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:	:	
	:	
JEFFREY M. SHERMAN,	:	
	:	
Respondent.	:	**Board Docket No. 19-BD-008**
	:	**Disciplinary Docket No. 2017-D336**
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 348896)	:	

REPORT AND RECOMMENDATION OF THE AD HOC HEARING COMMITTEE

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

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I. INTRODUCTION AND SUMMARY

This matter arises out of Respondent's representation of five clients in Chapter 11 bankruptcy cases between 2013 and 2017 in the federal Bankruptcy Courts of Maryland, Virginia and the District of Columbia. Respondent's handling of the fees in the two Maryland cases came to the attention of the Office of the United States Trustee for the United States Bankruptcy Court for the District of Maryland, Greenbelt Division (Maryland OUST) in 2014 and 2017, and his handling of fees in the two District of Columbia cases and one Virginia case subsequently came to the attention of the Office of the United States Trustee for the United States Bankruptcy Courts for the Eastern District of Virginia, Alexandria Division (Virginia OUST) in 2017.[1]

[1] District of Columbia bankruptcy matters are referred to a Virginia OUST as no OUST exists in the District of Columbia. *See* https://www.justice.gov/ust-regions-r04/region-4-eastern-district-virginia-alexandria-division-and-district-columbia (Department of Justice, U.S. Trustee Program

Relying on District of Columbia Rule 8.5(b) (Choice of Law), the Specification of Charges alleges violations of the Maryland Rules of Professional Conduct (Counts I and III), the District of Columbia Rules of Professional Conduct (Counts II and V) and the Virginia Rules of Professional Conduct (Count IV). Disciplinary Counsel charges that:

> Respondent violated Maryland Rule 19-301.5(a), District of Columbia Rule 1.5(a) or Virginia Rule 1.5(a) in the course of each of the five representations because paying client funds to himself without authorization of the Bankruptcy Courts was illegal and therefore constituted an unreasonable fee;
>
> Respondent violated Maryland Rule 19-308.4(c), District of Columbia Rule 8.4(c) or Virginia Rule 8.4(c) in the course of each of the five representations by engaging in conduct involving dishonesty, deceit or misrepresentation;
>
> Respondent violated District of Columbia Rule 1.15(a) or Maryland Rule 19-301.15(a) (Commingling) in the course of three of the representations by depositing entrusted funds into his and his wife's personal checking account which also contained their personal funds (Count II - *Siler*, Count III – *G. Boones*, and Count V- *Bello*);
>
> Respondent violated Maryland Rule 19-301.15(a), District of Columbia Rule 1.15(a) or Virginia Rule 1.15(b)(3) and 1.15(c) (Record-keeping) in the course of each of the five representations by failing to maintain complete records of the entrusted funds he was holding;
>
> Respondent violated Maryland Rule 19-301.15(a), District of Columbia Rule 1.15(a) or Virginia Rule 1.15(b)(5) (Safeguarding of Entrusted Funds) in the course of each of the five representations by intentionally or recklessly misappropriating entrusted funds; and
>
> Respondent violated Maryland Rule 19-301.15(c) or District of Columbia Rule 1.15(b) in four of the representations by failing to

(Updated March 16, 2020)); *see also* Tr. 25 (Vetter).

> deposit entrusted funds into a trust account at an approved depository (Count I - *Fields*), Count II - *Siler*), Count III – *G. Boones* and Count V - *Bello*).

Specification ¶¶ 27, 45, 56, 67, 83. For the reasons stated in Section IV, *infra*, we recommend that the Board find that Disciplinary Counsel has proven all of its charges by clear and convincing evidence.

Disciplinary Counsel recommends disbarment. Respondent recommends a one month-suspension for his dishonesty (conceded in the *Fields* matter), commingling of entrusted and personal funds in three matters, failing to deposit unearned fees into a trust account in four matters, and recordkeeping violations in five matters. R. Sanctions Br. at 11. If the Committee concludes, in addition, that Respondent negligently misappropriated funds, Respondent recommends a six-month suspension. *Id*. at 11-12. For the reasons stated in Section V, *infra*, we recommend that Respondent be disbarred.[2]

II. PROCEDURAL HISTORY

Disciplinary Counsel filed a Petition and Specification of Charges that was subsequently approved and filed with the Board on Professional Responsibility on January 16, 2019. DX B.[3] Respondent filed his Answer on February 21, 2019. DX D.

[2] As detailed in Section II, *infra*, Respondent initially asserted but then withdrew a defense under *In re Kersey*, 520 A.2d 321 (D.C. 1987), prior to the conclusion of the sanctions phase. Because Respondent has withdrawn his *Kersey* defense from our consideration and Disciplinary Counsel did not have a full opportunity to respond at the hearing, we do not reach that issue.

[3] "DX" refers to Disciplinary Counsel's exhibits. The parties agree that the following were admitted into evidence: DX A-D and DX 1-60, 61 (only pgs. 66-69 and 86-114), 62 and 67. "RX" refers to Respondent's exhibits. The parties agree that the following were admitted into evidence: RX 1-5, 8-11, 14, 16 and 16A. "Tr." refers to the transcript of the May 6 and 7, and July 15

Along with his Answer, Respondent filed with the Board a Notice of Intent to Raise Disability in Mitigation (which Respondent elected to disclose to the Hearing Committee prior to the sanctions phase, as reported hereinafter).

The parties filed their Witness Lists on April 22, 2019. Seven days later, on April 29, 2019, Respondent filed his Motion to Continue Merits Hearing. In that Motion, he disclosed to the Ad Hoc Hearing Committee that "Respondent intends to raise a *Kersey* defense in mitigation of sanction, as is evident from the designations on his witness list."[4] Disciplinary Counsel filed its Opposition to Respondent's Motion to Continue Merits Hearing on April 30, 2019. Following extensive arguments in a telephonic conference, *see* May 1, 2019 Prehearing Tr. at 2-22, the Hearing Committee denied Respondent's request that the merits phase of the hearing be continued. *Id*. at 23, 34-47.

Evidentiary hearings on the charges in this matter were thereupon conducted on May 6 and May 7, 2019, as previously scheduled, before the Ad Hoc Hearing Committee consisting of Warren Anthony Fitch, Esquire, Chair; Judy R. Franz, Public Member; and Teresa N. Taylor, Attorney Member (the "Hearing Committee"). Disciplinary Counsel was represented at the hearing by Assistant Disciplinary Counsel Jelani Lowery, Esquire. Respondent was present and

(redacted) and 16, 2019 hearing.

[4] In fact, the Hearing Committee saw nothing in Respondent's Witness List that indicated even the possibility of a *Kersey* defense, and Disciplinary Counsel's April 22, 2019 Witness List properly did not include Dr. Philip J. Candilis, whom it eventually designated as its expert witness with respect to *Kersey* issues.

represented by Daniel Schumack, Esquire. At the end of the hearing on May 7, the Hearing Committee made a preliminary non-binding determination that at least one rule violation had been proven by Disciplinary Counsel. Tr. 581-82; *see* Board Rule 11.11.

Following another telephonic conference on May 17, 2019, the Hearing Committee, in its Order of May 20, 2019, ordered that the sanctions phrase of the hearing would begin on July 15-16, 2019 to receive the *Kersey*-related evidence.[5] Respondent presented all of his evidence on his *Kersey* defense on July 15, 2019 to two members of the Hearing Committee, the third member having become unavailable for the July 15-16, 2019 hearings. When the hearing adjourned on July 15, Disciplinary Counsel had not completed its cross-examination of one of Respondent's *Kersey* witnesses. The July 16, 2019 hearing was then continued because of the unavailability of one of the remaining Hearing Committee members due to a medical emergency.

By Order of September 5, 2019, the *Kersey* phase of the hearing was re-scheduled for October 3-4, 2019, and the parties were also directed to file statements either consenting or objecting to further participation by the member who had missed the July 15, 2019 hearing. In a filing dated September 13, 2019, Respondent objected

[5] The May 20, 2019 Order also established a bifurcated briefing schedule. On May 23, 2019, Respondent filed a Consent Motion to Continue Merits Hearing and to Reconsider May 20 Scheduling Order. That motion was denied by Order of May 24, 2019. The parties filed their principal briefs on the first phase of the evidence as scheduled in the May 20, 2019 Order. *See* ODC Merits Br.; R. Merits Br. In its Order of July 26, 2019, the Hearing Committee subsequently extended the deadline for Disciplinary Counsel's reply brief for the first phase. *See* ODC Reply Merits Br.

to further participation by that member. In its Order of September 20, 2019, it was ordered that the disciplinary proceedings would proceed with a quorum of two Hearing Committee members pursuant to Board Rule 7.12 and the dates for the revised *Kersey* briefing were scheduled.

