fees
03/25/08	29134	Original Entry	**discuss appeal with Varrone,** t/c Latoyia re: Seard [sic], review electrical problems at house.	.50	$175
03/25/08	48237	Changed To	t/c Latoyia re: Seard [sic], review electrical problems at house.	.50	$175

For the *Baker* Trust, the PCLaw auditing feature showed that the following four entries were modified in late 2009 to remove references to work on the appeal and/or fee litigation[7]:

[6] *See* DX J7 at 13, 18 (PC Law entries for time/fees requested for trust work on September 7, 2007 and March 25, 2008).

[7] *See* DX J11 at 6, 16, 18-19, 22 (PC Law entries for time/fees requested for trust work for November 29, 2006, September 7, 2007, November 12, 2007, and February 13, 2008).

Date of Service	Entry ID	Changes	Explanation	Hours	Fees
11/29/2006	18469	Original Entry	**review status of appeal and fee petitions**	.30	$90
11/29/2006	48128	Changed To	review accounting entries, statements and Fees payable	.30	$90

Date of Service	Entry ID	Changes	Explanation	Hours	Fees
09/07/2007	25592	Original Entry	t/c Chris, review receipts, sign check, **t/c Varrone re: appeal**	.40	$140
09/07/2007	48119	Changed To	t/c Chris, review receipts, sign check	.40	$140

Date of Service	Entry ID	Changes	Explanation	Hours	Fees
11/12/2007	27026	Original Entry	contact Olender's office re: praecipe needed, t/c Bullock re: discharge meeting**, t/c Varrone re: brief**	.80	$280
11/12/2007	48010	Changed To	contact Olender's office re: praecipe needed, t/c Bullock re: discharge meeting	.80	$280

Date of Service	Entry ID	Changes	Explanation	Hours	Fees
2/13/08	28233	Original Entry	work on **notice and petition for fees**	1.50	$525
2/13/08	48035	Changed To	work on accounting	1.50	$525

Both the new entries added by Respondent in late 2009 and the above modifications were included in the *Brown* and *Baker* fee petitions unbeknownst to the probate court reviewing the compensation requests. DX C53 at 15, 20; DX D35 at 12, 21, 23, 26. Respondent added to and

altered his earlier contemporaneous entries to obtain the equivalent of the higher fees that he had improperly sought on a percentage basis. In addition, Respondent did so despite the fact that he knew he had not informed the probate court that the additional hours claimed were based upon such retroactive modifications. Despite claiming that attorneys have "no obligation" to make disclosures of non-contemporaneous estimates in a billing submitted to the probate court, Respondent acknowledged that he had done so previously in an explanation of services submitted to Judge Wolf on March 9, 2007 for a different trust. *See* Tr. 1679-683 (qualifying time entries for *In re Tolson* as a "good faith estimate[s] of the time of the task required").

Unlike the majority, I find that Disciplinary Counsel introduced clear and convincing evidence that Respondent purposely falsified (as opposed to recklessly) his entries in the "Pre-Bills." Neil Manne, the co-creator of the PCLaw software program, testified as an expert witness and explained that because of the audit feature in the PCLaw program, he could see that Respondent had changed the nature of the original entries. *See* FF 145. Because of this audit feature, Disciplinary Counsel proved by clear and convincing evidence that Respondent hid and recharacterized time he had spent litigating his fees and, further, added additional time that had not been accounted for originally.

Respondent has conceded that Mr. Manne's testimony established that PCLaw's "built-in audit trail feature" recorded when an existing entry was edited or altered, as any new entry is "automatically assigned its own unique Entry number." R. Br. at 119; *see also* FF 145. As a result, Respondent or his employees could not change the assigned number, and Respondent concedes that Mr. Manne verified that the entries with any ID number greater than 45019 were made after September 15, 2009. R. Br. at 119; *see also* FF 146-47. Respondent, himself, admits that the charges he submitted (total of $43,055) in his December 15, 2009 petition for compensation in the

Brown Trust for work purportedly completed October 1, 2006 to September 30, 2009 exceeded the total amount of original PCLaw entries by $10,800. FF 150, 154; *see also* R. Br. at 132 (agreeing that his added or modified entries increased his fees by $10,800). Respondent also admits that the charges he submitted (total of $47,642.60) in his January 8, 2010 petition for compensation in the *Baker* Trust, for services rendered from July 2006 – May 2009, exceeded the sum of the original PCLaw entries by $8,775. FF 164; R. Br. at 140.

I find that Disciplinary Counsel has established a substantial pattern of inaccurate submissions. *See, e,g.*, *In re Ukwu*, 926 A.2d 1106, 1113 (D.C. 2007) (letter contained misrepresentations that the respondent "at a minimum, should have known were false"); *In re Cleaver-Bascombe*, 892 A.2d 396, 404 (D.C. 2006) (respondent recklessly maintained inadequate time records and disregarded the risk that a client or fund might be overcharged).

