THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

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

In the Matter of:	:	
	:	
ISAAC H. MARKS, SR.,	:	
	:	
Respondent.	:	Board Docket No. 18-BD-059
	:	Disc. Docket No. 2013-D208
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 411706)	:	

REPORT AND RECOMMENDATION OF
THE AD HOC HEARING COMMITTEE

Respondent, Isaac H. Marks, Sr., is charged with violating Rules 1.1(a), 1.3(a), 1.3(b)(1), 1.3(c), 1.15(a), 1.15(c), 8.4(b), 8.4(c), and 8.4(d) of the District of Columbia Rules of Professional Conduct (the "Rules"), arising from Mr. Marks's role as trustee of a trust. Disciplinary Counsel contends that Mr. Marks should be disbarred for intentional or reckless misappropriation, failures to provide competent and zealous representation, dishonesty and serious interference with the administration of justice. Mr. Marks concedes that he misappropriated by mistake and failed, as trustee, to pay property taxes on a trust asset, but denies the other charges and asks that he receive no more than an informal admonition.

As set forth below, the Hearing Committee finds that Disciplinary Counsel has proven by clear and convincing evidence violations of Rules 1.1(a), 1.3(a), 1.3(b)(1), 1.3(c), 1.15(a), 1.15(c), 8.4(c), and 8.4(d), as explained in what follows.

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* Consult the 'Disciplinary Decisions' tab on the Board on Professional Responsibility's website (www.dcattorneydiscipline.org) to view any subsequent decisions in this case.

A majority of the Committee recommends that the Court impose an eighteen-month suspension with reinstatement conditioned on a showing of fitness and nine hours of CLE.

Mr. Hirsh dissents in part (disagreeing with the majority's Rule 1.3(b)(1) analysis, its Rule 8.4(c) analysis, its finding of dishonest testimony, and its sanction recommendation), and he recommends that the Court impose a one-year suspension with reinstatement conditioned on nine hours of CLE, but not a separate showing of fitness. *See* Separate Opinion of Mr. Hirsh Dissenting in Part and Concurring in the Result in Part, *infra*.

I. PROCEDURAL HISTORY

On May 21, 2013, District of Columbia Superior Court Judge Peter H. Wolf sent a complaint to Disciplinary Counsel concerning Mr. Marks. DX 5. On June 26, 2018, Disciplinary Counsel served Mr. Marks with a Specification of Charges. On November 6, 2018, Disciplinary Counsel filed a First Amended Specification of Charges ("Am. Specification"). The Amended Specification alleges that Mr. Marks violated the following rules:

- Rule 1.1(a) by failing to provide competent representation to his client;
- Rule 1.3(a) by failing to zealously and diligently represent his client within the bounds of the law;
- Rule 1.3(b)(1) by failing to seek the lawful objectives of his client;
- Rule 1.3(c) by failing to act with reasonable promptness in representing his client;

- 1.15(a) by failing to properly safeguard estate trust funds, intentionally or recklessly misappropriating funds, and failing to maintain and/or preserve complete records of account funds[1];

- 1.15(c) by failing to promptly deliver funds that the client and/or third person was entitled to receive and/or failing to promptly render a full accounting regarding such property;

- Rule 8.4(b)[2] by committing the criminal act of theft pursuant to D.C. Code §§ 22-3211 and 22-3212 and/or Md. Code Ann. Criminal Law §§ 7-104 and/or 7-113, which reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;

- Rule 8.4(c) by engaging in conduct involving dishonesty; and

- Rule 8.4(d) by engaging in conduct that seriously interferes with the administration of justice.

Am. Specification ¶59(a)–(i). Mr. Marks filed an amended Answer on November 28, 2018, that was responsive to the amended Specification and adopted his previous Answer to the original Specification of Charges. On September 12, 2019, just before the hearing began, Mr. Marks filed a motion for leave to file a second amended Answer. During the hearing, the Chair granted that motion over Disciplinary Counsel's objection. Tr. 6-7.

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[1] Disciplinary Counsel did not brief, nor clearly argue at the hearing that Respondent did not maintain adequate records in violation of 1.15(a). Accordingly, we find Disciplinary Counsel did not prove a violation of the record-keeping component of the Rule 1.15(a) charge by clear and convincing evidence.

[2] Near the close of the hearing, Disciplinary Counsel stated that it would no longer pursue the charged violation of Rule 8.4(b). Tr. 1015-16; *see also* Disciplinary Counsel's Post Hearing Brief to the Ad Hoc Hearing Committee, dated Oct. 21, 2019 ("ODC Br.") at 2. We recommend that the Board dismiss this charge.

A hearing was held on September 17–19, 23, and 25, 2019, before this Ad Hoc Hearing Committee (the "Hearing Committee"). Disciplinary Counsel was represented at the hearing by Becky Neal, Esquire. Mr. Marks was represented by Justin M. Flint, Esquire, and Channing L. Shor, Esquire. Both counsel filed a Motion to Withdraw their appearances on March 11, 2020, which was granted on March 17, 2020.

Prior to the hearing, Disciplinary Counsel submitted DX 1 through 136.[3] During the hearing, Disciplinary Counsel submitted DX 137-138. *See* Tr. 259, 592. All of Disciplinary Counsel's exhibits were received into evidence for at least some purposes[4] except for the initial version of DX 7[5], and DX 69 through 75, 77, 98, 120, and 121, which were withdrawn by Disciplinary Counsel. Tr. 901-03, 910-17. During the hearing, Disciplinary Counsel called as witnesses Mr. Marks; Patrick T. Hand, Esquire; Myrna Fawcett, Esquire; Matthew Hertz, Esquire; Andy Levy; and Tracy Lashley-White, Esquire.

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[3] "DX" Refers to Disciplinary Counsel's exhibits. "RX" refers to Respondent's exhibits, and as Respondent consecutively Bates stamped the exhibits, the corresponding page after the exhibit refers to the Bates number. "Tr." refers to the transcript of the hearing on September 17–19, 23, and 25, 2019.

[4] Respondent initially objected to DX 78-79, 80 at 4-9, 81, 84, 86 at 1-6, 88-89, 90 at 6, 92, 95, 97, 100-101, 102 at 2-3, 103, 107-109, 111-112, and 114-117 because they contained hearsay statements by Karen Walker, who was not called as a witness. The exhibits were admitted after Disciplinary Counsel clarified that Ms. Walker's statements were not being offered for the truth of the matters asserted. Tr. 917-18.

[5] Respondent objected to the admission of DX 7 for lack of completeness. Disciplinary Counsel substituted a complete copy of DX 7 and, on that basis, Respondent withdrew the objection. Tr. 177-78.

Also prior to the hearing, Mr. Marks submitted RX 300 through 351. During the hearing, Mr. Marks submitted RX 352. Tr. 206. Respondent's exhibits 300-310, 312-319, 321, 323, 325-334, 337, 340, 343[6], 347, 351, and 352 were received into evidence. Tr. 1142. Mr. Marks testified on his own behalf and called Donald S. Boucher, SRA as an expert witness in the liability phase.

Upon conclusion of the hearing, the Hearing Committee made a preliminary non-binding determination that Disciplinary Counsel had proven at least one of the ethical violations set forth in the Amended Specification of Charges. Tr. 1136; *see* Board Rule 11.11. In the sanctions phase of the hearing, Mr. Marks called as witnesses Dr. Zana H. Marks; Ronald C. Jessamy, Sr., Esquire; Elizabeth M. Hewlett, Esquire; and Maria Burley.

II. FINDINGS OF FACT

The following findings of fact are based on the testimony and documentary evidence admitted at the hearing, and are established by clear and convincing evidence. *See* Board Rule 11.6; *In re Cater*, 887 A.2d 1, 24 (D.C. 2005) ("clear and convincing evidence" is more than a preponderance of the evidence, it is '"evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the

[6] Disciplinary Counsel objected to the admission of a statement from pages 1789-90 of RX 343 (Mr. Boucher's expert report) in which Mr. Boucher stated that "[i]t is my opinion that the decision by Mr. Marks not to sell the subject property in 2009 was very prudent and advantageous for the Revocable Trust and the beneficiary of the Revocable Trust." Tr. 1137-39. The Chair overruled this objection with the understanding that it was not offered as an opinion on trust law, but rather an opinion on whether it was a prudent way to handle property; this opinion is within his field of expertise. Tr. 1140-41.

fact sought to be established"' (quoting *In re Dortch*, 860 A.2d 346, 358 (D.C. 2004)). Because the findings of fact are organized by topic, but the time periods overlap, we will briefly summarize the chronology of events:

In 2006, Mr. Marks drafted a trust for his client, June McCloud, which was intended to be used for the benefit of Ms. McCloud's granddaughter, Stormy Hill. Mr. Marks named himself successor trustee. *See* Part II.B, *infra*. The trust assets included a house where Ms. Hill lived, which was to be sold and placed in a special needs trust for Ms. Hill, plus two bank accounts and an outstanding loan. Respondent became trustee upon Ms. McCloud's death in October 2009 and served in that role until May 2013.

Respondent began working toward selling the house, which was the principal asset of the trust, in November 2009, but he decided not to do so, based on his assessment of the market conditions at that time. *See* Part II.E, *infra*. He spoke to Ms. McCloud's Pastor, Steven Tucker, about the loans, but made no further effort to collect loans owed to the trust based on his view that the loans were legally unenforceable. *See* Part II.J, *infra*.[7]

In November and December 2009, the Social Security Administration deposited Supplemental Security Income checks into the trust account, but Respondent did not provide the funds to Ms. Hill due to his concern that the funds

[7] Ultimately, the house was sold and the loan was collected, through a settlement, in 2014, after Respondent's removal as trustee. *See* Part II.O, *infra*.

were improperly deposited and might be reclaimed and his view that he was not responsible for resolving the issue. *See* Part II.G, *infra*.

In November 2009, the Probate Court appointed as guardian *ad litem* for Ms. Hill, Karen Walker, and as representative, Matthew Hertz.[8] Beginning in December 2009, Ms. Walker and Mr. Hertz requested that Respondent release funds from the trust for Ms. Hill's benefit, but Respondent turned over more limited amounts. *See* Part II.H, *infra*. Respondent also resisted Ms. Walker's requests that he provide funds for upkeep of the house, contending that it was her responsibility. *See* Part II.I, *infra*. Respondent paid attorneys' fees to his then firm from the trust on two occasions – in December 2009 and March 2010 – totaling almost $25,000. *See* Part II.D, *infra*. Court approval was not required for those withdrawals.

Also, in December 2010, at a hearing called to address Ms. Hill's capacity to manage her own affairs, the court allowed Mr. Hertz to depose Mr. Marks regarding the trust assets. That deposition took place December 22, 2009. On January 4, 2010,

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[8] The events of this case have included a number of people in various positions appointed in the interest of Ms. Hill (*see* DX 21):

- at least three guardians (either *ad litem* or permanent) including: Karen Walker (who began as guardian *ad litem*, became permanent guardian in January 2010 and petitioned in May 2014 to resign after Ms. Hill became unable to work with her), Linda Lee (who became guardian *ad litem* in March 2013), and after May 2014, Myrna Fawcett;
- two successor trustees: Patrick Hand, who succeeded Respondent in May 2013, and Ms. Fawcett, who succeeded Mr. Hand in June 2014.
- a court-appointed attorney – Matthew Hertz – who, by March 22, 2013 was replaced by Allison Alvarado;
- at least two Visitors (social workers who observed her situation and made recommendations on her care): Toni Cole and Ms. Fawcett; and
- at least two examiners: Drs. Ronald B. Wynne and Dr. Jessica Brown, who were appointed to opine on Ms. Hill's capacity.

the court resumed the hearing and determined that Ms. Hill was incapacitated and required a guardian. Ms. Walker was appointed that guardian.

On January 22, 2010, Ms. Walker filed a petition for a full accounting of the trust, to which Mr. Marks replied on February 17. A hearing on the matter was resolved by Mr. Marks's representation that he would provide the required accounting, which he did on March 1, 2010.

In March 2010, upon her request, the court appointed Ms. Walker personal representative of the estate. Also in March 2010, Respondent made a second and final fee payment to his then-firm in the amount of $10,074.59. He made no payments to himself after he left his firm to start his own practice.

Respondent provided Ms. Walker with a bank statement for the trust account in November 2010, but did not send statements or accountings thereafter. Respondent stopped paying property taxes for the house from 2011 until Ms. Walker sent him a notice from the D.C. government in July 2012. *See* Part II.K, *infra*. Ms. Walker filed a petition to remove Respondent as Trustee, which Respondent opposed in August 2012. *See* Part II.L, *infra*. The court denied the petition because of a procedural error, and Ms. Walker did not re-file it.

In November 2012, Respondent withdrew $1,750 in cash from the trust account for personal use, though he intended to withdraw it from a personal account. *See* Part II.M, *infra*. Respondent did not discover the withdrawal from the trust account until compelled to account for the trust payments in April 2013. In February 2013, Ms. Walker filed petitions with the court that did not initially involve Mr.

Marks. *See* Part II.N, *infra*. However, in April 2013, as part of an order referencing the motions, the court required that Mr. Marks appear at a hearing called for April 10, 2013 to examine the current disposition of the trust. At that hearing, the court required an accounting of the trust account and rescheduled the hearing for April 15, 2013. It was in preparing the required accounting that Respondent noticed the $1,750 withdrawal. On April 15, Respondent filed an accounting that listed the $1,750 withdrawal, and indicated that it was "to be confirmed." At a hearing the same day, Ms. Hill's attorney asked the court to remove Respondent as Trustee, citing, *inter alia*, Respondent's failures to provide accountings, deliver funds to Ms. Hill, and sell the house. In May 2013, the court issued an order removing Respondent as Trustee, citing his failure to administer the trust effectively, and referred the case to an Auditor-Master.

In June 2013, Respondent filed an amended accounting with the Auditor-Master that disclosed he made the $1,750 withdrawal in error and would repay it with 10% interest. Later that same month, he did, in fact, repay it with 10% interest. *See* Part II.O, *infra*. In September 2013, Respondent entered into a settlement agreement with the successor trustee and reimbursed the trust for the amount of his fees, plus penalties and interest for the late payment of property taxes in July 2012.

A. Background

1. Mr. Marks is an attorney licensed to practice in the District of Columbia, Maryland and Kansas (where he is inactive). Tr. 270, 666-67. He was

admitted to the Bar of the District of Columbia Court of Appeals on September 2, 1987, and assigned Bar number 411706. DX 1 at 1.

2. Mr. Marks has practiced for almost 33 years. Tr. 667. For the first two to three years he was at Jessamy, Fort & Ogletree. *Id.* For approximately 10 years, he was counsel to the National Capital Park and Planning Commission, a bi-county agency in Montgomery and Prince Georges Counties that handles land use and zoning. *Id.* He became a partner with O'Malley, Miles, Nylen and Gilmore. *Id.* On April 1, 2012, he left that firm to form his own solo office, the Law Office of Isaac H. Marks, Sr., where he continues to work. Tr. 667-68.

3. Mr. Marks has been on the boards of the Prince Georges Chamber of Commerce and the J. Franklyn Bourne Bar Association. For more than 25 years, he has also been a member of the Character Committee that interviews applicants for the Maryland Bar. Tr. 670. He is also a former board member of the Maryland Transportation Authority – the agency responsible for building the intercounty connector. Tr. 672-73. *See generally* RX 351.

4. In 2002, June C. McCloud's grandson, Benjamin Brown, died after being transported from the District of Columbia jail to a hospital for a medical procedure. RX 352 at 1-2, ¶2; *see also* Tr. 332, 673-75, 677-78. Ms. McCloud inquired of her Pastor, Steven Tucker, about lawyers who might be able to represent her in a wrongful death lawsuit. Pastor Tucker asked another Pastor, John Jenkins, for a recommendation on a lawyer; Pastor Jenkins recommended Mr. Marks, who

attended Pastor Jenkins' church and represented the church as an attorney. DX 30 at 29; *see also* Tr. 332.

5. Ms. McCloud came to Mr. Marks's office with Pastor Tucker, and then retained Mr. Marks, through his then-law firm O'Malley, Miles, Nylen & Gilmore, P.A, to sue the District of Columbia, the company that managed the jail, and others. Tr. 332-33, 674-75. Mr. Marks obtained a settlement of about $200,000 for Ms. McCloud, Tr. 332-33; RX 352 at 1, ¶2; *see also* Tr. 333, 678, and then went on to represent Ms. McCloud as personal representative of her grandson's estate. Tr. 678-80.

6. Ms. McCloud had a granddaughter, Stormy J. Hill, who suffered from brain damage that caused cognitive impairment. RX 352 at 2, ¶4. Ms. McCloud and Ms. Hill lived together in what was then a row house at 4519 Georgia Avenue, N.W., between Buchanan and Allison streets in the Petworth neighborhood. RX 352 at 2, ¶4; Tr. 333-34, 600.

7. Ms. Hill suffered from complications associated with a shunt neurologically implanted in her brain at an early age; these complications included comprehension and cognitive difficulty ("[n]umbers meant nothing to her"), short term memory loss, and anger management issues. DX 28 at 5, 6; DX 30 at 6-7; DX 55 at 1; *see also* Tr. 335-36, 680-81. Ms. McCloud took care of Ms. Hill and managed her financial affairs. *See* DX 28 at 5, 6. She was not able to manage money on her own and was easily taken advantage of. Tr. 45-47. *See generally* DX 26 at 8-13; DX 30 at 56-57. When Ms. McCloud died in October 2009, Ms. Hill was

approximately 31 years old. DX 30 at 57. Mr. Marks had known Ms. Hill for nearly ten years at that time. DX 28 at 6; Tr. 333.

8. Ms. McCloud also took care of Ms. Hill's financial affairs more generally. DX 26 at 9; DX 28 at 5-6; RX 352, ¶4. Because of her disability, Ms. Hill received monthly Supplemental Security Income (SSI) checks for $649 from the Social Security Administration (SSA). Tr. 345-48. When Ms. McCloud was alive, she received Ms. Hill's checks – it appears under an informal arrangement in which Social Security agreed to send Ms. Hill's checks to Ms. McCloud, rather than a formal status as a representative payee. *See* Tr. 50 (Hertz); Tr. 351-53, 682 (Marks).

9. Mr. Marks knew that Ms. McCloud was concerned about what would happen to Ms. Hill when Ms. McCloud was gone. DX 30 at 20. When he created the trust, Mr. Marks knew that Ms. McCloud's primary concern was that Ms. Hill receive adequate care and have a safe place to live, DX 30 at 20, 23; DX 76 at 3, and that Ms. McCloud preferred that Ms. Hill live in some type of assisted-living facility or group home. DX 76 at 3, ¶4.05; Tr. 337-39. Mr. Marks testified that she was also concerned that other people would take advantage of Ms. Hill and take for themselves money given to her. Tr. 687.

B. <u>The McCloud Trust</u>

10. In February 2006, Ms. McCloud hired Mr. Marks's firm to advise her on estate planning, including the creation of the June McCloud Trust. RX 352 at 2, ¶5. Mr. Marks created a trust document naming Ms. McCloud as the settlor and trustee, DX 76 at 1, §§ 1.01, 2.01; Ms. Hill was the sole beneficiary, *id.* at 3-4,

§§ 4.05, 4.06; and Mr. Marks was designated as successor trustee after Ms. McCloud's death. *Id.* at 1, 9, § 7.03.

11. When the McCloud Trust was established in 2006, its assets were designated as (1) the house that Ms. McCloud owned and lived in with Ms. Hill (which was titled to the McCloud Trust), (2) a Trust Bank Account ending in "1555" at Bank of America and an account at Pentagon Federal Credit Union (that was never actually transferred to the Trust, Tr. 704), and (3) outstanding loans owed to Ms. McCloud as of 1/25/06 of $12,300 loaned to Pastor Tucker and $6,500 loaned to New Commandment Baptist Church (where Pastor Tucker was the pastor). *Id.* at 12-13.

12. The McCloud Trust was an inter-vivos revocable trust, to be managed for Ms. McCloud's benefit during her lifetime, and "distributed to the beneficiar[y]," Ms. Hill, upon Ms. McCloud's death. *Id.* at 1 § 1.03; *see also id.* at 2-4, §§ 3, 4.

13. Section 4 of the McCloud Trust provided that after Ms. McCloud's death, Mr. Marks, as successor trustee, take the following actions:

(i) either at the direction of Ms. McCloud's personal representative, or in Mr. Marks's discretion, pay death taxes or other valid claims against Ms. McCloud's estate (apparently there were none), *id.* §§ 4.02-4.04;

(ii) sell the family home where Ms. Hill lived "as expeditiously as practicable so as not to unnecessarily minimize the value of the Trust Estate and to allow my granddaughter, Stormy J. Hill, to find safe living accommodations – preferably in an assisted-living facility," *id.* § 4.05; and,

(iii) transfer "[a]ll" remaining "proceeds, revenue and income of whatever source from the Trust Estate" to and hold them in "a special needs trust" for the benefit of Ms. Hill, *id.* § 4.06.

14. Section 5 of the McCloud Trust gave the Trustee "all powers, authorities and discretion granted by law, statute, and under any rule of court," and, in addition, expressly authorizes and empowers the Trustee, "***in the Trustee's sole and absolute discretion***, to exercise" any of a number of powers "***without application to, approval of or ratification by any court***." *Id.* § 5.01 (emphases added). Among these were the powers

- "to value and appraise the assets comprising the Trust Estate," *id.* § 5.01(d); and,
- "to pay, compromise, adjust, abandon, submit to arbitration, renew, settle, sue on, defend, sell, release and otherwise deal with any claims or demands of any trust against others or of others against such trust as the Trustee may determine…," § 5.01(g).

15. Section 6.03 specified that:

> The Trustee may make ***discretionary payments*** of income or principal to any beneficiary after taking into consideration, or without taking into consideration, ***as the Trustee deems appropriate***, any other income or financial resources reasonably available to said beneficiary, ***and any other factors affecting the beneficiary.*** The Trustee may also withhold payments of income or principal to any beneficiary if, in the Trustee's discretion, the beneficiary is impaired by addiction, debts or any other infirmity. ***All decisions of the Trustee with respect to the payment or withholding of any income and principal shall be made by the Trustee in her or his sole and absolute discretion,*** such that no beneficiary or creditor or claimant of any beneficiary, including any governmental agencies which may furnish services, payments or benefits to a beneficiary, shall have any claim to any of the income or principal of the Trust. [DX 76 § 6.03 (emphases added)]

16. Section 7.07 of the McCloud Trust specified that "the Trustee shall be excused from filing any account with any court; however … the Successor Trustee shall render to the Settlor an immediate and annual account at the time of the death, resignation, or removal of the Trustee required by law." DX 76 § 7.07; *see also* Tr. 110-11 (Hand) (Trust did not require court accounting). Mr. Marks testified that, if the reason for the successor trustee was that the Settlor (Ms. McCloud) had died, the accounting should go to the personal representative of Ms. McCloud's estate. Tr. 299-300, 1123-24.

17. The Trust specified that it was governed by the laws of the District of Columbia. *Id.* § 8.02. The District of Columbia Uniform Trust Code, (the "UTC") required Mr. Marks to "administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries . . . ." D.C. Code § 19-1308.01; *see also Cobell v. Norton*, 283 F. Supp. 2d 66, 267 (D.D.C. 2003) ("Upon acceptance of the trust by the trustee, he is under a duty to the beneficiary to administer the trust." (quoting Restatement (Second) of Trusts § 169 (1957))), *vac'd and rem'd on other grounds*, 392 F.3d 461 (D.C. Cir. 2004). D.C. Code § 19-1308.02(a) required Respondent to "administer the trust solely in the interests of the beneficiaries." *See Reardon v. Riggs Nat'l Bank*, 677 A.2d 1032, 1035 (D.C. 1996) ("A trustee has the highest duty of loyalty to the beneficiaries of the trust that it administers.").

18. D.C. Code § 19-1308.13(a), also obliges trustees to keep "beneficiaries of the trust reasonably informed about the administration of the trust

and of the material facts necessary for them to protect their interests," and specifies that "[u]nless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information related to the administration of the trust."

C. Initial Actions and the Appointment of a Guardian *Ad Litem* and Lawyer for Ms. Hill

19. On October 22, 2009, Ms. McCloud died intestate, *see* DX 97 at 6, and Mr. Marks became the trustee of the McCloud Trust. RX 352, ¶8; Tr. 273-74, 338-39. Ms. Hill was the sole surviving heir of Ms. McCloud's estate, as well as being the only beneficiary of the McCloud Trust. RX 352, ¶8; Tr. 379

20. When Ms. McCloud died, the McCloud Trust bank account held approximately $70,000. RX 352 at 3, ¶10; DX 19 at 7, 8. Mr. Marks took control of the trust bank account by November 14, 2009, changed its billing address from Ms. McCloud's home address to Mr. Marks's office address, and canceled the existing debit card associated with the account. DX 19 at 7-9; DX 48 at 9-10; Tr. 274, 286, 319, 765-67.

21. On November 5, 2009, Mr. Marks petitioned the District of Columbia Superior Court for the appointment of a guardian and conservator for Ms. Hill, which required a determination of whether Ms. Hill was incapacitated. *In re Stormy Hill*, 2009 INT 302. DX 22; RX 352 at 4, ¶11; Tr. 41-43. In the petition, Mr. Marks explained that Ms. Hill, "previously lived with elderly grandmother who received subject's monthly SSI check ($650.00) & generally took care of subject. Subject

has no cognitive ability regarding money, suffers from memory loss & has been subjected to pilferage of assets & money." DX 22 at 5.

22. The court appointed Karen S. Walker, Esquire, as guardian *ad litem* for Ms. Hill, and appointed Matthew Hertz, Esquire, to represent Ms. Hill. DX 22; DX 23; DX 25; RX 352 at 4, ¶11. The relationship between Mr. Marks and Ms. Walker, however, was never good. Mr. Marks testified that they "never had a civil conversation," Tr. 626, 1106-10, and, numerous emails, letters and pleadings in the record show marked acrimony. *See, e.g.*, DX 41 (petition to remove Mr. Marks as trustee); DX 42 (opposition to petition to remove Mr. Marks as trustee); DX 81 (emails between Mr. Marks, Mr. Hertz, and Ms. Walker); DX 84 (same); DX 86 (emails between Mr. Marks and Ms. Walker); DX 91 (emails between Mr. Marks, Mr. Hertz, and Ms. Walker); DX 92 (same); DX 93 (same); DX 107 (letters from Ms. Walker to Mr. Marks); DX 108 (email from Ms. Walker to Mr. Marks); DX 109 (letter from Ms. Walker to Mr. Marks); DX 110 (letter from Mr. Marks to Ms. Walker); DX 111 (letter from Ms. Walker to Mr. Marks); DX 112 (emails between Mr. Marks and Ms. Walker); DX 114 (fax from Ms. Walker to Mr. Marks); DX 117 at 2 (letter from Ms. Walker to Mr. Marks).

23. The court scheduled a hearing for Thursday, December 17, 2009 to consider Ms. Hill's capacity to manage her own affairs. DX 25 at 1; *see also* DX 24 at 5-6.

D. Trust Accounting

24. Mr. Marks had obligations under both the McCloud Trust and the D.C.'s Uniform Trust Code to provide information concerning the Trust to the beneficiary. D.C. Code § 19-1308.13(a), specifies that "[u]nless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information related to the administration of the trust." The Trust contemplated that "the Successor Trustee shall render to the Settlor [Ms. McCloud] an immediate and annual account at the time of the death, resignation, or removal of the Trustee as required by law." DX 76 § 7.07. Ms. McCloud died on October 22, 2009 (FF 19) and so the annual account during the period Mr. Marks was successor trustee would be due immediately upon death, and then on October 22, 2010, October 22, 2011 and October 22, 2012.

25. Once Ms. McCloud died, accountings would need to be sent to her personal representative; the beneficiary (or her representative) was also entitled to reports of the trust. DX 76 § 7.07; Tr. 299-300. Ms. McCloud, however, died intestate. Initially, Mr. Marks expected to ask to be appointed personal representative himself. Tr. 414-15. Later, he decided against pursuing that appointment, but the estate did not have a personal representative until March 2010, when the Probate Division of the Superior Court appointed Ms. Walker as personal representative. DX 13 at 10; DX 76 at 10.

October 22, 2009 "Date of Death" Accounting

26. In advance of the December 17 hearing, Ms. Hill's court-appointed representative, Mr. Hertz, asked Mr. Marks by email how much was in the trust, whether it was funded, how much was in liquid assets, what the current balance was on a reverse mortgage on the Georgia Avenue property, and why a special needs trust was chosen. DX 80 at 8; DX 81 at 3. Mr. Hertz first requested the information on Thursday, December 10, 2009. DX 80 at 8. At the close of business on Monday, December 14, 2009, Mr. Hertz sent a follow up email noting that he had not heard back from Mr. Marks on these questions and asking him to "[p]lease provide . . . this information if you can prior to tomorrow." DX 81 at 3.

27. On Tuesday, December 15, 2009, Mr. Marks replied to Mr. Hertz's email, but did not answer Mr. Hertz's questions about the Trust assets. Instead he wrote urging Mr. Hertz to make sure that they transport Ms. Hill to the December 17, 2009 hearing. *Id.* at 1-2. The next day, Mr. Hertz reminded Mr. Marks that he had not received a response to the request for information. *Id.* at 1.

28. At the hearing on December 17, 2009, Mr. Hertz raised his request for information with the court and requested extended discovery, including a deposition of Mr. Marks. Mr. Marks offered to "inform the Court what the assets are and the anticipated assets under oath right now." DX 28 at 11. The court granted Mr. Hertz's request to depose Mr. Marks. *Id.* at 5, 9, 12-16; DX 21 at 6.

29. On December 22, 2009, Mr. Hertz, Ms. Hill's court-appointed attorney, deposed Mr. Marks to ask him questions about the creation of the McCloud Trust,

and the status of its assets. DX 30. At the deposition, Mr. Marks brought the then-current bank statements from the McCloud Trust Account (ending in "1555"), and other documents concerning the Trust assets, all of which were marked as exhibits. *Id.* The McCloud Trust bank statement showed that, as of December 11, 2009, the trust account had a balance of $67,379.90. *Id.* at 36-37 & Ex. 5 at 136; Tr. 854-55.

30. During the deposition, Mr. Hertz asked Mr. Marks whether he expected to pay attorney's fees from the Trust. Mr. Marks told him "absolutely"; that his rate was (as Hertz recalled) either $325/hour or $350/hour; and that he expected to make "at least a partial payment" by year end. DX 30 at 58-59.

31. On December 29, 2009, a week after his deposition, Mr. Marks paid his then law firm $14,400 of attorney's fees from the McCloud Trust. DX 19 at 15-16.

32. On January 4, 2010, after the deposition, the court conducted another hearing and determined that Ms. Hill lacked capacity to manage her own affairs and appointed Ms. Walker as her guardian. DX 31 at 5, 7. The court denied without prejudice the request to appoint a conservator because at that point, Ms. Hill did not have sufficient finances to manage. *Id.* at 5-7, 10-14. The hearing did not address the Trust assets or the testimony or information Mr. Hertz had obtained at the deposition concerning those assets. DX 31.

33. Ms. Walker and Mr. Marks communicated about Ms. Hill's immediate needs and the state of the house in the following few weeks (*see, e.g.*, DX 86, 87, 88), but there were no further requests specifically for accounting information until January 22, 2010, when Ms. Walker, in her capacity as Ms. Hill's guardian, filed an

emergency petition with the Probate Division for a "full accounting of revocable trust." DX 33. In this petition, which Ms. Walker verified under oath, *id.* at 3, Ms. Walker asserted, among other things, that "Mr. Marks will not provide an accounting of the assets of the trust and continues to use the assets for unknown purposes, most likely to pay himself for attorney's and other fees." *Id.* at 2.

34. On February 17, 2010, Mr. Marks filed an opposition to Ms. Walker's January 22, 2010 petition arguing, in part, that Ms. Walker's "bald assertion that [Mr. Marks] 'will not provide an accounting of the assets of the trust[,]' is patently false and a borderline misrepresentation to the Court. Petitioner has *never* asked for an accounting of Trust assets and, moreover, is aware – or should have been aware – of the Trust assets." DX 36, ¶6. Mr. Marks stated that he had accounted for the trust assets by providing Ms. Walker with a copy of the McCloud Trust document, which identified the assets, and by providing copies of McCloud Trust bank statements at his December 22, 2009 deposition. *Id.*, ¶¶7-11 & referenced exhibits. Mr. Marks referred to the date-of-death balance of approximately $70,000 in the McCloud Trust Account (ending in 1555), and Ms. Walker's knowledge of that figure. *Id.* at 2-3 (¶8), 9 (Ex. 2).

35. In January 2010, Mr. Hertz sent a draft petition to Mr. Marks requesting that Mr. Hertz's fees be paid out of the Trust. RX 315 at 300-03. On February 2, 2010, not realizing that Mr. Hertz's petition was a draft (and that the procedure called for it to be shared with counsel before being filed, *see* Tr. 78-82), Mr. Marks filed what he titled as a response to fee petition of Mr. Hertz. DX 35. Mr. Marks referred

to the date-of-death balance of approximately $70,000 in the McCloud Trust Account (ending in 1555). *Id.* ¶6.

36. In neither the January 2010 pleading (DX 35) nor the February 2010 pleading (DX 36) did Mr. Marks explain that the current balance of the Trust Account was approximately $52,000. *Id.* The bulk of the difference was a result of $14,400 that Mr. Marks paid to his firm in attorney's fees on December 29, 2009. Other transactions that affected the account balance included that there was, as described below, a credit to the account for two of Ms. Hill's SSI checks and other payments out of the account, including the $450 in checks to Ms. Hill, payments for various utility bills, and bank fees. *See* DX 19; DX 94 at 5, 7-10; Tr. 839-46, 1119-20, 1125-26.

37. Some of these transactions (those that predated December 22, 2009) were reflected in information Mr. Marks provided to Mr. Hertz and Ms. Walker during his deposition that day. DX 30 at 36-37, 136-44; *see also* DX 37 at 3-4 (Mr. Hertz at hearing confirming that at the deposition Mr. Marks provided documentation of the assets through December 11, 2009). The rest are reflected in January and February 2010 Trust Account statements that he provided to them on March 1, 2010. DX 19 at 15-16; DX 94 at 1-10.