On October 2, 2019, the parties informally notified the Hearing Committee, through the Office of the Executive Attorney, that further evidentiary hearings in this matter would not be necessary; the parties also requested a status conference for the following morning, when the evidentiary hearing had been scheduled to recommence. In that conference, Respondent's counsel stated that "Mr. Sherman is withdrawing his *Kersey* defense [on] sanction [B]oth [counsel] have agreed that we would rest today by telephone without new evidence." October 3, 2019 Status Conference Tr. at 65.[6] A revised briefing schedule on sanction recommendations was thereupon adopted at the conference. *Id*. at 74-76.

After the October 3, 2019 conference, Disciplinary Counsel filed a Consent Motion to strike: 1) the entire testimony of a witness who testified during the interrupted sanctions phase but whom Disciplinary Counsel did not have an opportunity to cross-examine, and 2) Respondent's *Kersey*-related exhibits, RX 17, 17 A and B, and 18. The Hearing Committee granted this motion and confirmed the proceedings of the October 3, 2019 conference in an October 9, 2019 Order.

[6] As a result, Disciplinary Counsel's previously filed *Kersey*-related exhibits, DX 63 (CV of Dr. Philip J. Candilis) and 64 (Forensic Medical Evaluation of Respondent by Dr. Candilis), were never moved into evidence, and Disciplinary Counsel did not put on its witnesses to contest the *Kersey* claim.

III. FINDINGS OF FACT[7]

RESPONDENT'S BACKGROUND

1. Respondent was born in 1957. His long history of serious medical and related issues began at the age of 14, in 1971, when he became violently ill with gastroenteritis and in the course of which x-rays revealed that both of his kidneys were scarred and had not developed properly. Tr. 376-77 (Respondent). In 1972 he underwent a bilateral ureteroplasty to shorten both ureters and re-implant them in the bladder. Thereafter, his kidneys could not develop normally and began to deteriorate. Tr. 377 (Respondent). In addition, the inability of the impaired kidneys to produce certain hormones affected his blood pressure. Tr. 378 (Respondent).

2. Respondent was admitted to the Bar of the District of Columbia Court of Appeals on June 19, 1981 and was assigned Bar number 348896. DX A; DX D at ¶1. Respondent's practice has been focused on bankruptcy law throughout his professional career and, prior to the events at issue in this matter, he had practiced almost entirely with relatively large law firms in which he was supported by other lawyers and paraprofessionals. Tr. 116, 350-72, 424 (Respondent); PFF[8] ¶89

[7] The Specification consists of five counts, each corresponding to one of the five bankruptcy cases. Because of the possible interplay of developments in Respondent's personal life during the period in question and the steps he took in the five representations, we set forth our findings of fact in roughly chronological order. Like the parties, we organize our legal analysis in Section IV around the alleged Rule violations that Disciplinary Counsel has charged and then address, in Section V, the mitigation contentions that Respondent has advanced.

[8] Where the parties have both agreed on a Proposed Factual Finding in their post-hearing briefing, it is noted by "PFF ¶ (undisputed)." Disciplinary Counsel submitted Proposed Factual Findings ¶¶ 1-88 (ODC Merits Br.) and Respondent submitted Proposed Factual Findings ¶¶ 89-98 (R. Merits Br.). *See also* ODC Merits Reply Br. (Disciplinary Counsel agreeing with certain Proposed Factual Findings of Respondent or agreeing Respondent's clarifications of Disciplinary Counsel's

(undisputed). Respondent is also licensed in Virginia. DX A; DX B at ¶1; DX D at ¶1 (admitted). He is admitted to practice in the Bankruptcy and U.S District Courts for the District of Maryland. DX 1 at 2.

3. Respondent was diagnosed with end-stage renal disease in 1994. Tr. 379. This was followed by restless leg syndrome, pruritus skin disease and a general physical deterioration over the following years. Tr. 379-80 (Respondent). Respondent had slipped disc surgery in 1995. Tr. 385 (Respondent). He also had an onset of gout in this period. Tr. 388-90 (Respondent). Following five years on intermittent dialysis, as well as treatment for neurological effects of the kidney failure, Respondent had a kidney transplant in August 1999. Tr. 379 (Respondent). In 2012, Respondent had surgery for a pinched nerve, and his nephrologist prescribed the pain killer Tramadol. Tr. 385-87 (Respondent).

DEVELOPMENTS IN 2013-2014, INCLUDING RESPONDENT'S REPRESENTATION OF DANIEL FIELDS, JR.

4. Respondent left his relatively large Bethesda, MD law firm on June 30, 2013 and commenced a solo practice out of his home. Tr. 127, 368-69, 424 (Respondent). Respondent did not establish a trust or escrow account upon commencing his new practice or at any time thereafter. DX 2 at 3; Tr. 456-57 (Respondent); PFF ¶5 (undisputed). Before starting his solo practice, Respondent had no prior experience managing his own calendar, managing billing or bookkeeping, or managing banking or trust accounts. Tr. 372-73, 424 (Respondent);

Proposed Factual Findings).

PFF ¶89 (undisputed).

5. On October 9, 2013, Respondent filed a Chapter 11 Voluntary Petition on behalf of Daniel Fields, Jr., in the U.S. Bankruptcy Court for the District of Maryland. DX 3; Tr. 120 (Respondent). That same day, Respondent filed a Disclosure of Compensation, and the next day a slightly amended Disclosure of Compensation. DX 4; Tr. 26-28 (Vetter); Tr. 120 (Respondent). Respondent stated in each disclosure that he had agreed to accept $5,000 for legal services but had not received any payment before filing the disclosure statement. *Id*.; PFF ¶7 (undisputed). The Disclosure included Respondent's certification that any compensation for legal services would be "subject to Court approval on notice and opportunity to object." DX 4.

6. On October 11, 2013, Respondent filed his "Application for Employment of the Law Offices of Jeffrey M. Sherman as Debtor's Counsel," in which he verified (DX 5 at 4): "Sherman shall apply to the Court periodically for approval and award of compensation and reimbursement of expenses, on notice and with opportunity for parties in interest to object." DX 5 at 1-2; *see also* Tr. 33-34 (Vetter); Tr. 117-18, 121 (Respondent); PFF ¶8 (undisputed). Respondent's application for employment additionally verified that he had requested, and his client had agreed to, a "post-petition retainer deposit of $5,000 [that] shall be held in trust by Sherman, and shall not be drawn upon or taken into income by Sherman until the Court has approved the fees to be paid to Sherman and the expenses of Sherman to be reimbursed, on proper application, with notice and an opportunity for parties in

interest to be heard." DX 5 at 3.

7. Mr. Fields paid Respondent $6,500 by check dated October 11, 2013, ($5,000 for legal fees and $1,500 for filing fees). DX 6; Tr. 121-22 (Respondent). On October 15, 2013, Respondent deposited Mr. Fields' check into his and his wife's Wells Fargo Money Market Account, ending in #5318. DX 7 at 2 (joint account held by Jeffrey M. Sherman and Mary Colleen Sherman); DX 16 at 3; Tr. 125-26 (Respondent); Tr. 270-71 (O'Connell). Respondent did not file the required supplemental disclosure to inform the court that he had received this money then, nor within the next three and a half years. DX 1 at 2-3; DX 3; DX 15; Tr. 47 (Vetter); Tr. 126 (Respondent); PFF ¶9 (undisputed). Although the retainer included advanced fees and Respondent additionally promised the court that he would hold the $5,000 in trust in his Application for Employment, Respondent did not deposit the entrusted funds into a trust account.[9] *See* Tr. 196 (Respondent describing his handling of the retainer in *Fields*); *see also* PFF ¶37 (undisputed) ("advanced fees").

8. On October 29, 2013, the court granted Respondent's application for employment and ordered that "the compensation, if any, to be paid to the Attorney shall remain subject to review and allowance of this Court, upon periodic application, with notice and an opportunity for parties in interest to object." DX 8 at 1; Tr. 130-31 (Respondent); PFF ¶10 (undisputed).