As explicitly acknowledged by the majority in Section IV–O), despite assertions by Respondent regarding the availability of "a lot of documentation" and that "my attorney will now want to go through Exhibits 16 [pertaining to the *Brown* Trust] and 17 [pertaining to the *Baker* Trust] in great detail," (FF 153, 158) no such evidence was forthcoming to support Respondent's defense that the modified time and subject matter entries, made years later, were *more* accurate than the original PCLaw entries. *See* Report at 134, *supra*. In fact, Respondent, in his testimony, acknowledged his failure to provide support *even* for the handful of examples cited by Disciplinary Counsel (where Respondent would have had the greatest incentive to demonstrate to the Hearing Committee a well-documented basis for his retroactive alterations and additions). He stated:

> I didn't attempt to back up every change that Mr. Manne spoke about or that [Disciplinary Counsel] has put in her Specification of Charges. We've addressed a lot of them, and it takes a lot of hours to go through the many boxes of files, and unfortunately my calendar system changed, so I don't have calendars for these dates any more.

FF 153; Tr. 2298-2308.

Given Respondent's "arrogance and anger" (the words used in the majority's discussion in Section IV-O) with the probate court's and Court of Appeals' rulings in the 2007-2009 time period and the baseless and unsupported inflation of the entries, I do not believe that Respondent's altered entries that sought an excess of $10,800 in the *Brown* Trust and $8,775 in the *Baker* Trust were a "'good-faith reconstruction.'" *See* Report at 137-38 (citation omitted). These exact words in the Hearing Committee Report (Section IV-O), with which I fully agree, are worth reiterating:

> We think that Respondent's inflated self-esteem, intellectual arrogance and anger over Judge Wolf's, Judge Wertheim's and the Court of Appeals' rulings in the 2007-2009 time period that were manifested several times in his testimony clouded his judgment in the fall of 2009 not only to the point of irresponsibly and baselessly inflating the entries identified above but also to the point of not seeking advice about and review of the "Pre-Bills" from his counsel, his accountant or some other independent, objective professional without a stake in the battle that Respondent and Judge Wolf had waged in the Probate Division.

Id. at 137. While I agree with the majority that Rules 8.4(c) and 8.4(d) were violated, I would not limit that finding to only the four entries cited by the majority and I would also find that Respondent violated Rule 3.3(a)(1) when he purposely submitted dishonest fee requests to the probate court (without any qualifications or explanation that the time entries had been back-dated or only recently entered).

The fact that Respondent strongly resented the rejection of his position that he was entitled to be paid a percentage of the trust assets, and the fact that the total compensation requested for the *Brown* Trust equated about 2% of the original corpus of the Brown Trust when annualized, and the fact that total compensation requested and approved for the *Baker* Trust equated about 1% of the original corpus when annualized—all after the retroactive alterations in the PCLaw by Respondent—is not by coincidence but by planned calculation. "'Coincidences happen, but an explanation not predicated on happenstance is often the one that has the ring of truth.'" *In re*

Godette, 919 A.2d 1157, 1166 (D.C. 2007) (quoting *Burwell v. United States*, 901 A.2d 763, 770 (D.C. 2006) (citations omitted)).

B. DISCIPLINARY COUNSEL HAS PROVEN THE RULE 1.5(a) VIOLATION.

Finally, I dissent from the majority's conclusion that Disciplinary Counsel has not proven that Respondent violated Rule 1.5(a) ("A lawyer's fee shall be reasonable."), *see* Report Section IV-P.

The Court of Appeals has held that "Rule 1.5(a) can be violated by the act of charging an unreasonable fee without regard to whether the fee is collected." *Cleaver-Bascombe*, 892 A.2d at 403 (quoting Board Report). "It cannot be reasonable to demand payment for work that an attorney has not in fact done." *Id*. "Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, [or] a class . . . ." Rule 1.5, cmt. [15]; *see, e.g.*, *In re Pye*, 57 A.3d 960, 974 (D.C. 2013) (per curiam) (appended Board Report) (*per se* unreasonable fee where respondent keeps interest earned in probate representation).