38. On February 26, 2010, the court held a show-cause hearing on Ms. Walker's petition. DX 37. Mr. Marks, Ms. Walker, Mr. Hertz, and Ms. Hill appeared. At the hearing, the court confirmed that Mr. Hertz had shared the information through December 11, 2009 with Ms. Walker. *Id.* at 4-5. When

Mr. Marks informed him that he would provide the requested financial records to Ms. Walker and Mr. Hertz, *id.* at 4, the court told Mr. Marks to provide updated bank records and copies of checks by March 2, 2010 and denied Ms. Walker's petition as moot. *See id.* at 5-7, 10. On March 1, 2010, Mr. Marks provided Ms. Walker and Mr. Hertz copies of the McCloud Trust bank statements for January and February 2010. DX 2, ¶23; RX 352, ¶23.

39. On February 26, 2010, Ms. Walker filed a petition for unsupervised probate of the administration of Ms. McCloud's estate, *In re McCloud*, Case No. 2010 ADM 189 (D.C. Super. Ct.). As guardian of the sole heir, Ms. Walker requested her appointment as the personal representative, and the court granted it. RX 352, ¶24; DX 13 at 10.

40. On March 16, 2010, Mr. Marks had the O'Malley firm generate an invoice addressed to Mr. Marks for $5,619.59 for services from January 15, 2010 to March 5, 2010. DX 96. The invoice reflected the past due balance of $5,574 as listed on the January 15, 2010 bill, and a total balance due of $11,193.59. *Id.* at 3. On March 29, 2010, Mr. Marks wrote a check from the Trust Account paying his firm $10,074.59, apparently in respect of this invoice. DX 19 at 24-25.[9]

41. This March 29, 2010 payment was the last time Mr. Marks made any payment out of the Trust for his firm's fees. On August 16, 2010 and December 16, 2010, the O'Malley firm generated additional invoices for $2,275 and $2,870,

[9] There is no evidence in the record that explains the difference between the amount of the bill and the amount paid.

respectively. DX 106; DX 113. However, Mr. Marks never paid these invoices and never billed for any additional work: Mr. Marks testified that he did not want to see his fees consume the Trust assets. Tr. 327.

October 22, 2010 Accounting

42. On October 14, 2010, Ms. Walker wrote Mr. Marks asking for the financial records of the Trust account. DX 107 at 1. Ms. Walker repeated the request in an October 27, 2010 letter. DX 109 at 2; *see also* DX 111. On November 1, 2010, Mr. Marks sent her the bank statement for the trust, which Ms. Walker acknowledged. DX 112 at 2; *see also id.* at 3 (acknowledging receipt and asking about a payment).

October 22, 2011 and October 2012 Accountings

43. Between November 1, 2010 and July 18, 2012, Mr. Marks did not provide Ms. Walker with an updated accounting, nor did Ms. Walker ask for one.

44. On July 19, 2012, Ms. Walker filed a petition to remove Mr. Marks as successor trustee of the McCloud Trust, DX 41; Tr. 487-89, which alleged in part that Mr. Marks had failed to provide the accountings the Trust required.

45. Mr. Marks opposed Ms. Walker's petition, in part, by explaining that his reason for not providing an accounting was that he did not believe there was any change in the bank statements. DX 42 at 5 (verified pleading to the Probate Division on August 8, 2012); *see also* Respondent's Responsive Post-Hearing Brief, filed Nov. 7, 2019 ("Resp. Br."), at 6 (¶28). As explained below, *see* ¶¶ 126, 127, in this

brief, Mr. Marks also offered to "provide a report to [Ms. Walker] within 30 days . . . and will confirm the provision of same by praecipe to the Court." DX 42 at 5.

46. In fact, bank records show the following payments from the account: $34.00 monthly payments made to MetLife through April 2011, DX 19 at 40, 42, 44, 46, 48, 50; *see also id.* at 52 (making, but then refunding, the payment for May 2011). These payments reduced the balance from $41,523.91, as of October 16, 2010, to $41,319.91, as of April 11, 2011. *Id.* at 40, 50. The bank statements reflect no further transactions until July 16, 2012, when Mr. Marks paid the overdue property taxes (described below). *Id.* at 73. The only other change to the account during Mr. Marks's tenure as Trustee was the November 15, 2012 cash withdrawal of $1,750 (described below). *See id.* at 81.

47. Although the record does not contain evidence directly addressing whether Mr. Marks sent a report or accounting to Ms. Walker within 30 days of August 8, 2012, the subsequent evidence makes it clear he did not. As described below, the Trust accounting became a major issue in hearings before the court in April 2013. Had Mr. Marks provided an accounting to Ms. Walker the preceding August or September, he would have so informed the court and he did not. DX 46; DX 48. Indeed, at the April 10, 2013, hearing Allison Alvarado (who had replaced Mr. Hertz as Ms. Hill's counsel), responded to Mr. Marks's promise to provide an accounting by stating that Mr. Marks so promised "the Court almost three years ago . . . well, was that ever done? No, it was never done. No accounting was ever provided to" Ms. Walker, DX 46 at 21 (April 10, 2013 hearing). Mr. Marks did not

respond to this point, DX 46, and, when Ms. Alvarado repeated it at the subsequent April 15, 2013 hearing, DX 48 at 13, Mr. Marks referenced the earlier bank statements that he had provided and acknowledged that he "may not have provided a formal account." *Id.* at 19-20; *see also id.* at 23-24 (making it clear he is referring to the earlier provision of bank statements). If he had provided a report or accounting in August or September 2013, he would have said so.

E. The Georgia Avenue Property

48. The major asset of the McCloud Trust was the house at 4519 Georgia Avenue. DX 65 at 8; DX 67 at 1; DX 76 at 13. In February 2006, Mr. Marks transferred the title of the property from Ms. McCloud to the Trust. DX 14 at 1, 2; DX 52 at 20. In September 2006, the property was appraised at $525,000. RX 304 at 31, 34; Tr. 430, 694-95. At that time, Ms. McCloud, as trustee, took out a reverse mortgage on the property. DX 7 at 2; Tr. 430. At her death in October 2009, the balance of the reverse mortgage was approximately $130,000. DX 52 at 22. The Auditor-Master reviewed the bank records and "noted that $300 was added to the account every month for finance charges, interest charges, and mortgage protection charges." DX 62 at 38-39; *see* DX 52 at 21-23; DX 101 at 1, 3; DX 109 at 4; Tr. 440-42.

49. It is uncontested that the house had major problems. *See* ODC Br. at 19, ¶60 (stating that the house was in disrepair and had structural damage). The house had a "major crack" in the foundation that existed when Ms. McCloud lived there that could be seen from the inside and outside. Tr. 619-20 (Mr. Marks

testifying that he noticed a crack in the foundation, which did not affect the habitability of the house, in November 2006, and that Ms. McCloud had told him it had existed for "many years" prior); DX 60 at 29, 41 (September 2013 testimony of Uzoma Ogbuokiri, a real estate agent, before the Auditor-Master concerning his assessment of the property in late 2009[10], stating that a potential buyer brought two contractors who noticed the crack in the foundation); *see also* DX 30 at 19 (December 2009 deposition testimony of Mr. Marks calling the house a "tear-down" with "foundation issues"); DX 46 at 11, 18-19 (April 2013 statements of Mr. Marks to Judge Christian that the house was in "very poor condition" and "disrepair" and that potential buyers had told him it was a "tear-down"); DX 48 at 15, 18-19 (April 2013 statements of Mr. Marks to Judge Christian that the house was in "bad shape" but that it had been better and "livable" when Ms. McCloud died in 2009); DX 52 at 54 (June 2013 statement of Mr. Marks to the Auditor-Master that the property had structural damage and that its value was "underwater"). "It was old. It had a boiler for the HVAC. The windows leaked. The floors creaked." Tr. 426; *see also* Tr. 426-27, 430, 694-95. *But see* RX 304 at 34-35 (September 25, 2006 appraisal describing the condition of the house as "average" and "adequately maintained" and noting that there were "no apparent physical functional or external inadequacies" and "no

[10] Mr. Ogbuokiri testified that he "believe[d]" that Mr. Marks had contacted him in 2010 but that he could not find his records. DX 60 at 27-29. However, Mr. Marks billed for a conversation with Mr. Ogbuokiri in November 2009 and mentioned his assessment, including the crack in the foundation, in his December 2009 deposition. DX 30 at 19; DX 47 at 11.

evidence of roofing leakage"); DX 122 at 15 (April 2010 appraisal describing the condition as "adequately maintained and in overall average condition").

50. Both Mr. Marks (at this hearing, Tr. 620), and Mr. Ogbuokiri (at a 2013 proceeding before the Auditor-Master DX 60 at 28-38) testified that, because of the condition of the house and the market, the house's highest and best use was as a tear-down.

51. Beginning at least in early November 2009, Mr. Marks began to make inquiries into selling Ms. McCloud's house. Invoices between November 2009 and May 2010 reflect time he spent in connection with the property. DX 310 at 11/2/09, 11/4/09, 1/29/10, 2/1/10, 4/21/10, 4/23/10, 4/27/10, 4/29/10 and 5/14/10.

52. He met with Mr. Ogbuokiri and his client, United States Representative Robert Livingston, who owned the adjacent vacant lot. DX 47 at 11 (11/02/2009 Entry), 12 (11/04/2009 entry); 14 (12/09/2009 entry); DX 60 at 35-36; *see* Tr. 431-32, 598-99. He also testified he went with Mr. Ogbuokiri to show the house to two prospective buyers. Tr. 600-01. Mr. Marks believed that building a condominium on the lots was "a perfect fit." Tr. 431-32.

53. In 2009-10, after the real estate market crash of 2008, however, the market value of the house had declined from the $525,000 at which it had been appraised in 2006. RX 304 at 34; Tr. 430, 694-95. Mr. Marks testified he received offers from possible buyers at $150,000 or $200,000 and the buyers were not interested in the $530,000 or $550,000 Mr. Marks wanted to get for the property. Tr. 431-32, 600-03; *see also* DX 60 at 46-48. Mr. Marks referred to these as possible

buyers as "bottom fish[ers]," meaning people attempting to buy at the bottom of the market and hold for when the market improves. Tr. 430-32.

54. Mr. Ogbuokiri estimated that the property was worth only $200,000 to $270,000. DX 30 at 11; DX 60 at 28; Tr. 431-32. Mr. Marks told him about the earlier appraisal and said that he wanted to wait until the market rebounded. Tr. 432. He asked Mr. Ogbuokiri to let him know if anyone was interested in paying a better price for it. *Id*; DX 60 at 61-62. Mr. Marks called this a "poor man's" listing, Tr. 432, but did not actually list the property for sale.

55. Mr. Marks had the property reappraised in April 2010. Tr. 448-49. That appraisal came in at $280,000. DX 122 at 15; Tr. 449. After receiving the appraisal, Mr. Marks testified he concluded that he would "have to wait until the . . . market got up and the value increased to sell the property to get a decent price for it." Tr. 788.

56. Mr. Marks called Donald S. Boucher, SRA, as an expert witness to testify concerning the reasonableness of the decision to hold off selling the property. Tr. 922. Mr. Boucher has been qualified as an expert to testify in federal court and the courts of the District of Columbia and Montgomery and Prince Georges County Maryland, approximately 40 times. *Id.* He appraises homes in the Petworth and Brightwood neighborhoods on an ongoing basis and conducts ten appraisals in those neighborhoods a year. Tr. 929.

57. Mr. Boucher testified that the real estate recession started in 2009, and that in 2009 prices were declining in virtually every market in country, including the

District of Columbia. *Id.* Between 2006 and 2009, prices went down approximately 30 percent, then they began rebounding in 2010 and by 2013 had rebounded by about 16 percent. Tr. 933.

58. Based on the market conditions, Mr. Boucher concludes in his report, that this "hindsight view" of median price trends applies to Ms. McCloud's house: that 2009 would not have been the preferred time to sell Ms. McCloud's house, and that "2013 or lat[]er would have been the preferred time" to sell it. RX 343 at 1789.

59. Mr. Boucher concludes that "it was a smart decision not to sell the property in 2009 and to wait" and reached that opinion with a reasonable degree of professional certainty. Tr. 938-39; RX 343 at 1789-90.

60. Mr. Marks testified that, after April 2010, Mr. Marks did not have any other appraisals done of the property, formally list it for sale or look for other real estate agents. Tr. 449-50, 603, 607. He testified that he was aware of real estate trends in the area, and familiar with the neighborhood, Tr. 427-33, and continued to drive by the property to inspect its exterior. Tr. 618-19. He states that he continued to talk with Mr. Ogbuokiri about what the property was worth and believed that Mr. Ogbuokiri was incentivized by the prospect of the commission to try to get the best value for the property. Tr. 596-97.

61. Mr. Marks further testified that he was concerned about running up expenses that would come out of the Trust and needed to be "judicious" with his time, Tr. 607, and that a number of potential buyers called him from time to time after being referred by Mr. Ogbuokiri. Tr. 608-09. They were not interested in

buying the property to live in; they were envisioning a tear-down, Tr. 609-10; *see also* DX 60 at 26-27, and that is how Mr. Ogbuokiri also viewed the property. DX 60 at 28-33, 37-38. *See generally* Tr. 764-65 (discussing Mr. Marks's view of the market situation). In a verified brief in August 2012, Mr. Marks stated that the property "may now be ripe for a profitable sale." DX 42 at 3.

62. Because Mr. Marks testified that he stopped billing the Trust for his time after 2010 (Tr. 327), there are no invoices reflecting efforts Mr. Marks might have done to sell the property after May 2010.

63. As explained below, ultimately (in February 2014) Mr. Hand, as successor trustee obtained a contract to sell the Georgia Avenue house for $450,000. DX 67 at 2. The house and the one next door were torn down for a new residential complex. Tr. 429.

64. Waiting until the market improved to sell the property created a problem. Ms. McCloud's Trust contemplated that the house would be sold, and Ms. Hill would move to some other "safe living accommodations – preferably in an assisted-living facility," and that this happen "as expeditiously as practicable." DX 30 at 78, § 4.05. If the house were sold quickly as a tear-down, investing in improving the house would be a waste of trust assets, and it is sensible not to make such an investment. However, as the house was not sold quickly, and Ms. Hill was continuing to live there, the condition of the house became relevant to meeting Ms. McCloud's express goal of ensuring that Ms. Hill have "safe living accommodations." *See* DX 101 at 1; DX 109 at 1; DX 111 at 2.

65. Mr. Marks knew that Ms. Hill was "probably unable to live by herself or maintain the house" and wrote as early as 2010 that she was "fast rendering the house uninhabitable." DX 86 at 2, 3; *see* DX 30 at 20. Mr. Marks recounted in an email to Ms. Walker that a neighbor, Ms. Gray, had witnessed Ms. Hill allow a pot to boil dry on the stove, engulfing the house in smoke, DX 86 at 2, and left food scraps around the house causing the mice population to increase. *Id.* Although the house had been contaminated with mice, Mr. Marks testified this become worse after Ms. McCloud died. Tr. 421-22. In January 2010, Mr. Marks wrote that there were mouse droppings all over the house, including in Ms. Hill's bed. DX 86 at 2. The basement had flooded. *Id.* at 3. Mr. Marks sought to inspect the house with Ms. Walker. DX 86 at 4. It is unclear whether this inspection ever took place. *Id.* at 4-7. As Mr. Marks put it during testimony before the Probate Division on April 15, 2013, "Ms. Hill stayed in the house. That was the problem. She remained in the house, that much I knew." DX 46 at 18, 19.

F. The Special Needs Trust[11]

66. Section 4.06 of the McCloud Trust specifies that the trustee transfer "[a]ll" remaining "proceeds, revenue and income of whatever source from the Trust Estate" to and hold them in "a special needs trust" for the benefit of Ms. Hill. DX 76

[11] As discussed below, the failure to create a special needs trust was ultimately something that both Judge Wolf and Judge Christian expressed as a concern in orders and on the record and in Judge Wolf's disciplinary complaint, DX 5 at 1. However, it is not something that Disciplinary Counsel ultimately charged as being an element of the alleged violation. Because of the court's expressed concern, we are providing the facts that bear on the issue so as to put it into context.

§ 4.06. During his tenure as Trustee, Mr. Marks did not create a special needs trust for Ms. Hill. DX 45 at 5-6; DX 46 at 10; *see also* Tr. 611-12.

67. Mr. Marks conferred with one of his partners about creating a special needs trust. *See, e.g.*, DX 47 at 12 (11/04/2009 entry), 14 (12/08/2009 and 12/15/2009 entries). Mr. Marks testified that his partner advised him that it was legally possible to create a special needs trust, however, it was impractical to do so before selling the Georgia Avenue property because money would be used up for taxes or upkeep of the property and there would be no money in case an emergency arose. Tr. 612-14, 763-64. *But see* DX 45 at 5-6.

68. In a December 10, 2009 email, Mr. Hertz asked Mr. Marks why a special needs trust was chosen. DX 81 at 3. Mr. Hertz noted his understanding that "you [cannot] use the funds from a Special Needs Trust for purposes of upkeep (food, shelter, etc.) and so that would leave [Ms. Hill] in a bind." *Id.*; *see also* DX 30 at 20-22; Tr. 689-91.

69. Reviewing the assets available for the upkeep of Ms. Hill in 2013, however, both Judge Wolf and Judge Christian of the Probate Division said that the establishment of a special needs trust did not necessarily prevent the use of funds for immediate needs such as home maintenance and that the special needs trust could have been established and then subsequently funded by proceeds from the sale of the house. DX 45 at 5-6; DX 46 at 13-18.

70. However, the McCloud Trust, itself, appears to contemplate that the special needs trust for Miss Hill would be established after the house was sold.

DX 76 at 3-4. Section 4.05 orders the sale of the property "as expeditiously as practicable"; Section 4.06 orders, "All proceeds, revenue and income of whatever source from the Trust Estate shall be transferred to and held in a special needs trust for the benefit of my granddaughter, Stormy J. Hill for the duration of her natural life." *Id.* § 4.06.[12]

G. Supplemental Security Income ("SSI") Checks

71. Because of Ms. Hill's disability, she received $649 per month in social security benefits. RX 352 at 2, ¶4. While Ms. McCloud was alive, she was the representative payee, and each month the SSA directly deposited Ms. Hill's Social Security check into the trust account. DX 19 at 1-8; DX 22 at 5, ¶¶12, 14; DX 24 at 6 (Mr. Marks testifying at 11-6-2009 emergency hearing).

72. On November 3, and December 3, 2009, the SSA deposited two of Ms. Hill's $649 monthly SSI checks directly into the trust account. DX 19 at 8 (11-03 entry), 10 (first 12-03 entry).

73. On December 3, 2009 (the same day in which one of the payments was credited to the account), however, Bank of America issued a "DEBIT ADVICE" to Mr. Marks stating that because Ms. McCloud had died, "[f]ederal law requires us to return all government benefits paid after the date of death." The amount debited

[12] Disciplinary Counsel also agrees that Mr. Marks's obligation was to "place the proceeds from the sale of the house in a special needs trust for the benefit of Ms. Hill," ODC Br. at 4, ¶8, and does not argue that he was obliged to establish a special needs trust before the house was sold. *See also* DX 6 at 1 (Disciplinary Counsel's June 7, 2013 letter characterized its inquiry as arising from the fact that Mr. Marks had been removed as Trustee for "amongst other things, [his] failure to sell the property ***needed to fund*** a special needs trust." (emphasis added)).

included Ms. McCloud's directly deposited Social Security benefits, and one of the $649.00 payments for Ms. Hill's SSI. DX 19 at 10, 12; *see* DX 83 at 4 (entry 12/08/2009, IHM, billing record for "telephone conference with Bank of America[] re SSI debit of Stormy Hill payment).

74. On December 31, 2009, the SSA automatically deposited another $649.00 SSI payment, bringing the balance of SSI checks in the Trust account back up to $1,298. DX 19 at 15 (12-31 entry).

75. This $1,298, equal to two months SSI payments to Ms. Hill, remained in the Trust account throughout Mr. Marks's administration as trustee. Mr. Marks did not dispute that Ms. Hill was entitled to receive the SSI payments. DX 22 at 5, ¶¶12, 14; DX 24 at 6; DX 35 at 3, ¶8; DX 36 at 5; DX 48 at 11; Tr. 374-76. Nevertheless, there was a disagreement over who was responsible for resolving the disposition of the $1,298 in the Trust account. Mr. Hertz and Ms. Walker repeatedly asked Mr. Marks to provide the funds to Ms. Hill. *See, e.g.*, DX 78 at 1, 3, 4; DX 95 at 2; DX 97 at 1. Mr. Marks did not do so. DX 47 at 5, 6; DX 48 at 10, 11; DX 80 at 1; Tr. 60, 346-50, 365. Ms. Hill apparently visited the Social Security Office herself to request the payments. *See* DX 85 at 1.

76. Mr. Marks declined to provide those funds to Ms. Hill's guardian or attorney. At the disciplinary hearing he testified that he was concerned that the payments would be reclaimed by the government and that he told Ms. Walker to make the SSA aware of the payments so the funds could be reclaimed and distributed properly. Tr. 349-54, 364-65, 413-14; *see* DX 86 at 1 (Ms. Walker informing

Mr. Marks that she hoped "we will have the Social Security worked out tomorrow"). Ms. Walker began receiving Ms. Hill's SSI payments from that point forward. *See* Tr. 359-60. When asked whether he thought three years was the appropriate amount of time to wait to disburse the SSI funds, Mr. Marks testified that "[i]t wasn't my responsibility to do anything with the money. . . . I shared with Karen Walker, as the Guardian, it was her responsibility to get that changed over. And after that, I wiped my hands of it." Tr. 413, 414; *see also* Tr. 832-35 (to similar effect).

77. Mr. Marks took no action himself to contact Social Security or Bank of America and was continuing to hold the SSI funds in the trust as of the time he was removed as trustee in May 2013 – over three years later. Tr. 362-65, 832.

78. Questioned about the non-payment of these funds at the April 15, 2013 court hearing that resulted in his removal as trustee, Mr. Marks testified that at that point he had no problem with transferring the $1,298 to Ms. Hill as, at that point it was "pretty clear" Social Security's payment to the Trust was not going to get reversed. DX 48 at 15; Tr. 413; *see* FF 157, *infra*.

H. Distributions to Ms. Hill

79. Ms. Hill's guardian, Ms. Walker, and her representative, Mr. Hertz, requested Mr. Marks to make distributions from the Trust for Ms. Hill to use. Ms. Walker and Mr. Hertz requested that Mr. Marks release money from the Trust for her upkeep. *See, e.g.*, DX 79 at 1, 2; DX 80 at 2, 6, 8-9; DX 81 at 4.

80. Shortly after Mr. Marks took over as Trustee, he learned that Jeremiah Maynor (who called himself Ms. Hill's fiancé) had been using a debit card to

withdraw money from the Trust Account. Tr. 224-25, 320-31, 767-68; DX 30 at 39-41; DX 48 at 9-10; RX 314. Mr. Marks changed the account to eliminate the debit card, only to learn that Mr. Maynor was making direct withdrawals by telephone. *Id.* So, Mr. Marks cut that off also. *Id.*; *see also* DX 65 at 9, ¶53.

81. Although on December 4, 2009 Mr. Marks had suggested that Ms. Walker meet with Ms. Hill "to determine an amount she may need and let me know" (DX 80 at 1), Mr. Marks did not release as much money to Ms. Hill as she or her representatives requested. Mr. Marks expressed concern that money would be misused by others. DX 78 at 4, 6; DX 80 at 1. Mr. Hertz, Ms. Hill's representative, shared this concern. DX 78 at 1.

82. Mr. Marks provided funds to Ms. Hill from the Trust on at least three occasions: December 8, 2009 ($100), DX 82 at 1; December 23, 2009 ($250), *id.* at 3; January 13, 2010 ($100), *id.* at 4; *see also* DX 78 at 1, 4; DX 80 at 6, 8-9; DX 81 at 4.

83. On December 8, 2009, in a month when Ms. Hill had not received the SSI payment to which she was entitled, Mr. Marks sent Ms. Hill a check for $100 "to purchase groceries pending the December 17, 2009 hearing." DX 82 at 1.

84. On December 18, 2009, Mr. Hertz reported that Ms. Hill had gone through the first $100 and asked for "an additional $250" to "get her through the next 17 days." DX 84 at 1. Mr. Marks then gave Ms. Hill an additional $250, again, with a cover letter explaining that it was "to purchase groceries." DX 82 at 3. The

letter is dated December 23, but apparently Mr. Marks delivered the check to her personally on December 29. *Id.* at 3; DX 85 at 1.

85. On January 12, 2010, Ms. Walker sent Mr. Marks "Stormy's list" of items for which she wanted money, totaling $500. The list included $300 for groceries and personal items; $100 for hairdresser; $50 for cellphone minutes; $50 for miscellaneous expenses which were explained as "e.g. entertainment, transportation." DX 86 at 1. On January 13, 2010, Mr. Marks agreed to send an additional $100 "for food items," and justified refusing the remaining requests by noting that Ms. Hill's purported fiancé had taken the last $250 he had sent, and it was "not used to purchase food." DX 82 at 4; DX 86 at 1-2; *see also* DX 86 at 7.

86. Mr. Marks's firm's billing records from November 2009 through early March 2010 reflect time spent "review[ing] bills," "sort[ing] bills," or other bill-related activities. *See, e.g.*, DX 83 at 3 (11/18/2009, 11/23/2009), 4 (12/09/2009, 12/14/2009, 12/15/2009); DX 87 at 1 (01/04/2010, 01/06/2010); DX 96 at 1 (01/19/2010), 2 (02/01/2010, 02/18/2010, 03/01/2010). The trust appears to have paid utility and phone bills immediately following Ms. McCloud's death automatically (*see, e.g.*, DX 19 at 15 (Washington Gas, Pepco, Verizon)). After January 2010, records reflect that these payments were no longer taken from the trust. DX 19. By email dated January 20, 2010, Mr. Marks informed Ms. Hill's guardian that Ms. Hill "is required to pay the utilities and maintenance at the house if she plans to live in the house until such time that it is sold." DX 88 at 1 (attaching bills for Washington Gas for January 2010); *see also* DX 90 at 1 (January 29, 2010

email, Marks to Walker, conveying Comcast bill.); DX 93 at 2 (February 18, 2010, Verizon bills); DX 94 at 1 (March 1, 2010, all utilities, with copies of bills, *id.* at 4-21).

87. Mr. Marks told Ms. Walker that "[o]nce payment of her social security checks are converted to you on her behalf, she will be responsible for payment of all utilities at the house." DX 86 at 1. Mr. Marks explained at the disciplinary hearing that the $649 in monthly SSI payments Ms. Hill was receiving (once she arranged with Social Security to have them paid to her directly), coupled with $2,000 in life insurance money she had received from her grandmother's policy should suffice for Ms. Hill's maintenance. *See* Tr. 842-43; *see also* Tr. 1265.

I. Upkeep of the House

88. There was also a dispute between Mr. Marks and Ms. Walker concerning responsibility for upkeep of the house and Ms. Hill's care. Mr. Marks's view was that care of the house was not his obligation. DX 48 at 15. He made clear in emails that Ms. Walker's responsibility, as Ms. Hill's guardian, included ensuring that either the interior of the house was maintained or Ms. Hill relocated, whereas his was to maintain the value of house as an asset that could be sold as a tear-down. Tr. 629-31.

89. On January 13, 2010, Mr. Marks wrote a lengthy email to Ms. Walker reporting on numerous issues with both the house and Ms. Hill. DX 86 at 1-3. Among other things, he wrote that a neighbor reported that Ms. Hill had forgot she had put a pot of water on the stove to boil until the house was engulfed in smoke;

did not clean the house or throw out spoiled food to the point where mice were contaminating just about everything in the house and leaving droppings on Ms. Hill's bed; and flushed items down the toilet that led to a backup in the basement. *Id.* Mr. Marks wrote that Ms. Hill "is fast rendering the house uninhabitable," and urged Ms. Walker, among other things, "to seek alternative housing for [Ms. Hill] ASAP before the house becomes uninhabitable or the health department condemns it." *Id.* at 3.

90. Mr. Marks also indicated in February 2010, that he had been informed that Ms. Hill was staying at her purported fiancé's apartment and not in the house. DX 93 at 2, which Ms. Walker neither confirmed nor denied. *Id.*

91. In a verified Opposition to a Petition to Remove him as Trustee in August 2012, Mr. Marks stated that "the Guardian has ***never*** notified the Successor Trustee that Ms. Hill lived in the Property, much less that the Property required funds for upkeep." DX 42 at 3 (emphasis in original).

92. Mr. Marks confirmed at the April 10, 2013 hearing that he knew that Ms. Hill was living in the Georgia Avenue house for the three years following Ms. McCloud's death. DX 46 at 18, 19 ("Ms. Hill stayed in the house. That was the problem. She remained in the house, that much I knew.").

93. The poor and possibly dangerous condition of the property was again the subject of judicial review in April 10, 2013, when Probate Judge Christian was shown pictures of the house's poor repair and told about possibly dangerous electrical issues. *Id.* at 16, 28-31. *But see id.* at 13 (questioning paying for upkeep

on a property that is a "tear-down."). There was rat fecal matter and poison on the floor (*id.* at 29); the bathroom sink is broken (*id.*); the "house is soiled, the carpet very soiled" (*id.* at 31).

94. Mr. Marks testified that he "had not been to the property in some years," because he was "simply waiting" to hear from Ms. Walker about any needs. *Id.* at 17. Judge Christian pressed Mr. Marks, asking, "did you inquire as to whether there would be any need for the money?" *Id.* Mr. Marks did not respond substantively. *Id.* at 17-18.

95. When the hearing resumed on April 15, 2013, Judge Christian asked Mr. Marks why he did not "inquire" about or "determine" her living conditions. DX 48 at 18. Mr. Marks explained that he never "had questions about habitability of that property," and "it was not [his] responsibility." *Id.*; *see also id.* at 15.

96. At the April 15, 2013 hearing, the court found that Mr. Marks had not administered the Trust effectively. *Id.* at 25; DX 49 at 1. On May 1, 2013, Ms. Hill moved out of the property to stay with a friend. DX 52 at 4-6.

J. The Loans to Pastor Tucker

97. When the Trust was established, outstanding loans owed to Ms. McCloud by Pastor Tucker or New Commandment Baptist Church were a significant asset of the Trust. DX 76 at 13 (listing as loans outstanding A. Loan to Pastor Robert Tucker - $12,300 (as of 1/25/06); B. Loan to New Commandment Baptist Church - ($6,500 as of 1/25/06)).

98. Mr. Marks believed that the debts owed to the Trust exceeded the amount listed in the Trust document. DX 30 at 30, 31. Mr. Marks told Mr. Hertz at his December 2009 deposition that he thought Pastor Tucker had been "preying" on Ms. McCloud. *Id.* at 30. At that same deposition, Mr. Marks testified that he had "a big problem with Pastor Tucker. I think he's a crook basically." *Id.* at 30-31.

99. Mr. Marks knew that on February 19, 2009, Ms. McCloud had loaned an additional $38,000 to Jobs Partnership, Inc., where Pastor Tucker was the President. DX 48 at 7; DX 61 at 12; Tr. 344, 547. Mr. Marks sometimes referred to that loan as for "$40,000." DX 30 at 31, 35; DX 88 at 1; Tr. 552, 560-61. Mr. Marks learned of the check after Ms. McCloud died. Tr. 344, 547. The check was paid out of the McCloud Trust Account (ending in 1555) and noted that the purpose of the check was for "a loan." DX 61 at 12; Tr. 552-53.

100. At different times, Respondent acknowledged, but then denied that the $38,000 loan was a trust asset. In his January 20, 2010 email to Ms. Walker, Respondent agreed the $38,000 belonged to the trust: "I realized that the $40,000 is actually a part of the trust since the money was taken from the Bank of America trust account (and will be pursued as a separate matter by the trust)." DX 88 at 1.

101. At the June 25, 2013 hearing, when the Auditor-Master asked Mr. Marks why he did not "make any efforts to collect" the $38,000, Mr. Marks answered, "This was not in the trust." DX 52 at 73. The Auditor-Master continued questioning Respondent:

AM: So it came out of trust assets?

Marks: Yes.

AM: Well, if it came out of trust assets and it's a loan, isn't it a trust asset?

Marks: I believe it would be.

AM: But you didn't take any action to collect it?

Marks: There was a problem with this, Your Honor, and I am, I'm just trying to recall what the issues were with this check.

Id. at 74.

102. In the Second Amended Answer filed in these disciplinary proceedings (September 12, 2019), Respondent denied it was a trust asset: "Denied that any other assets, including the $38,000 loan to Jobs Partnership, Inc., were trust assets." RX 352 at 3, ¶6.

103. These loans were recorded in a number of ways. Ms. McCloud apparently kept her own record in a spiral notebook, but the notebook merely listed various numbers with little indication of what they related to or to whom money might have been paid. DX 15; Tr. 566-68. The entries in this record go back many years, and lack clear names of those who might have received money from Ms. McCloud. DX 15; Tr. 986-87. Ms. Walker in April 2010 provided to Mr. Marks an unsigned IOU listing a total of $87,800.00 in debts owed by Pastor Tucker, his church, or the Job Partnership (a program run by the church). DX 100. Additionally, there were checks drawn on the Bank of America or Sun Trust account. *See* DX 61 at 10-20. Mr. Marks testified that in two instances involving Pastor Tucker or the entities related to him, Ms. McCloud had "little sheet[s]" reflecting IOUs.

Tr. 549-50. Ms. McCloud told Mr. Marks that there were two copies of the IOU for a $12,500 loan – one she had and one Pastor Tucker had, Tr. 568-69, but she also said that, after one visit from Pastor Tucker to her house, Ms. McCloud realized that this IOU was missing from a folder she maintained. Tr. 550-51.

104. When Mr. Marks became successor trustee, he initially intended to seek to collect the loans from Pastor Tucker. DX 86 at 3; *see also* Tr. 446-47. Mr. Marks testified that he spoke to both Pastor Tucker and his wife Roberta Tucker. Tr. 717-29. However, he testified that the Tuckers insisted that Ms. McCloud had forgiven the loans after they had helped her take care of Ms. Hill. Tr. 553-54, 561-62. Invoices from Mr. Marks's law firm do not reflect the conversations Mr. Marks says he had with the Tuckers about the loans. *See* Tr. 722-26; RX 310 (including only an 11/05/09 conversation with Roberta Tucker, RX 310 at 65, which was about Ms. Hill, not the loan). Nevertheless, we do not see any reason to discredit Respondent's testimony on this point.