9. On June 9, 2014, Respondent received a second payment of $5,000

[9] Respondent refers to his bankruptcy clients' payments of unearned advance fees as "pre payments." *See* R. Merits Br. at 15, 23, 27 n.14.

from Mr. Fields. Respondent deposited these funds into his and his wife's Wells Fargo Essential Checking account, ending in #6138. DX 9 at 2, 5, 8; DX 61 at 94; Tr. 38-39, 64-65 (Vetter); Tr. 131 (Respondent); PFF ¶11 (undisputed).

10. The second $5,000 was intended originally to fund the purchase of a creditor's claim, but by August 8, 2014 Respondent had discovered that the claim could not be bought. Mr. Fields and Respondent agreed that Respondent would keep the money as attorney's fees. Tr. 132-35 (Respondent). Respondent did not file the required supplemental disclosure to inform the court that he had received this money then, nor within the next two and a half years. DX 1 at 3; DX 3; DX 15; Tr. 47 (Vetter); Tr. 135-37; PFF ¶12 (undisputed). Respondent knew that he was not entitled to take the second $5,000 payment, even if earned, without the Bankruptcy Court's approval. *See* Tr. 370 ("In a Chapter 11 case, you could work for a year or two years and not get paid one red cent"); *see also supra* FF 6 (Application for Employment in *Fields*); DX D at ¶5 (admitting "real-time knowledge of rule requiring court approval before disbursing compensation in Chapter 11 cases").

11. Respondent never applied for compensation in the Fields matter. Tr. 136-37 (Respondent); PFF ¶13 (undisputed).

12. On September 11, 2014, the Fields matter was converted from a Chapter 11 to a Chapter 7 case. DX 3 at 1, 16; PFF ¶14 (undisputed).

13. A Chapter 7 trustee was thereupon appointed, and the trustee discovered that Respondent had not disclosed the two payments received from Mr. Fields. Tr. 23-24 (Vetter).

14. The Chapter 7 trustee alerted the Greenbelt, Maryland Office of the United States Trustee for the United States District Court of the District of Maryland ("Maryland OUST"), which initiated an investigation. Tr. 31-32 (Vetter); PFF ¶16 (undisputed).

15. In 2014, Respondent's implanted kidney began to fail. Tr. 412 (Respondent).

16. Beginning in 2014, Respondent began experiencing the recurrence of gout approximately every six weeks, which caused intense pain for approximately 36 hours and left him physically incapacitated. Tr. 388-95 (Respondent).

17. In 2014, Respondent was suspended from the Virginia Bar for failure to report the required number of CLE credits. Tr. 439 (Respondent).

DEVELOPMENTS IN 2015-2016, INCLUDING RESPONDENT'S REPRESENTATION OF JOAQUIN B. SILER AND PANCHITA BELLO

18. In February or March of 2015, Respondent was hospitalized for several days with severe dehydration. Tr. 407-08 (Respondent). Respondent also became severely diabetic in 2015, losing 25 pounds over a six-month period, during which he had episodes of severe hypoglycemia which caused him to lose all sense of his location and activities and physically shake and babble. Tr. 397-400 (Respondent); *see also* Tr. 654 (Dr. Gonin).

Commencement of and Developments in Mr. Siler's Bankruptcy Case From April to August 2015

19. By check dated April 30, 2015, Mr. Joaquin B. Siler paid Respondent $7,500 to represent him in petitioning for Chapter 11 bankruptcy protection. DX 25

at 1; Tr. 202 (Respondent); Tr. 278 (O'Connell). The $7,500 check included $1,717 in filing fees and $5,783 in legal fees. Tr. 202 (Respondent); DX D at ¶28 (admitted); PFF ¶44 (undisputed). *Compare* DX 24, *with* DX 25. The "pre-payment" represented unearned advance fees. Tr. 202-05 (Respondent describing his handling of the retainer in *Siler*); *see also* PFF ¶37 (undisputed) ("advanced fees").

20. On May 1, 2015, Respondent filed a Chapter 11 Voluntary Petition on behalf of Mr. Siler in the U.S. Bankruptcy Court for the District of Columbia. DX 23 at 1; Tr. 202 (Respondent). That same day, Respondent filed a Disclosure of Compensation, stating that he had agreed to accept and already had received $5,783 for legal services. DX 24; Tr. 202-03 (Respondent); PFF ¶45 (undisputed). The Disclosure included Respondent's certification that any compensation for legal services or reimbursement of expenses would be "subject to Court approval on notice and opportunity to object." DX 24.

21. On May 5, 2015, Respondent deposited the $7,500 check into his #5318 account. DX 25 at 2; DX D at ¶30 (admitted); Tr. 278 (O'Connell); PFF ¶46 (undisputed). The account held Respondent's personal funds at the time. R. Merits Brief at 23-24 (conceding the account held personal funds at the time); *see also* DX 25 at 2.

22. On May 7, 2015, Respondent filed an Application to Employ Law Offices of Jeffrey M. Sherman in which he stated, "Sherman shall apply to the Court periodically for approval and award of compensation and reimbursement of expenses, on notice and with opportunity for parties in interest to object." DX 26;

Tr. 203 (Respondent); PFF ¶47 (undisputed).

23. On May 19, 2015, Respondent filed an "Application to Employ Berman, Sobin, Gross, Feldman, & Darby LLP as Administrative Support to the Law Offices of Jeffrey M. Sherman" which stated, *inter alia*, that "BSGFD" would "apply to the Court periodically for approval and award of compensation and reimbursement of expenses, on notice and with opportunity for parties in interest to object." DX 27; Tr. 203-04 (Respondent); PFF ¶48 (undisputed).

24. On July 9, 2015, Respondent filed an "Application for Approval of Compensation for [BGSD]," seeking $1,475 in fees for administrative support and $31.37 in expenses incurred by BGSD, as well as a Notice of Opportunity to Object that gave interested parties until July 30, 2015 to file objections. DX 23 at 6; DX 28; Tr. 204 (Respondent). The court granted that application for compensation on August 4, 2015. DX 23 at 7; Tr. 204 (Respondent); PFF ¶49 (undisputed).

25. Despite having filed an application for compensation for BGSD a week earlier, on July 16, 2015, Respondent electronically transferred $4,250 out of the #5318 joint money market account and into the #6138 joint checking account, labeling the transaction "Siler Fees," without filing an application for compensation for his own compensation. *See* DX 23, DX 29 at 1; DX D at ¶ 35 (admitted); Tr. 279-80 (O'Connell); Tr. 208 (Respondent). Respondent testified that after transferring the "Siler fees" to his #6138 account, he was "sure" he spent it. Tr. 204-05 (Respondent).

26. The following day, on July 17, 2015, the $4,250 transfer of "Siler Fees"

along with the deposit of Respondent's wife's paycheck of $2,336.91 raised the existing balance of the #6138 joint checking account to an amount that allowed Respondent to pay his wife's $13,764.31 American Express bill. DX 30 at 2; DX D at ¶36 (admitted); Tr. 280 (O'Connell); PFF ¶51 (undisputed).

27. On July 20, 2015 Respondent made another $800 payment from his #6138 joint checking account, lowering the balance in the account to $840.27. DX 30 at 2; DX D at ¶37 (admitted); PFF ¶52 (undisputed).

28. On July 24, 2015, Respondent transferred $2,500 from the #5318 joint money market account into the #6138 joint checking account, again labeling the transaction "Siler Fees." DX 29 at 2; DX D at ¶38 (admitted); Tr. 279-80 (O'Connell). At that time, Respondent still had not applied for or received approval from the court to take legal fees. DX 23; DX D at ¶38 (admitted); Tr. 208 (Respondent); PFF ¶53 (undisputed).

29. By August 26, 2015, the balance in Respondent's #6138 joint checking account had fallen to $415.20. DX 30 at 7; DX D at ¶39 (admitted); PFF ¶54 (undisputed).

30. In February 2016, Respondent was hospitalized with a severe case of flu along with a recurrence of dehydration. Tr. 408-09 (Respondent)

Commencement of and Developments in Ms. Bello's Case in 2016

31. On February 26, 2016, Respondent received $1,717.00 from Ms. Panchita Bello as payment for the filing fees related to a Chapter 11 bankruptcy representation. DX 51 at 1; Tr. 225 (Respondent); Tr. 287 (O'Connell). Respondent

did not deposit the advanced payment of filing fees into a trust account; instead he deposited the money into his #6138 joint checking account. DX 51 at 3; Tr. 225 (Respondent); Tr. 287 (O'Connell). This account also held Respondent's personal funds at that time. R. Merits Brief at 23-24 (admitting the account held personal funds); DX 51 at 3.