Here, Respondent added and modified entries in 2009, in many instances three years after the time he allegedly did the work for which he sought compensation, without notifying the courts when he submitted his fee petitions. Having found dishonesty in the submission of the *Brown* and *Baker* fee petitions, the Committee should have also found a violation of Rule 1.5(a). The substance of the alterations themselves demonstrates their contrived and dishonest nature, which goes to their reasonableness. For example, consider the retroactive removal of the "Varrone" (his appellate attorney) activity. Respondent was on notice, especially after the Court of Appeals decision, that time spent working on the litigation of his fees could not be charged to the trusts. Receiving payment for billing time previously described as work related to fee litigation was, therefore, in violation of the Court of Appeals' order. *See In re Bernstein*, 774 A.2d 309, 313 (D.C. 2001) (fee in worker's compensation case violates Rule 1.5(a) where respondent ignores

Commission's prior ruling on calculation of fee). In each of the six separate entries, the unauthorized compensation for time spent litigating the fees was later modified on PCLaw. The time and dollars charged were kept unchanged in these entries but they were no longer described as "Varrone" activities or fee litigation-related activity. As a result of the deletions of references to "Varrone" and the appeal, the probate court could not realize it was approving fees for time and work that Respondent was barred from charging to the trusts in the first place. The majority's citation to the probate courts' subsequent approvals of the compensation requested in the *Brown* and *Baker* Fee Petitions, *see* Report at 142, should carry little or no weight where Respondent failed to disclose the non-contemporaneous nature of added entries or the scrubbing of "Varrone" and appellate work from at least six entries.

These alterations stemming from the *Brown* and *Baker* Trusts were the result of supposed recollections by Respondent that in all cases just happened to result in amount of time and charges *exactly equal* to the original entries despite the fact that the "Varrone" or other fee litigating description had been removed. I cannot accept as simply a coincidence that Respondent had previously forgotten to include other compensable activities of the *exact* same dollar value as the disallowed activities involving Varrone and litigation of Respondent's fees. Accordingly, Respondent was collecting fees for work that had been disallowed by the Court of Appeals and, therefore, in violation of Rule 1.5(a). *See In re Haupt*, 444 A.2d 317, 326 (D.C. 1982) (per curiam) (appended Board Report) (retention of $450 fee in violation of bankruptcy court order constituted "charging of a clearly excessive fee").

Respondent's claim that he had been under-reporting his time and not using PCLaw regularly is contradicted by his own testimony that *after May 2006*, he was being "more attentive to recording time in PCLaw" for special needs trusts that were getting closer scrutiny. FF 148.

Respondent acknowledged that while the appeal was pending, "we had all agreed that we better keep track of time" and he and his colleagues contemporaneously recorded time during this appellate period. *Id*. All six entries were during this post-May 2006 time period when, as Respondent conceded, he knew his time-keeping would be under scrutiny and perhaps required for purposes of receiving payment if he lost on appeal.

As a result, I find that Respondent violated Rule 1.5(a) by seeking compensation for work that had not been completed as characterized and for which he was on notice was not allowed. *See Cleaver-Bascombe*, 892 A.2d at 403; *Bernstein*, 774 A.2d at 313; *Haupt*, 444 A.2d at 326 (appended Board Report).

In conclusion, I find that the majority has erred in not taking into full consideration the unanimously agreed-upon factual findings as described in points two through eight under Section IV-O of the Hearing Committee Report, where all seven points provide an additionally strong basis for the clear and convincing evidence that Respondent's dishonesty and inflated billing extended well beyond the few examples adopted by the majority. Respondent failed to rebut Disciplinary Counsel's clear and convincing PCLaw expert testimony that established that Respondent altered the billing entries, and indeed, Respondent admitted that the alterations resulted in a significant increase in payment to himself. In Section IV-P, the majority erred in finding that Disciplinary Counsel had not proven that Respondent sought an unreasonable fee in the petitions at issue. To act contrary to the Court of Appeals, by charging the *Brown* and *Baker* Trusts for his time spent on the appeal, and to submit the fee petitions without disclosing the recent addition of non-contemporaneous entries was a violation of Rule 1.5(a).

V. SANCTION RECOMMENDATION

A. ANALYSIS OF FACTORS

1. Seriousness of the Misconduct

Unlike the majority, I have found a pattern of deceitful behavior and dishonesty and, hence, find Respondent's misconduct more serious. Because I find that Respondent's misconduct in violating, in particular, Rules 3.3(a)(1) and 8.4(c) was more extensive and prolonged, this factor weighs in favor of a lengthier period of suspension than that recommended by the Chair.

2. Misrepresentation or Dishonesty

I do find that Respondent's conduct involved more instances of dishonesty and deceitful behavior generally and a lack of candor with the courts, but I do not find by clear and convincing evidence that Respondent testified falsely. In my view, Disciplinary Counsel did not prove that Respondent engaged in flagrant dishonesty. Based upon Respondent's level of professional achievement and the testimony by character witnesses, I am convinced that Respondent had no intention of defrauding the beneficiaries of the special needs trusts since he believed his percentage fee approach – which was apparently his standard practice with other types of trusts – was fair and reasonable. In my view, his passion about using a percentage-basis for his fee led to a misguided crusade in defiance of several judges. This appeared to be a crusade on his own behalf and (given his professional status and visibility) on behalf of the community of trust attorneys handling special needs trusts in the D.C. Probate Courts. Respondent's passion clouded his judgement to the point where many of his actions have to be deemed as "dishonest" according to the Rules of Professional Conduct since he purposefully misled the courts, even though they were not dishonest in the mind of Respondent (nor in many cases in the view of the majority). In other words, his dishonesty was not directed at the beneficiaries of the trusts but his dishonesty and lack of disclosure was directed at the courts.