105. Mr. Marks testified that he consulted his law partners about the difficulty of collecting the loans from Pastor Tucker, and the consensus was that the documentation Ms. McCloud had left was not going to be sufficient to overcome in court the word of a well-regarded pastor, and that other witnesses would testify that Ms. McCloud was generous and made contributions to the church. Tr. 562-63, 570, 729-32. Invoices from Mr. Marks's law firm do not appear to reflect any conversation with his law partners about collecting the loans from Pastor Tucker.

See DX 83, 87, 96. Nevertheless, we credit Mr. Marks's testimony about his reasons for not suing Pastor Tucker.

106. Mr. Marks also believed that Ms. McCloud's spiral notebook would probably be inadmissible and would not be understood even if it were admitted. Tr. 566-70. He did not address the checks drawn on the account or the other evidence of the loans gathered for the Auditor-Master hearing. DX 61 at 5-20.

107. Mr. Marks also believed that the statute of limitations would have run on a number of the loans unless Pastor Tucker were to acknowledge the indebtedness. Tr. 576-82. The Auditor-Master agreed that the statute of limitations would have run on some of the loans unless Pastor Tucker acknowledged the indebtedness. DX 62 at 31-34.

108. Mr. Marks testified that, for these reasons, he decided not to pursue Pastor Tucker in court for the loans beyond the initial communication and wrote off the loans. Tr. 562-63. Before he was removed as successor trustee in May 2013, Mr. Marks did not, however, attempt other, informal ways, short of an actual lawsuit, to pursue collection. He did not, for example, write a demand letter, or enlist the assistance of his own pastor to remonstrate with Pastor Tucker. Tr. 731-38, 772. Instead, he wrote off the loans as uncollectible and took no further action to collect them. Tr. 736-37.

109. Mr. Marks testified that he learned in April 2010 that Ms. Walker had pursued Pastor Tucker in connection with the loans. Tr. 584-85, 731-38; DX 100

(April 16, 2010 fax from Ms. Walker); DX 52 at 67-101.[13] According to Ms. Walker, there was some additional documentation in the house concerning the loans. At one point, Pastor Tucker promised to give Ms. Hill a rent-free home in a building that he was renovating, but then sold the building. And there was uncertainty about whether various payments were loans or gifts, and whether he had acknowledged those that were loans within the statute of limitations period (and, if so, which loans). As the Auditor-Master put it, "[t]here are a lot of strings that we have to pull together in order to address [the loans to Pastor Tucker] . . . this is not a simple case at all, it's very complicated." DX 52 at 90. The Auditor-Master determined to require Ms. Walker to provide additional documentation and to subpoena Pastor Tucker for another hearing. *See, e.g.*, DX 52 at 90-93; DX 53 at 4 (¶¶26, 27); DX 54.

110. In September 2013, four months after the court removed Mr. Marks as Trustee, the Auditor-Master scheduled a hearing calling Pastor Tucker and his wife to testify about the loans. In advance of that hearing, Mr. Marks testified that he called his own pastor, and told him that the Auditor-Master was holding him (Marks) accountable for not having recovered these loans. Tr. 554-55. Mr. Marks's pastor reportedly said that he would speak with Pastor Tucker and he did. Tr. 555.

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[13] DX 52 is the transcript of the June 25, 2013 hearing before the Auditor-Master to whom Judge Christian referred the investigation into the handling of the Trust and the Guardianship. Although as noted above, *see* note 4, *supra*, other documents (mainly emails) involving statements from Ms. Walker were the subject of an objection and ultimately offered only for the purposes of showing notice to Mr. Marks and not for their truth, there was no objection to this Exhibit and, in it, Ms. Walker's discusses her contacts with Pastor Tucker.

111. On September 18, 2013, at the beginning of the first day of resumed hearing before the Auditor-Master, Mr. Hand, the successor trustee, reached a settlement with Pastor Tucker, the Church, and Jobs Partnership. Tr. 133-35; DX 60 at 1-21; DX 61. The agreement acknowledged a total debt of $125,000 in outstanding loans, an amount that exceeded the amount identified in the trust. DX 60 at 15; DX 61; Tr. 134-35; *see* FF 103 (Ms. McCloud had identified a total of $87,800.00 in debts owed by Pastor Tucker, his church, or the Job Partnership). The Auditor-Master expressed surprise at the amount Pastor Tucker and his church had agreed to pay, given the "real issues as to the amount [Mr. Marks] would have been able to recover given for instance statute of limitation issues." DX 62 at 32.

K. Property Taxes

112. Mr. Marks did not pay taxes for the Georgia Avenue property in 2011 or the first half of 2012. RX 352 at 9, ¶27; Tr. 470, 487.[14]

113. On October 14, 2010, Ms. Walker notified Mr. Marks that the 2010 property taxes in the amount of $826.28 were overdue. DX 107 at 1; *see also*

[14] From the District of Columbia records, it appears that taxes were paid on the property for tax year 2010, which ran from October 1, 2009 to September 30, 2010, but that interest and penalties were assessed because both the September 2009 and March 2010 payments were late. RX 335 at 1641. Neither Disciplinary Counsel, nor Mr. Marks, was able to explain how this occurred. Tr. 789-801, 978-80. Ms. McCloud could have paid the property taxes in October 2009 before she died on October 22. But if, as one would expect, she made a half-year payment, that would not explain how the second payment was made in March 2010. And if she made a full-year payment, the second payment would not have been late. The records reflect a payment on 11/09/2010, RX 334 at 1641, but the "1555" Trust Account does not reflect that payment being from the account. DX 19; Tr. 993-94. The possibilities seem to be that the D.C. records are in error, or that Mr. Marks's firm, *see* Tr. 992-93, or someone else (such as Wells Fargo, the holder of the reverse mortgage) made the payment but then never sought to recovery it from the Trust.

RX 310 at 78. On October 15, 2010, Ms. Walker noted that "information on property taxes is readily available online so the delinquency should not have been a surprise." DX 108 at 1 (referencing prior correspondence); Tr. 472. Ms. Walker followed up on October 27, 2010 with a warning about the imminent foreclosure of the property per the reverse mortgage. DX 109 at 1 (referencing multiple prior notices to Mr. Marks and outlining the effects of a foreclosure on Ms. Hill). Mr. Marks replied on October 28, 2010 contending that Ms. Walker had forestalled any action from him by intercepting relevant correspondence concerning the house. DX 110. Ms. Walker responded on November 1, 2010 providing copies of documents already provided. DX 111, 112.

114. In March 2011, Ms. Walker sent Mr. Marks the property's tax bill for the first half of 2011. DX 114; Tr. 486. Mr. Marks, however, did not pay property taxes for the 2011 tax year or the first half of the 2012 tax year. Tr. 470-72.

115. On July 10, 2012, Ms. Walker sent to Mr. Marks a notice from the District of Columbia dated June 25, 2012, stating its intent to sell the house on Georgia Avenue based on Ms. McCloud's failure to pay taxes for 2011 and the first six months of 2012 and assessing interest and penalties. DX 117 at 2.

116. On July 16, 2012, Mr. Marks paid the District of Columbia $1,508.08 from the McCloud Trust for past-due property taxes, penalties and interest. DX 4 at 12; DX 51 at 25. He testified that, afterwards, he took steps to calendar the payment. Tr. 485.

L. Petition to Remove Mr. Marks and Response

117. On July 19, 2012, Ms. Walker filed a petition to remove Mr. Marks as successor trustee of the McCloud Trust. DX 41; Tr. 487-89. Ms. Walker alleged that Mr. Marks had failed to act in accordance with the terms of the trust. DX 41 at 3-4. Ms. Walker alleged, among other things, that Mr. Marks had (1) "not provided any financial support to [the beneficiary,] Stormy Hill," *id.* at 2, ¶6; (2) "refused to use trust assets to maintain or repair the real property," *id.* ¶8; (3) violated D.C. Code § 19-1304.18 by not retitling the property, which "remains titled in the name of June C. McCloud," *id.* ¶9, and (4) not identified himself to Wells Fargo or the D.C. Government in order to receive notices about the reverse mortgage and the taxes. *Id.* at 3, ¶11. It also alleged that the D.C. Government had notified Ms. McCloud of its scheduled sale of the property for failure to pay property taxes. *Id.* ¶12.

118. The Petition asserted that these aspects of Mr. Marks's conduct violated several duties, specifically (1) the duty "under D.C. Code § 19-1308.01 to administer the trust in good faith in accordance with its terms and purposes and its beneficiary by unnecessarily diminishing the value of the trust as a direct result of his failure to carry out the trust's specific instructions regarding the disposition of assets," (2) the duty of loyalty to the beneficiary, under D.C. Code 19-1308.02(a); (3) the duty "under D.C. Code § 19-1308.04 to administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements and other circumstances of the trust, and exercising reasonable care, skill, and caution," (4) the provisions of D.C. Code § 19-1308.05, which bar incurring costs that are

unreasonable by "compensating himself for administering the trust while failing to carry out his duties"; and (5) the duty "to inform and report under D.C. Code 19-1308.13(a) by failing to keep the beneficiary reasonably informed," and to report annually. DX 41 at 3-4.

119. On August 8, 2012, Mr. Marks filed an opposition to the petition to remove him and verified the pleading under oath as true. DX 42. Mr. Marks's opposition described Ms. Walker's petition as "frivolous and without merit," and said that Ms. Walker had made "unsupported scurrilous accusations" against him. DX 42 at 1-2; Tr. 1112-13.

120. Mr. Marks asserted that (1) prior to Ms. Walker's July 2012 notice regarding the overdue real property taxes, Mr. Marks had not spoken with Ms. Walker for 12-18 months; (2) since Ms. Walker's appointment as permanent guardian, the two had never had a civil conversation in which Ms. Walker was "not shrieking, yelling and speaking unintelligibly," (3) Ms. Walker "refused to provide" Mr. Marks with the property tax statements "thus resulting in the delinquent payment of taxes"; and, (4) Ms. Walker "continually refused to otherwise communicate with" Mr. Marks, "regarding the status of" Ms. Hill. DX 42 at 1.

121. The first and second of these four statements (that Mr. Marks and Ms. Walker had not spoken during the 12-18-month period, and had never had a civil conversation, *id.*) appear to be true and are uncontested on this record.

122. The last of these statements (that Ms. Walker "continually refused to otherwise communicate with" Mr. Marks, "regarding the status of" Ms. Hill, *id.*),

was arguably true. As noted above, although there had been some communications about Ms. Hill's situation, they largely date from 2010 and, as discussed below, even as late as April 2013, it appeared that Ms. Walker, herself, was not familiar with how bad the conditions were in the house. *See* FF 150, *infra*.

123. The remaining statement, however (that Ms. Walker "refused to provide [Mr. Marks] with the property tax statements" and that this was what "result[ed] in the delinquent payment of taxes," DX 42 at 1) was not true. Prior to sending Mr. Marks the District's June 25, 2012 notice of its intent to sell the house due to delinquent property taxes, Ms. Walker had told Mr. Marks that the 2010 property taxes were overdue, DX 107 at 1 (October 14, 2010 letter); RX 310 at 78 (bill entry for reviewing Ms. Walker's letter), notified him that "information on property taxes is readily available online so the delinquency should not have been a surprise," DX 108 at 1 (October 15, 2010 letter); Tr 471-72 (Mr. Marks acknowledging he had discussed the issue with Ms. Walker), and sent Mr. Marks the tax bill for the first half of 2011 that he failed to pay. DX 114 at 1-2 (March 2, 2011 fax); DX 42 at 1 (Mr. Marks acknowledging that he paid the overdue taxes in July 2012); *see also* DX 7 at 3; DX 52 at 58, 59; Tr. 470-71; Resp. Br. at 2 (stating no objection to Disciplinary Counsel's Proposed Findings of Fact 67-74, on these points).

124. In response to Ms. Walker's argument that he had failed to notify the District of Columbia that the Georgia Avenue property was owned by the Trust, Mr. Marks's opposition to the petition to remove him as trustee argued that, retitling

property was discretionary under the statute, and if he had notified the District Government, "the amount of annual real property taxes would increase [due to] the loss of the homestead exemption." DX 42 at 3; Tr. 490-91.

125. In response to the allegation that he "refused to use trust assets to maintain or repair the real property . . .", Mr. Marks wrote: "[T]he Guardian has ***never*** notified the Successor Trustee that Ms. Hill lived in the Property, much less that the Property required funds for upkeep." DX 42 at 3 (emphasis in brief). Mr. Marks did not tell the court that he knew that Ms. Hill lived in the McCloud Trust property (in fact, he drove by there frequently). Tr. 617-19. He testified that he wrote it this way to underscore the fact that Ms. Walker had not communicated for 12-18 months before filing this motion, despite his offer to provide money for Ms. Hill if she needed it. Tr. 618, 626; *see also* Tr. 630.

126. In response to the assertion that Mr. Marks "violated his duty to inform and report," Mr. Marks wrote (1) he had not filed an annual report of the trust assets "due to inactivity in the Trust estate as the real estate market rebounded," (2) he would "provide a report to [Ms. Walker] within 30 days . . . and will confirm the provision of same by praecipe to the Court." DX 42 at 5.

127. Mr. Marks did not submit the praecipe, DX 21 at 12-13, and did not provide a report or accounting until he was ordered to do as part of subsequent proceedings (described below) in April 2013. *See* DX 48 at 20.

128. On August 22, 2012, the court denied Ms. Walker's petition to remove Mr. Marks, without prejudice, because of a filing error, and allowed her to re-file the

petition with payment of the applicable filing fee and certificate of service. DX 43. Ms. Walker, however, did not re-file the petition. RX 352, ¶38.

M. $1,750 Withdrawal from the Trust Account

129. On November 15, 2012, at 4:35 p.m., Mr. Marks withdrew $1,750 cash from the McCloud Trust Account (ending in 1555) at the bank counter, through a teller, using the debit card to his personal account as identification. DX 19 at 81, 82; Tr. 251-53, 256-57. Mr. Marks had intended to withdraw the money from a personal account. Tr. 274-75, 991. The $1,750 disbursement from the trust account was not used to pay trust obligations. *See* DX 52 at 65; DX 65 at 11. The $1,750 was not deposited into Mr. Marks's personal account. Tr. 991:19-22. Mr. Marks testified that he gave $1,000-$1,200 to his wife to use on a trip to visit her ailing mother in North Carolina. Tr. 274-75, 991.

130. Mr. Levy, a Bank of America Operations Analyst testified about Bank of America's policies and the information reflected on the documents that the Bank produced concerning this transaction. As Mr. Levy explained, had Mr. Marks used the debit card at an ATM, the ATM would not have permitted him to withdraw cash from the McCloud Trust Account. Tr. 259-60. The debit card was linked to Mr. Marks's personal checking and savings accounts and not to the McCloud Trust Account (ending in 1555). *Id.*

131. Because the amount of the withdrawal exceeded the limit for an ATM, Mr. Marks made the withdrawal at a teller window. DX 19 at 83. *But see* DX 52 at

64 (Marks testifying he made this withdrawal from an ATM and correcting his testimony on questions from the Auditor-Master).

132. Mr. Levy testified that, to make a withdrawal from a teller the customer must present "identification of some sort." Tr. 260. The bank's electronic reporting system reflected that, on November 15, 2012, Mr. Marks used his debit card as his identification by swiping his debit card at the counter. *Id.*

133. As Mr. Levy explained, because Bank of America uses the debit card presented to a teller as form of identification, swiping the card at the counter allows the teller to access all accounts in Mr. Marks's name, including the Trust Account. Tr. 260, 285-86. Mr. Marks testified that he was unaware that when he presented the card to the teller, she was able to access all accounts, and so the Trust Account was one of the options for the teller. Tr. 1019.

134. The teller was not permitted to disburse $1,750 cash without manager approval. DX 19 at 83; Tr. 257-58. To obtain manager approval, "[the teller] would have to ask – physically ask her manager, or his manager, to come over and approve the transaction to proceed." Tr. 258.

135. Mr. Levy testified that in order to make the withdrawal, as a practice at the bank, "[it is] up to the customer to notify the teller of what account – if they have multiple accounts, of what account they would like the money to be withdrawn from." Tr. 260-61. The customer sees on the screen a summary of the transaction, which "would say which account the money was coming out of, and the dollar

amount." Tr. 267. The teller cannot finalize the transaction until the customer confirms the account number and amount to be withdrawn is correct. *Id.*

136. Contemporaneous electronic bank records reflect that the teller followed bank policy by having her manager approve the transaction and obtained a key-pad approval for the withdrawal from Mr. Marks. DX 19 at 83, Tr. 257-61, 267.

137. Contrary to bank record evidence, Mr. Marks testified at the disciplinary hearing that he told the teller to take the amount from "the lowest account" (Tr. 285, 972-73, 990-91); the teller only "looked at the screen and then gave [him] $1,750 and asked if [he] wanted an envelope" (Tr. 996-97); and no manager approved the transaction. (Tr. 997). We find Respondent's testimony too confusing to establish what he told the teller, and his other two statements are not credible because the bank records are more reliable evidence.

138. Five minutes after Mr. Marks initiated the transaction, at 4:40 p.m., bank records show the teller disbursed $1,750 to Mr. Marks in the form of seventeen $100 bills and a $50 bill. DX 19 at 83; Tr. 258. We do not find clear and convincing evidence that the withdrawal of these funds from the trust account was anything more than a miscommunication or mistake.

139. On November 15, 2012, the balance of Mr. Marks's personal account was $3,766.30. RX 328 at 1357. On November 15, 2012, the balance of Mr. Marks's operating account for his law firm was $12,974.31. Tr. 1003, 1006; RX 327 at 1350.

140. Mr. Marks testified that he periodically reviewed the trust bank statements, but he claimed that he did not review the trust bank statements after November 2012, and he did not notice that his personal account had not been debited the $1,750. Tr. 324, 971, 1019. Mr. Marks explained this failure to find the $1,750 withdrawal as follows:

> I didn't catch it. I fell into that classic trap for new practitioners, solo practitioners. I was opening my firm, handling everything, and I had not looked at a bank statement in over a decade. Because at my former firm, my paralegals handled that. And I didn't. I did not catch it. I did not think there was any activity going on in the account. I did not catch it. I should have.

Tr. 963. Mr. Marks did not promptly return the funds. DX 19 at 81-94.

N. The *Sua Sponte* Order and April 2013 Hearings

141. On February 27, 2013, Ms. Walker filed a Petition for Compensation with the Probate Division for her time as Guardian. DX 21 at 13, Entries 100-02.

142. On April 4, 2013, Judge Wolf entered a Memorandum Order (signed April 2, 2013) denying the fee petition without prejudice pending a determination of its reasonableness and the payment source, DX 45 at 6. Although there is some confusion concerning the events that led to this Order,[15] it is undisputed that

[15] The Specification of Charges alleges that this Order was entered in connection with another pleading – an Emergency Petition Ms. Walker filed on March 14, 2013 related to Ms. Hill's medical condition. DX 1, ¶¶40, 41. However, although the Order mentioned that petition as pending, it is directed to the fee motion. DX 45 at 1. Mr. Marks, for his part, testified that the impetus was a hearing that Judge Wolf conducted in another proceeding in which Mr. Marks's was not a participant. Tr. 289-91. But the docket in the case does not reflect any hearing, at least before Judge Wolf, that precipitated this Order. DX 21 at 13; *see* Tr. 305-07.

Mr. Marks was not a party to this petition and did not participate as an attorney in it. *See* RX 352, ¶40.

143. This Order also, however, *sua sponte*, raised issues relating to Mr. Marks's conduct as trustee of the McCloud Trust. The court noted that no one had "created a special needs trust for [Ms. Hill], as Ms. McCloud's trust would appear to direct." DX 45 at 3. Judge Wolf wrote:

> The court has no idea why a petition to establish the subject's special needs trust has not been filed, whether Mr. Marks has complied with the docket entry of February 26, 2010 above "to provide bank statements and copies of any checks from December 2009–February 2010 to the Guardian by March 2, 2010," what has happened in the three years since, whether any accountings exist or should be made, whether Mr. Marks has paid himself any fees as McCloud trustee . . . .

Id. at 5; Tr. 297.

144. Judge Wolf ordered that on or before May 13, 2013, Mr. Marks must (1) "file and serve a complete initial inventory of the McCloud trust, and yearly accountings therefor from its inception through March 31, 2013;" (2) "file and serve a complete chronological explanation and description of the history of said trust through the current time;" and (3) appear at a hearing before Judge Christian on April 10, 2013 "fully informed and cooperative about the McCloud Trust and prepared to answer any questions about it by the court . . . ." DX 45 at 6.

145. Mr. Marks testified that he was "totally surprised" by this April 4, 2013 order. Tr. 289-90. Mr. Marks said he had never appeared before Judge Wolf, the order was entered at a hearing Mr. Marks did not attend, and Mr. Marks received the order while in trial in another case. *Id.* Mr. Marks considered himself to be a "deer

in the headlights," in responding and did not realize he was going to be the subject of Judge Christian's inquiry prior to the first, April 10 hearing; he realized it prior to the second (April 15) hearing. Tr. 288-95.

146. Before the hearing, Mr. Marks reviewed trust bank account records. Mr. Marks knew the exact amount ($38,061.83) in the trust account and reported that to the court. DX 46 at 10; DX 19 at 91; *see also* Tr. 288-89, 312-13. But Mr. Marks testified, he was not able to gather all of the documents in advance of the hearing or recall how the $1,750 came to be withdrawn from the Trust Account. *Id.* Accordingly, when he created the accounting he wrote "to be confirmed," to flag that he needed to investigate the withdrawal. Tr. 284-86; DX 47 at 10 (11/15/2012 entry).

147. At the April 10, 2013 hearing, Judge Christian questioned Mr. Marks about why the special needs trust had not been created. DX 46 at 11-18. Mr. Marks said that the special needs trust was not established because the house had not yet been sold, and the money in the Trust might be needed for repairs and taxes. *Id.* at 11-13. Judge Christian said that that is the purpose of the special needs trust, DX 46 at 13, and that if, the house is a tear-down and that if Mr. Marks knew that "[Ms. Walker] was looking for other living arrangements, there would be no need to keep the money for any repairs, especially with the belief that it would be a tear-down." *Id.* at 18. Mr. Marks said that "if I am in error for holding those funds, it's a mistake of the heart, not the head." *Id.* at 13. He added that "if it's the Court's wish that I file a petition to set up that special needs trust, I will do that immediately. . . . I

simply held those funds out, because I knew she was in the house and I knew the house was in disrepair." *Id.* at 19.

148. Judge Christian also questioned Mr. Marks about the trust accounting. Mr. Marks said that he had been in trial in Harford County and received Judge Wolf's order when it was faxed to him the night before. DX 46 at 14-16. He said he did not recall how much money had been in the Trust Account when Ms. McCloud died, and that the payments would be the fees that he paid "initially throughout 2010, property taxes," and some other expenses. *Id.* at 15; *see id.* at 24-25.

149. Judge Christian ordered Mr. Marks to file an accounting by April 12, 2013, showing "where all the money went, every cent," and continued the hearing until April 15, 2013. DX 46 at 34-35.

150. At the hearing, Judge Christian was also very critical of Ms. Walker, especially about being unaware of the conditions under which Ms. Hill was living. DX 46 at 29-33. He also ordered her to provide an interim accounting. *Id.* at 46-41.

151. On April 15, 2013, Mr. Marks filed the "first accounting" to the court of the McCloud Trust covering the period October 23, 2009 through April 12, 2013. DX 47.

152. On Schedule F (Other Collections), Mr. Marks showed that, in 2009, the McCloud Trust account received by direct deposit two checks from social security payable to Ms. Hill for a total of $1,298 – $649 per check. *Id.* at 6.

153. On Schedule H (Administrative Expenses) of the accounting, Mr. Marks showed the November 15, 2012 withdrawal in the amount of $1,750, but he did not explain the purpose or identify the payee. Mr. Marks wrote that the payment was "to be confirmed." *Id.* at 10; Tr. 284-87.

154. Mr. Marks is unable to say exactly when he confirmed that the $1,750 he had withdrawn from the Trust Account on November 15, 2012 was the cash he withdrew for personal purposes. Tr. 965-66. It was following the April 15, 2013 hearing. *Id.* The exact date he determined this is unclear. *See* Tr. 284, 964-66, 1050-51. He describes looking through his files, talking with his staff, then going to the bank. Tr. 966. Mr. Marks agrees that he should have caught this sooner and says that he has since implemented safeguards to avoid such a misappropriation. Tr. 1019-20, 1022.

155. Mr. Marks testified at the disciplinary hearing that he did not put the money back in trust in April 2013 "[b]ecause I was going to let it be known it had happened, and to see how it should be handled." Tr. 1031. At the April 13, 2013 hearing, Mr. Marks did not ask Judge Christian how to "handle" the matter. Tr. 1032.

156. At the April 15, 2013 hearing, Ms. Alvarado (Ms. Hill's attorney) asked the court to remove Mr. Marks as Trustee on several bases including the lack of an accounting, the fact that Mr. Marks had not given Ms. Hill the SSI payments, the fact that the house had not been listed for sale and the terrible condition of the house. DX 48 at 12-15.

157. In response, Mr. Marks told the court, among other things, that:

- "There was no wide-ranging accounting that needed to be done. . . . It may be said, I didn't provide an account. I may not have provided a formal account, but there were two assets in the trust: the house and bank account, and I did provide Ms. Walker with copies of the bank statements." DX 48 at 15, 19-20;

- "I have no problems transferring the $1,298 [in SSI payments], since at this point it's pretty clear that's not going to be reversed," *id.* at 15;

- "I was never informed that Ms. Hill needed any of the funds," or of "any need, for that matter," *id.* at 15-16;

- "Under the trust I had authority to sell [the house] at my discretion as I think appropriate. I didn't just sit on this and refuse to do anything. I was aware of the market conditions," and that if he sold the house "it probably would have been at Ms. Hill's detriment financially," *id.* at 16, 17;

- The house "was nowhere near as bad [in 2009] as it is today," and "Ms. Walker never informed me there was a problem with the house," *id.* at 18.

158. Then, Ms. Walker argued that there were "dozens" of examples in which Mr. Marks had refused to agree to payments to Ms. Hill and that Mr. Marks had failed to retitle the house in the name of the trust, and therefore failed to obtain notices and to pay bills on time. DX 48 at 20-22.

159. In response to Ms. Walker's statements, Mr. Marks told the court that:

- Those requests came from 2010, and there were reasons why he agreed to some payments not others, *id.* at 23;

- "Ms. Walker never, ever sent me the mail that . . . went to the house," *id.*;

- "[T]o this day I have not notified the District of Columbia – the property is still in Ms. McCloud's name ***because if I notified them that she is dead, the property taxes increase. I'm just trying to preserve what little I can where I can***." *Id.* at 23-24 (emphasis added).

160. In response to this last statement, the court said "[y]ou can't go around the law because you're looking at a bill increasing." *Id.* at 24.

161. In testimony before this Committee, Mr. Marks asserted that he did not mean to suggest either in this statement or in the statement discussed in his August 2012 brief discussed ¶L.121 above, that he did not retitle the property because "the amount of annual real property taxes would increase [due to] the loss of the homestead exemption," DX 42 at 3; Tr. 490-91, that the property taxes owing would increase if the property were retitled. He said that, because Ms. Hill continued to live in the property, the homestead exemption would always have applied, and that the real issue was that if he contacted the District, it might *mistakenly* eliminate the homestead exemption and he would need to make efforts to get to mistake resolved. Tr. 473-83. Mr. Marks suggested that "didn't explain enough to Judge Christian" about what he meant. Tr. 478.[16]

162. The court removed Mr. Marks as trustee "because . . . a successor trustee will service the best interests of the beneficiary." DX 48 at 25. He also found "that this trust has not been administered effectively, even according to Mr. Marks' own testimony," and that "[i]t has been unfortunately administered in violation of

[16] Mr. Marks also maintained the argument that "at this hearing I was under quite a bit of attack. And so I didn't go into a full explanation." Tr. 479. However, he subsequently acknowledged that he was not under this pressure when he wrote the earlier brief making the same statement. Tr. 491-93. Ultimately, he testified that he could not say why he made the statement in the brief and that it was "gratuitous" in the sense that it responded to a point about how the property is titled, not the taxes, and that the statement was "incorrect." Tr. 493-95.

the law in one instance." *Id.* He referred the matter to the Auditor-Master to assess Mr. Marks's compliance and the attorney fee billing. *Id.*

163. Initially, the court also said that it would also order Mr. Marks to transfer the $1,298 in SSI payments. *Id.* at 26. However, after discussion about the history of the payments, the court said that before making the transfer the Court should examine whether Ms. Walker should continue as guardian, *id.* at 26-28, and that it was not going to order the transfer of any funds (of any sort), "until the auditor master reviews it." *Id.* at 30. The court stated that the approximately $7,000 that Ms. Hill had at her disposal should be sufficient to tide her over and "I want to make sure nothing moves until we get an accounting of what's going on and whether it should be transferred." *Id.*

164. On May 28, 2013, Judge Christian issued a written order memorializing his finding that "the 'trust has not been administered effectively,' and may have been administered in violation of the law in one instance." DX 49 at 1 (quoting April 15, 2013 hearing transcript). Judge Christian added that

> In particular, the Court is concerned that a special needs trust has not been established for [the] beneficiary[,] Stormy J. Hill[,] even though it is expressly required by the trust instrument. Further, the Court noted that Trustee Isaac Marks' former firm billed $24,474.59 to the June C. McCloud Revocable Trust, an incredibly large amount considering the failure of the Trustee to follow the provisions of the trust instrument. Trustee also failed to pursue collection of a loan made to a church official. Finally, there were allegations that there may be a reverse mortgage on the real property; the status of the alleged reverse mortgage is unclear at this time. [*Id.*]

This Order removed Mr. Marks as Successor Trustee, referred the matter to the Auditor-Master to investigate, *id.* at 3, and appointed Patrick Hand as Successor Trustee. *Id.*

165. The May 28, 2013 Order also stated that "pursuant to the Court's finding that Guardian Karen Walker's term as guardian may have been ineffective, Guardian Karen Walker's first accounting shall also be subject to the Auditor-Master's Review." *Id.* at 2.

O. The Auditor-Master Proceedings

166. The Auditor-Master is Louis Jenkins. Tr. 210.

167. On June 17, 2013, Mr. Marks submitted an Amended First Accounting to the Auditor-Master covering the period from Ms. McCloud's death through June 17, 2013. DX 51. In this amended accounting, Mr. Marks explained that the $1,750 "withdrawal was in error and is to be repaid at 10% interest." *Id.* at 16.

168. Mr. Marks testified that prior to submitting the amended accounting, he spoke with the Auditor-Master about the withdrawal and how to handle it and the Auditor-Master advised him to include the information in the Amended Accounting. Tr. 315-16, 965, 970, 1038-43; DX 51. At the June 25, 2013 hearing, however, when the Auditor-Master questioned Mr. Marks about the $1,750 withdrawal, neither Mr. Marks nor the Auditor-Master referenced a previous conversation. DX 52 at 61-66.

Mr. Marks's assertion that he spoke with the Auditor-Master about repayment of the $1,750 is without support.[17]

169. Mr. Marks at the June 25, 2013 hearing displayed a very limited memory of the bank transaction, by contrast with his detailed memory on display at the disciplinary hearing. When questioned by the Auditor-Master about the withdrawal, Mr. Marks stated:

> [Auditor-Master]: It was a check?
>
> [Mr. Marks]: No, it was an ATM. It was an ATM withdrawal.
>
> [Auditor-Master]: It was an ATM withdrawal?
>
> [Mr. Marks]: Correct.
>
> [Auditor-Master]: At 1700?
>
> [Mr. Marks]: $ 1,750.
>
> [Auditor-Master]: You were able to do that all at once?
>
> [Mr. Marks]: I take that back. It would not have been an ATM deposit. It would have been from the bank.
>
> [Auditor-Master]: You mean withdrawal?
>
> [Mr. Marks]: Yes, it was a withdrawal. But I did not write a check for it.
>
> [Auditor-Master]: You went to the bank and you've [sic] got a counter check?

[17] The specificity of Mr. Marks's promise to repay the amount "with 10% interest" may suggest that he did speak to someone, who advised him to offer this rate of interest, but the evidence in the record suggests that his assertion of a conversation with the Auditor-Master before the June 25, 2013 hearing is false.

> [Mr. Marks]: It must have been a counter check, yes.
>
> [Auditor-Master]: You're not sure?
>
> [Mr. Marks]: I am not. I am not, because I had no documentation, and that's why I came to the conclusion I must have withdrawn this. Well, I did withdraw this in error. It was not related to the trust. . . .
>
> [Auditor-Master]: Okay, but you don't know right now how this withdrawal of $1,750 was made?
>
> [Mr. Marks]: It would have been from a bank window. I would have gone to the bank and requested the withdrawal. And I can only surmise that that was the account it was taken from and that was in error.

DX 52 at 64-66.

170. At the June 25, 2013 hearing, the Auditor-Master ordered that all interested parties brief the propriety of Mr. Marks paying fees to his firm from the Trust for time spent in connection with the intervention proceeding he filed in 2009 to seek appointment of a guardian and conservator for Ms. Hill. DX 52 at 59, 100; *see also* DX 53 at 3, ¶20.

171. Although Ms. Alvarado and Ms. Walker both opposed Mr. Marks paying fees to his firm from the Trust for this proceeding, DX 57, 58, Mr. Marks's successor as trustee, Mr. Hand, agreed with Mr. Marks that the "intervention proceeding was necessary," an "argument could be made that Mr. Marks was not required to petition the Court prior to receiving payment," and the portion of the fees for that proceeding were not unreasonably high *per se*. DX 56 at 2-3. Mr. Hand, however, said that the remaining $9,190.43 were not documented by way of invoice and on that basis should be recovered against Mr. Marks and his former firm. *Id.* at 3-4.

172. On July 16, 2013, the Auditor-Master issued a show cause order requiring that Pastor Tucker appear before the Auditor-Master and show cause why the loans made to him, his church and the Job Partnership should not be repaid. DX 54. Pastor Tucker, his attorney, and several other church officers appeared at the September 18, 2013 Auditor-Master hearing. DX 60 at 4; Tr. 133-34.