32. On or about March 1, 2016, Respondent received and negotiated an additional $7,500 check from Ms. Bello as payment for legal fees. DX 50; DX 52 at 2; Tr. 226 (Respondent); Tr. 288 (O'Connell). The "pre-payment" represented unearned advance fees. Tr. 232-33 (Respondent's handling of the retainer in *Bello*); *see also* PFF ¶37 (undisputed) ("advanced fees"). Respondent testified that he believed the $7,500 payment from Ms. Bello went into his #6138 account. Tr. 226 (Respondent). Respondent did not review any of his records before testifying on May 6, 2019 in this matter. Tr. 227 (Respondent). The bank records, however, show Respondent did not deposit the money into the #6138 account or *any* of the other three accounts Disciplinary Counsel investigated. DX 58, 59, 60; Tr. 288-90 (O'Connell).

33. On March 20, 2016, Respondent filed a Chapter 11 Bankruptcy petition for Ms. Bello in the United States Bankruptcy Court for the District of the District of Columbia. DX 49 at 1; Tr. 227 (Respondent). Respondent also filed a "Disclosure of Compensation of Attorney for Debtors" in which he stated that he had agreed to accept and had already received $7,500 for legal services. DX 50; Tr. 224-25 (Respondent); PFF ¶79 (undisputed). The Disclosure included Respondent's

certification that his compensation and reimbursement of incurred expenses would be "subject to Court approval on notice and opportunity to object." DX 50.

34. On May 11, 2016, Respondent filed an "Application for Employment of The Law Offices of Jeffrey M. Sherman as Debtor's Counsel," in which he stated, "Sherman shall apply to the Court periodically for approval and award of compensation and reimbursement of expenses, on notice and with opportunity for parties in interest to object." DX 53 at 2; PFF ¶80 (undisputed).

35. On June 2, 2016, the Court granted Respondent's application for employment and ordered "the compensation, if any, to be paid to the Attorney shall remain subject to review and allowance of this Court, upon periodic application, with notice and an opportunity for parties in interest to object." DX 54; PFF ¶81 (undisputed).

36. Thereafter, Respondent did not file an Application for Compensation for over a year. DX 49 at 5-15; Tr. 227-28 (Respondent); PFF ¶82 (undisputed).

Further Developments in Mr. Siler's Bankruptcy Case in December 2016

37. On December 5, 2016, Mr. Siler transferred $11,000 labeled "Legal Fees Siler," into Respondent's #6138 joint checking account. DX 31 at 1, 3; DX D at ¶40 (admitted); Tr. 205 (Respondent); Tr. 281-82 (O'Connell). Prior to the transfer, the account held $1,838.11. DX 31 at 3 (balance on December 3, 2016). This account held Respondent's personal funds at that time. DX 31 at 3-4; DX D at ¶40 (admitted); Tr. 206 (Respondent); *see also* R. Merits Brief at 23-24. Respondent still had not applied for or received approval from the Court to take legal fees. DX

23; DX D at ¶40 (admitted); Tr. 208 (Respondent); PFF ¶55 (undisputed). Respondent knew he was not entitled to take the second payment of $11,000, even if earned, without the Bankruptcy Court's approval. *See* Tr. 370 (Respondent); FF 22 (Application for Employment in *Siler*); DX D at ¶5 (admitting "real-time knowledge of rule requiring court approval before disbursing compensation in Chapter 11 cases").

38. Respondent did not disclose the additional $11,000 payment to the Court. DX 23; DX 31 at 7-18; DX D at ¶41 (admitted); Tr. 206 (Respondent); PFF ¶56 (undisputed).

39. By December 7, 2016, the balance in Respondent's #6138 joint account had fallen to $2,598.90 after paying another American Express bill. DX 31 at 3; DX D at ¶42 (admitted); Tr. 207-08 (Respondent); Tr. 282 (O'Connell); PFF ¶57 (undisputed). The $11,000 transfer was depleted in two days by Respondent's payments of his wife's American Express bills. *See* Tr. 282 (O'Connell); Tr. 208 (Respondent admitting how he spent the $11,000 payment from Siler); DX 31 at 3.

40. At some point in 2016, Respondent had a tumor removed from one of his four parathyroid glands. Tr. 396 (Respondent); *see also* Tr. 653 (Dr. Gonin).

DEVELOPMENTS IN 2017 AND 2018

41. In January 2017 Respondent was hospitalized with another severe case of flu. Tr. 409 (Respondent).

42. In early or mid-2017, Respondent's new endocrinologist prescribed a different, injected form of insulin. Respondent had a positive response to this change in medication. Tr. 403-04 (Respondent).

Further Developments in and Resolution of the *Fields* Bankruptcy Case

43. On January 19, 2017, Maryland OUST filed a motion alleging that Respondent had not disclosed receipt of the $11,500 in fees he had received from Mr. Fields. PFF ¶17 (undisputed). Maryland OUST also asked the court to order disgorgement. DX 10 at 3; Tr. 33 (Vetter); PFF ¶17 (undisputed). Respondent was hospitalized at the time his response to the motion was due. Tr. 91-93 (Respondent); DX 13 at ¶¶ 3-4.

44. The court granted the trustee's motion by default on February 8, 2017 and ordered Respondent to file a supplemental disclosure statement and disgorge all fees. DX 11; Tr. 48-49 (Vetter); PFF ¶18 (undisputed).

45. On February 23, 2017, Respondent filed a Supplement to Disclosure of Compensation of Attorney for Debtor, in which he disclosed for the first time that he had received a total of $10,000 in payments from Mr. Fields. DX 12; Tr. 47 (Vetter); Tr. 139 (Respondent). That same day, Respondent moved to vacate the order requiring him to disgorge the fees. DX 13; Tr. 50 (Vetter); Tr. 139 (Respondent).

46. On March 31, 2017, the Court vacated the February 8, 2017 order. DX 14; Tr. 50 (Vetter); Tr. 139 (Respondent); PFF ¶20 (undisputed).

47. Gerard Vetter, Esquire, became manager of Maryland OUST's Greenbelt, Maryland field office in mid-April 2017 and remained in that position through the date of the disciplinary hearing in this matter. Tr. 20-21 (Vetter). When he began, Leander Barnhill, Esquire, an attorney with Maryland OUST, was working

with Respondent to resolve the investigation. *See* Tr. 47-48 (Vetter); PFF ¶21 (undisputed).

48. Throughout the investigation, Mr. Barnhill exchanged emails with Respondent and shared those emails with Mr. Vetter. Tr. 51, 110-11 (Vetter); PFF ¶22 (undisputed).

49. In an email to Mr. Barnhill dated April 26, 2017, Respondent offered to make the disgorgement of $1,500 and forego any other payment from Mr. Fields or the bankruptcy estate. DX 15; Tr. 51 (Vetter); Tr. 140-41 (Respondent).

50. Respondent falsely told Maryland OUST that he had kept at least the initial $5,000 he received from Mr. Fields in a trust account. Tr. 51-54 (Vetter). On May 4, 2017, Respondent sent Mr. Barnhill a proposed "Motion for Authorization to Apply Retainer," in which Respondent falsely stated that the initial retainer of $5,000 that he had received on October 11, 2013, "was and has been held ever since by [Respondent], although the account into which the Retainer Check was deposited was the subject of countless other transactions for other clients in the more than three and a half years since the original deposit." DX 16 at 1, 3; Tr. 53-54 (Vetter); Tr. 141-42 (Respondent);[10] PFF ¶24 (undisputed).

51. Between October 11, 2013, and May 4, 2017, the balance in Respondent's #5318 joint money market account, in which he had deposited Mr. Fields' initial payment, fell below $5,000 on numerous occasions. DX 17; Tr. 272-

[10] As to the other $5,000 Mr. Fields had agreed to allocate toward fees, Respondent acknowledged failing to file an appropriate disclosure and proposed that he disgorge $1,500 of the amount. DX 16 at 4, 6.

73 (O'Connell); PFF ¶25 (undisputed).