While I find that Respondent's actions in adding and altering PCLaw entries in the *Brown* and *Baker* Trusts were knowingly dishonest, it is clear to me that Respondent was attempting to invoke an equivalent alternative method for yielding the fee to which he felt he was entitled. Thus, the excessive fee finding results from a lack of supporting documentation and does not in any sense imply that Respondent meant to withdraw a fee beyond which he felt was fair compensation on the basis of what he had argued was generally accepted practice. Nevertheless, it cannot be overlooked that based upon clear court orders denying a percentage compensation fee structure, Respondent did take fees that were excessive in terms of the court's guidance.

In some respects, Respondent's dishonesty was similar to that of the respondent in *In re McClure*, 144 A.3d 570 (D.C. 2016) (per curiam). In *McClure*, the Board described the dishonest misconduct as follows:

> Respondent dishonestly attempted to collect a substantial attorneys' fee award. First, he claimed an hourly fee of $190 without the benefit of contemporaneous time records. Following his termination, he placed an attorney's lien of 33 1/3% on the recovery, notwithstanding that the retainer provided for his compensation on an hourly basis. He then submitted the "Contents of Attorney Fee and Expenses" document . . . which included numerous false entries and affirmative misrepresentations claiming compensation for work he had not performed and inflated hourly claims, and which failed to state that line items were based on unsupported guesses, well after the fact.

In re McClure, Bar Docket No. 2010-D152, at 33-34 (BPR Dec. 31, 2015), *recommendation adopted*, 144 A.3d at 570. In *McClure*, the Hearing Committee determined that the respondent's dishonesty did not rise to the level of "flagrant dishonesty" as described by the Courts, and the Board, describing it as a close call, ultimately did not find flagrant dishonesty because of additional misconduct by the respondent that affected the sanction. *Id*. at 38-39.

3. Respondent's Attitude

While Respondent regrets the position in which he finds himself in the discipline process and acknowledges in his testimony that he would have done some things differently with hindsight,

his attitude is still one of intensity about having been treated inconsistently and unfairly by the courts. He did, however, concede two Rule violations and otherwise cooperated with Disciplinary Counsel.

4. Prior Discipline

As noted by the majority, the absence of any prior discipline being imposed against Respondent is a mitigating factor. *See* Report at 146.

5. Mitigating Circumstances

I agree with the majority's analysis of the delay issue raised by Respondent. *See* Report at 146-47. In regard to the negligent misappropriation finding by Ms. Mims, I add the following as a factor in mitigation even though I do not find misappropriation.

It does not seem reasonable to invoke automatic negligent misappropriation sanctions (six-month suspension) for isolated and innocent accounting miscues by an attorney or his staff, such as an inadvertent key stroke error, and this is especially true for trust attorneys when the very nature of their work requires orders of magnitude more financial transactions than virtually any other attorney whose activities may only involve a relative handful of financial transactions on behalf of their clients. Ironically, if Respondent had prevailed in his quest for his fees to be calculated on a percentage basis, at least some of the errors cited in this case would not have occurred.

In the case of Respondent, the period related to the scope of charges brought by Disciplinary Counsel extends for over a decade, and so even a few such errors, if quickly corrected when discovered, should not automatically imply negligence in their financial transactions.

The highest plausible level of error-free repetitive activities is often characterized as "six sigma" which refers to an exceedingly rare frequency of errors that few processes are able to

achieve. And even for the few who achieve six-sigma[8] performance, occasional errors, though rare, do occur. Very few processes ever achieve six sigma, but the key point is that the implied expectation "error free" performance is not reasonable. Furthermore, why would any attorney typically responsible for hundreds of financial transactions for individual trusts, and potentially thousands of transactions over the life of multiple trusts, become interested in providing such a service when much of the data entry may be performed by subordinates, and isolated clerical errors can lead to a suspension, or if deemed reckless, potentially disbarment?

Accordingly, while I am concerned about Respondent's lack of candor with the courts and dishonesty with the courts and Court of Appeals, I am less concerned about Respondent's mistakes in his withdrawal of funds.

Finally, I join my Hearing Committee colleagues in giving weight to Respondent's service and work in probate law and his good works outside of the legal profession as mitigating factors.