173. On September 19, 2013, during the final day of hearings before the Auditor-Master, DX 62 at 66-70, Mr. Hand reached a settlement with Mr. Marks relating to the amount of fees he had paid his firm. Mr. Marks personally agreed to pay the McCloud Trust $17,624.84 of the $24,474.59 attorney's fees he had collected on behalf of his prior firm, but if he did not meet the deadline, Mr. Marks agreed that the court should enter a judgment against him in the amount of $24,474.59. DX 63. This $17,624.84 was greater than the $9,190.43 Mr. Hand had argued in briefing should be returned. *See* FF 171, *supra*; DX 56 at 3-4. On September 27, 2013, Mr. Marks paid the funds personally. DX 124.

174. On June 27, 2013, Mr. Marks returned to the trust $1,750, plus interest ($102.13), for a total of $1,852.13 as repayment of the money he had withdrawn from the Trust account on November 15, 2012. DX 123; Tr. 132-33.

175. After becoming successor Trustee in May 2013, Mr. Hand obtained another appraisal of the Georgia Avenue Property that indicated the property was worth $302,000. DX 67 at 2; Tr. 137. Then, in February 2014, Mr. Hand obtained a contract to sell the Georgia Avenue house for still more – $450,000, DX 67 at 2 – despite the terrible condition of the house's interior.

176. On February 6, 2014, the Auditor-Master filed its report with the court. Tr. 136. Among other things, the Auditor-Master found that Mr. Marks made the $1,750 withdrawal from the account on November 15, 2012. DX 65, ¶57. However, he made no finding about the intent involved. Instead, he noted Mr. Marks's testimony that he had withdrawn the funds mistakenly and ruled that "[i]t is the responsibility of this office to refer counsel to Bar Counsel when it appears that a misappropriation has occurred even if it is reportedly accidental." *Id.*, ¶57(F).

177. The Auditor-Master's report also noted that, upon review of the documentation (which Ms. Walker provided) at the June 25, 2013 hearing, the Auditor-Master disagreed with Mr. Marks's view that there was insufficient evidence to pursue collection of the loans and issued a show cause order for the hearing that ended in the settlement with Pastor Tucker. *Id.* at 12, ¶64. However, the report did not comment on whether Mr. Marks's view was unreasonable.

178. On March 14, 2014, the court conducted a hearing to show cause to determine whether the court should approve the Auditor-Master report. All the interested parties appeared, including Mr. Marks, Mr. Hand (Trustee), Ms. Hill, Ms. Walker, and Ms. Alvarado. The court approved the Auditor-Master report without objection from any of the parties, including Mr. Marks. DX 68.

P. Mitigation Proceeding

179. On September 23, 2019, after both sides rested on liability issues, pursuant to Board Rule 11.11, the Committee met in executive session and determined preliminarily that Disciplinary Counsel had met its burden of proving at

least one of the ethical violations set forth in the Amended Specification of Charges. Tr. 1136. At this point, Mr. Marks offered four witnesses on mitigation. Disciplinary Counsel did not call any witnesses on aggravation.

180. Mr. Marks called a client, Maria Burley, as a character witness. Tr. 1146. Ms. Burley has known Mr. Marks since early 2001 when Mr. Marks first represented Ms. Burley and her husband to assist with their property. Tr. 1147-48. Mr. Marks has represented Ms. Burley in several additional matters. *Id.* According to Ms. Burley, "[Mr. Marks] is a good, decent man. He is very protective of his clients and helping his clients. That's my opinion because I heard it from him. He helped me a lot. I trust him financially." Tr. 1149.

181. Mr. Marks called Elizabeth Hewlett, Esquire, as a character witness. Tr. 1153. Ms. Hewlett is the chair of the Maryland National Capital Park and Planning Commission, a past President of the J. Franklyn Bourne Bar Association, a 20-year member of the Maryland State Bar Association Judicial Selections Committee, a member and chair of the Washington Metropolitan Area Transit Authority and has served as chair of the committee to elect sitting judges in Prince Georges County. Tr. 1155-56.

182. Ms. Hewlett has known Mr. Marks approximately 32 years. Tr. 1158. Ms. Hewlett has known Mr. Marks both professionally as his supervisor, as well as socially as friends and is godmother to Mr. Marks's son. Tr. 1160-61. In Ms. Hewlett's opinion, Mr. Marks is "honest and operate[s] with integrity" and "[h]e is generous with his time. He is generous with his money." Tr. 1162-63.

183. Mr. Marks called Ronald Jessamy, Sr., Esquire, as a character witness. Tr. 1167. Mr. Jessamy met Mr. Marks in the 1980s, and gave Mr. Marks his first job out of law school as an associate with the law firm Jessamy, Fort, Ogletree, and Botts. Tr. 1168-69; RX 351 at 1805. Mr. Jessamy considers Mr. Marks his "go-to guy for referrals in the area in which he practiced in Maryland" and someone "of strong character" that shows in "probably almost anything that he does." Tr. 1174, 1176.

184. Mr. Marks called his wife, Zana Handy Marks, M.D., as a character witness. Tr. 1179. The two met in 1991. Tr. 1180, 1182. Dr. Marks testified that "Isaac Marks is an honorable man. He takes this profession extremely seriously. I have never known him to steal, lie or do anything untoward in his dealings with me and with others." Tr. 1186. Dr. Marks also testified Mr. Marks has helped many elderly people in their church to help manage their wills and estates and did not charge them to do so. Tr. 1186-88.

185. Each of these witnesses testified that they had never known Mr. Marks to be dishonest or deceitful in any way. Tr. 1150 (Burley); Tr. 1165-66 (Hewlett): Tr. 1177 (Jessamy); Tr. 1188 (Dr. Marks).

III. DISCIPLINARY COUNSEL'S POSITION

Disciplinary Counsel's charges fall into three categories. First, Disciplinary Counsel asserts that Mr. Marks violated Rules 1.1(a), 1.3(a), 1.3(b)(1), and 1.3(c) by failing to administer the trust effectively in five ways. Disciplinary Counsel argues that Mr. Marks failed (1) to provide an accounting for the trust; (2) to attempt to

collect the loans to Pastor Tucker; (3) to take action to market and sell the house; (4) to maintain the property; and (5) to pay property taxes. ODC Br. at 37-43.[18]

Second, Disciplinary Counsel asserts that Mr. Marks intentionally or at least recklessly misappropriated funds in violation of Rule 1.15(a) when he withdrew the $1,750 from the Trust account for personal use, *id.* at 43-48, and that he violated Rules 1.3(b)(1) and 1.15(c) when he did not promptly deliver the $1,298 in SSI payments to Ms. Hill. *Id.* at 49.

Finally, Disciplinary Counsel asserts that Mr. Marks engaged in conduct involving dishonesty and misrepresentation, in violation of Rule 8.4(c) and seriously

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[18] The Specification of Charges and, to some extent, the exhibits offered, and questioning conducted at the hearing also focused on some other actions that Disciplinary Counsel did not pursue as grounds for ethical violations. One issue involves a reverse mortgage with Wells Fargo that Ms. McCloud had obtained on the Georgia Avenue property that went automatically into default when Ms. McCloud died. *See, e.g.*, DX 108 at 13. During the hearing, Disciplinary Counsel initially sought to establish that Mr. Marks failed to mitigate the risk of foreclosure by making interest payments on the reverse mortgage. Tr. 438-42, 458. Mr. Marks testified that although Wells Fargo threatened foreclosure, it could not legally foreclose while Ms. Hill lived in the property and never actually did. Tr. 439-50. At hearing, Disciplinary Counsel conceded that if Mr. Marks was correct that Wells Fargo could not foreclose on the property while Ms. Hill lived there, his handling of the reverse mortgage was not ethically deficient. Tr. 454-56.

A second such issue involves the fact that Mr. Marks did not establish a special needs trust. Although the Specification of Charges alleges that Mr. Marks's "failure" to establish a special needs trust was a focus of Judge Wolf's show cause orders, and suggests that it forms a basis of a Rule violation as well, *see, e.g.*, DX 2, ¶¶9, 41, the Post-Hearing submissions do not appear to argue that Mr. Marks committed an ethical violation by failing to establish the special needs trust *per se*, but rather in failing to sell the house and generate the proceeds that would fund a special needs trust.

A third such issue is that the questioning appeared to suggest that there was something inappropriate in Mr. Marks taking the position that Ms. Hill's counsel Mr. Hertz should not be paid out of the Trust – an action that resulted in Mr. Hertz being told ultimately to collect a reduced fee out of the Guardianship fund, Tr. 89-92 – which was the outcome Mr. Marks urged. DX 35, ¶9. However, Disciplinary Counsel does not in Post-Hearing submissions assert any impropriety in this position.

interfered with the administration of justice in violation of Rule 8.4(d) by necessitating legal proceeds in connection with his trust administration. *Id.* at 49-50.

Disciplinary Counsel seeks Mr. Marks's disbarment. In support of this sanction, Disciplinary Counsel argues that Mr. Marks committed serious violations; made misrepresentations to the court for the purpose of deflecting closer scrutiny of his conduct; has not acknowledged any misconduct, or blames others and was dishonest at the hearing before the Hearing Committee. *Id.* at 51-58.

IV. MR. MARKS'S POSITION

Mr. Marks maintains that "[t]his case amounts to a one-time mistaken withdrawal from the Trust Account on November 15, 2012, and not paying property taxes on time." Resp. Br. at 36. Mr. Marks asserts that Disciplinary Counsel has failed to prove the alleged violations of Rules 1.1(a), 1.3(a), 1.3(b)(1) and 1.3(c) allegations in Disciplinary Counsel's by clear and convincing evidence because Disciplinary Counsel did not offer expert testimony to say that this action failed to meet the standard of conduct for a trustee and the conduct involved was not "'so obviously lacking that expert testimony showing what other lawyers generally would do is unnecessary."' *Id.* at 39 (*quoting In re Speights*, 173 A.3d 96, 133 (D.C. 2017)).

On the alleged misappropriation violation of Rule 1.15(a), Mr. Marks concedes that "he should have caught the one-time mistaken withdrawal" of $1,750 from the Trust account "sooner," but asserts that the withdrawal was "mistaken,"

and that Disciplinary Counsel has failed to prove that it was intentional or reckless. *Id.* at 48-50.

On the alleged violation of Rule 1.15(c), Mr. Marks maintains that it was Ms. Walker's responsibility as Ms. Hill's guardian "to resolve the [$1,298 in] SSI payments directly with SSA," not his own, and that the Bank of America notice should be understood as a "'just claim,"' to the money. *Id.* at 47-48.

On the alleged violations of 8.4(c) and (d), Mr. Marks asserts that Disciplinary Counsel has failed to prove that he acted with a dishonest state of mind, or that the circumstances of the statements suggested that they were dishonest, or that his conduct cannot be said seriously to interfere in the administration of justice. *Id.* at 50-53.

Mr. Marks urges that the appropriate sanction for the misappropriation of client funds and delay in paying the property taxes is an informal admonition. *Id.* at 53-56.

V. CONCLUSIONS OF LAW

A. Preliminary Issues

1. Mr. Marks's role as trustee obliged him to comply with the Rules of Professional Conduct, based on the standards expected of a fiduciary.

The charges involve actions that Mr. Marks is alleged to have taken or failed to take as the trustee of the McCloud Trust, rather than actions he took in the course of a legal representation itself. Disciplinary Counsel and Mr. Marks agree that "the District of Columbia Rules of Professional Conduct apply to attorneys serving as fiduciaries." Respondent's Pre-Hearing Brief at 2 (citing *In re Krame*, Board Docket

No. 16-BD-014 (BPR July 31, 2019)); *see also* Disciplinary Counsel's Pre-Hearing Brief at 5-6 (citing among other authorities in addition to *Krame*, *In re Burton*, 472 A.2d 831, 837 (D.C. 1984) (per curiam) (appended Board Report) (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 Speights*, 189 A.3d 205 (D.C. 2018) (applying Rule 8.4(d) to a personal representative); *In re Wilson*, 953 A.2d 1052 (D.C. 2008) (applying Rule 1.15(a) to a guardian)).

Indeed, Mr. Marks notes that his "conduct at issue in this proceeding stems from his role as counsel for the McCloud Trust," as well as "successor trustee of the McCloud Trust." Respondent's Pre-Hearing Brief at 3. Mr. Marks, for example, represented Ms. McCloud in drafting the trust and in drafting the deed that made Ms. McCloud's house a trust asset. *See also* Tr. at 32 (counsel for Mr. Marks acknowledging that "on August 6, 2009, Mr. Marks, as the Successor Trustee provided in the Trust, hired his firm to represent the Trust. So there was an attorney-client aspect to this matter . . . .").

However, the conclusion that the Rules of Professional Conduct apply to Mr. Marks's conduct in his capacity of trustee of the McCloud Trust does not necessary explain how its provisions apply in all circumstances. As explained below, it is relatively easy to apply, for example, Rule 1.15(a), (c) (involving misappropriation and failure to deliver funds) to a trust context, as the fiduciary

obligations of a trustee and lawyer with respect to funds do not appear to differ materially.

It is not, however, as clear how other rules, such as determining when a trustee has intentionally "failed" under Rule 1.3(b)(1) to seek the lawful objectives of a "client."[19] Disciplinary Counsel and Mr. Marks agree that Ms. Hill was *not* Mr. Marks's client. Tr. 392, 465. Nor is there an exact analog to a client in this situation. The McCloud Trust provided direction about general goals, and a fiduciary responsibility that, as Trustee, Mr. Marks was responsible to honor. However, like many trusts, the McCloud Trust also afforded Mr. Marks, as Trustee, broad discretion to make determinations that, in the context of a legal representation, would not be a lawyer's to make. A client might lawfully decide to pursue or not to pursue a particular claim, and the lawyer's obligation is to act on the client's instructions. By contrast, although a trust has purposes that a trustee is obliged to serve, a significant reason for having a trustee is to rely on the *trustee's* judgment about how these purposes might best be achieved.

In evaluating Mr. Marks's conduct as a Trustee, we must evaluate how he performed the obligations of a Trustee. It would entirely unfair (and defeat the purpose of having a trust) to expect him to act under different standards that would have applied to a lawyer providing representation.

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[19] For example, Comment to the UTC § 813 which discusses attorney-client privilege in the context of a trustee-beneficiary relationship and outlines the courts' efforts to balance the trustee's sometimes conflicting duties to the interests of the beneficiary and to the intent of the settlor. Unif. Trust Code § 813 Comment.

2. To prove a violation, Disciplinary Counsel need not provide expert testimony concerning the standards expected of a Trustee; but, in the absence of such testimony, the conduct must be shown to be "obviously lacking" in order to constitute a violation.

Respondent argues that an additional complicating factor is that Disciplinary Counsel did not offer any expert testimony concerning what is appropriate conduct for a Trustee in approaching the decisions involved in this matter. When asked during the hearing about how the Board is to determine under Rule 1.1(a), for example, that Mr. Marks acted incompetently or failed to exercise diligence when he decided as a Trustee not to pursue Pastor Tucker for recovery of the loans, or not to sell the property at a particular time, or to rely on particular information in making that decision, Disciplinary Counsel urged that "the duties that are required as set forth in the Trust and the rules are clear enough -- and that Mr. Marks' action, or inaction, was clear enough -- that it didn't require an expert to make a determination whether there was a rule violation or not. And to the extent that it is not clear, then that's just where we are." Tr. 405-06.

Similarly, in post-hearing briefing, Disciplinary Counsel argued that "[e]xpert testimony is not required to prove a Rule 1.1 violation by clear and convincing evidence, when the lawyer's conduct was 'obviously lacking.'" ODC Br. at 35 (citing *In re Hargrove*, Board Docket No. 15-BD-060, at 13 (BPR April 26, 2016); *In re Ontell*, Bar Docket No. 228-96 (BPR July 1, 1998); *In re Lewis*, 689 A.2d 561 (D.C. 1997), and *In re Dietz*, 633 A.2d 850 (D.C. 1993)).

We agree that some conduct can be said to violate an attorney's ethical duties when acting as a Trustee without need for an expert. *Hargrove*, for example,

involved a personal representative who failed for six years to determine that a house was not properly titled to the estate and then failed to correct the problem after the court advised her to do so; *Ontell* involved an attorney who repeatedly ignored court deadlines and *Lewis* involved an attorney who simply walked away from a criminal case and could not be located. *Lewis*, 689 A.2d at 562-53; *Hargrove*, Board Docket No. 15-BD-060, at 13, *recommendation adopted where no exceptions filed*, 155 A.3d 375 (D.C. 2017) (per curiam); *Ontell*, Bar Docket No. 228-96, at 6, *recommendation adopted*, 724 A.2d 1204 (D.C. 1999). But portions of this case involve judgment calls where the line is not nearly so obvious as these examples. Perhaps an expert might say the some of these decisions failed to meet a minimum standard of competence or diligence. But it is Disciplinary Counsel's burden to prove violations by "clear and convincing evidence," and given the record, some of the decisions involved are debatable, rather than "obvious[]."[20]

3. The rulings of the Court and the Report of the Auditor-Master are evidence that we are to consider, but are not binding and do not necessarily address the issues in this proceeding.

An additional issue is the weight that should be accorded the rulings of the Probate Division and the report of the Auditor-Master. Disciplinary Counsel agrees that Judge Christian's order is "not binding" and that the Committee "doesn't have to accept that the Trust was not being administered effectively." Tr. 115.

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[20] This results in imposing a high standard of proof on Disciplinary Counsel, but not an unreasonable one. If we are uncertain about what the right decision for a Trustee would be in a particular circumstance, Mr. Marks should not be held to have violated his ethical obligations by choosing one of the possible options.

But Disciplinary Counsel maintains that the order "certainly is relevant in the sense that a Court that reviewed the Trust, and what can be done since Mr. Marks was Trustee as of April 2013" and determined that Mr. Marks "had not administered it effectively," *id.*, and that the order and the proceedings that led to it are relevant to the charge (under Rule 8.4(d)) that Mr. Marks's conduct was "prejudicial to the administration of justice." *Id.* at 115-17.

We agree that the court orders are not binding on this Committee and that the Auditor-Master's report is also not binding. Indeed, the Auditor-Master's report itself says so (albeit to the extent of noting that it is not binding on Disciplinary Counsel). DX 65 at 12, ¶57(J) (*citing In re Berryman*, 764 A.2d 760, 767 (D.C. 2000)). We also agree that orders are evidence of the extent to which Mr. Marks's conduct interfered with the administration of justice.

However, it is less clear what weight to give these orders on other issues – such as the charge of incompetent representation. Although a Probate Judge and the Auditor-Master can be called "experts" on the appropriate conduct of a Trustee in a matter before them, and certainly their statements about Mr. Marks's conduct merit consideration, the law does not support the conclusion that they are sufficient in and of themselves to create a *prima facie* case of incompetent representation, and shift the burden to Mr. Marks to defend his conduct.

Although statements by courts about conduct may be instructive in particular circumstances, they are not dispositive on the question of a disciplinary violation. *See, e.g.*, *In re Pearson*, Board Docket No. 15-BD-031, at 39 (HC Rpt. June 3, 2016);

see also In re Pearson, Board Docket No. 15-BD-031, at 12-13 (BPR May 23, 2018), *pending review*, D.C. App. No. 18-BG-586. As *Pearson* reflects, this is true even when the court is addressing the same issue that it alleged in the disciplinary violation (there, whether an attorney asserted a claim with "no basis in law or fact" for purposes of Rules 3.1 and 3.2(a)).

It is possible that, in some cases, where a judge addressed an issue involved in a disciplinary determination after a proceeding that afforded the parties and the court a full opportunity to consider it in an analogous setting, a judge's opinion might substitute for expert testimony. To use *Pearson*, as an example, a judge's determination that an issue a judge had to consider "had no basis in law or fact," is certainly some indication from an expert source about the quality of the argument.

However, even when a court has been called on to assess the quality of legal representation (for example, in dealing with a motion for a new trial based on ineffective assistance of counsel), there is a difference between making a mistake and committing a violation of ethical rules warranting discipline. "As in ineffective assistance cases, a judgmental or tactical error of this kind, revealed by later events or hindsight, does not in and of itself establish a disciplinary rule violation." *In re Thorup*, 432 A.2d 1221, 1226 (D.C. 1981).

Moreover, as a practical matter, the import afforded to a judge's statement varies depending on circumstances. Judges frequently use harsh words to describe conduct. In doing so, they rarely analyze a complete record in order to determine

whether disciplinary sanction would be appropriate. And it would not serve judicial administration to expect them to do so.

To add to that, the meaning of words may change from context. As the Hearing Committee noted in *Pearson*, Board Docket No. 15-BD-031, at 50, n.14, for example, since *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), there are scores of opinions that have dismissed federal lawsuits because they failed to meet the standard of "plausibility," and "and we trust that not every D.C. Bar member who has a claim in federal court dismissed on implausibility grounds will be found to have violated Rule 3.1."

Here, the difficulty with using the court's or Auditor-Master's opinions as a substitute for expert testimony is that the fit between what they decided and the issues to be decided here is even less clear. The Probate Division and the Auditor-Master were not called upon to decide based on clear and convincing evidence whether Mr. Marks violated his ethical duties when acting as a Trustee. They were called on to determine, based on a preponderance of the evidence, whether the trust was managed effectively and whether it was, on that basis, appropriate to remove him as Trustee, under standards that understandably seek to err on the side of protecting the beneficiary.

The decisions are an additional step further removed from the issues this Committee needs to decide because, unlike other cases in which judicial opinions have been particularly persuasive, this is not a situation in which a judge is commenting on a lawyer's conduct in the judge's presence or in arguments made to

the court. In *Pearson*, Board Docket No. 15-BD-031, for example, the Board commented that had Disciplinary Counsel filed an exception to the Committee's conclusion that a respondent's conduct had not violated Rule 3.2(a), the Board would have considered whether the claim was worth pursuing inasmuch as at least the judge had found respondent's discovery requests in the relevant litigation to be as '"excessive and disproportionate,"' '"burdensome, intrusive, and calculated to harass the defendant."' *Id.* at 22-23 & 23 n.14 (quoting Judge Kravitz). Although the 2018 decision in *Speights*, 189 A.3d 205, is factually closer (in that the case does involve conduct as a personal representative of an estate), the Court decision relied upon a ruling that the respondent had repeatedly failed to comply with court orders, resulting in attendant harm. 189 A.3d at 207.

Here, the court orders and Special Master's report that arguably discuss Mr. Marks's conduct do not rule that Mr. Marks violated a court order. Judge Wolf entered his April 4, 2013 order, *sua sponte*, without a factual record and while it expressed surprise at the status of the trust implementation, it did not purport to rule on Mr. Marks's conduct. DX 45 at 5. In the April 11 and 15, 2013 hearings, and the May 28, 2013 Order that filed, Judge Christian did find that "the 'trust has not been administered effectively,'" DX 49 at 1, but the court was not asked to rule on Mr. Marks's ethics, *per se*, and expressed more tentative conclusions (subject to the investigation of the Auditor-Master) on what Mr. Marks might have done wrong.

Moreover, as noted elsewhere, *see* note 18, *supra*, most of the issues that the court stressed in referring the matter to Disciplinary Counsel for investigation – such

as the possibility that Mr. Marks was acting illegally to defraud the District of Columbia out of property taxes, his failure to create a special needs trust or potentially inappropriate billing and "allegations that there may be a reverse mortgage on the real property; the status of the alleged reverse mortgage is unclear at this time," DX 49 at 1 – are not grounds that Disciplinary Counsel now asserts even warrant sanction.

The Auditor-Master's report does touch on some of the matters that Disciplinary Counsel asserts warrant a sanction, but addresses them only in a limited way. It concludes that Mr. Marks made the $1,750 withdrawal from the account on November 15, 2012 (which no one disputes), but made no finding about the intent involved. DX 65 at 11, ¶57. The Auditor-Master's report also noted that, upon review of the documentation (which Ms. Walker provided) at the June 25, 2013 hearing, the Auditor-Master disagreed with Mr. Marks's view that there was insufficient evidence to pursue collection of the loans and issued a show cause order for the hearing that ending in the settlement with Pastor Tucker. DX 65 at 12, ¶64. However, the report did not comment on whether Mr. Marks's view (or conduct) was unreasonable given the information he had.

Ultimately, the point on which these opinions are the most relevant is a general one – that although the trust granted Mr. Marks very broad discretion to choose the proper way to implement its goals, he owed a fiduciary duty to seek to achieve its goals and could not abandon them. This point helps animate our conclusions below that some of what Disciplinary Counsel is asserting (*e.g.*, that Mr. Marks should

have either sold the property somewhat sooner, or marketed it through real estate listings) are really disputes over means, within Mr. Marks's discretion, while others (deciding that he had no responsibility if Ms. Hill lived in squalor), involve the goals of the Trust.

4. Inaction can be appropriate, but not always.

Another issue presented by the evidence is how to assess inaction. Although Mr. Marks engaged in substantial activity between Ms. McCloud's death on October 22, 2009 and sometime in the first half of 2010, between, July 2010 and April 2013, Mr. Marks's activity with respect to the Trust was largely confined to a number of proceedings in court. He did very little in connection with managing Trust.

From November 2010, until May 2013 when he was removed by the court as Trustee, for example, Mr. Marks (1) did not provide an annual accounting; (2) did not market or sell the Georgia Avenue property; (3) did not spend money from the Trust to maintain or repair the condition of the house; (4) did not take steps to ensure that Ms. Hill was safely housed; (5) did not identify the rightful owner of the SSI payments and either deliver them to Ms. Hill or return them to the government; (6) did not make distributions to Ms. Hill or her guardian; (7) took no further action to pursue the loans from Pastor Tucker; (8) failed to pay property taxes for the 2011 tax year or the first half of the 2012 tax year; (9) did not review trust banking documents such that he failed to notice that he had, in November 2012, withdrawn $1,750 from the trust account; (10) did not immediately return the funds to the trust when the $1,750 withdrawal was discovered. Mr. Marks at the disciplinary hearing

and, in some cases, before, provided explanations for his failure to take action in each instance.

As an initial matter, we are skeptical about testimony offered years after the fact, purporting to explain that seeming inaction was actually a conscious and even strategic choice. Mr. Marks testified at the hearing with answers to questions about the administration of the trust and, for every instance of apparent inaction raised by the disciplinary counsel, had an explanation of how his inaction in every case was a necessary, reasonable, or, in some instances, beneficial response for the trust.

There is a natural human tendency to remember one's prior events in a way that justifies them. But here, apart, from Mr. Marks's testimony, there is no evidence that corroborates or even suggests that Mr. Marks gave the tasks of managing the Trust much in the way of serious thought or effort after Spring 2010. His testimony appears to be that he made decisions on each of these matters soon after Ms. McCloud died in October 2009, and never reconsidered them later. He was subsequently active in fighting Ms. Hill's guardian or attorney or others in court, but he took few actions towards effecting the purposes of the Trust. The fact that Mr. Marks determined not to bill his time after early 2010, though a generous decision in itself, means that, after early 2010, there is simply no record of him having spent any time managing the Trust.

Thus, it could be true that, at some point, Mr. Marks simply stopped putting effort into managing the Trust. This could be true for any number of reasons (*e.g.*, he was not being paid; the relationship with Ms. Walker was clearly very bad and

his time was consumed in pleadings and court appearances; or he simply did not think to revisit in 2011, 2012 or 2013 the conclusions he reached in 2009-10). If so, whether inaction worked out well (as it appears to have done in the case of selling the property later rather than sooner), or poorly (as it appears to have done with not pursuing Pastor Tucker), was simply fortuitous.

B. Determinations on Specific Charges

1. Mr. Marks violated Rules 1.1(a), 1.3(a), 1.3(b)(1), and 1.3(c) by failing to provide competent representation to a client; failing to represent a client zealously and diligently; intentionally failing to seek the lawful objectives of a client; and failing to act with reasonable promptness in representing a client.

Disciplinary Counsel alleges that Mr. Marks violated these Rules by failing to effectively administer the terms of the Trust, specifically by failing: (a) to provide an accounting for the Trust; (b) to attempt to collect the loans to Pastor Tucker; (c) to take action to market and sell the house; (d) to maintain the property; and (e) to pay property taxes. ODC Br. at 37-43. With the exception of the sale of the house (Issue c), we conclude that Mr. Marks committed violations in each of these categories as described in what follows.

These duties arise under the District of Columbia Uniform Trust Code which requires a trustee to "administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries. . . ." D.C. Code § 19-1308.01; *Cobell*, 283 F. Supp. 2d at 267. The trustee must, "administer the trust solely in the interests of the beneficiaries." D.C. Code § 19-1308.02(a). The D.C. Court of

Appeals has said that "A trustee has the highest duty of loyalty to the beneficiaries of the trust it administers." *Reardon*, 677 A.2d at 1035.

The Parties agree that the Rules of Professional Conduct apply to Mr. Marks's conduct as a Trustee of the McCloud Trust. *See, e.g.*, Disciplinary Counsel's Pre-Hearing Brief at 5-6; Respondent's Pre-Hearing Brief at 3.

Rule 1.1(a). Rule 1.1(a) requires a lawyer to "provide competent representation to a client." The Court has determined that competent representation requires the "legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." *In re Drew*, 693 A.2d 1127, 1130 (D.C. 1997) (per curiam) (appended Board Report); *see also In re Ekekwe-Kauffman*, 210 A.3d 775, 786 (D.C. 2019) (per curiam). The comments to Rule 1.1 state that competent representation includes "adequate preparation and continuing attention to the needs of the representation to assure that there is no neglect of such needs." Rule 1.1, cmt. [5].[21]

In *In re Nwadike*, Bar Docket No. 371-00, at 17-25 (BPR July 30, 2004), the Board clarified and harmonized prior authority on the scope of Rule 1.1(a) by explaining that to comply with the Rule it is not enough to have sufficient competence to undertake a matter. Rather, "an attorney who has the requisite skill and knowledge to provide competent representation, but who nonetheless fails to

[21] The Specification of Charges do not assert a violation Rule 1.1(b), which mandates that "a lawyer shall serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters."

engage in the thoroughness and preparation reasonably necessary for the representation, while he is actively continuing the representation, is also subject to Rule 1.1(a) when his or her failures constitute a serious deficiency in the representation." *Id.* at 25 (*citing In re Stiller*, 725 A.2d 533 (D.C. 1999), *recommendation adopted,* 905 A.2d 221 (D.C. 2006); *In re Shorter*, 707 A.2d 1305 (D.C. 1998) (per curiam); *Ontell*, Bar Docket No. 228-96; *In re Hanny*, Bar Docket No. 31-97 (BPR June 13, 2000)).

In *In re Evans*, the Board explained that:

> To prove a violation [of Rule 1.1(a)], [Disciplinary] Counsel must not only show that the attorney failed to apply his or her skill and knowledge, but that this failure constituted a serious deficiency in the representation. . . . The determination of what constitutes a "serious deficiency" is fact specific. It has generally been found in cases where the attorney makes an error that prejudices or could have prejudiced a client and the error was caused by a lack of competence. . . . Mere careless errors do not rise to the level of incompetence.

902 A.2d 56, 69–70 (D.C. 2006) (per curiam) (appended Board Report). To reiterate, in order to prove a "serious deficiency," Disciplinary Counsel must prove that the conduct "prejudices or could have prejudiced the client." *Id.* at 70.

Disciplinary Counsel does not maintain that Mr. Marks lacked sufficient experience to assume the responsibilities of a successor trustee under the McCloud Trust. Tr. 1234. He had previous served as a Trustee at least once and maybe twice and had drafted approximately ten trust documents; in addition, his law practice included estate and probate matters, real estate transactions, contract negotiations

and family law. Tr. 340-43. Disciplinary Counsel instead maintains that Mr. Marks violated Rule 1.1(a) through a "serious deficiency" in his representation.

Rule 1.3(a). Rule 1.3(a) states that an attorney "shall represent a client zealously and diligently within the bounds of the law." "Neglect has been defined as indifference and a consistent failure to carry out the obligations that the lawyer has assumed to the client or a conscious disregard of the responsibilities owed to the client." *In re Wright*, 702 A.2d 1251, 1255 (D.C. 1997) (per curiam) (appended Board Report) (citing *In re Reback*, 487 A.2d 235, 238 (D.C. 1985), *adopted in relevant part*, 513 A.2d 226 (D.C. 1986) (en banc)). Rule 1.3(a) "does not require proof of intent, but only that the attorney has not taken action necessary to further the client's interests, whether or not legal prejudice arises from such inaction." *In re Bradley*, Bar Docket Nos. 2004-D240 & 2004-D302, at 17 (BPR July 31, 2012), *adopted in relevant part*, 70 A.3d 1189, 1191 (D.C. 2013) (per curiam); *see also Lewis*, 689 A.2d at 564 (Rule 1.3(a) violated even where "[t]he failure to take action for a significant time to further a client's cause . . . [does] not [result in] prejudice to the client").

The Court has found neglect in violation of Rule 1.3(a) where an attorney persistently and repeatedly failed to fulfill duties owed to the client over a period of time. *See, e.g.*, *In re Ukwu*, 926 A.2d 1106, 1135 (D.C. 2007) (appended Board Report) (Mr. Marks violated Rule 1.3(a) when he repeatedly failed to inform his clients about the status of their cases, prepare his clients for hearings and interviews with immigration officials, or prepare himself for court appearances); *Wright*, 702

A.2d at 1255 (appended Board Report) (respondent violated Rule 1.3(a) by failing to respond to discovery requests, a motion to compel, and a show cause order); *In re Chapman*, Bar Docket No. 055-02, at 19–20 (BPR July 30, 2007) (respondent violated Rule 1.3(a) where he did virtually no work on the client's case during the eight-month term of the representation, failed to conduct any discovery, and did not respond to discovery requests from the opposing party), *recommendation adopted in relevant part*, 962 A.2d 922, 923–24 (D.C. 2009) (per curiam).

Rule 1.3(b)(1). Rule 1.3(b)(1) provides that, "A lawyer shall not intentionally . . . [f]ail to seek the lawful objectives of a client through reasonably available means permitted by law and the disciplinary rules."