52. On May 10, 2017, Respondent sent an email to Maryland OUST with two attachments to support his claim that he had not spent the funds Mr. Fields had paid him. DX 61 at 66; Tr. 60 (Vetter). He submitted one page of a bank statement from his #5318 account showing a deposit on October 15, 2013, that included the first $6,500 Mr. Fields paid. DX 61 at 66, 87; Tr. 60-61 (Vetter). Respondent also submitted an account summary showing the balances for both the #5318 and #6138 accounts, as of May 10, 2017. DX 61 at 89; Tr. 60-61 (Vetter). Maryland OUST then requested that Respondent provide complete statements. Tr. 62 (Vetter); PFF ¶26 (undisputed).

53. On May 16, 2017, Respondent met with Mr. Vetter and told him that he used the #5318 joint money market account as a trust account. Tr. 63 (Vetter). Respondent claimed that he had transferred the initial $5,000 payment out of the #5318 account and into the #6138 account in February 2014 because the bank had required him to convert the money market account from a savings account to a checking account. DX 1 at 4; DX 61; Tr. 63 (Vetter); Tr. 160-65 (Respondent). In fact, the #5318 account remained a money market savings account through at least May 31, 2015, and Respondent continued to deposit client funds into that account. DX 25 at 2.

54. Respondent falsely told Mr. Vetter that after the February 2014 transfer the $5,000 had always remained in the #6138 joint checking account. Tr. 63 (Vetter). Between February 2014, and May 16, 2017, the balance in Respondent's #6138 joint

checking account fell below $5,000 on numerous occasions. DX 17A; Tr. 274-75 (O'Connell); PFF ¶28 (undisputed).

55. Maryland OUST subsequently requested that Respondent provide additional documents to support his claims about how he handled the Fields money. Tr. 62-64 (Vetter); PFF ¶29 (undisputed).

56. On June 8, 2017, Respondent sent an email to Maryland OUST with two more attachments showing that he had transferred the first $6,500 from the #5318 account into the #6138 account (as part of a larger transfer) on February 20, 2014 and that he had deposited the second payment of $5,000 into the #6138 account on June 9, 2014. DX 61 at 91, 94, 96; Tr. 64-66 (Vetter); Tr. 166-67 (Respondent). Respondent implied that the balance in his #6138 account remained approximately the same as the balance on May 10, 2017, when he first provided bank records to Maryland OUST. Tr. 179-80 (Respondent). But when Respondent wrote that email on June 8, 2017, the balance in his #6138 account was $2,382.60. DX 34 at 18; Tr. 180 (Respondent). Respondent also falsely referred to his #6138 account as a trust account. DX 61 at 91; Tr. 182 (Respondent); PFF ¶30 (undisputed).

57. Respondent told Maryland OUST that he had redacted transactions pertaining to other clients from the #6138 account document. DX 61 at 91. Respondent also had redacted client related transactions, personal transactions and his wife's name, which appeared on the line under his name. DX 61 at 94; Tr. 66 (Vetter); Tr. 168-70 (Respondent).

58. After the June 8, 2017 email, Maryland OUST asked about the redacted

line under Respondent's name. Tr. 66 (Vetter). Maryland OUST wanted to know whether it contained some reference to the account being a trust account rather than a personal checking account. *Id.*; PFF ¶32 (undisputed).

59. Respondent thereupon provided Maryland OUST with full statements for February 2014 of the #5318 account and June 2014 of the #6138 account. DX 61 at 98, 100-05, 107-09; Tr. 67-68 (Vetter); Tr. 184 (Respondent). Again, however, Respondent redacted all the personal checking transactions and his wife's name, which appeared on the line under his name and revealed that it was joint account. DX 61 at 100-05; Tr. 68-69 (Vetter); Tr. 185-86 (Respondent). Maryland OUST continued to request information about the type of account and the redacted second line under Respondent's name "because, again, this could be a personal account. It's not necessarily a business account. It's not necessarily a trust account." Tr. 69-70 (Vetter); PFF ¶33 (undisputed).

60. On June 27, 2017, the balance in Respondent's #6138 account was $1,299.86. DX 34 at 24; DX 55 at 3; Tr. 192-93, 232 (Respondent). On June 28, 2017, Respondent deposited $13,000 into the #6138 account and on June 29, 2017 Respondent's wife's paycheck of $2,386.98 was also deposited into the account. *Id.*; PFF ¶34 (undisputed).

61. Respondent then sent an email to Maryland OUST with three attachments, including an updated account summary, dated June 29, 2017, showing a balance of $16,686.84. DX 61 at 111, 114; Tr. 70 (Vetter); Tr. 188 (Respondent). Respondent falsely claimed in this email that the new balance included the money

that was in the account as of the May 10, 2017 statement, plus "additional pre-filing and non-bankruptcy retainer and expense deposits received since then." DX 61 at 111; Tr. 70-72 (Vetter). Respondent also provided what he claimed to be unredacted first pages of the February 2014 statement from the #5318 account and the June 2014 statement from the #6138 account. DX 61 at 116, 118. Respondent falsely claimed that he had previously redacted the second line under his name to remove his tax ID number (his social security number) because, after twice having his identity stolen, he did not want to reveal it. DX 61 at 111. In fact, Respondent had *altered* the statements and replaced his wife's name with his taxpayer identification number before submitting them as purportedly "unredacted" documents. Tr. 188-89 (Respondent); *see also* PFF ¶35 (undisputed).

62. By July 3, 2017, Respondent had spent the #6138 account down to a balance of $1,885.77. DX 34 at 24; Tr. 193 (Respondent); PFF ¶36 (undisputed).

63. Maryland OUST remained concerned that the accounts did not qualify as trust accounts. Tr. 73 (Vetter). By this time, Mr. Vetter also had contacted the Alexandria, Virginia office of the Office of the United States Trustee ("Virginia OUST") and discovered other cases where Respondent had received advanced fees from clients but had not applied for compensation. Tr. 73-74 (Vetter). Maryland OUST determined that Respondent's account should have held over $30,000 for all of the cases that were reviewed. DX 1 at 5; Tr. 74 (Vetter); PFF ¶37 (undisputed).

64. On July 19, 2017, Mr. Vetter met with Respondent, who falsely claimed that he was still holding Mr. Fields' money in the #6138 account. Tr. 74-75 (Vetter).

Mr. Vetter then showed Respondent the Disclosures of Compensation for the other four cases: *G. Boones*; *Siler*; *Bello*; *and Z Lights*. Tr. 75 (Vetter). At that point, Respondent acknowledged that he had "prematurely and improperly" spent the funds that he was supposed to hold in his trust account for these five clients. DX D at ¶7 (admitted); DX 1 at 5; Tr. 75-76 (Vetter). Respondent then agreed to disgorge the fees he had received in both the *Fields* and *G. Boones* cases – the two Maryland cases over which Mr. Vetter had jurisdiction. Tr. 77-78 (Vetter); PFF ¶38 (undisputed). Prior to the July 19, 2017 meeting with Mr. Vetter, Respondent believed that Mr. Vetter's investigation into the *Fields* matter was solely a housekeeping matter internal to the Bankruptcy Court and nobody from OUST had suggested the inquiry involved an ethics issue. Tr. 89-90, 93-94, 461-62, 470-74 (Respondent); PFF ¶91 (undisputed). Mr. Vetter concluded that the work that Respondent had done on the *Fields* matter was worth more than the funds he had improperly transferred. Tr. 94-96, 98-99, 101-02; PFF ¶98 (undisputed).

65. On July 20, 2017, the Maryland Bankruptcy Court entered a "Consent Order Granting Motion to Examine Debtor's Transactions with Attorney and to Disgorge Fees." DX 18. It ordered Respondent to disgorge and pay the Chapter 7 Trustee, Gary A. Rosen, $5,000 within 10 days and another $4,783 within 45 days. DX 18; Tr. 79 (Vetter); PFF ¶39 (undisputed).

66. Respondent made the first $5,000 payment on in early August 2017, but did not pay the $4,783 within 45 days. DX 19 at 2; Tr. 79-80 (Vetter).

67. Mr. Rosen moved to compel Respondent to make the payment. DX 19;

Tr. 80 (Vetter). On October 16, 2017 the Court ordered Respondent to pay the $4,783 within 14 days. DX 20.