6. Number of Violations

Because I find a greater number of violations than the majority, this factor weighs in favor of a lengthier suspension period than that recommended by the Chair.

7. Prejudice to the Client

I find greater prejudice to the trusts than as described by the majority. Because I find that Respondent improperly altered and added entries in his December 15, 2009 and January 8, 2010 fee petitions in the *Brown* and *Baker* trusts, respectively, the prejudice to the trusts was the excess fee taken that were not supported by contemporaneous time records kept by Respondent. R. Br. at 132, 140 (conceding "added or modified entries" that increased his fees by $10,800 and $8,775).

[8] A six sigma process is one in which 99.99966% of all opportunities to produce some feature of a part are statistically expected to be free of defects (3.4 defective features per million opportunities).

B. COMPARABLE CASES

Because I am finding many more Rule violations, more serious misconduct, and more prejudice to the clients, my comparable case analysis differs from the Chair and my recommended sanction is more severe. On the other hand, in looking at comparable cases, it is important to keep in mind that, in my view, Disciplinary Counsel failed to prove that Respondent engaged in flagrant dishonesty. Where dishonesty is not flagrant, the sanctions for multiple acts of dishonesty range from a brief suspension to a three-year suspension with a fitness requirement. In *In re Mendoza*, 885 A.2d 317, 318-19 (D.C. 2005) (per curiam), the Court adopted the Board's recommendation for a sanction of a ninety-day suspension for a *single* charge of dishonesty violation of Rule 8.4(c) connected to the respondent's submission of false vouchers, resulting in the advance payment that had not yet been submitted to the court, where the respondent had no prior discipline and had submitted five supportive letters by character witnesses. Here, however, I have found multiple Rule 8.4(c) violations, which warrant a longer suspension.

In *In re Parshall*, 878 A.2d 1253, 1254-55 & n.4 (D.C. 2005) (per curiam), the Court imposed an eighteen-month suspension in a reciprocal case for the violation of Rule 3.3(a)(1) in the intentional filing of a false status report before a U.S. District Court and despite mitigating factors of no prior disciplinary history in nearly twenty years of practice, sincere remorse, cooperation with Disciplinary Counsel, and representation of indigent persons. In *In re Mayers*, 943 A.2d 1170, 1171 (D.C. 2003) (per curiam), among other charges, the respondent made a false statement of material fact to a tribunal, submitted altered checks to the Superior Court during a child support hearing, and misrepresented to the court how many payments he had made, all in violation of Rules 3.3(a)(1), 3.4(a), 3.4(b), 8.4(a), 8.4(b), 8.4(c), and 8.4(d). In adopting the recommended sanction of an eighteen-month suspension, the Court noted the significant mitigating factors such as genuine remorse, lack of prior disciplinary history, respondent's

depression, and his nearly twenty years of public service as a government attorney. *See also In re Martin*, 67 A.3d 1032, 1053-56 (D.C. 2013) (eighteen-month suspension was imposed for the taking of an unreasonable fee from settlement proceeds while knowing the fee was in dispute and where respondent engaged in "protracted" dishonesty). In *In re Samad*, where the respondent committed multiple rule violations in six separate cases, the Board recommended a three-year suspension with a fitness requirement and cited respondent's lack of honesty, his "dissembling" before a judge, his lack of candor that the court expects, and his "cavalier attitude." *In re Samad*, Bar Docket Nos. 120-04 *et al.*, at 41-42 (BPR June 24, 2011), *recommendation adopted*, 51 A.3d 486, 499-501 (D.C. 2012) (per curiam).

Here, a lengthy suspension would be appropriate and consistent with comparable cases. As discussed, *supra*, I do not believe that Respondent was deliberately false in his testimony before the Hearing Committee or that his dishonesty was flagrant, so disbarment would be an exceedingly harsh and inappropriate sanction. I also do not doubt Respondent's fitness to practice law, so I would not recommend a fitness requirement here. Given the mitigating factors present, as described *supra*, I believe a three-year suspension would be too harsh, but an eighteen-month suspension would be appropriate and a comparable sanction for the misconduct involved. Accordingly, I recommend an eighteen-month suspension in light of Respondent's dishonesty with the courts concerning his compensation and his submission of altered billing records.

I concur in the other members' recommendations that a portion of the suspension be stayed and recommend that six months of the eighteen-month suspension be stayed. *See In re Long*, 902 A.2d 1168, 1172 (D.C. 2006) (per curiam) (acknowledgement of transgressions supports imposition of a stay); *In re Mance*, 869 A.2d 339, 342 (D.C. 2005) (per curiam) (suspension stayed due to the respondent's overwhelming caseload at the time of the misconduct, the absence of prior

discipline, and his lengthy history as a criminal practitioner). Accordingly, I recommend a sanction of an eighteen-month suspension, with six months stayed under the same conditions recommended by the Chair.