A negligent failure to pursue a client's interest is deemed intentional when "the neglect is so pervasive that the lawyer must [be] aware of it" or "when a lawyer's inaction coexists with an awareness of his obligations to his client." *Ukwu*, 926 A.2d at 1116 (citations and internal quotation marks omitted). "Neglect of a client's matter, often through procrastination, can 'ripen into . . . intentional' neglect in violation of Rule 1.3(b) 'when the lawyer is aware of his neglect' but nonetheless continues to neglect the client's matter." *In re Vohra*, 68 A.3d 766, 781 (D.C. 2013) (appended Board Report) (quoting *In re Mance*, 869 A.2d 339, 341 n.2 (D.C. 2005) (per curiam)). "Knowing abandonment of a client is the classic case of a Rule 1.3(b)(1) violation . . . ." *Lewis*, 689 A.2d at 564 .

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

widely resented by clients than procrastination," and "in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed." Rule 1.3, cmt. [8]. The Court has held that failure to take action for a significant time to further a client's cause, whether or not prejudice to the client results, violates Rule 1.3(c). *See, e.g.*, *In re Speights*, 173 A.3d 96, 101 (D.C. 2017) (per curiam). Comment [8] to Rule 1.3 provides that "[e]ven when the client's interests are not affected in substance . . . unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness," making such delay a "serious violation."

Disciplinary counsel alleges that Mr. Marks violated these Rules by failing to (a) provide an accounting for the trust; (b) attempt to collect the loans to Pastor Tucker; (c) take action to market and sell the house; (d) maintain the property; and (e) pay property taxes. ODC Br. at 37-43. Mr. Marks admits that he failed to pay property taxes. Resp. Br. at 36. With the exception of the sale of the house (Issue c), we conclude that Mr. Marks committed these violations in the ways described in what follows.

a. Mr. Marks violated the Disciplinary Rules by failing to provide the October 2011 and October 2012 accounting required under the Trust and the UTC.

Disciplinary Counsel charges that Mr. Marks violated his duty, under the Trust and the UTC, to provide an annual accounting in October 2009 and October 2010, October 2011, October 2012. We find, however, that Mr. Marks materially complied with the Trust and UTC requirements in connection with the October 2009

and October 2010 accounting. Nevertheless, he violated these Disciplinary Rules by failing to provide the October 2011 and October 2012 accounting the Trust required.

As Findings II.B.16 and II.B.18 above reflect, Mr. Marks had obligations under both the McCloud Trust and the D.C.'s Uniform Trust Code to provide information concerning the Trust to the trust beneficiary or her representative. The Trust contemplated that "the Successor Trustee shall render to the Settlor [Ms. McCloud] an immediate and annual account at the time of the death, resignation, or removal of the Trustee required by law." DX 76 § 7.07; *see also* DX 13 at 10. D.C. Code § 19-1308.13(a) specifies that "[u]nless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information related to the administration of the trust." Mr. Marks's compliance with these obligations varied depending on the year involved.

2009-10. Disciplinary Counsel maintains that Mr. Marks committed violations in 2009-10 (1) by failing to respond to Mr. Hertz's December 10 and 14, 2009 inquiries concerning the Trust assets before the matter came to court on December 17, 2009; (2) failing to make clear the first time he responded to any pleading that touched on the issue that the Trust assets had been reduced by the attorney's fees he had paid out of the Trust, as he testified in his deposition he would do.

Mr. Marks presented no good reason why he did not respond to Mr. Hertz's inquiries directly. Regardless of what Mr. Marks thought of Ms. Walker, or her

motives, or the clash between them, Mr. Marks could have avoided the additional court action in January, not to say, immeasurable heartache to himself, and delays and inconvenience to the parties and the court, simply by sending Ms. Walker or Mr. Hertz bank statements as they came in with appropriate explanations. When he referred the court to information he had provided to Ms. Walker and Mr. Hertz at the December 22, 2009 deposition, Mr. Marks should have provided the court with updated status of the trust balance which he had not to that date provided.

However, we do not find that the Trust or the UTC obliged Mr. Marks to provide this information as part of the required accounting. In reaching this conclusion we analyze the obligations under both the Trust and the UTC.

The Trust. The Trust provided that, "the Trustee shall be excused from filing any account with any court; however … the Successor Trustee shall render to the Settlor an immediate and annual account at the time of the death, resignation, or removal of the Trustee required by law." DX 76 § 7.07. It does not say the accounting need be in particular form, or that any information need be provided to a court, or more than annually. *Id.*; Tr. 297-301; *see also* Tr. 159 ("[m]ost trusts don't have court oversight"). Those obligations arise only if and when the court takes over supervision of the trust – something that did not happen here until May 27, 2013, when the court replaced Mr. Marks with a successor trustee – initially Patrick Hand. Tr. 110-13; DX 49.

Mr. Marks understood Section 7.07 to mean that upon Ms. McCloud's death and annually thereafter he needed to account for the funds in the Trust to

Ms. McCloud's personal representative, but that it did not need to be formal and here, the bank statements provided the information that was necessary. Tr. 300-02. This is consistent with the Trust Mr. Marks himself had drafted.

Because Ms. McCloud died intestate, there was no personal representative of the estate until March 2010, when the Probate Division of the Superior Court appointed Ms. Walker as personal representative (based on the motion she filed in February 2010). DX 13 at 9-10; DX 76 at 10. By that point, Mr. Marks had provided the 2009 bank statements (at least to Mr. Hertz at his December 2009 deposition). DX 30 at 36-37 & Ex 5 at 30-136; Tr. 854-55. At least so far as the Trust is concerned, we cannot conclude that there was an obligation – on pain of disciplinary sanction – for Mr. Marks to anticipate that Ms. Walker would later be appointed and send her an October 2009 accounting.

The UTC. There is a stronger argument that, Mr. Marks violated his obligation under the UTC to respond "promptly . . . to a beneficiary's request for information related to the administration of the trust." On November 5, and 9, of 2009, the Probate Court appointed Ms. Walker as Ms. Hill's guardian *ad litem* and Mr. Hertz as her counsel respectively. DX 23, 25. When Mr. Marks did not respond to Mr. Hertz's December 10, 2009 email requesting information about the Trust, and responded to Mr. Hertz's December 14, 2009 email but without providing the requested information, in advance of the December 17, 2009 hearing on Ms. Hill's competence to care for herself, he may have violated the requirement to "promptly" respond to a beneficiary's request for information. Under the D.C. UTC, reasonable

notification to qualified beneficiaries of a trustee's acceptance of the office of trustee together with his or her contact information must be provided within sixty days; the same period of time is allotted for notification of the trust's existence after the settlor's death. D.C. Code § 19-1308.13 (b)(2), (3); *see also* UTC (2000) § 813(b)(2) and (b)(3). The purpose of the notification – and of the "prompt report" – is to allow beneficiaries to protect their interests. D.C. Code § 19-1308.13 (a) ("A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests."); *see also* UTC (2000) § 813 Comment. Thus, in the absence of other guidance, Mr. Marks's response to Mr. Hertz's request for information (or, later, Ms. Walker's), must be judged in terms of whether (1) it sufficed to allow the beneficiary to protect her interests and (2) was provided within 60 days of the request or triggering event.

Mr. Hertz requested the specified information about the funds in the Trust on December 10, 2009. Mr. Marks offered to provide the information during the December 17 hearing, and did provide it at his December 22nd deposition. This is well within the sixty days of the reasonable notice provision. Further the required "report" – made in this case by providing bank statements – is sufficient.[22] The Comment to the UTC (2000) explains:

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[22] Disciplinary Counsel maintains that we should construe this statement to mean that he was not prepared to provide the account statements, themselves, and was willing to provide the information only orally. ODC Br. at 6, ¶16. However, both Mr. Marks, Tr. 851-52, and Mr. Hertz, Tr. 70, recall that Mr. Marks offered to "deliver the information right there at the Court." And we do not

> The Uniform Trust code employs the term "report" instead of "accounting" in order to negate any inference that the report must be prepared in any particular format or with a high degree of formality. The reporting requirement might even be satisfied by providing the beneficiaries with copies of the trust's income tax returns and monthly brokerage account statements if the information on those returns and statements is complete and sufficiently clear. The key factor is not the format chosen but whether the report provides the beneficiaries with the information necessary to protect their interests.

UTC (2000) § 813 Comment; *see* also D.C. UTC 19-1308.13 (c) (requiring the trustee send a "report" not an "accounting").

We cannot say that the delay by a trustee of providing a report for one week, or even twelve days, amounted to a failure to "provide competent representation to a client," under Rule 1.1(a), "a consistent failure to carry out the obligations that the lawyer has assumed to the client or a conscious disregard of the responsibilities owed to the client," under Rule 1.3(a), *Wright*, 702 A.2d at 1255, or a delay so significant that it constitutes a failure to "act with reasonable promptness," under Rule 1.3(c).

Mr. Marks also (1) provided the account information and testified at his December 22, 2009 deposition that he "absolutely," expected to make "[a]t least a partial payment" of attorney's fees by year end, Tr. 73-74; DX 30 at 58-59; (2) did, in fact, make that partial payment to his law firm from the Trust on December 29,

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understand Mr. Marks's statement that he *was* prepared to testify to mean that he was *not* prepared to support his testimony with the account statements. In any event, the distinction seems small. As we explain below, the bottom line remains the same: (1) Mr. Marks could have been more forthcoming in providing complete information about the Trust both on this occasion and in updating that information to reflect the payments made to his firm for legal fees (discussed below); but, (2) the actual delays in providing the complete information were small and did not ultimately affect the Trust or its beneficiary. *See* Tr. 853-55.

2009 in the amount of $14,400; (3) responded to Ms. Walker's January 22, 2010 petition for a "full accounting of revocable trust," DX 33, and Mr. Hertz's motion for attorney's fees against the Trust by noting the accounting he had provided a month earlier at his deposition, and the "date of death balance" in the trust, without updating it; (4) offered to update the information at a hearing on the petition on February 26, 2010; and then (5) provided the updated information on March 1, 2010. DX 2, ¶23; RX 352, ¶23. The court did not find that any of Mr. Marks's conduct violated either the Trust or the UTC. To the contrary, in response to Mr. Marks's offering to provide the information to Ms. Walker, it dismissed her Emergency Motion as moot. DX 37 at 5-10. In short, we conclude Mr. Marks substantially complied with his reporting obligations in 2009 and early 2010, and his conduct does not violate the Disciplinary Rules cited.

October 2010. Disciplinary Counsel's allegation that Mr. Marks failed to provide an October 2010 update is mistaken. There is email evidence showing that on November 1, 2010, Mr. Marks sent Ms. Walker the bank statement for the Trust. DX 112 at 2. As the accounting need not be formal, Mr. Marks committed no accounting violation during this period.

October 2011. Mr. Marks did, however, fail to provide the updated accounting the Trust and DC-UTC required in or about October 2011. Mr. Marks maintained both in this proceeding and in 2013 in hearings before the Probate Division that his reason for not providing an update was that he did not believe there was any change in the bank statements. *See* Resp. Br. at 6 (¶28); DX 42 at 5 (making

a similar statement in verified pleading to the Probate Division on August 8, 2012). In fact, there was activity in the bank account, albeit small, during this period. FF 46; *see* DX 19 at 40, 42, 44, 46, 48, 50. And, in any event, the Trust, which he himself drafted, contained no exception to the obligation to provide the accounting based on how much activity there was or whether Ms. Walker asked for another accounting. Indeed, one purpose of an accounting is to confirm that the money was still there. The failure to provide this account violated Mr. Marks's obligations to the Trust and Disciplinary Rules 1.1(a), 1.3(a), and 1.3(c).

October 2012. Mr. Marks's conduct in 2012 was significantly worse. On July 19, 2012 Ms. Walker filed a petition to remove Mr. Marks as successor trustee of the McCloud Trust. DX 41; Tr. 487-89. This in part alleged that Mr. Marks had "violated his duty to inform and report." DX 41 at 4. In his August 8, 2012, response, Mr. Marks defended his failure to provide an annual report of the Trust assets, "due to inactivity in the Trust estate as the real estate market rebounded." DX 42 at 5. He also promised that he would provide a report to Ms. Walker within 30 days "and will confirm the provision of same by praecipe to the Court." *Id.* Mr. Marks neither provided the promised report to Ms. Walker nor filed the praecipe with the court. *See* FF 126-27. When Mr. Marks did neither, he broke that promise and violated his duties under the Rules. Mr. Marks did not provide an accounting in October 2012, or any accounting at all, until ordered by the court to account for "every cent" on April 10, 2013. DX 46 at 34-35. There is no excuse for this failure

to account. It violated Mr. Marks's obligations to the Trust and Disciplinary Rules 1.1(a), 1.3(a), and 1.3(c).

b. Mr. Marks violated the Rules by intentionally failing to pursue Pastor Tucker's loans through lesser alternatives to litigation.

The loans to Pastor Tucker were an enormous potential Trust asset, ultimately amounting to $125,000. Tr. 135, 159-63, DX 16. Mr. Marks made a limited effort to attempt to collect the loans – meeting with Pastor Tucker and his wife – before determining, on the advice of his former law partners, that litigation to recover the amounts owed would be expensive and difficult. FF 105. By early 2010, he had decided to write off the loans and did not revisit this decision. After he had been removed as Trustee in May 2013, the loans were resolved by the successor trustee.

It was the successor trustee, Mr. Hand, who negotiated the settlement with Pastor Tucker and his church to repay the trust. The effort to recover this money was assisted by information that Ms. Walker provided to the Auditor-Master, that helped to confirm the loans, and led the Auditor-Master to issue the show-cause order compelling Pastor Tucker and others of his church to testify before his proceeding. The settlement that led to Pastor Tucker's payment came about as a consequence of this compulsion to appear and testify before the Auditor-Master.

We do not find that Mr. Marks should be faulted for failing to settle with Pastor Tucker, as Mr. Hand was able to do on the day before Pastor Tucker was ordered to appear and show cause why he and his church should not repay the loans. Mr. Marks did not have the compulsion of the Auditor-Master behind him and he

seems also not to have had information Ms. Walker had gathered about the loans to inform his decision.

We also find that Mr. Marks's decision not to pursue litigation against Pastor Tucker and his church for repayment of the loans was reasonably within his discretion as a trustee. It was reasonable for Mr. Marks to conclude that pursuing litigation against Pastor Tucker was not in the interest of the Trust. Ms. McCloud's spiral notebook, even if admissible, was not at all clear evidence of Pastor Tucker and others' obligation to repay money to the trust. His calculation that suing a popular pastor for money that had been used for church programs was unlikely to be successful was also reasonable. Finally, we credit him with making some effort in 2013, after he was removed as Trustee, to prevail upon his own pastor to serve as a go-between Pastor Tucker and Mr. Hand and to himself pray with Pastor Tucker before the hearing. Reportedly, in response to these efforts, Pastor Tucker agreed to "make this right."

However, we do fault Mr. Marks for failing to seek repayment of the loans, from Spring 2010 through May 2013, through any lesser method than litigation. Suing Pastor Tucker was not Mr. Marks's only option. Although he initially began the process of discussing the matter with Pastor Tucker and his wife, he abandoned that process early in 2010 after having a contentious conversation. Mr. Marks did not try make any other effort at that time to try to collect the loans, appearing to consider his options either litigating to get the money or simply writing off the loans, which is what he testified he determined was best. Lacking in 2010 and in the years

until the Auditor-Master hearing forced the settlement was any other effort. Mr. Marks did not, in 2010, think to speak with his own pastor for help in appealing to Pastor Tucker. He did not seek out more evidence to strengthen the case for repayment of the loans as Ms. Walker appears to have done. He did not write to Pastor Tucker a demand letter, seeking repayment of the loans. He did not even try to arrange other meetings with Pastor Tucker, the leadership of the church, or others who might have been open to repaying some portion of the money that Ms. McCloud had loaned the church. Instead, he took the position that if he could not effectively sue Pastor Tucker in court, he could take no other action to secure at least a partial payment of a substantial amount of money owed to the Trust.

This lack of sufficient diligence—which a majority of the Committee finds was done intentionally—in pursuing the interests of the Trust and of its beneficiary, Ms. Hill, violated Mr. Marks's obligations to the Trust and Disciplinary Rules 1.1(a), 1.3(a), 1.3(b)(1), and 1.3(c). *See* Separate Opinion of Mr. Hirsh, *infra*, at 2-6 (finding no violation of Rule 1.3(b)(1) on this basis).

c. Mr. Marks's decision not to sell or market the house did not violate the Disciplinary Rules.

Section 4.05 of the McCloud Trust obliged Mr. Marks to do two things: (1) to sell the Georgia Avenue property "as expeditiously as practicable so as not to unnecessarily minimize the value of the Trust Estate" and (2) "to allow [Ms. McCloud's] granddaughter, Stormy J. Hill, to find safe living accommodations – preferably in an assisted-living facility." DX 41 at 18 § 4.05. We conclude that Mr.

Marks performed the first obligation, but (as explained in the next section) that he failed to act to allow Ms. Hill "to find safe living accommodations."

Disciplinary Counsel charges that Mr. Marks "did not put the house on the market or attempt to sell the house," ODC Br. at 34, but does not dispute that Mr. Marks took active efforts to evaluate the asset and to test the market for sale in 2009-10. Nor does Disciplinary Counsel dispute that it was appropriate for Mr. Marks to decide during that period (2009-2010) that the poor market made it a bad time to sell the asset. Instead, Disciplinary Counsel maintains that Mr. Marks should have done something to market the property between 2011 and 2013, when he was removed as Trustee, specifically asserting that "[w]e cannot know what offers Respondent might have received if he had listed the house on the market in 2011 or 2012." *Id.* at 41.

It is an overstatement to say that Mr. Marks did not put the house on the market or attempt to sell the house. From October 2009 through April 2010, Mr. Marks obtained an appraisal of the house and spoke to the realtor for the adjoining property, Mr. Ogbuokiri, about the value of the property. He learned that the current value of the house (based on Mr. Ogbuokiri's view, the offers that Mr. Marks received on it, and the April 2010 appraisal) was a fraction of what the house had been appraised in 2006 – so small that there would be essentially no value to the Trust in selling it during the poor post-2008 market. Mr. Ogbuokiri and Mr. Marks also both believed that the poor condition of the house (including the crack in the foundation) and market made the house more valuable as a tear down. FF 50. This limited the market, as the house was much less likely to be purchased by someone who wanted

a place to live in immediately or after relatively minor repairs. In addition, Mr. Marks knew that Representative Livingston, who owed the property next door, viewed the market similarly, and there was a possibility of a sale of adjacent parcels (thereby potentially increasing value).[23]

This approach of waiting for the market to improve is also consistent with what the appraisals were reflecting: the property, which had been appraised at $525,000 in September 2006, RX 304 at 34; Tr. 430, was appraised in April 2010 at only $280,000. DX 122 at 15; Tr. 449. It would eventually sell, in 2014, for $450,000. FF 63, 175.

After the April 2010 appraisal, Mr. Marks had Mr. Ogbuokiri keep an eye out for offers, went by the property periodically and knew what was happening to real estate in the area. It is not unreasonable to believe that values would be improving. The property was in poor condition, but in a very good location – less than one mile from the Petworth Metro Stop in an area undergoing rapid gentrification.

The evidence does not suggest that the house would have garnered significantly better offers in 2011 or 2012. The general market may have started to improve, but that did not mean someone was there ready to buy a tear-down. The fact that Representative Livingston received no offers on the neighboring property

[23] In the exhibits and during the hearing, there was some discussion of the fact that there was a reverse mortgage. However, ultimately Disciplinary Counsel did not contend the handling was a basis for the charges relevant to Respondent's decision not to sell the house, so we decline to discuss it further.

indicates otherwise. DX 60 at 69-72; Tr. 427-29. Ultimately, the house sold in 2014 over twice the amount Mr. Marks was offered for it in 2009-10.

Thus, it appears that Mr. Marks's decision to delay selling the house in 2009 or 2010 until property values improve was prudent and based on a modicum of effort on his part to confirm the property's radical drop in value after the 2008 financial downturn. The dispute comes in whether, after 2010, in the period approximately from 2011 through his removal as trustee in May 2013, Mr. Marks was equally prudent in continuing to delay the sale of the house. Because the housing market's improvement was gradual, when did it become a violation of the intent of the trust for Marks to delay sale of the house?

Although it is true that the continuing delay in selling the house is consistent with Mr. Marks's characteristic inaction in administering the trust, much of which we find here violated his professional duty under the Rules, this Committee does not reach that conclusion in the case of the sale of the house. We conclude that Mr. Marks's decision to delay selling the house was reasonable and consistent with the intent of the settlor and the best interests of the beneficiary. The dramatic (and in recent time unprecedented) decline in the real estate market was a matter of public knowledge. *See* Tr. 757-59. Holding this property for a better time was consistent with how Mr. Ogbuokiri and Representative Livingston treated the adjacent property: after looking into the possibility of tearing down the property in 2010 and listing the property for five years between 2006-11, they took the property off the market with the plan of putting it back on the market when housing sales improved.

DX 60 at 38-44. Therefore, we do not find that Mr. Marks's inaction in marketing or selling the house was contrary to Disciplinary Rules 1.1(a), 1.3(a), 1.3(b)(1), or 1.3(c), as charged.

> d. Having decided to hold on to the house while the market improved, however, Mr. Marks owed an obligation that he violated, to make sure that Ms. Hill had a safe place to live.

Although we thus find that Mr. Marks met his first obligation under Trust Section 4.05 to exercise appropriate judgment on selling the house, we find that he did not honor – or even consider – his second obligation "to allow [Ms. McCloud's] granddaughter, Stormy J. Hill, to find safe living accommodations – preferably in an assisted-living facility." DX 41 at 18 § 4.05. If Mr. Marks were expecting to sell the house quickly (as Ms. McCloud's envisioned), it was entirely understandable that he would not want to invest Trust assets in improving the conditions of a house that was about to be torn down. In that sense, it is understandable why he would think his obligation would be to maintain the "outside" of the house, rather than the inside. Indeed, at the April 10, 2013 hearing Judge Christian noted that if Mr. Marks knew that Ms. Walker "would be looking for other living arrangements, there would be no need" even to be concerned about keeping money available "money for any repairs, especially with the belief that it would be a tear-down." DX 46 at 18; *see also id.* at 13 (Judge Christian: questioning why the $38,000 left in the McCloud Trust could not go into a special needs trust because "[t]here was nothing to improve the house on, if it was a tear-down").

However, as Judge Christian also suggested at the hearing, once Mr. Marks determined to wait and see what happened with the market, most likely for years, it was contrary to the intent of the Trust for him to take the view that the condition under which Ms. Hill lived was not his concern. Tr. 1109-10. The point of the Trust was to care for Ms. Hill and, in particular, to ensure her safe living conditions. If this could not be reasonably accomplished by selling the house and using the money to find suitable living arrangements for her, it needed to be accomplished in some other way. The Trustee was not relieved of the responsibility to see that this clearly expressed intent of the settlor was effectuated.

How the Trust might serve to ensure Ms. Hill's safe living conditions was a matter of the Trustee's discretion. Mr. Marks could have used Trust funds to improve the deteriorating conditions of the house to make it more habitable. He could have worked with Ms. Walker to find an alternative living arrangement, perhaps using a combination of trust funds and public assistance. But what he could not do is decide that this was entirely some else's problem to solve. And that is exactly what he did.

We find that by intentionally abdicating this responsibility, Mr. Marks violated obligations to the Trust to effect the settlor's intent and the beneficiary's interest and, in doing so, violated Disciplinary Rules 1.1(a), 1.3(a), 1.3(b)(1), and 1.3(c).

e. Mr. Marks violated the Disciplinary Rules by failing to pay property taxes on the house and suggesting a false explanation to the Court.

Mr. Marks's admitted failure to pay property taxes in 2011 and 2012, Resp. Br. at 1; *see* ¶II.K.112, *supra*, violated his duty as Trustee and Disciplinary Rules 1.1(a), 1.3(a), 1.3(b)(1), and 1.3(c). His misrepresentation of facts to the tribunal about this failure to pay taxes is an attempt to justify his inaction and is a violation of Disciplinary Rule 8.4(c). *See* ¶V.B.4, *infra*; *see also* Separate Opinion of Mr. Hirsh, *infra*, at 21-22 (finding one Rule 8.4(c) violation, based on reckless, rather than intentional, dishonesty).

Because of his failure to pay the taxes, the District of Columbia scheduled the house for a forced sale in July of 2012. *See* ¶II.K.115. Mr. Marks paid, out of the Trust account, the past-due taxes, together with penalties and interest, on July 16, 2012. ¶II.K.116. He reimbursed the Trust for the penalties and interest as part of his negotiated settlement with the successor trustee in September 2013. *See* ¶II.O.173.

Mr. Marks testified that (1) the property tax bills were coming to the house and were not always provided to him; and (2) he was concerned that if he contacted the Office of Tax and Revenue and informed them that Ms. McCloud died it might eliminate the homestead protection and increase the taxes. Tr. 472-74.

The record shows, however, that Ms. Walker had told Mr. Marks that the 2010 property taxes were overdue. DX 107-1; RX 310 at 78. She had provided the tax bill for 2011 that he had failed to pay. DX 114. She had provided the tax assessment for the first half of 2012 to Mr. Marks. DX 115. She had provided the notice of the

pending tax sale of the property on July 10, 2012. DX 117 (with that notice she provided evidence she had downloaded of the unpaid, past-due taxes); *see also* DX 108 at 1 (email from Walker to Marks dated October 15, 2010, noting that "information on property taxes is readily available online so the delinquency should not have been a surprise" and referencing prior correspondence); Tr. 474.

Ms. Walker petitioned the court to remove Mr. Marks as successor trustee of the McCloud Trust. DX 41; Tr. 487-89. She charged him not only with breaching his fiduciary duty in failing to pay the taxes on time, but also in failing to notify the District of Columbia of Ms. McCloud's death and take steps so that he would receive notices relevant to the property. DX 41 at 1-4. Mr. Marks's August 8, 2012 opposition to the petition (DX 42), stated that Ms. Walker had "refused to provide [Mr. Marks] with the property tax statements . . . thus resulting in the delinquent payment of taxes." *Id.* at 1.

Even if Ms. Walker had, in fact, failed to provide Mr. Marks with notice of taxes due and past-due, his failure to pay the taxes could not be thus excused. Anyone with the appropriate skill to act as fiduciary to maintain property in the District of Columbia has to know that property taxes are due and should know that they are due in March and September. Tr. 483-84; *see also* 479-80. Mr. Marks received at least one property tax bill that he overlooked. RX 318 at 998; Tr. 486-87. And, as the Auditor-Master noted, in any event, Mr. Marks's excuse "doesn't work," whether it is through prevailing on Ms. Walker to send other bills, or attempting to see if property tax liability can be confirmed online, or contacting the

Office of Tax and Revenue, Mr. Marks should have obtained and paid the property taxes. DX 52 at 59.

Mr. Marks's second assertion, justifying his failure to notify the District of the death of Ms. McCloud and providing a change of address to the trust for notices from the D.C. Government concerning the property is equally unavailing. His argument that it was appropriate not to contact the Office of Tax and Revenue to confirm the tax obligations, lest the District of Columba act to determine what tax is owing, is even more troubling.

To begin with, this is no defense. A Trustee is responsible to pay taxes on property in the Trust; a desire *not* to be candid with the Government is obviously no excuse for failing to meet that responsibility.

Mr. Marks's view, as he testified, is that that, because Ms. Hill continued to live in the property, the homestead exemption would always have applied, but that he was concerned that, if he contacted the District, it might *mistakenly* eliminate the homestead exemption and he would need to make efforts to get to mistake resolved. Tr. 473-78; *see also* Tr. 1010-11.

Worse, Mr. Marks was also not candid with the court. It is difficult to understand Mr. Marks's attempt to make the District of Columbia an excuse for his own failure to pay taxes. We cannot imagine that as he was forgetting to pay any tax on the property, he was consciously deciding not to contact the District about getting taxes mailed to him.

But, if what he actually believed was that the property was always subject to the same homestead exemption, regardless of whether the District of Columbia knew that the Trust owned the property, that is not what he told the court. Mr. Marks told the court in his verified opposition to the July 2012 motion to remove him as Trustee that, if he had informed the Government that the Trust owned the property, "the amount of annual real property taxes ***would*** increase d[ue to] the loss of the homestead exemption." DX 42 at 3; Tr. 490-91 (emphasis). He did not say that the District Government ***might mistakenly think*** that it should increase.

At hearing on April 15, 2013, he told Judge Christian that "I'm just trying to preserve what little I can where I can." DX 48 at 243; Tr. 480-82. He did not say that all he was trying to do was avoid the difficulty of having to explain the situation to the District – something that would not have cost the Trust anything unless he billed the Trust for time (which he was not doing).

Mr. Marks suggests that he "didn't explain enough to Judge Christian" to disabuse the court of the understandable impression that he was seeking to evade District of Columbia property taxes. Tr. 478. But his statements to the court strongly suggested that this was exactly the impression he was seeking to leave. Tr. 480-82. Indeed, he was urging this fact as an explanation of how his failure to take the simple step of becoming the addressee for property tax statements is supposed to have benefitted the Trust. Tr. 491-95.

In any event, failing to pay property taxes for 18 months because someone does not think to do so is clearly negligent. Indeed, especially when Mr. Marks relies

on his expertise in real estate to justify the decision not to sell the house, he cannot maintain that he lacked sufficient understanding about real estate to pay property taxes. But not contacting the District to determine the property tax liability for 18 months out of a fear that the District might determine what tax is actually owing (and perhaps, initially get it wrong), is significantly worse (as it suggests the act was intentional). This is not an excuse any citizen, much less a fiduciary, should invoke for failing to pay taxes. Mr. Marks violated Disciplinary Rules 1.1(a), 1.3(a), 1.3(b)(1), 1.3(c).

2. Mr. Marks violated Rule 1.15(a) by negligently misappropriating $1,750 from the Trust Account.

Mr. Marks admits that he took $1,750 from the trust account that was unauthorized and not used for trust business. Resp. Br. at 1. This admitted misappropriation violates Disciplinary Rule 1.15(a).

1.15 provides, in pertinent part, that:

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

This portion of Rule 1.15(a) prohibits misappropriation of entrusted funds. Misappropriation is '"any unauthorized use of client's funds entrusted to [an attorney], including not only stealing but also unauthorized temporary use for the lawyer's own purpose, whether or not [the attorney] derives any personal gain or benefit therefrom."' *In re Cloud*, 939 A.2d 653, 659 (D.C. 2007) (first alteration in original) (quoting *In re Harrison*, 461 A.2d 1034, 1036 (D.C. 1983)).

Misappropriation requires proof of two distinct elements. First, Disciplinary Counsel must establish the unauthorized use of client funds. *See In re Anderson*, 778 A.2d 330, 335 (D.C. 2001); *Harrison*, 461 A.2d at 1036. Misappropriation is essentially a *per se* offense and does not require proof of improper intent. *See Anderson*, 778 A.2d at 335. It occurs where "the balance in [the attorney's] trust account falls below the amount due the client [or third party]." *In re Ahaghotu*, 75 A.3d 251, 256 (D.C. 2013) (first alteration in original) (internal quotation marks and citations omitted). Thus, "when the balance in [a] [r]espondent's . . . account dip[s] below the amount owed to" the respondent's client or clients, misappropriation has occurred. *In re Chang*, 694 A.2d 877, 880 (D.C. 1997) (per curiam) (appended Board Report) (citing *In re Pels*, 653 A.2d 388, 394 (D.C. 1995)).

Second, Disciplinary Counsel must establish whether the misappropriation was intentional, reckless, or negligent. *See Anderson*, 778 A.2d at 336-38. Intentional misappropriation most obviously occurs where an attorney takes a client's funds for the attorney's personal use. *See id.* at 339 (intentional misappropriation occurs where an attorney handles entrusted funds in a way "that reveals . . . an intent to treat the funds as the attorney's own" (citations omitted)).

The Court of Appeals' decisions indicate that recklessness is not just a difference in the degree of negligence, it is a difference in kind. "Reckless misappropriation reveal[s] an unacceptable disregard for the safety and welfare of entrusted funds, and its hallmarks include: the indiscriminate commingling of entrusted and personal funds; a complete failure to track settlement proceeds; the

total disregard of the status of accounts into which entrusted funds were placed, resulting in a repeated overdraft condition; the indiscriminate movement of monies between accounts; and finally the disregard of inquiries concerning the status of funds." *Ahaghotu*, 75 A.3d at 256 (internal quotation marks and citation omitted); *see also Anderson*, 778 A.2d at 339 ("[R]ecklessness is a state of mind in which a person does not care about the consequences of his or her action." (citation and internal quotation marks omitted)).

> [T]he central issue in determining whether a misappropriation is reckless is *how* the attorney handles entrusted funds, whether in a way that suggests the unauthorized use was inadvertent or the result of simple negligence, or in a way that reveals either an intent to treat the funds as the attorney's own or a conscious indifference to the consequences of his [or her] behavior for the security of the funds.

In re Carlson, 802 A.2d 341, 348 (D.C. 2002) (emphasis in original) (citation omitted). "'Reckless misconduct"' also "'requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts that would disclose this danger to any reasonable person.'" *Anderson*, 778 A.2d at 339 (quoting 57 Am. Jur. 2d *Negligence* § 302 (1989)). Thus, an objective standard should be applied in assessing whether a respondent's misappropriation was reckless. *See In re Gray*, 224 A.3d 1222, 1232 (D.C. 2020) (per curiam).

Finally, 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)). "Negligent 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 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." *In re Abbey*, 169 A.3d 865, 872 (D.C. 2017) (citations omitted); *see also Anderson*, 778 A.2d at 339 (providing that negligent misappropriation occurs where "the unauthorized use was inadvertent or the result of simple negligence" (citations omitted)).

There is no question that the Court of Appeals takes misappropriation of funds very seriously. In *In re Berryman*, 764 A.2d 760 (D.C. 2000), for example, the Court upheld the disbarment of an attorney who took client funds for payment towards $6,000 she was owed and intentionally backdated a deposit slip to suggest it was covered. The Court analogized that case to *In re Robinson*, 583 A.2d 691, 692 (D.C. 1990) and *In re Pierson*, 690 A.2d 941, 950 (D.C. 1997); both noted a number of mitigating factors – including "the relatively small amount of money, the relatively short period of time during which the client was denied the misappropriated funds, the absence of financial harm to the client, the fact that the misappropriation involved a single client, the relative inexperience of respondent, the absence of a prior disciplinary record, and the character testimony offered on respondent's behalf – are insufficient to overcome the presumption of disbarment." 764 A.2d at 773.