68. Respondent made the final $4,783 payment to the trustee on or about October 27, 2017. DX 21.

69. On May 10, 2018, Disciplinary Counsel asked Respondent, through an email to his attorney, to identify the account into which he deposited the $6,500 he received from Mr. Fields in October 2013. DX 22 at 2. The same email requested Respondent to identify the accounts into which he deposited the money he received from his other bankruptcy clients: Mr. Siler, G. Boones, Z Lights, and Ms. Bello. *Id.* In response, Respondent's attorney stated that Respondent "did not have a real-time bookkeeping system at the time of the subject deposits," but it was "likely" that the $6,500 from Mr. Fields was deposited into his #5318 account, it was "likely" that the $7,500 from Z Lights was deposited into his #6138 account, and he could not identify the accounts where he deposited the other clients' funds. DX 22 at 7. Although Respondent denied knowing of the email exchange between Disciplinary Counsel and his attorney, he admitted violating the record-keeping rule in each of the matters. Tr. 199 (Respondent); DX D at ¶¶27, 45, 56, 67, 83 (admitting recordkeeping violations in each of the five matters).

Further Developments in and Resolution of the *Bello* Case

70. On June 23, 2017, Respondent received an additional payment of $8,000 from Ms. Bello. DX 55 at 1; Tr. 228 (Respondent); PFF ¶83 (undisputed).

71. On June 28, 2017, Respondent deposited the $8,000 check into his

#6138 joint account as part of a multi-item deposit that totaled $13,000. DX 55 at 1, 3; Tr. 228-29 (Respondent); Tr. 290-91 (O'Connell). This account also held Respondent's personal funds at that time. DX 55 at 3; Tr. 229 (Respondent); *see also* R. Merits Brief at 23-24. At that time, Respondent had not applied for or received approval from the Court to take his legal fees. DX 49 at 1-15; Tr. 228 (Respondent); PFF ¶84 (undisputed). Respondent knew that he was not entitled to take the second $8,000 payment, even if earned, without the Bankruptcy Court's approval. *See* Tr. 370 (Respondent noting that Chapter 11 attorneys were not paid fees as they were earned but subject to the court's allowance); FF 34 (Application for Employment in *Bello*); *see also* DX D at ¶5 (admitting "real-time knowledge of rule requiring court approval before disbursing compensation in Chapter 11 cases").

72. The $13,000 deposit on June 28, 2017 was the same deposit Respondent used to try to convince Maryland OUST he was still holding the money he received from Mr. Fields. Tr. 230-32 (Respondent); *see* FF 60-61.

73. On June 30, 2017, Respondent filed his first application in the *Bello* case for compensation for the period of March 2016 through the end of June 2017. DX 56; Tr. 228, 233 (Respondent). Respondent requested $15,500 in legal fees and disclosed that he had already received a $7,500 "retainer deposit" and "an expense advance" of $1,717.00 for the payment of the filing fee. DX 56 at 4-5; Tr. 233-34 (Respondent). Respondent did not file a supplemental disclosure to notify the Bankruptcy Court of the additional $8,000 payment he had just received. *See* Tr. 234 (Respondent).

74. On July 19, 2017, Respondent's #6138 joint account was overdrawn, resulting in a balance of -$58.51. DX 55 at 3; Tr. 291 (O'Connell). At that time, Respondent had not received approval from the Court to take his legal fees. DX 49; PFF ¶87 (undisputed).

75. On July 25, 2017, the Court granted Respondent's application in *Bello* for compensation and awarded him the full $15,500 in legal fees. DX 57; PFF ¶88 (undisputed). The Virginia OUST did not seek disgorgement or any other sanction. RX 14; Tr. 490-96 (Respondent); PFF ¶97 (undisputed). Although the disgorgement matters in the D.C. and Virginia Bankruptcy Courts have only recently been resolved, delays related to those work-outs solely were due to conflicts in Virginia OUST's schedule. Tr. 484-97; (Respondent); PFF ¶96 (undisputed).

Respondent's Representation in 2017 of G. Boones at the Boonsboro Event Center, LLC

76. On February 27, 2017, Respondent received an $8,217 check from Christine Grauer, president of G. Boones at the Boonsboro Event Center, LLC ("G. Boones"). DX 34 at 1; DX D at ¶46 (admitted); Tr. 209 (Respondent); Tr. 283 (O'Connell). The $8,217 represented the $1,717 filing fee and attorney's fees of $6,500. DX D at ¶46 (admitted); Tr. 209 (Respondent); PFF ¶59 (undisputed). *Compare* DX 33, *with* DX 34 at 1. The "pre-payment" represented unearned advanced fees. *See* Tr. 211-12 (Respondent's handling of the retainer in *G. Boones*); *see also* PFF ¶37 (undisputed) ("advanced fees").

77. On March 10, 2017, Respondent filed a Chapter 11 Bankruptcy petition for G. Boones in the United States Bankruptcy Court for the District of Maryland.

DX 32 at 2; DX D at ¶47 (admitted); Tr. 211 (Respondent). Respondent also filed a "Disclosure of Compensation of Attorney for Debtors" in which he stated that he had agreed to accept and already had received $6,500 for legal services. DX 33; DX D at ¶47 (admitted); Tr. 209 (Respondent); PFF ¶60 (undisputed). In the Disclosure, Respondent certified that his compensation would be "subject to Court approval on notice and opportunity to object." DX 33.

78. On March 17, 2017, Respondent deposited the $8,217 check (representing both the $6,500 fee for legal services and the $1,717 filing fee) into his #6138 joint checking account. DX 34 at 3; DX D at ¶48 (admitted); Tr. 210 (Respondent); Tr. 283 (O'Connell). This account also held Respondent's personal funds at that time. DX 34 at 3; DX D at ¶48 (admitted); Tr. 210-11 (Respondent); *see also* R. Merits Brief at 23-24. Respondent had not applied for or received approval from the Court to take legal fees. DX 32; DX D at ¶48 (admitted); PFF ¶61 (undisputed).

79. On April 17, 2017, Respondent filed an "Application for Employment of The Law Offices of Jeffrey M. Sherman," in which he stated, "Sherman shall apply to the Court periodically for approval and award of compensation and reimbursement of expenses, on notice and with opportunity for parties in interest to object." DX 36; DX D at ¶49 (admitted); Tr. 211 (Respondent); PFF ¶62 (undisputed).

80. On May 9, 2017, the Court granted Respondent's application for employment and ordered "the compensation, if any, to be paid to the Attorney shall

remain subject to review and allowance of this Court, upon periodic application, with notice and an opportunity for parties in interest to object." DX 37; DX D at ¶50 (admitted); Tr. 211 (Respondent); PFF ¶63 (undisputed).

81. By May 30, 2017 the balance in Respondent's #6138 joint account fell to $332.06 after a payment to American Express. DX 34 at 18; DX D at ¶51 (admitted); Tr. 212-13 (Respondent); Tr. 284 (O'Connell). Respondent had not applied for or received approval from the Court to take legal fees. DX 32; DX D at ¶51 (admitted); Tr. 211-12 (Respondent); PFF ¶64 (undisputed).

82. Respondent expended the funds received from G. Boones without court approval, at a time when he was under investigation by Maryland OUST and in regular communication with Mr. Barnhill about his failure to handle bankruptcy payments in accordance with the Bankruptcy Court rules. Tr. 151-58, 212 (Respondent). Respondent had met with Mr. Vetter and Mr. Barnhill approximately two weeks previously about his compliance with the requirement to hold fees in trust in bankruptcy matters. Tr. 63 (Vetter); Tr. 212 (Respondent).

83. On July 26, 2017, Maryland OUST filed a "Motion to Examine Debtor's Transactions with Attorney and to Disgorge Fees" in the *G. Boones* case. DX 38; DX D at ¶52 (admitted); Tr. 214 (Respondent). It reported that, despite the lack of a fee application or Court approval, Respondent had admitted he had "withdrawn a significant portion of the $6,500 retainer." DX 38 at 2; DX D at ¶52 (admitted). Maryland OUST asked for sanctions and requested that the Court order Respondent "to disgorge and pay to the Debtor's Chapter 7 Trustee all fees that

Counsel has received to represent the Debtor in this matter." DX 38 at 3; DX D at ¶52 (admitted). This filing incorporated terms agreed upon by OUST and Respondent. *See* RX 2; RX 4; PFF ¶66 (undisputed).