Respectfully submitted,

Hal Kassoff
Public Member

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

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

SEPARATE STATEMENT OF BUFFY MIMS

Mims, Buffy J. (concurring in part, dissenting in part).

Although I agree with the conclusions of law in the majority Report of the Ad Hoc Hearing Committee ("H.C. Report"), I disagree with the majority's conclusion with respect to the Rule 1.15(a) misappropriation charges in the *Seay* and *Brown* matters. *See* H.C. Report at Section IV, C and H. I would find a Rule 1.15(a) violation in the *Seay* Special Needs Trust based on Respondent's admitted duplicate fee disbursements (FF 35, 43) and in the *Brown* Special Needs Trust based on Respondent's reimbursement of unsubstantiated expenses (FF 80-81, 86). This Hearing Committee member interprets the law to require a finding of misappropriation even in a case where the mistake was the careless mistake of another.

Unfortunately, under the law, an innocent, good-faith mistake of fact or law is not a defense to misappropriation. Law dictates that it is a *per se* offense requiring no proof of improper intent. *See In re Anderson*, 778 A.2d 330, 335 (D.C. 2001). Misappropriation is defined as "any unauthorized use of client[] [or third-party] funds entrusted to [the lawyer], including not only stealing but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom." *In re Harrison*, 461 A.2d 1034, 1036 (D.C. 1983)

(citation and quotation marks omitted). Taking a payment from an estate without the required court approval is an "unauthorized use." *In re Bach,* 966 A.2d 350, 363 (D.C. 2009). Misappropriation can be found even where the lawyer did not benefit in any way from the unauthorized use of client funds. *See, e.g.*, *In re Gregory*, 790 A.2d 573 (D.C. 2002) (per curiam) (appended Board Report). Safeguarding of entrusted funds is "a non-delegable, fiduciary" duty. *Id.* at 578 (appended Board Report) (citation and quotation marks omitted).

I agree with the majority of the Hearing Committee that Disciplinary Counsel's position that equating the specific circumstances at issue in *Fair*, *Pye*, *Abbey*, or *Utley* is problematic and further agree that the facts in those cases materially differ from the facts here. H.C. Report at 91-92. That said, there is no doubt that the law in this area appears to be unwavering and harsh. One reason is likely to protect the innocent client from, among other things, the slippery slope of multiple recordkeeping errors or "mistakes" by staff to whom the client has somewhat blindly entrusted his monies. This type of protection is even more important when the client is infirmed, disabled, elderly, or the beneficiary of a special needs trust. Because it is a *per se* offense, a finding of misappropriation is required.[1] It is only after that finding that the question becomes one of intent. The Court recently explained in *In re Abbey*, "[n]egligent misappropriation is an attorney's non-intentional, non-deliberate, non-reckless misuse of entrusted funds or an attorney's non-intentional, non-deliberate, non-reckless failure to retain the proper balance of entrusted funds. Its

[1] I disagree with the Hearing Committee that this interpretation necessarily means that every partner in every law firm would be liable for misappropriation. H.C. Report at 92-93. Respondent admittedly violated Rule 3.4(c) when he knowingly and brazenly violated the May 9, 2009 court Order disallowing costs incurred in connection with litigating his fees as well as not returning the $200 filing fee "forthwith" in violation of the court's January 18, 2007 Order. Thus, it was Respondent's own actions and informed decision to violate an order of the court which led him to a situation where Disciplinary Counsel had the opportunity to dissect his client files and each financial transaction. Unfortunately for Respondent, Disciplinary Counsel did find two mistakes by his staff which I believe legally require a finding of misappropriation, albeit negligent.

hallmarks include a good-faith, genuine, or sincere but erroneous belief that entrusted funds have properly been paid; and an honest or inadvertent but mistaken belief that entrusted funds have been properly safeguarded." 169 A.3d 865, 872-73 (D.C. 2017) (citations omitted).