But the Court concluded that "[e]ven with a stronger showing of mitigating factors, the aggravating factors found by the Board, including the incident[] of knowing dishonesty . . . make clear his failure to overcome the presumption." *Id.*

The issue, however, is not whether misappropriation (especially when intentional) is a serious offense, but whether Disciplinary Counsel proved Mr. Marks's state of mind. We find that Disciplinary Counsel proved by clear and convincing evidence that Mr. Marks negligently misappropriated $1,750 from the Trust Account, but that Disciplinary Counsel has failed to prove by clear and convincing evidence that the misappropriation was intentional or reckless.

Some aspects of Mr. Marks's account both in his testimony before us and in prior testimony are not accurate. For example, the electronic record of the transactions at Bank of America reflects that the teller required and received manager approval for the withdrawal. DX 19 at 83; Tr. 256-57. And it would not have been possible for Mr. Marks to complete the transaction without approving it, and the account from which it was to be taken, on a keypad. Tr. 268 (although that record is not generally preserved).

In addition, when at least by April 2013, when Mr. Marks realized there was a withdrawal he could not explain to a court, he could and should have been more focused on getting to the bottom of the situation as quickly as possible.[24]

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[24] Still other aspects of Mr. Marks's testimony about the withdrawal and the events that followed may be accurate, but are not probative. That Mr. Marks can identify in detail the location of the branch from which he made the withdrawal is not surprising. It indicates that he is familiar with the branch, not that his recollection is correct about the withdrawal that took place in November

However, the electronic record does not show why the withdrawal came from the Trust Account, Tr. 266-67, and the debit card was not "linked" to the McCloud Trust Account (ending in 1555) when used at an ATM.

And the evidence as a whole makes it unlikely that he came to the bank with the intent of taking $1,750 in cash out of the Trust account and converting for personal use. Most simply, if Mr. Marks had wanted to take cash from the Trust, he could have issued a bill to the Trust for his uncompensated time and paid the money to himself directly, with full justification and documentation.

There is no evidence he had a cash-flow problem. During the hearing, Disciplinary Counsel maintained that because (a) Mr. Marks had some overdrafts in prior months on the personal account he shared with his wife; and (b) later in November 2012 had a regular payment withdrawn from the account to pay tuition for their son's school, this is proof that he intentionally took the $1,750 in cash from the Trust Account in November. However, in post-hearing briefing, Disciplinary Counsel did not assert this theory and we do not see that this evidence supports the conclusion. There were ample funds in the account at the time to withdraw the $1,750, Tr. 274-75, 627, 998-99; RX 328 at 1357, and, in any event, Mr. Marks did not deposit the withdrawn funds into the personal account and so they could not have

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2012. It does not suggest that his recollection of the transaction itself is more accurate than the contemporaneous details reflected in the bank's electronic records. This is especially true when (according to his testimony) the transaction did not take on significance for him until the following April when the court ordered him to provide an accounting of the Trust Account and he realized that he could not explain the withdrawal.

helped to meet the automatic tuition payment from that account regardless. *See* Tr. 991.

For this reason, we do not find the misappropriation to be intentional.

Nor has Disciplinary Counsel proven that it was reckless. "The hallmarks of [reckless] misconduct revealed by our cases include: the indiscriminate commingling of entrusted and personal funds; a complete failure to track settlement proceeds; total disregard of the status of accounts into which entrusted funds were placed, resulting in a repeated overdraft condition; the indiscriminate movement of monies between accounts; and the disregard of inquiries concerning the status of funds." *Anderson*, 778 A.2d at 338-39 (*citing*, *In re Utley*, 698 A.2d 446, 450 (D.C. 1997); *In re Pels*, 653 A.2d 388, 390-91 (D.C. 1995); *In re Micheel*, 610 A.2d 231, 232-33 (D.C. 1992). "All of these actions reveal an intent by the attorney 'to deal with and use funds escrowed for clients as his own' or an unacceptable disregard for the security of client funds." *Id.* at 339 (*citing In re Hines*, 482 A.2d 378, 380 (D.C. 1984)).

In *Anderson*, the Court upheld the Board's decision not to accept a Committee's recommendation that an attorney be found to have engaged in "reckless" misappropriation, even though the attorney (1) maintained no separate account for settlement funds owing to client, the law office or doctors; (2) made payment using certified checks with no record of what had or had not been paid; and (3) in fact, forgot a particular payment and let the account balance go below the amount due a medical provider. In finding that these facts constituted "negligence,"

the Court noted "[a]s the Board recognized, this 'system' was obviously deficient and invited mistakes especially when two cases were settled at around the same time. But our decisions, by clear implication, have rejected the proposition that recklessness can be shown by inadequate record-keeping alone combined with commingling and misappropriation." *Id.* at 339-40.[25]

The Court added that "[t]he aggravating factors beyond poor record-keeping which the court has found indicative of recklessness are not present in this case: the proof that Anderson failed to pay a single client obligation is not evidence that he flagrantly disregarded the integrity of third-party funds; he did not indiscriminately write checks on the operating account; and he did not write checks that were dishonored or that caused the account to be in overdraft." *Id.* at 340.

The Court upheld the Board's conclusion that this was "negligence" even over the argument that the Committee had found the attorney's testimony (that he had received no inquiry from the doctor about the bill) to lack credibility. The Court reasoned that (1) it would "set aside" the Committee's reference to Mr. Anderson's

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[25] In support of this conclusion, the Court cited several cases: *In re Reed*, 679 A.2d 506, 509 (D.C. 1996), "which sustained the Board's determination that the misappropriation had resulted from simple negligence even though the attorney's 'accounting practices were practically non-existent and careless at best. She did not keep a running balance, her check ledger had no memos, and she did not keep track of the [entrusted] funds'"; *In re Choroszej*, 624 A.2d 434, 436 (D.C. 1992), in which the Court agreed that the "misappropriation resulted from negligence even though the attorney had 'failed to maintain documentation on his clients' fund[s]' and 'was unable to produce a ledger of the checks he wrote on the client trust account or bank statements and accounting records showing [w]hat was paid [to] or received from his clients'"; and *In re Harrison*, 461 A.2d 1034, 1036 (D.C. 1983) ("inadvertent misappropriation resulted from attorney's 'failure to keep proper records'").

testimony as "self-serving," "because testimony by a respondent in explanation of his conduct is almost by definition self-serving"; (2) while the Court would uphold a finding of reckless if the "respondent ignored post-settlement inquiries," from the doctor, in fact there was insufficient evidence that this occurred "and if nothing alerted him to the fact that his belief that he had paid the bill was mistaken, then 'the time taken to pay the medical providers' has no ultimate significance"; and (3) the credibility determination did not appear to be from an assessment of the witness's demeanor but rather from a mistaken understanding that there were post-settlement inquiries and the fact that he had "fail[ed] to conform [his] bookkeeping practices to accepted norms (indeed, required protocols)." *Id*. at 341-42. The Court concluded that ultimately, this was a legal conclusion – that "willful failure" to maintain any accounting system, amounted to recklessness, when, in fact that is not the law. *Id.* at 342.

By contrast, in *Carlson*, the Court found misappropriations reckless when the attorney engaged in '"a pattern or course of conduct demonstrating an unacceptable disregard for the welfare of entrusted funds,"' that included "ignored repeated requests . . . for an accounting of client trust funds." 802 A.2d at 349. There, an associate at a law firm deposited client funds into an account and then repeatedly wrote hundreds checks out of the account over a period of some six years both to meet law firm operating expenses (as directed by a partner), and to pay herself. *Id.* She did this even though she and the partner had previously left another firm because

an attorney there had been using money from a trust account to pay expenses. *Id.* at 344 & n.6.

There is no question that Mr. Marks was negligent in failing to ensure that money for his personal use was not taken from the trust account. He should have exercised more care in reviewing the account from which the $1,750 was taken. The separate trust account was invaded because he was inattentive to the fact that it was held at the same bank as his personal accounts and that both appeared under his name. Beyond this, this misappropriation does not involve the establishment of a system that is likely to result in comingling of funds, as in *Anderson* or the more serious situation in *Carlson*. Rather it appears to have resulted from inattention.

Mr. Marks's failure to catch the mistake until he was ordered to provide detail to the Probate Court in April 2013 is serious negligence, exacerbating his initial error, but it cannot be classified as "reckless." The transfer of funds from the trust he administered to his own pocket, initiated in November 2012, continued until the court intervened. Mr. Marks had the benefit of that money until July 2013.

Mr. Marks admitted that in the intervening months he received from the bank statements for the Trust. FF 140. He admitted he did not look at the statements, attributing that inaction to his being a solo practitioner. *Id.*

In judging this testimony, it is worth noting that just four months earlier, in July 2012, Mr. Marks paid overdue property taxes on the trust estate in order to avoid it being sold at a tax auction; in August 2012 Mr. Marks had opposed a Petition to Remove him as Trustee. DX 42. In his opposition, Mr. Marks had been forced to

defend his inaction on the McCloud Trust. He identified no action that he had taken on behalf of the beneficiary, but excused his lack of action in a number of ways. At the end of his Opposition, he had promised he would provide to Ms. Walker as the beneficiary's guardian a report on the trust account and promised as well that the court would receive a praecipe confirming this. *Id.* at 5.

Following the August 2012 filing, Mr. Marks failed to provide the promised report and he failed to file the praecipe. In November 2012, he failed to recognize the trust account and through this inattention misappropriated funds from the trust account for his personal use. In the following five months, he failed to review bank statements on the account and so failed to discover the misappropriation and correct it.

Mr. Marks did not actively ignore information that would have alerted him to the mistaken misappropriation, as required for a "reckless" misappropriation. Mr. Marks acted to ensure that no information as to the trust account reached him at all. Alternatively, he did not act at all, and his inaction itself is the cause, as in so much, of the misappropriation going undiscovered and unrepaid for so many months.

Additionally, even after Mr. Marks was compelled in April 2013 to prepare an accounting for the trust and he finally identified the misappropriation from November 15, 2012, he did not repay the trust until June of 2013.

3. Mr. Marks violated Rule 1.15(c) by failing promptly to deliver funds that a third person was entitled to receive.

Rule 1.15(c) requires that a lawyer "promptly notify the client or third person" "[u]pon receiving funds . . . in which a client or third person has an interest" and to

"promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive." *See, e.g.*, *In re Edwards*, 990 A.2d 501, 520–21 (D.C. 2010) (after foreclosure of client's condominium, Respondent was required to return money held in trust to be used to prevent foreclosure because the purpose of holding the funds had been rendered moot).

Mr. Marks knew in November 2009, that the Trust had received SSI checks that Ms. McCloud had been receiving on Ms. Hill's behalf. And he knew that this money did not belong in the Trust. For some period of time, his conduct with respect to this money was reasonable. Mr. Marks cannot be said to have failed to notify Ms. Hill or her representatives that the Trust held the checks – Ms. Walker and Mr. Hertz knew about the checks and discussed them with Mr. Marks. FF 75.

Mr. Marks also had reason to expect that either Bank of America, which held the Trust Account, or the SSA might reclaim the checks. The Government had reclaimed checks in other cases in which he had been involved, Tr. 361, and, indeed, Bank of America did reclaim one of Ms. Hill's SSI checks, explaining that "Federal law ***requires us to return all*** government benefits paid after the date of death." DX 30 at 138 (emphasis added). On that basis, although he should have been more helpful and cooperative, it was reasonable for Mr. Marks not to send the SSI funds to Ms. Hill or her representatives directly as soon as he received them.

In its Reply Brief, Disciplinary Counsel asserts for the first time that when Bank of America referred to the law requiring it to return "***all*** government benefits paid after the date of death," DX 30 at 138 (emphasis added), "[i]t was clearly

referring to Ms. McCloud's death benefits," and not the SSI benefits Ms. McCloud was receiving informally on behalf of Ms. Hill, DC Reply Br. at 14, and cites provisions of SSA regulators and its internal Policy Operations Manual System (POMS) concerning how SSA says *it* will make payments when an alternative payee is needed. *Id.* at 14-15 (citing 20 C.F.R. § 416.650 (entitled "§ 416.650 When will ***we*** select a new representative payee for you?") (emphasis added); POMS GN 00504.105 (describing to SSA employees the agency procedure along with various exceptions depending on the circumstances or whether the beneficiary is in California).[26]

We are concerned both about the fairness of raising this argument (and citing this authority) for the first time in a post-hearing reply brief, and even without this concern, do not find it convincing. It was not "clear" that Bank of America meant the words "***all*** government benefits" to refer only to Ms. McCloud's own Social Security benefits – for Bank of America ***also*** returned to SSA (and debited the

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[26] Disciplinary Counsel also asserts in its Opening Brief that Mr. Marks "had the discretion to disburse trust assets directly to Ms. Hill, and he could have paid her $1,298 – ***either as the funds belonging to her or from the trust assets***." ODC Br. at 15, ¶47 (citing DX 75 at 8; Tr. 1084-86) (emphasis added). Exhibit 75, however, is one that Disciplinary Counsel withdrew, Tr. 910, and in the passage at Tr. 1084-86, Mr. Marks testifies that, while the Trust document authorized him to use his discretion to make payments from Ms. Walker's funds, this was "not necessarily related to the Social Security payments," Tr. 1085 – which he was withholding based on SSA's potential position. The alternative – that, money is fungible, and Mr. Marks was afforded such great discretion under the Trust that he could have paid $1,298 to Ms. Hill out of the trust funds while purporting to "hold" the $1,298 that came from Social Security – does appear to be true, but at best begs the question. There does not appear to be anything in the Trust that limited Mr. Marks's discretion by requiring him to pay the money to Ms. Hill and it is the failure to pay that Disciplinary Counsel maintains violates the ethics rules. Ultimately the source of the requirement to pay does not come from the Trust. It comes from Rule 1.15(c).

account for) one of the SSI payments to Ms. Hill. *See* FF 73, *supra*. And although it is understandable that SSA's policy was, *itself*, to send payment to a recipient for a period of time under certain circumstances where there was a representative payee who died, the regulation and internal operating procedures Disciplinary Counsel cite do not purport to direct *members of the public* to decide on their own where government checks should be delivered.[27]

It may have been reasonable for Mr. Marks not to guess and instead, to make sure that Social Security was notified of the situation in order to receive instruction on whether the money should be returned to the Government or sent on to Ms. Hill. And for some period of time, it may have been reasonable for him to expect Ms. Walker to contact Social Security and work out the problem. However, Ms. Walker notified Mr. Marks in January 2010 that she was going to contact the SSA to sort out how future payments would be delivered, and Mr. Marks knew that the SSA began sending payments to Ms. Walker that month. *See* FF 76; DX 86 at 1; Tr. 359-60. At that point, Mr. Marks's hands-off approach became untenable. If he still suspected that the SSA might reclaim claim to the money in his account,

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[27] The actual situation is even less clear. The SSA regulation deals with a situation in which someone has been designated a "representative payee," and then dies or becomes incapacitated. 20 C.F.R. § 416.650. Ms. McCloud, however, was not designated a representative payee, but rather was receiving the payments informally into an account that was made part of a revocable *inter vivos* trust. Tr. 351-53, 682 (Marks); Tr. 50 (Hertz). The fact that SSA employee may have been comfortable sending Ms. Hill's SSI's checks to her grandmother does not make it obvious how SSA would handle the situation after the grandmother died. To add to that, the internal operating procedures instruct SSA employees to delay sending checks directly to previously represented recipients under certain circumstances. POMS GN 00504.105.

notwithstanding Ms. Walker's apparent resolution of the matter, he should have contacted either Ms. Walker or the SSA to find out whether the SSA had a "just claim" to the money, as he now contends. *See* Resp. Br. at 47-48; Rule 1.15(d) & cmt. [8] (requiring a lawyer to hold disputed funds pending an accounting and severance of interests). Instead, without explanation, he continued to hold, for 3-1/2 years, money that did not belong to the Trust. This violates Rule 1.15(c).

4. Mr. Marks Violated Rule 8.4(c) In His Repeated False Representations.

Rule 8.4(c) prohibits a lawyer from engaging "in conduct involving dishonesty, fraud, deceit, or misrepresentation." Disciplinary Counsel alleges only dishonesty and misrepresentation.

Dishonesty is the most general of these categories. It 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.'" *In re Samad*, 51 A.3d 486, 496 (D.C. 2012) (per curiam) (quoting *In re Shorter*, 570 A.2d 760, 767-68 (D.C. 1990) (per curiam)). The Court holds lawyers to a "high standard of honesty, no matter what role the lawyer is filling," *In re Jackson*, 650 A.2d 675, 677 (D.C. 1994) (per curiam) (appended Board Report), because "[l]awyers have a greater duty than ordinary citizens to be scrupulously honest at all times, for honesty is 'basic' to the practice of law." *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc).

If the dishonest conduct is "obviously wrongful and intentionally done, the performing of the act itself is sufficient to show the requisite intent for a violation."

In re Romansky, 825 A.2d 311, 315 (D.C. 2003). Conversely, "when the act itself is not of a kind that is clearly wrongful, or not intentional, [Disciplinary] Counsel has the additional burden of showing the requisite dishonest intent." *Id.*; *see also In re Uchendu*, 812 A.2d 933, 939 (D.C. 2002) ("some evidence of a dishonest state of mind is necessary to prove an 8.4(c) violation"). Dishonest intent can be established by proof of recklessness. *See Romansky*, 825 A.2d at 315, 317. To prove recklessness, Disciplinary Counsel must establish by clear and convincing evidence that the respondent "consciously disregarded the risk" created by his actions. *Id.* at 316-17; *see, e.g.*, *In re Boykins*, 999 A.2d 166, 171-72 (D.C. 2010) (finding reckless dishonesty where the respondent falsely represented to Disciplinary Counsel that medical provider bills had been paid, without attempting to verify his memory of events from more than four years prior, and despite the fact that he had recently received notice of non-payment from one of the providers). The entire context of the respondent's actions, including their credibility at the hearing, is relevant to a determination of intent. *See In re Ekekwe-Kauffman*, 210 A.3d 775, 796-97 (D.C. 2019) (per curiam).

Misrepresentation is a "statement . . . that a thing is in fact a particular way, when it is not so." *Shorter*, 570 A.2d at 767 n.12 (citation omitted). Misrepresentation requires active deception or a positive falsehood. *See id*. at 768. The failure to disclose a material fact also constitutes a misrepresentation. *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); *see, e.g.*, *In re Lattimer*, 223 A.3d 437, 449-51 (D.C. 2020) (per curiam) (respondent stated as fact a proposition that was contradicted by the only relevant evidence in the record); *In re Scanio*, 919 A.2d 1137, 1139-41, 1142-44 (D.C. 2007) (respondent failed to disclose that he was salaried employee when he made a claim for lost income to insurance company measured by lost hours multiplied by billing rate); *In re Reback*, 513 A.2d 226, 228-29 (D.C. 1986) (en banc) (respondents neglected a claim, failed to inform client of dismissal of the case, forged a client's signature onto second complaint, and had the complaint falsely notarized).

The Court has held that Disciplinary Counsel does not need to establish that a respondent acted with "deliberateness" in making a misrepresentation in order to prove a violation of Rule 8.4(c). *In re Rosen*, 570 A.2d 728, 728-30 (D.C. 1989) (per curiam). Rather, as with dishonesty, establishing a violation of Rule 8.4(c) based on a misrepresentation only requires proof that the respondent "acted in reckless disregard of the truth." *Id.* (finding material misrepresentation in Bar application where the respondent acted in reckless disregard of the truth); *see, e.g.*, *Lattimer*, 223 A.3d at 449-51. Disciplinary Counsel asserts that Mr. Marks acted dishonestly in the following ways:

First, Disciplinary Counsel asserts that Mr. Marks was dishonest when he reported the date of death balance on the Trust account in the pleadings he filed in February 2010 in response to Ms. Walker's petition for an accounting and Mr. Hertz's efforts to obtain attorney's fees, rather than the current balance. ODC Br. at 38-39. As explained above, we do not view this as being dishonest. At his December

22, 2009 deposition, he had already provided Mr. Hertz with bank statements reflecting withdrawals off the original approximately $70,000 date of death balance and testified that he was "absolutely" going to withdraw money to pay attorney's fees by the end of the month. His statement to the court about the date of death balance was true, and, in the case of Ms. Walker's motion, was in response to an argument that he had never provided an accounting. He did not say he had provided a current balance.

Nevertheless, Mr. Marks at the hearing on this motion misrepresented his interaction with Ms. Walker. He stated that Ms. Walker had never requested an accounting, but himself provided as an exhibit to his Opposition brief an email where Ms. Walker was asking him for clarification as to the contents of the trust. DX 36 at 9. It is hard to understand this as anything other than a request for an accounting or, at least, an account of, what assets the trust contained. Still more, when asked by the court about checks from the trust, he stated there were no checks. That was untrue, as he himself conceded when pressed, that there were, in fact, checks drawn on the trust account, if only a very few. DX 37 at 6. Mr. Marks's assertions to the court, in the view of the majority, were deliberately false statements in violation of Rule 8.4(c). *See also* Separate Opinion of Mr. Hirsh, *infra*, at 10-11 (finding no violation of Rule 8.4(c) on this basis).

Second, Disciplinary Counsel asserts that Mr. Marks acted dishonestly in his August 2012 opposition to Ms. Walker's motion to remove him as trustee, because, while he did not deny his obligation to maintain the property, he stated "[T]he

Guardian has ***never*** notified the Successor Trustee [Respondent] that Ms. Hill lived in the Property, much less that the Property required funds for upkeep." ODC Br. at 42 (emphasis in Brief) (quoting DX 41 at 12). Disciplinary Counsel asserts that this statement was dishonest and misleading because it "failed to inform the court that: (1) he knew that Ms. Hill lived in the trust property; and (2) he had not made any payments for the property's utilities, maintenance, or repair since January 2010." *Id.* The Committee agrees that this statement was misleading, but is divided on whether it violated Rule 8.4(c). Two members conclude that the statement was deliberately dishonest and a violation of Mr. Marks's duties under Rule 8.4(c). *See also* Separate Opinion of Mr. Hirsh, *infra*, at 6-9 (finding no violation of Rule 8.4(c) on this basis).

The majority opinion of the Hearing Committee, that Mr. Marks violated Rule 8.4(c) in his misrepresentation to the court in the August 2012 verified filing, rests on more than the evidence highlighted by Disciplinary Counsel and noted above. *See Ekekwe-Kauffman*, 210 A.3d at 796-97 (the entire context of the respondent's actions, including their credibility at the hearing, is relevant to a determination of intent). The full Hearing Committee agrees that Mr. Marks made misrepresentations in this verified brief claiming that Ms. Walker "refused to provide the Successor Trustee with the property tax statements for the trust real property . . . thus resulting in the delinquent payment of taxes." DX 42 at 1. This assertion is contradicted by the documentary record, presented at hearing, that shows clearly that Ms. Walker provided these tax documents to Mr. Marks. DX 114 (March 2, 2011, providing the tax bill for the first half of 2011); DX 115 (March 7, 2011, providing the 2012

assessment for the trust property); DX 116 (March 21, 2011, providing property insurance renewal notice on the trust property); DX 117 (July 10, 2012, providing notice of D.C.'s intent to sell the trust property at a tax sale); *see also* DX 101, 103, 107, 108, 111, 112 (showing Ms. Walker providing Mr. Marks with documents concerning the house and its possible threatened foreclosure because of the reverse mortgage). Mr. Marks would repeat this statement in subsequent hearings. *See, e.g.*, DX 52 at 58-59. To make this assertion in the August 2012 verified brief, Mr. Marks had to consciously disregard the multiple notices he had received from Ms. Walker having to do with obligations connected with the house, including property taxes, the reverse mortgage, insurance.

In the opinion of the majority, it is far worse than the "reckless dishonesty" of *Boykins*, 999 A.2d at 171-72, where the respondent falsely represented to Disciplinary Counsel that medical provider bills had been paid, without attempting to verify his memory of events from more than four years prior, and despite the fact that he had recently received notice of non-payment from one of the providers. Mr. Marks, by contrast, made the misrepresentation to the court, in a verified brief, and he did not simply neglect to mention the notice he had received; rather, he declared that Ms. Walker had "refused to provide" the notice. DX 42 at 1. Finally, he used this purported failure to provide notice as a basis for blaming his own late payment of property taxes on Ms. Walker. A majority of the Hearing Committee finds this blaming of others for his own inaction is a consistent feature of Mr. Marks's response to Disciplinary Counsel's charges and something that significantly undercut his

credibility at hearing. In his overt declaration in the August 2012 brief that Ms. Walker's failure to give him notice of the taxes due on the trust property was the cause of the late payment of taxes, he deliberately misrepresented the facts, as established by the record, and violated Rule 8.4(c).

The Hearing Committee majority is further concerned with Mr. Marks's explanation in this August 2012 Opposition that he did not know of the property tax bills because he did not have the property tax records corrected to reflect the Trust's ownership out of a concern that this would lead to a loss of homestead protection. DX 42 at 3. Mr. Marks would offer this explanation in subsequent briefs and appearances before the Probate Court in April 2013 (*see, e.g.*, DX 48 at 24). At the disciplinary hearing he would explain, "I didn't want someone to say: Oh, you owe – you lose your exemption, the tax exemption that an elderly person got. Because it carried over and Ms. McCloud was able to keep it when the property went to the trust. I didn't want to have to deal with that. So I made that determination." Tr. 473. It is clear that Mr. Marks failed to notify the city of Ms. McCloud's death, but hard to know, in light of his changing and somewhat conflicting explanations, why he failed to do so. The Hearing Committee as a whole agrees that this failure was itself misleading and inappropriate -- and that his testimony in the August 2012 brief and subsequent testimony, justifying this failure to notify on the basis of wanting to preserve Ms. McCloud's tax exemptions, was still more inappropriate. A majority of the Hearing Committee would further note that Mr. Marks's shifting explanations for his failure to notify the D.C. Government are consistent with his conduct more

generally at the Disciplinary Hearing: providing an excuse to justify his inaction. We know he did not notify the D.C. Government; his attempts to turn this inaction into a virtue by arguing that he deliberately chose not to act in order to save the trust taxes, resembles his excuses offered elsewhere about his inaction and is no more worthy of credibility.

Mr. Marks quite simply misrepresented in his verified Opposition to the court the facts surrounding his failure to pay the property taxes on the Trust property, seeking to exculpate himself by blaming Ms. Walker. He also attempted to turn his failure to alert the District to Ms. McCloud's death into a virtue, justifying his inaction by noting a possible tax savings. Two members of the Hearing Committee find that in these ways, Mr. Marks was intentionally dishonest, and his dishonesty in each of these ways was a violation of Disciplinary Rule 8.4(c). Mr. Hirsh agrees that Disciplinary Counsel proved a violation of Rule 8.4(c), but finds that the evidence supports a finding of reckless, rather than intentional, dishonesty. *See* Separate Opinion of Mr. Hirsh, *infra*, at 21-22.

Finally, Disciplinary counsel also taxes Mr. Marks with failing to be fully forthcoming in the April 15 trust accounting, where he first identified the $1,750 as missing from the trust, but marked it only as, "TO BE CONFIRMED." FF 145-46, 149, 151, 153. However, we do not agree that saying "TO BE CONFIRMED" can fairly be called an effort to hide the problem. It flagged it for future attention. It is true that Mr. Marks could – and should – have stated for the court what he knew at the time of the hearing, that the money was taken from the trust account in error and

was not used for trust business. The "to be confirmed" flagged the problem but did not identify clearly that Mr. Marks already had figured out that the money was wrongly taken from the trust. We find no violation of 8.4(c) in this notation in the April 15, 2013 accounting, but we do note that Mr. Marks's imprecise notation is a deliberate vagueness, a characteristic dissembling. More serious, perhaps, in the view of the majority, is his justification for delaying resolving this "to be confirmed" $1,750, a misrepresentation to the court that he was unable to review the relevant bank statements, which were, as he said, "missing." Evidence presented by Disciplinary Counsel shows that he had access to these statements online, Tr. 313, and his excuse about the missing bank statements was another misrepresentation to the court to justify delaying the disclosure of the $1,750 misappropriation and to delay as well its repayment. A majority of the Committee finds that this misrepresentation violated 8.4(c). *See also* Separate Opinion of Mr. Hirsh, *infra*, at 14-15 (finding no violation of Rule 8.4(c) on this basis).

5. Mr. Marks violated Rule 8.4(d) by engaging in conduct that seriously interferes with the administration of justice.

Rule 8.4(d) provides that it is professional misconduct for a lawyer to "[e]ngage in conduct that seriously interferes with the administration of justice." To establish a violation of Rule 8.4(d), Disciplinary Counsel must demonstrate by clear and convincing evidence that: (i) Respondent's conduct was improper, *i.e.*, that Respondent either acted or failed to act when he should have; (ii) Respondent's conduct bore directly upon the judicial process with respect to an identifiable case or tribunal; and (iii) Respondent's conduct tainted the judicial process in more than

a *de minimis* way, *i.e.*, it must have at least potentially had an impact upon the process to a serious and adverse degree. *In re Hopkins*, 677 A.2d 55, 60-61 (D.C. 1996).

Rule 8.4(d) can be violated by conduct that causes otherwise unnecessary judicial proceedings. *See In re Cole*, 967 A.2d 1264, 1266 (D.C. 2009). This includes a court's consideration of a request for appointment of counsel arising from the respondent's misconduct. *See In re Evans*, 187 A.3d 554, 557 (D.C. 2018) (per curiam) (finding a violation of Rule 8.4(d) where the client had to ask the court for appointment of counsel at the public's expense after the respondent failed to complete the work he was hired to do and the failed to refund the money to the client). Failure to respond to Disciplinary Counsel's inquiries and orders of the court also constitutes a violation of Rule 8.4(d). Rule 8.4, cmt. [2]; *see, e.g.*, *In re Askew*, Board Docket No. 12-BD-037, at 22-23 (BPR May 22, 2013) (finding a violation of Rule 8.4(d) where the respondent failed to comply with court orders requiring her to file a brief and to turn over client files), *aff'd in relevant part*, 96 A.3d 52 (D.C. 2014) (per curiam).

Although we have not agreed with all of Disciplinary Counsel's charges, we have found, first, that Mr. Marks engaged in improper conduct in a number of respects, most seriously as a practical matter, the failure to take responsibility for the squalid condition of a house that he had decided not to sell and the negligent misappropriation, as well as the failure provide the 2011 and 2012 accounting, the

failure to take any action concerning the SSI payments, and the failure to pay the property taxes and dishonesty about same.

Second, Mr. Marks's failings repeatedly ended up in court and resulted in unnecessary expenditure of judicial resources. We do not hold Mr. Marks responsible for necessitating the February 26, 2010 hearing, as we do not believe he acted improperly with respect to the accounting in 2009-10, or that the premise of Ms. Walker's motion – that he had provided no accounting – was correct. The 2012 proceedings in connection with Ms. Walker's petition to remove Mr. Marks as trustee raised significant questions; however, this petition was denied for procedural reasons and not refiled. *See In re Rachal*, Board Docket No. 14-BD-062, at 14-15 (BPR July 6, 2017) (finding the negative impact on the administration of justice of the respondent's improper praecipe was *de minimis*, and did not violate Rule 8.4(d), because it was dismissed on procedural grounds), *pending review*, D.C. App. No. 17-BG-766.

More seriously, the two April 2013 hearings and the appointment of the Auditor-Master, with attendant hearings, resulted from Mr. Marks's inattention and improprieties with respect to the Trust. There can be no doubt that Mr. Marks's administration of the McCloud Trust was improper in that he failed to act to achieve the express intent of the settlor or to protect the interests of the beneficiary. His inattention to the administration of the Trust bore directly on the judicial process when it precipitated the proceedings before the Probate Court in April 2013 and the referral to the Auditor-Master. *See Hopkins*, 677 A.2d at 60-61.

The closer issue is the third element – whether Mr. Marks's conduct had at least the potential of a serious and adverse impact on the process. *Hopkins*, 677 A.2d at 61. The seriousness of Mr. Marks's conduct in requiring first proceeding (on April 10, 2013) and then a second proceeding (on April 15, 2013) followed by the referral of the case to the Auditor-Master who held multiple hearings in the matter, must force a conclusion that his conduct did have a serious and adverse impact on the process. By failing to take steps to effect the intent of the Trust and the interests of the sole beneficiary, Mr. Marks violated his duty as trustee and compelled the intervention of the courts, thus violating Rule 8.4(d).

VI. RECOMMENDED SANCTION

In this case, Disciplinary Counsel has asked the Hearing Committee to recommend the sanction of disbarment. Mr. Marks has requested that the Hearing Committee recommend no more than an informal admonition. For the reasons described below, a majority of the Hearing Committee recommends that the Court impose an eighteen-month suspension with reinstatement conditioned on a showing of fitness and nine hours of CLE: six hours on the topic of trust account management and three hours on the topic of legal ethics. Mr. Hirsh recommends a one-year suspension with the same condition—nine hours of CLE, but no fitness requirement. *See* Separate Opinion of Mr. Hirsh, *infra*, at 22-33.

A. Standard of Review

The sanction imposed in an attorney disciplinary matter is one that is necessary to protect the public and the courts, maintain the integrity of the legal

profession, and deter the respondent and other attorneys from engaging in similar misconduct. *See, e.g.*, *Hutchinson*, 534 A.2d at 924; *In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013); *Cater*, 887 A.2d at 17. "In all cases, [the] purpose in imposing discipline is to serve the public and professional interests . . . rather than to visit punishment upon an attorney." *Reback*, 513 A.2d at 231 (citations omitted); *see also In re Goffe*, 641 A.2d 458, 464 (D.C. 1994) (per curiam).

The sanction also must not "foster a tendency toward inconsistent dispositions for comparable conduct or . . . otherwise be unwarranted." D.C. Bar R. XI, § 9(h)(1); *see, e.g.*, *Hutchinson*, 534 A.2d at 923-24; *In re Berryman*, 764 A.2d 760, 766 (D.C. 2000). 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.*, *Martin*, 67 A.3d at 1053 (citing *In re Elgin*, 918 A.2d 362, 376 (D.C. 2007)). The Court also considers "'the moral fitness of the attorney' and 'the need to protect the public, the courts, and the legal profession. . . .'" *In re Rodriguez-Quesada*, 122 A.3d 913, 921 (D.C. 2015) (per curiam) (quoting *In re Howes*, 52 A.3d 1, 15 (D.C. 2012)).