84. On August 3, 2017, the Court issued a consent order in the *G. Boones* case requiring Respondent to disgorge $4,783 (representing the $6,500 retainer minus the $1,717 filing fee) "within forty-five (45) days of the date of entry of this Order." DX 39; DX D at ¶53 (admitted); Tr. 79-80 (Vetter); PFF ¶67 (undisputed).

85. Between approximately November 2017 and December 2018, the Chapter 7 Trustee, Cheryl Rose, emailed Respondent numerous times, asking that he comply with the court order to disgorge the *G. Boones* fees. DX 40 at 8-61; Tr. 216-17 (Respondent). Respondent completed his obligation under the Court order to disgorge the $4,783 on or about December 12, 2018. DX 40 at 4; Tr. 79-80 (Vetter); Tr. 216-17 (Respondent).

Respondent's Representation in 2017 Of Z Lights And Furniture

86. On March 30, 2017, Respondent filed a Chapter 11 Bankruptcy petition for Z Lights and Furniture ("Z Lights") in the United States Bankruptcy Court for the Eastern District of Virginia. DX 41; Tr. 220 (Respondent). On April 4, 2017, Respondent filed a "Disclosure of Compensation of Attorney for Debtor" in which he stated that he had agreed to accept and had already received $7,500 for legal services. DX 42; DX D at ¶58 (admitted); Tr. 218-19 (Respondent); PFF ¶71 (undisputed). The Disclosure included Respondent's certification that any compensation for legal services or reimbursement of incurred expenses would be

"subject to Court approval on notice and opportunity to object." DX 42.

87. At approximately the same time, Respondent received $7,500 from Z Lights as payment for legal fees. DX 42; DX D at ¶57 (admitted); Tr. 218 (Respondent). Although the "pre-payment" included advanced fees, Respondent did not deposit them into a trust account. *See* Tr. 219-21 (Respondent describing his handling of the retainer in Z Lights); *see also* PFF ¶ 37 (undisputed) (receipt of advanced fees).

88. On April 3, 2017, Respondent deposited the $7,500 along with $1,717 he had received for filing fees into his #6138 joint account. DX 34 at 7; Tr. 219 (Respondent); Tr. 285 (O'Connell). His personal funds were in the account at that time. Tr. 219 (Respondent); *see also* R. Merits Brief at 23-24.

89. On April 17, 2017, Respondent filed an "Application for Employment of The Law Offices of Jeffrey M. Sherman as Debtor's Counsel," in which he stated, "Sherman shall apply to the Court periodically for approval and award of compensation and reimbursement of expenses, on notice and with opportunity for parties in interest to object." DX 43; DX D at ¶59 (admitted); Tr. 220 (Respondent); PFF ¶72.

90. On May 8, 2017, the Court granted Respondent's application for employment and ordered "the compensation, if any, to be paid to the Attorney shall remain subject to review and allowance of this Court, upon periodic application, with notice and an opportunity for parties in interest to object." DX 44; DX D at ¶60 (admitted); Tr. 220 (Respondent); PFF ¶73 (undisputed).

91. By May 30, 2017 the balance in Respondent's #6138 joint account had fallen to $332.06 after the American Express credit card payment reported in FF 81. DX 34 at 18; DX D at ¶51; Tr. 221-22 (Respondent); Tr. 284, 286 (O'Connell). Respondent had not applied for or received approval from the Court to take legal fees in the *Z Lights* matter. DX 41; Tr. 223 (Respondent); PFF ¶74 (undisputed).

92. Respondent expended the funds received from Z Lights without the required court approval at a time when he was under investigation by Maryland OUST and regularly communicated with Mr. Barnhill about his failure to handle bankruptcy payments in accordance with the Bankruptcy Court rules. Tr. 151-58, 212 (Respondent). Respondent had met with Mr. Vetter about his compliance with the requirement to hold fees in trust in bankruptcy matters. Tr. 63 (Vetter); Tr. 212 (Respondent).

93. Respondent asserts that he did not apply for or receive approval from the Virginia Bankruptcy Court to disburse legal fees in the *Z Lights* matter because of the pendency of the Virginia OUST's determination of the appropriate disgorgement in that case. DX 41; DX D at ¶63 (admitted), Tr. 484-97 (Respondent); PFF ¶76 (undisputed). The Virginia OUST filed a stipulated disgorgement agreement order on April 10, 2019, which the Court granted on April 26, 2019. RX 5; RX 10; PFF ¶76 (undisputed).

IV. CONCLUSIONS OF LAW[11]

We turn now to the six charges that Disciplinary Counsel has brought against Respondent. Disciplinary Counsel charges that Respondent received unlawful and therefore unreasonable fees from his clients (as discussed in subsection A of this Section), that Respondent failed to maintain complete records regarding those fee receipts (as discussed in subsection B of this Section), that he failed in four instances to deposit those fees in a trust account at an approved depository (as discussed in subsection C of this Section), that in three instances he commingled these fees with his and his wife's personal checking account (as discussed in subsection D of this Section), that he intentionally misappropriated funds that he was holding for each of the five clients (as discussed in subsection E of this Section), and that he was dishonest in his filings before the Bankruptcy Courts and in his representations to Maryland OUST (as discussed in subsection F of this Section).

Four of the six charges require Disciplinary Counsel to prove that Respondent was holding funds in trust for a client or a third-party. *See infra* Section IV.B-E. We address this issue common to these four charges at this point before turning to particularized analysis of each of the six charges.

Because of the unique facts of this case, we must address both disciplinary law and bankruptcy law in order to resolve the "entrustment" issue. For the reasons discussed below, we conclude that Respondent held unearned advanced fees in trust

[11] The Hearing Committee found the research and analysis in Disciplinary Counsel's Opening Brief and Reply Brief to be thorough and comprehensive, and therefore the Hearing Committee has drawn substantially from Disciplinary Counsel's papers in this section of this Report.

for four of his five clients before those four clients' bankruptcy petitions were filed; after each of those four bankruptcy petitions was filed, unearned advanced fees that had been held in trust became assets of the client's bankruptcy estate and thus were being held in trust for each client's bankruptcy estate. For the remaining client who paid a retainer after the bankruptcy petition was filed, Respondent promised to hold the entire amount in trust.

Respondent's Clients Paid Him in Advance

The parties agree that Respondent received a fee advance from each client to handle each bankruptcy petition. *See* FF 7, 19, 32, 76, 87. An advance of unearned fees is the property of the client and must be held as client funds in a client's trust or escrow account until it is earned by the lawyer's performance of legal services. *See, e.g.*, D.C. Rule 1.15(d); *Attorney Grievance Comm'n v. Barton*, 110 A.3d 668, 692 (Md. 2015) ("Rule 1.15(a) requires that an attorney deposit advance fees into an attorney trust account"); Maryland State Bar Association Ethics Opinion Docket No. 88–09 (1988) (retainer paid to counsel for future services are funds to be held in trust for the client until earned); *Marcus, Santoro & Kozak, P.C. v. Wu*, 652 S.E.2d 777, 781 (Va. 2007) (same). The same would be true if the fees constituted or were categorized as "flat fees" as opposed to "advance fees." *In re Mance*, 980 A.2d 1196, 1203 (D.C. 2009). Mr. Siler, Ms. Bello, Z Lights and G. Boones each paid advance fees before their bankruptcy petitions were filed. Respondent held, or was required to hold, these funds in trust for each client until he earned fees by performing legal services. As discussed in the next section, the nature of the entrustment changed

when Respondent filed each client's bankruptcy petition.