As discussed, the Hearing Committee has been unable to locate any case law that falls squarely within the facts of Respondent's case; however, there are cases which are somewhat instructive. "[N]egligent misappropriation cases generally have involved single, or discrete, inadvertent or negligent acts." *In re Carlson*, 802 A.2d 341, 350 n.12 (D.C. 2002); *see also, e.g.*, *In re Robinson*, 74 A.3d 688, 695 (D.C. 2013) (negligent misappropriation found where respondent's negligence in supervising the subordinate attorney handling the firm's client trust resulted in a second overdraft when the account balance fell below the amount owed to two clients); *In re Boykins*, 999 A.2d 166, 169 (D.C. 2010) (negligent misappropriation found where respondent overpaid himself and law firm for legal fees and expenses from a trust account, resulting in insufficient funds to pay clients); *In re Bailey*, 883 A.2d 106, 122-23 (D.C. 2005) (negligent misappropriation found where respondent had "honest but mistaken belief" that settlement proceeds were not assigned to doctor for medical expenses, and that respondent could enter into an agreement to borrow these funds from a client); *In re Davenport*, 794 A.2d 602, 604 (D.C. 2002) (negligent misappropriation found where respondent inadvertently deposited a retainer check into the wrong account, causing the escrow account to become overdrawn one time); *In re Frank*, Bar Docket No. 212-98, at 16-17 (BPR June 10, 2005) (negligent misappropriation found where respondent authorized withdrawals from firm's trust accounts which resulted in insufficient funds due to bookkeeping errors), *recommendation adopted*, 881 A.2d 1099, 1099 (D.C. 2005) (per curiam); *In re Katz*, Bar Docket No. 259-99, at 23-28 (BPR May 1, 2002) (negligent misappropriation found where respondent used one client's check to pay the recordation

fees of another client, and then used funds escrowed for the latter client to pay the recordation fees of the former client – respondent had honest, albeit mistaken belief that the bookkeeping entries were proper), *recommendation adopted*, 801 A.2d 982, 982 (D.C. 2002) (per curiam).

In the *Seay* matter, Respondent acknowledged that he mistakenly paid himself twice for the February 8, 2001 fee petition (FF 35) and the February 5, 2002 fee petition (FF 40, 44). The Hearing Committee credited Respondent's testimony that these errors were caused by inadequate administrative support. The majority concludes that these mistaken duplicative payments made by Respondent's staff are distinguishable from those in *Fair*, *Pye*, and *Utley*, where the respondents personally made the mistakes. *In re Fair*, 780 A.2d 1106, 1110, 1113 (D.C. 2001) (personal representative of an estate wrote six checks to herself as fee payments on the estate's bank account without obtaining court approval, a mistake of law made "in the context of an ambiguous probate culture"); *In re Pye*, 57 A.3d 960 (D.C. 2012) (appended Board Report) (personal representative withdrew without explanation $20,000 in entrusted funds from the estate he was administering and deposited the funds into his personal account, but returned the funds 10 days later, describing the transaction as a mistaken withdrawal); *In re Utley*, 698 A.2d 446, 448-49 (D.C. 1997) (mistaken disbursement that "arose out of inadvertence" – i.e., "an honest mistake resulting from respondent's inadequate records"). But precedent does not support the conclusion that the mistake must be personally made by the respondent in order for the "unauthorized use" to constitute a misappropriation. Respondent's disbursement of duplicative payments due to administrative staffing errors resulted in a "non-reckless failure to retain the proper balance of entrusted funds" in the *Seay* matter, and thus was negligent misappropriation in violation of Rule 1.15(a).

In the *Brown* matter, Respondent engaged in the unauthorized use of entrusted funds when

he signed a check for reimbursement of unsubstantiated expenses mistakenly presented to him by his administrative staff (FF 80, 86) and withdrew the funds from the trust account. While the Hearing Committee credits Respondent's testimony that the payment "was a complete mistake" (FF 81), suggesting that Respondent signed the check with "a good-faith, genuine, or sincere but erroneous belief that entrusted funds [were] properly [being] paid" – those actions were indeed hallmarks of negligent misappropriation in violation of Rule 1.15(a). *Abbey*, 169 A.3d at 872.

For these reasons, I dissent from the majority's conclusions as to the Rule 1.15(a) misappropriation charges set forth in the Report of the Ad Hoc Hearing Committee at Section IV, C and H.

RECOMMENDED SANCTION

As noted in the H.C. Report, Respondent admitted and we recommended findings of two Rule 3.4(c) violations. The Hearing Committee found violations of Rules 3.3(a)(1), 8.4(c) and 8.4(d) when Respondent stated in the November 2007 brief to the Court of Appeals that he had not kept time records for the Brown trust. *See* Section IV.G (ii). The Hearing Committee also found violations of Rules 8.4(c) and 8.4(d) when Respondent submitted his December 15, 2009 fee request in the *Brown* and *Baker* trusts following the decision of the District of Columbia Court of Appeals. I also find a Rule 1.15(a) violation in the *Seay* and *Brown* Special Needs Trusts based on Respondent's reimbursement of unsubstantiated expenses. As already noted, I find a Rule 1.15(a) violation only because law dictates that it is a *per se* violation. Although the violation appears to be the result of good faith errors, it is a violation nonetheless.