B. Application of the Sanction Factors

1. The seriousness of the misconduct

Mr. Marks's misconduct was between the extremes recommended by Respondent, on the one hand, and Disciplinary Counsel, on the other. We do not accept Respondent's contention that this case is merely about a mistaken withdrawal and failing to pay property taxes. Mr. Marks committed significantly more serious violations of the Rules both through his misrepresentations and his negligence. We do not conclude, as Disciplinary Counsel argued, that the misappropriation was intentional or even reckless, the basis for the recommendation of disbarment. However, a majority of the Committee concludes that the negligent misappropriation was made worse by negligence in failing to review the accounts of the Trust and to catch the misappropriation, and the Committee is unanimous that conduct was made worse by a host of additional acts of negligence that resulted in the beneficiary to the Trust being denied the benefits the Trust was created to confer. A majority of the Hearing Committee concludes still more that Mr. Marks's repeated misrepresentations to the Probate Court were deliberate and intended to excuse his negligence and, therefore, significantly enhance the seriousness of his conduct. Mr. Marks committed clear violations (*e.g.*, withdrawing the money, failing to provide the accounting and failing to pay the property taxes), that were at least partially rectified when he agreed to, and did, pay back all funds lost to the Trust as a consequence of his actions. The errors that had more serious repercussions for the Trust or its sole beneficiary (*e.g.*, failing to take responsibility for Ms. Hill's living

conditions and failing to pursue loans made to Pastor Tucker and his church, and the non-return of the SSI checks) were obligations that were arguably less than perfectly clear. Mr. Marks did not set out to defraud someone, or hurt them in some other way. He did not act for personal profit. His violations of the Rules, though serious, do not reach to the most egregious conduct the Court sanctions.

2. Prejudice to the client

As noted above, the "client," for this matter involving administration of a Trust, is not clear. We have treated "the client" as the objectives of the trust, which were the sale of the house (as quickly as practicable) and the provision of a safe living space for the sole beneficiary of the trust, Ms. Hill.

Mr. Marks's failure to take responsibility for the condition of the house that led to Ms. Hill living in an unsafe environment for the period of time she lived there was prejudice to the objectives of the Trust. And although Ms. Hill eventually did move after the house was sold, she cannot get that time back. For more than three years, Ms. Hill was denied the benefits of the Trust expressly created to benefit her. We consider this to be a significant harm caused by Mr. Marks's failure to take responsibility that Ms. Hill have a safe place to live, as directed by the Trust.

As explained above, we do not find that Mr. Marks's decision to delay selling the house, given the drop in housing prices in 2009 and following, to be a violation of his duty to the Trust or to have caused prejudice to the "client." Mr. Marks's failure to pay property taxes on time, while clearly negligent, did not result in lasting prejudice to the Trust or Ms. Hill – the city did not, in the end sell the house, after

Mr. Marks paid the late taxes and penalties. Mr. Marks's failure to report on the assets of the Trust, detailed above, while improper, appear to have had a limited actual effect, as the actual payments out of the Trust were quite small. Mr. Marks's failure to act to collect the loans owing to the Trust could have resulted in significant prejudice to the Trust and to its sole beneficiary. It did not, but only because Mr. Marks was replaced as Trustee and the successor trustee was successful in negotiating a settlement that resulted in repayment of this money owed the Trust.

3. Dishonesty

As discussed above, the Hearing Committee finds that Respondent violated Rule 8.4(c), with a majority finding multiple instances of intentional dishonesty. Beyond the Rule 8.4(c) charges, Disciplinary Counsel alleges that Respondent testified falsely in three respects:

a. The $1,750 withdrawal

Disciplinary Counsel asserts that the inconsistencies and inaccuracies in Mr. Marks's testimony concerning the $1,750 withdrawal were dishonest. ODC Br. at 43-48. As explained above, aspects of Mr. Marks's testimony both in June 2013 – seven months after the withdrawal – and at the November 2019 disciplinary hearing in this matter, are at variance with each other and inconsistent with what facts can be established about the misappropriation.

To his credit, Mr. Marks did not deny, in either proceeding, that he improperly withdrew the money for his own use from the trust account. His account of the

transaction, however, was significantly inconsistent with the bank records and established bank practice.

Mr. Marks testified that he told the teller to take the amount from "the lowest account," that he did not approve the transaction amount or account on a keypad, and that no manager approved the transaction, all of which contradicted more reliable bank record evidence. FF 137. And despite his inability to recall details of the transaction in June 2013, he provided in his testimony in the disciplinary hearing a highly detailed account of the events, including the physical appearance of the teller and the purported lack of involvement of other bank officials. A majority of the Hearing Committee finds this testimony was a deliberate effort to excuse his negligent misappropriation and to assign responsibility for it to the teller. As such, we find that his testimony was an intentional misrepresentation to the Hearing Committee. *See also* Separate Opinion of Mr. Hirsh, *infra*, at 16-17 (finding no false testimony).

Mr. Marks also should have been faster to get to the bottom of the misappropriation. He excuses, at the disciplinary hearing, his failure to discover the misappropriation until April 2013 when the court ordered an accounting of the Trust, by referencing his inexperience as a solo practitioner. He claims he did not open bank statements for the Trust in the period from November 2012 through April 2013, because he was unaccustomed to doing this work for himself. But his failure to check the Trust bank statements is consistent with his lack of effort on the Trust business that resulted in his non-payment of taxes on the Trust property as recently

as four months earlier. Blaming, at the disciplinary hearing, the non-review of Trust banking records on his new solo-practitioner status, characteristically seeks to excuse his culpability for performing the duties of the Trustee. Two members of the Hearing Committee find that Mr. Marks's testimony regarding the misappropriations was not worthy of credence and, in fact, did much to undercut his credibility with respect to his testimony more generally. Nevertheless, the full Committee agrees that Disciplinary Counsel did not provide clear and convincing evidence that Respondent testified falsely in this respect.

b. Awareness of the focus of the April 2013 hearing

Mr. Marks testified that he was "totally surprised" by Judge Wolf's April 4, 2013 ordering him to appear before Judge Christian, considered himself to be a "deer in the headlights," in responding, and was thus unaware that he would be expected to provide an accounting at the April 10, 2013 hearing. FF 145. A majority of the Hearing Committee finds this assertion typically self-exculpatory, but an exaggeration seeking sympathy, and not a falsehood. *See also* Separate Opinion of Mr. Hirsh, *infra*, at 17-19 (disagreeing with the characterization of the statement as self-serving).

c. Speaking to the Auditor-Master

Mr. Marks testified that prior to submitting the Amended Accounting, he spoke with the Auditor-Master about the withdrawal and how to handle it, and the Auditor-Master advised him to include the information in the Amended Accounting.

FF 168. The Amended Accounting says that $1,750 was "a withdrawal in error and is to be repaid at 10 percent interest." *Id.*

This testimony appears to be incorrect in some way. On June 25, 2013, when the Auditor-Master conducted his first hearing, Tr. 221-22; DX 52, Mr. Marks volunteered in response to a question about whether he commingled funds in the account, that he had made the $1,750 withdrawal, explained that he was prepared to repay the money with 10 percent interest, asked for the Auditor-Master's guidance about what to do and ultimately discussed at some length what had happened. DX 52 at 61-67; Tr. 1043-52. The exchange, however, does not suggest the Auditor-Master had already known about the withdrawal from an earlier discussion with Mr. Marks before this questioning began and had already advised Mr. Marks to reflect the error in the Amended First Account. Thus, it appears unlikely that Mr. Marks had, in fact, asked the Auditor-Master for guidance about the November 15, 2012 withdrawal of $1,750 from the trust account.

At the same time, it is not unreasonable to think that Mr. Marks spoke to someone else other than the Auditor-Master about how to handle the repayment, such as the Successor Trustee, Mr. Hand, or one of his law partners. It is difficult to construct how – in the absence of such a conversation – Mr. Marks would have been able to say in the June 17 Amended Accounting stated that the $1,750 "***is*** to be repaid at ***10 percent interest***." DX 51 at 16 (emphasis added); Tr. 316-17. Ten percent is significantly above market; it not the default rate of interest in the District of Columbia, *see* D.C. Code § 28-3302 (6 percent); and could not have come from the

checking account rate, as it paid no interest. *See* DX 19. The self-imposed 10% interest suggests that Mr. Marks had reached an understanding with someone about the appropriate interest rate on repayment of the $1,750 before he submitted the accounting.[28] Therefore, we believe that Mr. Marks's testimony that he spoke with the Auditor-Master before the June hearing was in error, but it was not dishonest or a violation of 8.4(c).

In his handling of the trust itself, Mr. Marks does not appear to have been dishonest, just inactive. In his defense of his inaction, however, on multiple occasions he misrepresented facts in order to exculpate himself. This is apparent most clearly in his response to the July 2012 Petition to Remove and in the probate hearings in 2013 that resulted in his removal as Trustee.

We recognize that he admitted to the misappropriation and the late payment of property taxes. We note that after he left his law firm, he sought no compensation for any of his work in connection with the Trust or the hearings. He voluntarily paid the interest and penalties on the late property taxes. DX 124. He agreed to refund the $1,750 with a higher than market ten percent rate of interest. He personally paid $17,627.84 into the Trust to reimburse portions of the legal fees that were in paid to

[28] Other possible explanations of the exchange with the Auditor-Master are that at the 2019 disciplinary hearing, Mr. Marks either misremembered entirely what took place in 2013, or confused that exchange with having made an earlier call. Neither of these, however, explain the entry in the Amended Accounting. It is not, however, plausible to conclude (as Disciplinary Counsel urges), that at the Hearing before the Committee, in the course of discussing at length how he (admittedly wrongfully) withdrew money from this account, Mr. Marks chose to lie about the specific detail of the exchanges that led to his repayment.

his former law firm. DX 124. Instead of receiving any financial benefit from this representation, he actually paid money to perform the representation.

Nevertheless, it is in pleadings and transcripts of court appearances that Mr. Marks's misrepresentations cause concern for the majority. As detailed above, the record makes clear that Mr. Marks was dishonest in representations to the court and in this he violated Rule 8.4(c) in the view of the majority.

4. Violations of Other Disciplinary Rules

We have taken into account all of the violations of Disciplinary Rules.

5. Previous Disciplinary History

This is a mitigating factor. Mr. Marks has no previous disciplinary history and, especially from the testimony of Ms. Hewlett, appears to be an extremely well-respected member of the legal community. *See, e.g.*, *In re Kline*, 11 A.3d 261, 266 & n.6 (D.C. 2011) (citing as a mitigating factor character witness testimony establishing that "misconduct was an aberration in an otherwise unblemished 27-year practice as a lawyer").

6. Acknowledgement of Wrongful Conduct

Mr. Marks has acknowledged that he failed to pay property taxes on time and that he took $1,750 from the Trust account in error. It is significant, however, that he also clearly does not acknowledge the broad negligence and dishonesty for which he is here found responsible.

7. Other Circumstances in Aggravation and Mitigation

Mr. Marks did not seek or obtain personal profit from his violations of the Disciplinary Rules. To the contrary, he ultimately paid personally a substantial portion of the attorney's fees that went to his former firm, paid the $1,750 in misappropriated funds back to the Trust, with self-imposed ten percent interest, and paid the interest and penalties on the late-paid District of Columbia property taxes. Taken together, this means that he performed the work he did in connection with the Trust at a financial loss.

It is important that Mr. Marks took steps, albeit after his removal as Trustee, to repay the Trust and to do so, in the case of the negligently misappropriated $1,750, with a sizeable self-imposed interest of 10%. A respondent's willingness to make financial amends should be a reason for mitigation, just as on other occasions the Board and ultimately the Court of Appeals have cited a respondent's attempt to avoid making such amends as the basis for imposing a stricter sanction. *Compare, e.g.*, *Ekekwe-Kauffman*, 210 A.3d at 797-98 (refusal to provide a refund and dishonest attempt to prove no such obligation existed considered in aggravation of sanction), *and In re Kanu*, 5 A.3d 1, 17 (D.C. 2010) ("foot-dragging" in paying refunds considered in aggravation), *with Reback* 513 A.2d at 233 ("prompt" client refund upon termination of representation considered in mitigation), *and Vohra*, 68 A.3d at 786 (appended Board Report) (voluntary client refund considered in mitigation even though it occurred after the respondent received notice of the disciplinary investigation).

Further, Disciplinary Counsel does not dispute that Mr. Marks cooperated in the investigation, making himself available for questioning and providing documents.

In addition, Mr. Marks's good character, his long service to his own community and the legal community was attested to by a number of people called at the disciplinary hearing. Respondent called four witnesses who collectively have decades of experience working with him personally or professionally. Although none of these witnesses had personal knowledge of how Mr. Marks handled his role as trustee to the McCloud Trust, all of them attested to many ways in which he has acted with kindness and decency over the years. Their testimony suggests that he is respected not just in the legal community, but in his religious and social community.

C. Sanctions Imposed for Comparable Misconduct

In cases involving only negligent misappropriation, "the ordinary sanction . . . would not exceed suspension for six months." *Kline*, 11 A.3d at265; *see, e.g., In re Frank*, 881 A.2d 1099, 1099-1100 (D.C. 2005) (per curiam) (six-month suspension for negligent misappropriation in a single matter). Dishonesty, depending on the severity, can result in a broad range of sanctions, from non-suspensory sanctions to disbarment. *Compare, e.g.*, *In re Mitchell*, 727 A.2d 308, 315-16 (D.C. 1999) (public censure for, among other violations, misrepresentation by omission not motivated by personal gain, and further mitigated by lack of prior discipline and contributions to the D.C. Street Law program), *with In re Baber*, 106 A.3d 1072, 1076-77 (D.C. 2015) (per curiam) (disbarment for dishonesty to the court, making

false accusations of fraud against his client in court and in the disciplinary process, and lack of remorse).

Although no cases are directly on point, cases primarily involving negligent misappropriation, dishonesty, and other minor violations have resulted in lengthy suspensions of up to two years. *See, e.g.*, *In re Boykins*, 999 A.2d 166, 171-74 (D.C. 2010) (two-year suspension with fitness for negligent misappropriation, both knowing and reckless dishonesty, failure to keep records, failure to promptly notify and pay medical providers, and serious interference with the administration of justice, arising from his mishandling of settlement funds and false statements to Disciplinary Counsel, aggravated by prior discipline); *In re Midlen*, 885 A.2d 1280, 1288-1291 (D.C. 2005) (eighteen-month suspension for negligent misappropriation, dishonesty, failure to communicate, failure to render an accounting, and failure to deliver the client's file upon termination of the representation, arising from the respondent's fee payments to himself despite a dispute with the client and execution of a document despite the client's instructions to the contrary); *see also, e.g.*, *Reback*, 513 A.2d at 228-29, 233 (six-month suspension for neglect and dishonesty, where the respondents wrote, without permission, a client's signature on an amended complaint to avoid telling her that the first complaint had been dismissed, mitigated by remorse, cooperation, prompt refund to the client, and lack of prior discipline); *Ukwu*, 926 A.2d 1106 (two-year suspension with fitness for, among other violations, dishonesty, a pattern of neglect, failure to communicate, and serious interference with the administration of justice, arising from the respondent's handling of five

immigration cases, including directing a client to submit a false letter to the INS); *In re Soininen*, 853 A.2d 712, 715 & n.4 (D.C. 2004) (six-month suspension for dishonesty, unauthorized practice of law, and serious interference with the administration of justice, where the respondent falsely represented to immigration tribunals that she was in good standing with the Bar); *In re Fair*, 780 A.2d 1106, 1113, 1115-16 (D.C. 2001) (fourteen-month suspension with fitness for two instances of negligent misappropriation, a pattern of neglect, charging an unreasonable fee, and serious interference with the administration of justice, in connection with the respondent's withdrawal of fees from an estate before court approval, mitigated by the fact that some of the respondent's actions were common and later legislatively sanctioned).[29]

Our finding of negligent misappropriation carries with it a presumptive six-month suspension.[30] Respondent's violations of Rule 8.4(c) do not rise to the level of flagrant dishonesty that would require disbarment, *see Vohra*, 68 A.3d at 787-88 (three-year suspension with fitness where the respondent engaged in immigration

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[29] Additionally, Disciplinary Counsel argues that *In re Krame*, Board Docket No. 16-BD-014 (BPR July 31, 2019), is relevant to the sanction analysis in this matter, "including consideration of the vulnerability of the [trust] beneficiary." Disciplinary Counsel's Pre-Hearing Brief at 8. But *Krame* is not directly comparable, because the Board recommended the respondent be disbarred for his negligent misappropriation, "deliberate violations of court orders," and "flagrant dishonesty." *Krame*, Board Docket No. 16-BD-014, at 4.

[30] In reviewing the cases he has cited, we do not agree with Mr. Marks that actual findings of negligent misappropriation have resulted in an informal admonition. Moreover, given what appears to be not just a single act of negligence but additional negligence (in failing to catch the error or to get to the bottom of it quickly), we do not find that a shorter period would be appropriate here.

fraud but the dishonesty was "not grounded in malice, but in weakness"), nor does this case involve the protracted dishonesty and prior discipline that resulted in a two-year suspension in *Boykins*. Nevertheless, the Hearing Committee agrees that Respondent's misconduct is serious and that a sanction between one and two years is appropriate. Based on the Hearing Committee majority's findings of multiple instances of intentional dishonesty, a very serious violation, *see Hutchinson*, 534 A.2d at 924, negligent misappropriation, and the totality of the misconduct, which is at least as serious as that in *Midlen*, 885 A.2d at 1288-1291, aggravated by false testimony, the majority recommends a suspension of eighteen months.

D. Fitness

A fitness showing is a substantial undertaking. *Cater*, 887 A.2d at 20 . Thus, in *Cater*, the Court held that "to justify requiring a suspended attorney to prove fitness as a condition of reinstatement, the record in the disciplinary proceeding must contain clear and convincing evidence that casts a serious doubt upon the attorney's continuing fitness to practice law." *Id*. at 6. Proof of a "serious doubt" involves "more than 'no confidence that [a] Respondent will not engage in similar conduct in the future.'" *In re Guberman*, 978 A.2d 200, 213 (D.C. 2009) (citation omitted). It connotes '"real skepticism, not just a lack of certainty."' *Id.* (quoting *Cater*, 887 A.2d at 24).

In articulating this standard, the Court observed that the reason for conditioning reinstatement on proof of fitness was "conceptually different" from the basis for imposing a suspension. As the Court explained:

> The fixed period of suspension is intended to serve as the commensurate response to the attorney's past ethical misconduct. In contrast, the open-ended fitness requirement is intended to be an appropriate response to serious concerns about whether the attorney will act ethically and competently in the future, after the period of suspension has run. . . . [P]roof of a violation of the Rules that merits even a substantial period of suspension is not necessarily sufficient to justify a fitness requirement.

Cater, 887 A.2d at 22.

In addition, the Court found that the five factors for reinstatement set forth in *In re Roundtree*, 503 A.2d 1215, 1217 (D.C. 1985), should be used in applying the *Cater* fitness standard. They include:

(a) the nature and circumstances of the misconduct for which the attorney was disciplined;

(b) whether the attorney recognizes the seriousness of the misconduct;

(c) the attorney's conduct since discipline was imposed, including the steps taken to remedy past wrongs and prevent future ones;

(d) the attorney's present character; and

(e) the attorney's present qualifications and competence to practice law.

Cater, 887 A.2d at 21, 25.

A majority of the Hearing Committee finds that it is appropriate to require a showing of fitness. In applying these factors there are competing considerations. On the one hand, we have no evidence that Mr. Marks's violations were anything but isolated (factor a). Mr. Marks does acknowledge in some respects the seriousness of the misconduct (factor b) and has personally made payment for the interest and penalties on the taxes, and 10% interest on the $1,750 withdrawal as

well as a substantial portion of fees that were paid to his former law firm (factor c). The character witnesses attest to his good character (factor d) and the violations are directed to responsibilities as a Trustee and so do not necessarily connote an inability to "practice law" in the sense of representing clients in a legal proceeding (factor e).

However, outweighing those considerations are the seriousness of his violations, including negligent misappropriation and dishonesty. The violations more broadly, in substantial part, reflect Respondent's serious misapprehension of his responsibilities as a Trustee and as a member of the Bar, which he continues to fail to acknowledge. Most serious of all, Respondent's repeated false statements to the Probate Court and false testimony to the Hearing Committee gives the majority serious doubt about Respondent's apprehension of his duty of honesty to the tribunal and, consequently, his ability to behave ethically in the future. *See In re Cleaver-Bascombe*, 892 A.2d 396, 413 n.16 (D.C. 2006) (noting that false testimony "has been deemed probative of [a person's] attitudes toward society and prospects of rehabilitation" (citation and quotation marks omitted)). *But see In re Askew*, 225 A.3d 388, 401 n.17 (D.C. 2020) (noting that deliberately false testimony does not always result in a fitness requirement). Requiring Mr. Marks to demonstrate his appreciation of the responsibilities as a Trustee and, for example, to show that he has taken CLE classes on those responsibilities, is necessary to ensure that Respondent will be able to provide competent representation and behave honestly in the future. *See also* Separate Opinion of Mr. Hirsh, *infra*, at 27-33 (recommending no fitness requirement).

VII. CONCLUSION

For the foregoing reasons, the Committee finds, unanimously, that Mr. Marks violated Rules 1.1(a), 1.3(a), 1.3(b)(1), 1.3(c), 1.15(a), 1.15(c), 8.4(c) (in at least one respect), and 8.4(d), and a majority of the Committee, finding additional violations of Rules 1.3(b)(1) and 8.4(c), aggravated by false testimony, recommends that Mr. Marks should be suspended for eighteen months with reinstatement conditioned on a showing of fitness. *See also* Separate Opinion of Mr. Hirsh, *infra* (recommending a one-year suspension with CLE). The Committee is unanimous in recommending the requirement of nine hours of CLE: six hours on the topic of trust account management and three hours on the topic of legal ethics.

AD HOC HEARING COMMITTEE

Merril Hirsh, Chair*

Patricia Mathews, Public Member

Mary E. Kuntz, Attorney Member

* Mr. Hirsh filed a separate opinion dissenting in part and concurring in the result in part.

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

In the Matter of:	:	
	:	
ISAAC H. MARKS, SR.,	:	
	:	
Respondent.	:	Board Docket No. 18-BD-059
	:	Disc. Docket No. 2013-D208
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 411706)	:	

SEPARATE OPINION OF MR. HIRSH
DISSENTING IN PART AND CONCURRING IN THE RESULT IN PART

I disagree with the majority's conclusions that Disciplinary Counsel proved, by clear and convincing evidence, that Mr. Marks (1) violated Rule 1.3(b)(1) by *intentionally* failing to pursue a client objective when he decided not to pursue Pastor Stephen Tucker for recovery of the loans; (2) violated Rule 8.4(c) when he stated in his August 8, 2012 Opposition to Ms. Walker's motion to remove him as Trustee that Ms. Walker "has ***never*** notified the Successor Trustee [Respondent] that Ms. Hill lived in the Property, much less that the Property required funds for upkeep," DX 42 at 3 (emphasis in original), or made statements in two other instances that Disciplinary Counsel did not allege were dishonest; and (3) in any instance, provided dishonest testimony in our proceeding. I do believe that Mr. Marks violated Rule 8.4(c) in making a reckless misrepresentation concerning receiving tax statements from Ms. Walker, but disagree that he acted intentionally.

Accordingly, although I join in the factual section and the other conclusions of the majority's decision, based on the Rule 1.3(a), 1.15(a), and 8.4(c) (single instance of reckless dishonesty) violations that I believe have been proven and also consider this to be serious misconduct, I would recommend a less severe sanction. I believe an appropriate sanction would be a one-year suspension with reinstatement conditioned upon having taken the continuing legal education courses described in the majority decision, but not upon a separate fitness requirement beyond this.

I. Disagreements on the Intent Behind the Decision Not to Pursue Pastor Tucker

I find that Mr. Marks's conduct in connection with recovering the loan from Pastor Tucker violated Rule 1.3(a) *but not* Rule 1.3(b)(1). As the main opinion notes, there is a critical distinction between these two Rules. Rule 1.3(a) provides that "a lawyer shall represent a client zealously and diligently within the bounds of the law," and "*does not require proof of intent*, but only that the attorney has not taken action necessary to further the client's interests, whether or not legal prejudice arises from such inaction." *In re Bradley*, Board Docket No. 10-BD-073, at 17 (BPR July 31, 2012) (emphasis added), *adopted in relevant part*, 70 A.3d 1189, 1191 (D.C. 2013) (per curiam).

As relevant here, Rule 1.3(b)(1) provides that "[a] lawyer shall not *intentionally* . . . [f]ail to seek the lawful objectives of a client through reasonably available means permitted by law and the disciplinary rules." (Emphasis added). It requires not just neglect, but neglect that is "so pervasive that the lawyer must [be] aware of it" or "when a lawyer's inaction coexists with an awareness of his

obligations to his client." *In re Ukwu*, 926 A.2d 1106, 1116 (D.C. 2007) (citations and internal quotation marks omitted). It must at least be a situation "'when the lawyer is aware of his neglect' but nonetheless continues to neglect the client's matter." *In re Vohra*, 68 A.3d 766, 781 (D.C. 2013) (appended Board Report) (quoting *In re Mance*, 869 A.2d 339, 341 n.2 (D.C. 2005) (per curiam)).

As we all note in the main opinion (Report and Recommendation at 76-77), applying these rules to a situation in which a lawyer served as a trustee, as opposed to an advocate, requires some adjustment. Were Mr. Marks retained by Ms. McCloud while she was alive to pursue the loans to Pastor Tucker, Mr. Marks would be able (and expected) to ask Ms. McCloud about not only her general objectives but her specific ones. He could (and would be expected to) report to Ms. McCloud on his conversations with Pastor Tucker and discuss how Ms. McCloud wished to proceed. Ms. McCloud could tell him, for example, "I would like to take this action" or "I don't want to pursue this" – and in evaluating the applicability of 1.3(b)(1), there would be a clear direction or how (or how not) to proceed.

Here, the direction is far more general. Mr. Marks was managing a trust created by one of Pastor Tucker's parishioners. He understood it was his general responsibility to attempt to collect the loans. But the trust gave him discretion to determine what the appropriate means was of doing that. And even if he were obligated to implement Ms. McCloud's specific wishes, it is not at all clear what those specific wishes would have been.

We have found that (1) the loans to Pastor Tucker were assets of the trust, FF 97; (2) Mr. Marks thought there were additional loans beyond those documented in the trust document and that Pastor Tucker was "a crook basically" who had been "preying" on Ms. McCloud, FF 98-99 (citing testimony from Mr. Marks's December 2009 deposition, DX 30 at 30-31); (3) the documentation Mr. Marks had concerning the loans was unclear in various ways, FF 103, and might not be admissible or understood even if it were admitted, FF 106; (4) although Mr. Marks intended to collect the loans, and spoke with the Tuckers about them, the Tuckers initially maintained that the loans were forgiven, FF 104; (5) after discussion with his law partners, Mr. Marks decided for a number of reasons that (based on the information he had) a lawsuit seeking to collect on these loans faced too many difficulties to be worth pursuing, FF 105, 108; and (6) as both Mr. Marks and the Auditor-Master noted, unless Pastor Tucker could be persuaded to acknowledge the indebtedness, some of the recovery would be barred by the statute of limitations. FF 107.

Ultimately, Pastor Tucker did decide to make good on the loans. However, that was after several things occurred. To begin with, Ms. Walker located additional documentation concerning the loans that Mr. Marks never had. FF 109. Although, as the Auditor-Master noted, that still did not make the case simple (but instead left "a lot of strings that we have to pull together" to pursue the loans), it did lead him to do something Mr. Marks could not – subpoena the Pastor for testimony. *Id.* Then, Mr. Marks got his Pastor to intercede with Pastor Tucker and prayed with Pastor

Tucker; and, on the day he was to testify, Pastor Tucker changed his mind and acknowledged the loans. FF 110-11; Tr. 555.

Given these facts, all of us have found that Mr. Marks should not even be "faulted" for failing to settle with Pastor Tucker, and that the decision not to sue Pastor Tucker was "reasonably within his discretion as a trustee." Report and Recommendation at 99. We also credit his efforts in 2013 to get Pastor Tucker to change his mind. *Id.*

All of us also agree, however, that he violated Rule 1.3(a) because he should not have viewed the issue as binary – sue or write the loans off. Instead, as a zealous "advocate" he should have pursued informal means of collecting the debt and not just given up. *Id.* at 98-99. I considered this to be a very close call. Indeed, the perception that Pastor Tucker was a "crook," suggests that informal efforts would not be successful either. But Mr. Marks testified that he wrote off collection without seriously considering other options. Tr. 731-38, 772. And I agree that fell short of the zealousness Rule 1.3(a) requires.

Given this history and conclusions, however, I cannot agree with the majority's further step – of concluding that, he not only made a mistake by viewing the issue as binary, but instead "*intentionally*" decided not pursue the loans he had, in fact, tried to pursue before making that decision. There is no evidence that he "intended" not to try to collect this money – much less clear and convincing evidence.

Nor is this situation where there was clear client direction making him "aware of" a "neglect" that he nonetheless continued. *See Vohra*, 68 A.3d at 781. Mr. Vohra's "sustained neglect," 68 A.3d at 768, for example, involved first, filing an application for his clients' visa extensions on the wrong form, getting the form returned and then waiting 10 months (until after his clients' visa had expired) to refile while leading his client to believe the application was pending. *Id.* at 771.

Mr. Marks did not engage in neglect in this sense. He had no clear direction. He made a judgment call on how to pursue an unclear direction. The judgment call was mistaken. But recasting it as "intentional neglect," is also a mistake. It eliminates the distinction between 1.3(a) and 1.3(b)(1). Accordingly, I dissent from this conclusion.

II. Disagreements on the Proof of Dishonesty

A. Notice of Ms. Hill Living in the Property

I agree with the majority that Mr. Marks's statement in his August 8, 2012 brief that Ms. Walker had "***never*** notified" Mr. Marks lived in the property, though literally true, was misleading to the extent it conveyed the impression that Mr. Marks did not know that Ms. Hill continued to live in the property. During his testimony in this proceeding Mr. Marks agreed (without hesitation) that he knew that Ms. Hill was living in the property. Tr. 617-18. He also told Judge Christian the same thing at the April 10, 2013 hearing. DX 46 at 18-19; *see* ODC PFF 62.

I do not agree, however, that Disciplinary Counsel proved that Mr. Marks made the statement in his brief intending to convey that he was unaware that Ms. Hill

was living in the property. Rather, as he explained, he was trying to convey that the lack of communication about Ms. Hill was so extreme that Ms. Walker had not notified him that Ms. Hill was *even in* the property "much less that the property required funds for upkeep." Tr. 617-19.

That there was a lack of communication between Mr. Marks and Ms. Walker about Ms. Hill's needs is very well supported by the evidence. There is no evidence I could locate that Mr. Marks and Ms. Walker had actually spoken (as opposed to having left voice mail messages) since April 16, 2010. DX 100 at 1 (referencing a matter Ms. Walker and Mr. Marks "discussed today"). The record contains numerous (mostly nasty) exchanges between Mr. Marks and Ms. Walker (sometimes with Mr. Hertz also involved). *See* DX 78 to 82, 84 to 86, 88 to 95, 97, 99 to 105, 107 to 112, 114 to 117. But the last one of these that specifically discusses the condition of the house was a January 13, 2010 email *from* Mr. Marks to Ms. Walker, urging that *she* take action because Ms. Hill "is fast rendering the house uninhabitable." DX 86 at 3.

There are then some communications involving whether particular utility or insurance bills have or have not been paid and who should be paying them. *See* DX 88 to 91, 93 to 94, 97, 99, 103, 105; *see, e.g.*, DX 107 to 112 (involving a threat (which turned out to be based on a misunderstanding) to foreclose on Ms. McCloud's reverse mortgage). But even these only go until later in 2010. *See* DX 112 (showing communications from November 2010). And in a February 18, 2010 email exchange between Mr. Marks and Ms. Walker, Mr. Marks states that "I

was also informed that Stormy has been staying with [the man she referred to as her fiancé] in his temporary apartment, rather than at the house," DX 93 at 2, and Ms. Walker, in response suggests that this was correct. *See id.* ("Thank you for noting your concerns about Stormy. I am fully aware of Stormy's whereabouts and needs.").

In some of the 2010 correspondence, Ms. Walker discusses the house as an asset. For example, an October 29, 2010 letter quotes from an earlier April 20, 2010 communication in which Ms. Walker said that "[y]ou asked me to advise you of plans regarding Stormy Hill's future living arrangements. <u>As you very well know, her future largely depends on the proceeds from the Trust</u>," and asks that Mr. Marks advise her "<u>of [his] anticipated plans regarding the sale of the property so that [she is] able to plan for Stormy's future.</u>" DX 111 at 2 (emphasis in original); *see also* DX 101. And in still later correspondence, she expressed strong concern about the potential for a foreclosure on the house. *See* DX 112, 114 to 117. But none of these discuss the conditions of the house or whether, in the meantime, Ms. Hill required money for its maintenance.

Nor does Disciplinary Counsel's brief suggest there is any evidence that Mr. Marks had been in the house since 2010 to observe the conditions. Rather, it cites Mr. Marks's statement at the April 10, 2013 hearing that he "had not been in the property in some years," DX 46 at 17, and argues that Mr. Marks failed to *inquire* about the condition of the property and instead simply waited to hear from Ms. Walker. ODC PFF 64, 65.

I have joined the portions of the decision that find violations of other Rules based on Mr. Marks's position that he could wash his hands of the obligation to ensure that Ms. Hill lived in a safe environment. *See* Report and Recommendation at 104-05. But the issue under Rule 8.4(c) is dishonesty. And the only evidence in the record that specifically supports the conclusion that Mr. Marks knew Ms. Hill remained in the house after some time in 2010 are his own statements that he knew this – both before Judge Christian on April 10, 2013, DX 46 at 17-19, and at the hearing here. Tr. 617-18.