In determining the appropriate sanction, the Court of Appeals considers a number of factors, including: (1) the seriousness of the conduct at issue; (2) the prejudice, if any, to the client which resulted from the conduct; (3) whether the conduct involved dishonesty; (4) the presence or

absence of violations of other provisions of the disciplinary Rules; (5) whether the attorney has a previous disciplinary history; (6) whether the attorney has acknowledged his wrongful conduct; and (7) circumstances in mitigation or aggravation. *See, e.g.*, *In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013) (citing *In re Elgin*, 918 A.2d 362, 376 (D.C. 2007)). With respect to violations of Rules 3.3(a)(1), 8.4(c) and 8.4(d), I adopt the well-reasoned analysis of the H.C. Report in its entirety, as well as its discussion of the seriousness of Respondent's misconduct, the presence of misrepresentation or dishonesty, Respondent's attitude toward the underlying misconduct, prior discipline, mitigating circumstances, and prejudice to the client. Mr. Fitch recommends a sanction of a six-month suspension for the aforementioned violations, with at least four months stayed. While I agree with the vast majority of Mr. Fitch's analysis, I disagree with his recommended sanction. Although Respondent does have an extraordinary record of professional and public service, I do place more weight on Respondent's multiple violations and blatant disregard of court orders. I recommend a sanction of a nine-month suspension with respect to the Rule violations found by the majority of the Hearing Committee. I now apply the factors to the additional Rule 1.15(a) violation.[2]

APPLICATION OF THE SANCTION FACTORS TO THE RULE 1.15(a) VIOLATION

1. The Seriousness of the Misconduct

I find that the mistakes by Respondent's staff over the course of many years were relatively minor. The two mistakes were inadvertent and appear to be somewhat isolated.

2. Prejudice to the Client

I find no prejudice to the clients in either the Brown or Seay Special Needs Trust resulting

[2] I agree with the Hearing Committee recommendations with respect to restitution to the *Brown* and *Baker* trusts.

from the Rule 1.15(a) violation.

3. Dishonesty

I do not find any evidence that Respondent was dishonest when the mistakes resulting in the Rule 1.15(a) violation occurred.

4. Violations of other Disciplinary Rules

Respondent admitted to violations of Rule 3.4(c). The Hearing Committee, either unanimously or through a majority, found violations of Rules 3.3(a)(1), 8.4(c) and 8.4(d). I find an additional violation of Rule 1.15(a). I believe the number of violations weighs, to some extent, in favor of discounting the many mitigating factors and ultimately should result in the number of months the sanction is stayed being minimal.

5. Prior Disciplinary History

Respondent has no prior disciplinary history in the District of Columbia.

6. Acknowledgment of Wrongful Conduct

Respondent acknowledges that the actions resulting in the Rule 1.15(a) violation were inadvertent mistakes of staff.

7. Mitigating Factors

I agree with the Chair's analysis of the delay issue raised by Respondent. With respect to the Chair's "Other Mitigating Factors," I agree in part and disagree in part. I agree that Respondent's long history of work in the area of trusts, estates, and probate, his service as an expert witness (at the request of the Office Disciplinary Counsel), and his service as a regular lecturer do merit discussion. Respondent has also served as a steering committee member and later as co-chair of the Estates, Trusts, and Probate section of the Bar. Respondent has an impressive history of service and community involvement. However, at some point, the number of violations has to

serve to reduce the application of the mitigating factors. If Respondent had been found to have violated one or two Rules and had extensive mitigating factors, as Respondent does here, a recommendation of a stay of most or all of his recommended sanction could be warranted. I find Respondent's violation of five Rules – some with multiple violations of the same Rule – a considerable obstacle to the application of mitigating factors that might have otherwise served to stay part or all of my sanction recommendation.

In my review of the case law, there are few comparable cases where a respondent has been found to violate Rule 1.15(a) solely because of a mistake or the mistake of another. The majority of courts appear to adopt an automatic six-month suspension in cases of negligent misappropriation. *See, e.g.*, *Anderson*, 778 A.2d at 333, 342 (six-month suspension where respondent's inadequate bookkeeping allowed the firm operating account holding settlement funds to fall below the amount due to medical providers); *In re Cooper*, 613 A.2d 938, 939-940 (D.C. 1992) (per curiam) (six-month suspension with proof of fitness where respondent made a negligent "objectively reasonable, albeit erroneous" payment of fees from settlement funds that exceeded the amount owed to him) (quoting *In re Evans*, 578 A.2d 1141, 1142-43 (D.C. 1990) (per curiam) (appended Board Report) (negligent misappropriation where respondent reasonably believed he entered into side agreement with heirs of an estate to take a greater attorney fee than allowed by statute)). Given the state of the law in the area of misappropriation, I recommend an additional 6-month suspension for the negligent misappropriation charge, bringing my total recommended sanction to 15 months with 3 months of it stayed.

Respectfully submitted,

Buffy J. Mims

Buffy Mims
Attorney Member