It is not plausible that Mr. Marks wrote the statement that Ms. Walker had never notified him that Ms. Hill was in the house "much less" about Ms. Hill's needs in an effort to convey that he did not know that Ms. Hill was there only to provide the contrary evidence on both these occasions afterwards. *See* DX 42 at 3; DX 46 at 17-19; Tr. 617-18. Nor do I believe it is correct to credit his representations that he knew about Ms. Hill being in the house, but then discredit his representations made immediately afterwards about what he intended by the sentence in his brief. *See* Tr. 617-18.

But in any event, it is not Mr. Marks's burden to prove Disciplinary Counsel's theory to be implausible. It is Disciplinary Counsel's burden to prove his "dishonest intent" by clear and convincing evidence. *See In re Romansky*, 825 A.2d 311, 315 (D.C. 2003). On this allegation, I do not believe that burden was met.

B. Statements Disciplinary Counsel Did Not Argue Were Dishonest

The majority also finds dishonesty in two other instances. The majority concludes that Mr. Marks was dishonest when (1) he suggested (also in his August 2012 opposition to Ms. Walker's motion to remove him as trustee) that the reason for not having the District's records corrected to reflect Ms. McCloud's death was that this might lead the District to assert that the homestead exemption did not apply, DX 42 at 3; and (2) he told the court at the February 2010 hearing on Ms. Walker's "Emergency" motion for a "full accounting of the revocable trust" that Ms. Walker had never requested an accounting and that there were no checks for the trust account, DX 37 at 6. I cannot agree with either of these conclusions.

Although Disciplinary Counsel argued specifically that other statements in both of the pleadings were dishonest, Disciplinary Counsel *did not* assert that these statements were dishonest in the Specification of Charges or in its brief. *See* ODC Br. at 37-48. I am very reluctant to find that Mr. Marks committed violations that Disciplinary Counsel did not allege. *Cf. In re Austin*, 858 A.2d 969, 976 (D.C. 2004) (finding no due process violation where the "specification of charges *and post-hearing filings* fairly put respondent on notice of the . . . charges against him" (emphasis added)).

Even putting aside questions of fairness in finding Mr. Marks responsible for issues he was not on notice to address in his briefs, as I note elsewhere, Disciplinary Counsel was, in many ways, extremely aggressive in charging Mr. Marks with

dishonesty. I would have to assume that Disciplinary Counsel considered reasons why these might not give rise to this serious accusation.

In any event, I do not believe that these statements do rise to the level of dishonesty. The statement about the homestead exemption was a poor and uncompelling argument. But it was an argument. And the assertion about checks was trivial in the context in which it was made.

Construing the statement about not requesting an accounting to be dishonest is even more strained. In fact, it was ***true*** that Ms. Walker did not request a formal accounting in the sense of the "full accounting of the revocable trust," her motion sought. And what she and Mr. Hertz had requested – information about the trust assets, DX 33 at 2 – *was already known to the Court*. At the December 17, 2009 hearing, Mr. Hertz said he needed a deposition to obtain information on what was in the Trust. Mr. Marks offered to provide the information at the hearing. FF 28; DX 28 at 11. Then, Mr. Marks went through with the deposition and provided the information there. FF 29; DX 30. After the deposition, Ms. Walker communicated with Mr. Marks about other things, but never requested any more information than Mr. Marks provided at the deposition, much less a formal accounting. FF 33. She filed an "Emergency" motion without meeting or conferring or mentioning the information Mr. Marks had already provided. *See id.*

Far from being dishonest, it was entirely reasonable for Mr. Marks to point these things out to the court.

C. The $1,750 Withdrawal

I agree with the majority that Disciplinary Counsel proved a negligent misappropriation when Mr. Marks withdrew $1,750 from the Trust account on November 15, 2012. I also agree that the testimony Mr. Marks provided concerning the details of this transaction both before the Auditor-Master in June 2013 and at our hearing in September 2019, was inaccurate and, in some ways, confusing. I, too, credit Bank of America's electronic record of the transaction over Mr. Marks's recollection. As explained below, I also have difficulty with his efforts to get to the bottom of what happened.

I do not believe, however, that any of the statements Mr. Marks made about $1,750 withdrawal (either prior to or at our hearing) that Disciplinary Counsel asserts were dishonest meets any standard of dishonesty.

Disciplinary Counsel appears to assert that Mr. Marks made seven misrepresentations in connection with the $1,750 withdrawal (some of which are repeated in different ways). Four of them relate to the Rule 8.4(c) charge while the other three relate to his testimony at the disciplinary hearing.

1. Prior to Our Hearing

First, Disciplinary Counsel asserts that:

> At the April 10[, 2013] hearing, when Judge Christian asked Respondent about expenditures in the account, Respondent did not disclose that in 2009 and 2010 that he had paid his firm's fees from the trust account, or tell the court about his $1,750 withdrawal, even though he knew this information because he had accessed the account information online.

ODC Br. at 46 (citing ODC PFF 38). As the portions of the decision in which I have joined note, Disciplinary Counsel's assertion that Mr. Marks concealed the fees he paid his firm was, itself, based on incorrect statement: in fact, Mr. Marks provided the bank statements to Ms. Walker reflecting these payments on November 1, 2010. DX 112 at 2; *see also id.* at 3 (acknowledging receipt and asking about a payment).

Indeed, whereas Disciplinary Counsel's argument states that "Respondent did not disclose that in 2009 and 2010 that he had paid his firm's fees from the trust account," ODC Br. at 46, the proposed finding of fact it relies upon (ODC PFF 38) urges, that Mr. Marks ***did*** inform the Court "that he had 'paid [himself] initially in 2010 when [he] filed the petition for Ms. Hill.'" ODC PFF 38 (quoting DX 46 at 14) (bracketed additions in ODC's Brief). In PFF 38, Disciplinary Counsel argues that Mr. Marks's dishonesty was in going on to say that this payment was "the first and last time funds have been used," DX 46 at 14, when, "contrary to this representation, Respondent had paid his fees twice – $14,400 on December 31, 2009, and $10,[0]74.59 on March 30, 2010." ODC PFF 38; *see* DX 19 at 24.

But this allegation – that Mr. Marks disclosed only one of the payments – is also misleading. On the next page of the transcript, Mr. Marks qualified his statement and explained the "expenditures ***would have been the fees*** that I paid initially ***throughout 2010*** . . . ." DX 46 at 15 (emphasis added) – not just the initial one in 2009.

Nor does the context of the April 10, 2013 hearing suggest that Mr. Marks misled the court about what he knew of the $1,750 withdrawal. Mr. Marks did not

purport to be providing the court with a complete accounting of the withdrawals. To the contrary, he told the court that Judge Wolf's *sua sponte* order, signed April 2, 2013 and entered April 4, 2013, DX 45 (about which Mr. Marks learned while at trial), "did require me to provide an accounting for the trust, and I will certainly do that. I'm at a bit of a disadvantage, because I haven't been in my office to pull that file and I haven't looked at it in a while, Your Honor." DX 46 at 15.

Second, Disciplinary Counsel asserts that:

> Before the April 15, 2013 hearing, Respondent talked to his staff, reviewed his files, and determined that the $1,750 he had withdrawn from the trust account was not related to the trust. PFF 97. Yet, in the first accounting Respondent filed on April 15, 2013, he wrote that the $1,750 withdrawal was 'to be confirmed.' PFF 96.

ODC Br. at 46; *see also id.* at 47 (asserting that Mr. Marks testified in this proceeding that "after he filed the first account on April 15, 2013, he 'had to go investigate to see why that withdrawal occurred.' But Respondent knew the key fact – that the withdrawal was not related to the trust – before the April 15, 2013 hearing" (citing ODC PFF 97)).

However, the evidence discussed in ODC PFFs 96 and 97 does not show that he *did* get to the bottom of the $1,750 withdrawal before the April 15 hearing. The only evidence on that point is to the contrary. *See* Tr. 284, 286-87, 962, 1029, 1034. And, the evidence Disciplinary Counsel cites in its PFFs is that he *should have* and *could have* done it. As noted below, I agree that Mr. Marks *should* have and *could* have gotten to the bottom of this information. But it was not *dishonest* for him to say that he had *not* gotten to the bottom of what happened. That statement was true.

In any event, as the majority notes, saying "TO BE CONFIRMED" flagged the problem rather than hiding it. And although (again, as noted below) there is a dispute about whether Mr. Marks then spoke to the Auditor-Master about what to do about the withdrawal, there is no dispute that on June 17, 2013, Mr. Marks *did* confirm in his amended accounting that the withdrawal was "in error and is to be repaid at 10% interest." *See* DX 51 at 16; Tr. 223-35.

Third, Disciplinary Counsel states that Mr. Marks:

> testified that he wanted to ask Judge Christian how to handle this. PFF 97. Yet he neither returned the funds to the account nor did he ask Judge Christian, 'how to handle this.' Instead, Respondent lied to the court about missing bank statements. PFF 99.

ODC Br. at 47. For the reasons noted above, the assertion that Mr. Marks "lied to the court about missing bank statements," is not a fair statement of the evidence. And he did return the funds to the Trust with 10% interest on June 27, 2013. DX 123; Tr. 132-33.

Fourth, Disciplinary Counsel asserts that at the April 15, 2013 hearing Mr. Marks:

> misrepresented to Judge Christian that he was "missing some of those bank statements" and could not confirm the $1,750 payment. PFF 99. Respondent could not be "missing" statements that he had accessed online. *Id.*

ODC Br. at 46-47. Here again, in the testimony ODC PFF 99 cites (Tr. 312-13), Mr. Marks did not say that he *did* access the statements online. He said that he *could have* accessed them online, but instead grabbed his paper file that was missing some of the bank statements. Tr. 312-13. Therefore, his statement was not dishonest.

2. Testimony at our Hearing

Disciplinary Counsel also alleges that Respondent testified falsely about the $1,750 withdrawal on three occasions at the disciplinary hearing.

First, Disciplinary Counsel contends (and the majority agrees) that:

> At the disciplinary hearing, Respondent falsely testified that he told the teller to withdraw the cash from the account with the "lowest balance" or from the "lowest account." PFF 93.

ODC Br. at 45; *see* Report and Recommendation at 139-41.

I strongly disagree with the conclusion that this testimony was intentionally false. As we all noted in the opinion, Mr. Marks's testimony about the withdrawal was confusing. I do not know what it means to say that he asked the teller to withdraw the money from the "lowest account," or how the teller could have complied with such a request. Also, it is difficult to believe after seven years that Mr. Marks would actually remember the teller's age or ethnicity.

But this transaction took place in November 2012, seven *months* before Mr. Marks spoke about it before the Auditor-Master in June 2013 and seven *years* before his November 2019 testimony in this matter. It is not surprising that someone testifying about it would get details wrong. Nothing suggests to me that Mr. Marks knew the "true" facts, but instead decided to tell a story about asking the teller to take the money from the "lowest" account – or that he appreciated at the time of his November 2012 withdrawal that (because he presented his debit card to a *teller* instead of using it at an ATM) the McCloud Trust was even one of the accounts from which the money could possibly be taken.

Nor do I believe this testimony was an attempt to blame the teller. Mr. Marks never suggested that the teller made a mistake, or that she bore responsibility for the withdrawal.

Nor is it plausible to think that Mr. Marks intentionally lied in this way. If he was willing to lie to do that, there would be much more useful lies to tell. The bank had some records of the transaction, but no record of what Mr. Marks and the teller said to each other. If he were intentionally dishonest, he could have said that he told the teller specifically to take it from a specific personal account and the teller apparently made a mistake. Testimony that he said to take the money from the "lowest" account evidences a lack of care on *his* part, not error by the teller.

Second, Disciplinary Counsel asserts that:

> at the disciplinary hearing Respondent falsely testified that he was like a "deer in the headlights," and he did not know that his conduct was at issue. PFF 100. It is impossible that Respondent did not know his conduct was at issue in light of Judge Wolf's April 2, 2013 order and Judge Christian's April 10, 2013 order. PFF 35, 100.

ODC Br. at 47.

I agree with the majority that this statement is not a falsehood. But I do not believe it accurate or fair to call it "typically self-exculpatory," or an "exaggeration seeking sympathy." As I note below, Mr. Marks's statements were not always exculpatory and in a number of instances form the only or primary basis upon which we hold him responsible for serious violations. Moreover, calling statements "self-exculpatory" is not independent evidence that it is untrue. As the Court noted in *In re Anderson*, in criticizing a panel's attempt to dismiss testimony as "self-serving,"

"[w]e set aside the adjective ('self-serving') because testimony by a respondent in explanation of his conduct is almost by definition self-serving." 778 A.2d 330, 341 (D.C. 2001).

There is no dishonesty in this statement. To begin with, Disciplinary Counsel somewhat misstates the testimony. Mr. Marks testified that he was a "deer in the headlights," at the April 10 hearing when he was responding immediately to Judge Wolf's order (entered April 4), and did not realize he was going to be the subject of Judge Christian's hearing, until the second (April 15) hearing. Tr. 288-95.

Also (again) this is a statement about what Mr. Marks *should have known*, not a statement about what he *did* know. To be clear, Judge Wolf's April 4, 2013 order did not require Mr. Marks to complete an accounting and history of the Trust in advance of the April 10, 2013 hearing. It required that Mr. Marks do so "on or before ***May 13, 2013***," over a month later. DX 45 at 6, ¶¶1-2. But it did require Mr. Marks in advance of that accounting and history to appear at hearing before Judge Christian on April 10, 2013 "fully informed and cooperative about the McCloud Trust, and prepared to answer any questions about it by the court or any of the below-listed counsel, formally or informally." *Id.* ¶3.

The April 10, 2013 transcript and Mr. Marks's testimony at our hearing make it apparent that Mr. Marks was not fully informed about the McCloud Trust at that hearing. He did not have information at his fingertips. He had not run the events to ground. "Deer in the headlights" is an accurate description.

There is neither evidence nor reason to believe that Mr. Marks actually took Judge Wolf's order to heart, fully prepared for this hearing, came ready to answer any question about the McCloud Trust, but then (1) attempted to appear unprepared for it for some ulterior purpose and then (2) lied at our hearing to conceal what was actually his thorough preparation. That would require that he intend to violate Judge Wolf's order to no reason, when the real problem was that he did not sufficiently focus on and comply with it.

Moreover, admitting to being a "deer in the headlights" is not an exculpation, an exaggeration or a play for sympathy. Mr. Marks *should have* prepared better for this hearing. He *should have* gotten to the bottom of this withdrawal. Judge Wolf's April 4, 2013 order and Judge Christian's April 10, 2013 direction that Mr. Marks account for "where all the money went, every cent," DX 46 at 34-35, were enormous wake up calls that *should* lead a lawyer to move heaven and earth to run the facts to the ground. And if he did not have time to do that before the April hearings, he should have requested an extension. It is right to criticize his handling of the situation. But it is wrong to suggest he was dishonest about it.

Third, Disciplinary Counsel asserts that

> In addition, Respondent falsely testified at the disciplinary hearing that after the April 15, 2013 hearing, he called the Auditor Master and asked him how he should handle the cash withdrawal. PFF 103. There is no evidence corroborating Respondent's testimony – he has no notes or record of the conversation, and during his exchange with the Auditor Master at the June 25, 2013 hearing, he does not refer to any earlier conversation between them. PFF 103; Tr. 1042. Moreover, when questioned by the Auditor Master at the June 25, 2013 hearing, Respondent answered basic questions about the transaction with

> incorrect information – first saying and also affirming that it was an ATM withdrawal, then saying it was a counter check, and ultimately telling the Auditor Master that he was not sure about the transaction "because I had no documentation . . ." PFF 103. Respondent's inaccurate responses are contrary to his claim that he had investigated the matter – even a cursory review of the bank statements would have shown that the transaction was a "Tlr [sic] cash withdrawal." DX 19-81.

ODC Br. at 48.

As the majority notes, the exchange between the Auditor-Master and Mr. Marks at the June 25, 2013 hearing does make it unlikely that Mr. Marks called the Auditor-Master to ask what do about returning the money. *See* DX 52 at 61-67; Tr. 1043-52. But the reference in Mr. Marks's amended accounting eight days earlier that the withdrawal was "in error and ***is to be repaid*** at 10% interest," DX 51 at 16 (emphasis added); *see* Tr. 223-35, strongly suggests that (1) he spoke with someone and is now mistaken about who it was; and (2) Mr. Marks was incorrect about the details of the transaction when he testified on June 25, 2013 and when he testified at our hearing.

More generally, ascribing intent to errors made about the details of a bank transaction done seven months or seven years before, not only fails to show by clear and convincing evidence that he was lying about it, but overlooks the much more compelling evidence to the contrary. Mr. Marks did not deny, in either proceeding, that he improperly withdrew the money. He never suggested that it was the bank's fault or that it did not happen. And the details about which he is mistaken (like whether he remembers the manager coming to approve the transaction or what it was

he did specially that caused the money to be taken out of the "1555" Trust account) are not particularly important, nor uniformly exculpatory. But one fact is clear: on June 17, 2013, before the Auditor Master questioned him on June 25, much less he appeared at our hearing, he had ***already*** said that the withdrawal was in error and that he was going to repay the money with 10% interest. *See* DX 51 at 16; Tr. 223-35.

D. Recklessly False Statement About Not Receiving Tax Statements

There is one statement that I agree meets a standard of "dishonesty" under Rule 8.4(c). Mr. Marks made a statement in the same August 2012 opposition brief discussed above that Ms. Walker "refused to provide" him "with the property tax statements" for the Georgia Avenue property. I would not find it to be intentionally false. But I do believe that it meets the standard for reckless dishonesty.

To find that Mr. Marks engaged in intentional dishonesty with respect to his statement that Ms. Walker did not provide him with tax statements requires a finding that Mr. Marks in drafting his August 8, 2012 opposition either (1) went back to what are now Exhibits DX 114 and DX 115, and saw that Ms. Walker had sent him copies of the tax statements in March 2011; or, at least (2) knew full well without checking that she had sent him these statements 17 months before, but then decided to tell the court that she had not. I do not see any evidence that this occurred (much less clear or convincing evidence) or any reason to think that it occurred. Repeatedly, we find Mr. Marks to have committed violations because he *failed* to act with intent and careful knowledge. I do not see any basis ascribing dishonesty

premised on an assumption that he acted with such intent or knowledge. Indeed, the idea that, he would intentionally lie about a fact so easily controverted is to me not plausible, much less proved by clear and convincing evidence.[1]

I would, however, find that this misstatement was recklessly dishonest. In *In re Boykins*, 999 A.2d 166 (D.C. 2010), the Court concluded that Mr. Boykins acted with reckless dishonestly in "rel[ying] solely upon his memory of events more than four years past." 999 A.2d at 172. And I do not see a material difference between this conduct and what Mr. Marks did (relying on his memory about whether a flurry of information he received from Ms. Walker included tax statements). Mr. Marks should have checked.

III. Sanction

Because I differ with conclusions the majority reaches concerning the extent to which Mr. Marks engaged in dishonesty, I would recommend a one-year suspension. I agree that it should be conditioned on the nine hours of continuing legal education concerning trust obligations the majority describes. But as I differ in the reasoning, I do not believe that a general showing of fitness should be required or serves the ends of justice.

[1] In fact, only DX 114 is a tax bill (for amounts due on March 31, 2011). DX 115 is a proposed tax assessment for tax year 2012 that does not identify the amount due. It is entirely believable Mr. Marks forgot he received one document and implausible that he calculatedly feigned forgetting to receive a document he actually remembered.

A. One-Year Suspension

In reaching this conclusion, I start with the expectation that the negligent misappropriation we have found warrants a six-month suspension, in and of itself, and examine to what extent the sanction should be more severe in light of other findings of violations in which I have joined.

Cases that appear to involve less culpable or roughly comparable conduct. *In re Fair*, 780 A.2d 1106 (D.C. 2001), approving a 14-month suspension, provides some guidance. The Court reasoned that Ms. Fair was found to have committed two independent acts of negligent misappropriation (each sanctionable by a six-month suspension, and therefore warranting a 12-month suspension) and then imposed an additional two-month suspension because Ms. Fair neglected her role as a personal representative. 780 A.2d at 1115-16. As Mr. Marks committed one act of negligent misappropriation, the base punishment is six months, rather than a year. His failures in connection with his role as Trustee do not quite amount to the neglect in which Ms. Fair engaged. But the conclusions I would make that he engaged in reckless dishonesty and serious interference with the administration of justice, warrant greater sanction. A total sanction of a one-year suspension, therefore, is fair.

Conversely, *In re Reback*, 513 A.2d 226, 228-29, 233 (D.C. 1986) (en banc), did not involve a misappropriation (and, hence, did not start with a six-month suspension), but did impose a six-month suspension on lawyers who, among other things, forged a client's signature on a complaint to avoid telling the client the first

complaint had been dismissed, and then delegated the case to an associate. The sanction, however, also took into account that the conduct was mitigated by full remorse, cooperation, a prompt refund to the client and a lack of prior discipline.

Putting aside the misappropriation, there are some similarities between *Reback* and this case. This is also Mr. Marks's first offense, and he did make substantial efforts to rectify the financial impact of his conduct. And, the differences in facts cut both ways. On the one hand, Mr. Marks did not commit an error that got a case dismissed, or (I believe) engage in the type of inherent dishonesty involved in forging a client signature in order to avoid having an error discovered, or delegate the proceedings thereafter to an associate in the way that respondents in *Reback* did. However, he did engage in other conduct (such as failing to pursue Pastor Tucker, washing his hands of Ms. Hill's living arrangements, failing to make two accountings and failing to work out the SSI checks) that do not have analogs in the *Reback* facts.

Taken together, it is fair to view Mr. Marks's conduct, apart from the misappropriation, to be comparable to the conduct warranting a six-month suspension in *Reback*.

In re Soininen, 853 A.2d 712, 714 (D.C. 2004), also involved a six-month suspension for conduct that did not involve a misappropriation of funds and also involved different facts that cut both ways. On the one hand, the matter was a second offense for Ms. Soininen (for practicing law while she was under suspension for an earlier violation), not a first offense. And Ms. Soininen made a number of

statements that were more than recklessly dishonest by telling immigration tribunals that she was an "attorney" without noting the suspension and a labor tribunal (that permitted non-attorney agents to appear if they made it clear that they were *not* acting as an attorney) that she was a "former DC Bar member – reinstatement pending," when there was no reinstatement pending. 853 A.2d at 715, 717-21.

On the other hand, there were some mitigating facts about her situation. An attorney had advised her (albeit incorrectly) that she could practice in the immigration proceedings while on suspension. *See id.* at 717. Her initial suspension arose from being convicted of stealing flowers and potting soil worth less than $200, possessing a controlled substance (Vicodin) and driving while intoxicated, and many of her problems appeared to be linked to substance abuse that she had later managed. *See id.* at 716. She also she voluntarily agreed to a suspension while her case was pending. *See id.* at 727-28.

Again, weighing the differing facts that make Mr. Marks's situation less worthy of sanction and those that made Ms. Soininen's situation less worthy of sanction, it is reasonable to impose a sanction of a six-month suspension on Mr. Marks for the conduct apart from misappropriation.

Cases that involve significantly more blameworthy conduct. By contrast, Mr. Marks's violations were significantly less severe than those involved in *Boykins*, 999 A.2d at 167-70, 173-74, *In re Midlen*, 885 A.2d 1280, 1282-85 (D.C. 2005), *Ukwu*, 926 A.2d at 1109, and *Vohra*, 68 A.3d at 768.

Mr. Boykins committed separate violations in two unrelated matters. 999 A.2d at 167. He not only misappropriated funds, and was recklessly dishonest in making false statements without confirming the facts, he also induced his client to sign a false affidavit to assist his defense in the disciplinary proceeding, and represented to Disciplinary Counsel that his client recalled having taken checks owed to providers. *Id.* at 171-72. Indeed, on appeal, Mr. Boykins did not even contest the two-year suspension, instead focusing on Disciplinary Counsel's request for a fitness requirement. *See* 999 A.2d at 173. None of Mr. Marks's violations rises to that level of culpability.

Mr. Midlen committed negligent misappropriation by continuing to pay himself from an escrow account after his client clearly disputed his fees. 885 A.2d at 1282. He also refused for 18 months to account for his own fees (when they were the subject of a dispute) and he took a position in litigation after his client had clearly instructed him not to do so. *Id.* at 1289-92. The 18-month suspension that he received was, thus, warranted by misconduct that was significantly more serious than Mr. Marks's violations. *See id.* at 1292.

Mr. Ukwu neglected and mishandled five different immigration matters and instructed a client to make false representations to the INS after (at best) failing to determine whether the representations were true. 926 A.2d at 1109, 1112-14. Again, these violations involve significantly more serious culpability than those Mr. Marks committed.

Mr. Vohra committed 13 violations in connection with his clients' immigration matters. 68 A.3d at 768. He had visa applications rejected because he filed them on the wrong form, failed to inform the clients that the filing had been rejected, forged client signatures on ostensibly sworn visa applications, repeatedly lied to the clients about what he had done, and then made multiple misrepresentations to Disciplinary Counsel – blaming his clients for the delays in filing the visa applications and claiming he had committed no ethical violation whatever. *Id.* at 769-71, 782, 785-86. He also had an instance of similar misconduct in a prior disciplinary matter. *Id.* at 785. Nothing Mr. Marks did approaches this level of culpability.

B. Showing of Fitness

As the majority notes (and I agree) there are competing considerations involved in imposing a showing of fitness in this case. *In re Cater*, 887 A.2d 1, 20-21 (D.C. 2005), instructs us to consider the five factors set forth in *In re Roundtree*, 503 A.2d 1215, 1217 (D.C. 1985):

(a) the nature and circumstances of the misconduct for which the attorney was disciplined;

(b) whether the attorney recognizes the seriousness of the misconduct;

(c) the attorney's conduct since discipline was imposed, including the steps taken to remedy past wrongs and prevent future ones;

(d) the attorney's present character; and

(e) the attorney's present qualifications and competence to practice law.

As the majority points out, weighing against requiring a showing is that we have no evidence that Mr. Marks's violations were anything but isolated (factor a). Mr. Marks does acknowledge in some respects the seriousness of the misconduct (factor b) and has personally made payment for the interest and penalties on the taxes, and 10% interest on the $1,750 withdrawal as well as a substantial portion of fees that were paid to his former law firm (factor c). The character witnesses attest to his good character (factor d) and the violations are directed to responsibilities as a trustee and so do not necessarily connote an inability to "practice law" in the sense of representing clients in a legal proceeding (factor e).

The majority finds these considerations to be outweighed, in part, because it concludes that his violations reflect Mr. Marks's "serious misapprehension of his responsibilities as a Trustee and as a member of the Bar," which (to some extent) "he continues to fail to acknowledge," and "[m]ost serious[ly]" by what the majority calls Mr. Marks's "repeated false statements to the Probate Court and dishonest false testimony to the Hearing Committee," that "give[] the majority serious doubt about Respondent's apprehension of his duty of honesty to the tribunal and, consequently, his ability to behave ethically in the future." Report and Recommendation at 151.

Although I agree that Mr. Marks made serious misapprehensions of his responsibility as a Trustee, and to some extent as a member of the Bar, I believe these are being remedied both by the one-year sanction I recommend, and by requiring the continuing legal education.

Requiring a further showing of fitness would not only impose a substantial burden on Mr. Marks. It could in effect add many months to his suspension – which under either the majority's recommendation or mine, is already considerable. *See In re Ukwu*, 926 A.2d at 1119 ("We take judicial notice, however, of the reality that the process of reinstatement based on an attempted showing of fitness may take approximately eighteen months, and that this 'imposes a heavy burden on the disciplined attorney.'").

Moreover, I particularly disagree with the premise that Mr. Marks exhibited the sort of dishonesty that could be "deemed probative" in a negative way of his "attitudes towards society and prospects of rehabilitation." *In re Cleaver-Bascombe*, 892 A.2d 396, 413 n.16 (D.C. 2006). Mr. Marks's testimony and the record as a whole show that Mr. Marks's errors stem from two sources. The first is an angry dispute with Ms. Walker that overtook his common sense. It is impossible to read the emails, letters and briefs he exchanged with Ms. Walker without seeing that both of them were very angry with each other and that both frequently responded to the other with anger, not thoughtfulness. An angry reaction is not an accurate reaction, and in some instances his briefs reflect this. This is not good lawyering or, as the outcome illustrates, good advocacy.

The second source (which to some extent may be related to the anger) is an inability to focus on, address and resolve problems that developed. If something was difficult, painful or annoying to do, Mr. Marks fell into inertia. This is the pattern in all of the events for which we have found him responsible – failing to take

the simple step to send Ms. Walker bank statements in October 2011 and October 2012, giving up on dealing with Pastor Tucker, failing to take action on Ms. Hill's living arrangements, not paying the property taxes, and leaving it to Ms. Walker to resolve the SSI checks in the account for which he was Trustee. It is also reflected in his failure promptly to get to the bottom of the $1,750 he withdrew from the Trust account even when prompted by a Court order. In each instance, Mr. Marks never focused on the problem sufficiently to resolve it, or relied on the first possible answer he had without working it through.

These are significant failings and we have found that he committed serious violations as a result. But anger and inaction are inconsistent with the type of calculation involved in intentional dishonesty. Mr. Marks was not "thoughtful, but manipulative." He was *not* thoughtful, *at all*.

Moreover, a common theme throughout almost all the statements that Disciplinary Counsel alleged and the majority found were "dishonest" is that, although they might be ways of rationalizing events that took place, they are not actually defenses. This is not at all like Ms. Berryman backdating a deposit slip to try to conceal having engaged in self-help to collect a fee, *In re Berryman*, 764 A.2d 760, 761, 764 (D.C. 2000), or Mr. Boykins attempting to defend himself by inducing his client to sign a false affidavit. 999 A.2d at 172.

There are also are several factors that belie the assertion that Mr. Marks engaged in intentional dishonesty. Disciplinary Counsel was, in a number of ways extremely aggressive in charging Mr. Marks with wrongdoing. Disciplinary

Counsel sought disbarment, and charged Mr. Marks not only with dishonesty, but even with having committed a crime. *See* ODC Br. at 2, 51. As noted above, Disciplinary Counsel even misstated evidence in attempting to prove Mr. Marks's dishonesty. Yet, Disciplinary Counsel did not intimate, much less attempt to prove, that there was a single instance in which Mr. Marks was anything but cooperative and forthcoming during the course of Disciplinary Counsel's investigation.

Also, in many respects, Mr. Marks's testimony was forthcoming. He did not evade questions, he answered them. Mr. Marks did not attempt to deny, for example, that it was wrong for him to take $1,750 from the Trust account and to fail to pay property taxes, and that particular statements in his briefs in the Probate Division overstated or misstated facts.

Indeed, all of the other violations we find rely in some measure on facts that he admitted. For example, the *only* evidence that shows that he knew as of August 2012 that Ms. Hill remained in the house (as opposed to living with her fiancé), is his testimony. It is his statement that the withdrawal was in error. He is the one who stated that he washed his hands of the matter of the SSI checks, did not believe it was his responsibility to be concerned about the condition of the house, or that he did not believe Ms. Walker was entitled to an updated accounting. In a number of these instances, we did not agree that he properly understood his responsibilities. But that does not make dishonest his acknowledgement of what he did.

There are also many instances in which Mr. Marks took action that was against his apparent interest and at his personal expense. For example, after he left

his law firm, he sought no compensation for any of his work in connection with the Trust or the hearings. He voluntarily paid the interest and penalties on the late property taxes. *See* DX 124. He agreed to refund the $1,750 with a higher than market 10% rate of interest. He personally paid $17,000 into the Trust to reimburse portions of the legal fees amounts that were, in the first instance, paid to his former law firm. *See id.* Instead of receiving any financial benefit from this representation, he paid money to perform the representation.

Mr. Marks's testimony was not perfect. Before Disciplinary Counsel's cross-examination on September 23, Mr. Marks broke down emotionally upon hearing Disciplinary Counsel's reasoning for initially charging Mr. Marks of committing a crime, in violation of Rule 8.4(b). *See* DX 2 at 12 ¶59(g); Tr. 1014-18 (Disciplinary Counsel asserted that she had alleged this charge because "theft" is, routinely, the "alternative charge" for a misappropriation, but added that there was, by the time of the hearing, no reason to prove that Mr. Marks was (as charged) a thief, because he agreed that "the more specific allegation . . . of misappropriation" applied). And after that exchange, his answers betrayed an obvious annoyance at the questioning.

These different moods are also reflected in some of the communications about the events in the case. His emails with Ms. Walker and, to a lesser extent, Mr. Hertz, and some of the pleadings are intemperate in a way that makes them misleading. Mr. Marks's unwillingness to take simple steps that would have resolved conflicts is even maddening in some respects. But there is a big difference between being intemperate or even maddening, and intentionally dishonest.

Moreover, the conclusion that Mr. Marks was dishonest at our hearing becomes even less plausible in context. Mr. Marks testified on four different days spanning 684 pages of the hearing transcript (Tr. 269-495, 545-634, 666-856, 951-1130). He was not always correct. But he was not evasive. Moreover, not only did his actual conduct (such as taking financial responsibility) attest to the importance of honesty to him, four character witnesses, who collectively have decades of experience with him (not the four days of experience on which we must judge him) also did so and in glowing terms.

In short, Mr. Marks should not be required to prove his integrity. Disciplinary Counsel was required to prove his lack of integrity by clear and convincing evidence and did not.

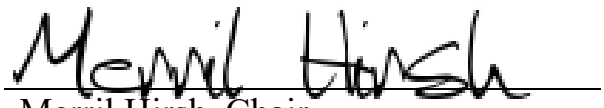
III. Conclusion

All of the members of the Committee have worked extremely hard to analyze a complex case with quite a number of issues that, even with the benefit of hindsight, are not always easy to assess. My greatest difference with the majority is that fundamentally, I do not believe that Disciplinary Counsel proved that Mr. Marks intended to be dishonest.

This does not mean that Mr. Marks did not engage in serious wrongdoing. Indeed, although I differ with my colleagues over the specifics, all of us recommend a severe sanction.

But it does mean that his violations, though severe, fall into a very different category from forging documents, back-dating bank statements, inducing clients to

lie to government officials, or absconding with money that is never repaid. I do believe that Mr. Marks can be a productive attorney, who will take this experience to heart, and hope that he will be so after serving his suspension and completing the CLE courses we recommend.



Merril Hirsh, Chair