The Effect of Filing a Bankruptcy Petition

When a Chapter 11 bankruptcy petition is filed, all assets previously owned by the bankruptcy debtor become the property of the debtor's bankruptcy estate. *Czyzewski v. Jevic Holding Corp*., 137 S. Ct. 973, 978 (2017) ("Filing for Chapter 11 bankruptcy has several relevant legal consequences. First, an estate is created comprising all property of the debtor." (citing 11 U.S.C. § 541(a)(1) (the bankruptcy estate is comprised of the debtor's property, "wherever located and by whomever held"))). Bankruptcy Courts look to state law to determine a debtor's property rights, and thus determine the assets in the debtor's bankruptcy estate. *Butner v. United States*, 440 U.S. 48, 54 (1979). To the extent that Respondent held unearned fees in trust for clients before the bankruptcy petition was filed, he held those unearned fees in trust for the client's bankruptcy estate after the petition was filed. *In re Prudoff*, 186 B.R. 64, 67 (Bankr. E.D. Va. 1995) ("[o]n the date that debtor filed her bankruptcy petition, [her] equitable interest in any unused portion of the retainer" becomes the property of the bankruptcy estate); *In re Bread & Chocolate, Inc*., 148 B.R. 81, 82 (Bankr. D.D.C. 1992) (unearned prepetition retainer is property of the estate upon filing of petition); *In re Lilliston*, 127 B.R. 119, 121 (Bankr. D. Md. 1991) ("Since Debtor had an equitable interest in the retainer funds as of the bankruptcy filing date, the prepetition retainer is property of the bankruptcy estate."). Similarly, any advance fees Respondent received from a client *after* the bankruptcy petition was filed belonged to the bankruptcy estate for the reasons discussed

above. Mr. Fields paid his advance fees after the filing of the bankruptcy petition. Thus, the $6,500 advance fees that Respondent received from Mr. Fields were required to be held in trust for the Fields bankruptcy estate. Additionally, Respondent himself verified in his Application for Employment that he would hold the Mr. Fields' "post-petition retainer" in trust. *See* FF 6. Under applicable bankruptcy law, any advance fees held in trust for the client's bankruptcy estate could not be withdrawn without court permission. *See* 11
U.S.C. § 330 (Bankruptcy Code).

How Respondent Handled the Fee Advances

Respondent initially deposited all of the advanced fees into his joint money market account #5318, which he treated as the functional equivalent of an escrow account "into which [he] was depositing retainers that [he] wouldn't draw against" until he had earned the fees. Tr. 147-48. By March 2017, he began to deposit his advance fees into his joint checking account #6138. *See* FF 78, 88.

Respondent testified that he did not "draw against" any of the fee advances before he filed the bankruptcy petitions for the clients. *See, e.g*., Tr. 196 (describing his handling of the retainer in *Fields*); *see also* Tr. 202-05 (the retainer in *Siler*); Tr. 211-12 (the retainer in *G. Boones*); Tr. 219-21 (the retainer in *Z Lights*); Tr. 232- 33 (the retainer in *Bello*). Although Respondent performed legal services for each of the clients in that he prepared a bankruptcy petition for each, Respondent's inadequate record-keeping prevents us from determining the precise amount of fees he earned and thus the amount of unearned advanced fees that became estate assets with the

filing of each client's bankruptcy petition. *See, e.g.*, *In re King*, 392 B.R. 62, 71 (Bankr. S.D.N.Y. 2008) ("'In order for a prepetition retainer held by debtor's counsel to be property of the estate, the debtor must have some interest in the retainer itself at the time the petition is filed.'" (quoting *In re McDonald Bros.*, 114 B.R. 989, 996 (Bankr. N.D. Ill. 1990))).

Notwithstanding his inadequate record-keeping, Respondent had not already earned the entire amount of the pre-petition fee advances in *Siler*, *Bello*, *Z Lights* and *G. Boones* upon receipt (*see* FF 19, 32, 76. 87), and thus was holding entrusted funds when the petitions were filed. *See* D.C. Rule 1.15(d); *Barton*, 110 A.3d at 692; Maryland State Bar Association Ethics Opinion Docket No. 88–09 (1988); *Marcus, Santoro & Kozak, P.C.*, 652 S.E.2d at 781. In *Fields*, because the retainer was paid after the Chapter 11 petition had been filed, the entire post-petition retainer was the property of the bankruptcy estate and should have been held in trust. *See* FF 6. On the unique facts of this case, and as discussed below, we do not need to determine the precise amounts of the pre-petition unearned fees in each client matter. The fact that Respondent held some pre-petition unearned advanced fees for four clients and post-petition unearned advanced fees for one client, is sufficient to analyze Disciplinary Counsel's recordkeeping, depository, commingling and misappropriation charges when we reach them later in this Section.

A. DISCIPLINARY COUNSEL HAS PROVED BY CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT VIOLATED MARYLAND RULE 19.301.5(A), DISTRICT OF COLUMBIA RULE 1.5(A), OR VIRGINIA RULE 1.5(A) IN THE COURSE OF EACH OF THE FIVE REPRESENTATIONS BY PAYING CLIENT FUNDS TO HIMSELF WITHOUT PRIOR AUTHORIZATION OF THE

BANKRUPTCY COURTS.

The Bankruptcy Code (11 U.S.C. § 329 et seq.) requires attorneys to disclose the compensation they receive in Chapter 11 bankruptcy cases. Section 330 requires attorneys who represent debtors to apply for and obtain approval of compensation before taking legal fees. *See, e.g.*, FF 8, 35, 80, 90; Tr. 116 (Respondent). Respondent did not obtain approval from the court before taking any of the fees in these matters. FF 5-7, 10-11, 25-29, 35-39, 51, 54, 74, 81, 91.

Disciplinary Counsel argues that Respondent's fees in the underlying matters at issue were therefore unlawful. ODC Merits Br. at 35; ODC Merits Reply at 8. Disciplinary Counsel argues further that unlawful fees are unreasonable under each of the Rules at issue here. ODC Merits Br. at 34; ODC Merits Reply at 9-10. Respondent counters that Disciplinary Counsel did not prove that Respondent did not earn the fees in question, that none of the three applicable Rules includes a definition of an "unlawful fee" or an "illegal fee," and that there is little or no case law guidance in the three jurisdictions on what constitutes an illegal or unlawful fee or whether unlawful fees are *per se* unreasonable. We turn now to the resolution of those two questions – unlawfulness and unreasonableness – under each of the three Rules at issue here.

Although Maryland Rule 19-301.5(a) does not explicitly state that illegal fees are prohibited, Maryland's predecessor Rule DR 2-106 provided: "A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." Subsequent revisions to the Rule were intended to impose a stricter standard upon

lawyers. *See Attorney Grievance Comm'n v. Monfried*, 794 A.2d 92, 102 n.8 (Md. 2002). Thus, we do not read the current Maryland Rule as allowing lawyers to charge fees prohibited by law. *See Attorney Grievance Comm'n v. Kendrick*, 943 A.2d 1173, 1184 (Md. 2008) (acceptance of attorney fees without compliance with the statutory provisions set forth in Maryland Code § 7-604 violates Rule 1.5 as the payments are prohibited by law).

The Maryland courts appear to have elided the questions of whether a fee taken in violation of bankruptcy court statutes and rules is an unlawful fee and whether an unlawful fee is an unreasonable fee. In *Attorney Grievance Comm'n v. Nichols*, 950 A.2d 778, 783 (Md. 2008), the Maryland Court of Appeals held:

> Respondent's fee was unreasonable, in violation of Rule 1.5(a) of the Maryland Rules of Professional Conduct. Respondent was required to obtain permission of the Bankruptcy Court before taking a fee from the settlement proceeds. He failed to obtain that permission and did not return the fee.

Later in its opinion, the Maryland Court of Appeals also agreed with an analogy suggested by Maryland Bar Counsel:

> Bar Counsel contends that "Respondent's unauthorized taking of a fee without approval of the Bankruptcy Court is analogous to the taking of a fee from an estate without complying with the relevant statute or obtaining permission of the Orphans' Court [Maryland's probate court]."

Id. at 784. The Maryland court agreed that taking a fee without authorization from the Bankruptcy Court was no different from doing so in a probate case. *Id.* at 785-86 (citing multiple cases where attorneys took fees without approval from Maryland's probate court and imposing a similar sanction for Nichols' failure to get

Bankruptcy Court approval).

On the basis of the foregoing, we conclude that Respondent's failures to obtain statutorily required prior bankruptcy court approval for dispersal of fees in the *Fields* and *G. Boones* cases were unlawful and therefore unreasonable under Maryland Rule 19-301.5(a).

It appears that neither the Virginia Supreme Court nor the District of Columbia Court of Appeals has addressed whether taking a fee without Bankruptcy Court approval would constitute an unlawful fee and, if so, whether such an unlawful fee would constitute an unreasonable fee.

In the District of Columbia, it is clear that any fee that is illegal is *per se* unreasonable. The District of Columbia Court of Appeals explained in *In re Fair*, 780 A.2d 1106, 1108 n.3 (D.C. 2001) that:

> Rule 1.5(a) requires that "a lawyer's fee shall be reasonable." Rule 1.5(f) provides that "[a]ny fee that is prohibited . . . by law is per se unreasonable." Although not enacted until 1996, we agree with Bar Counsel that this addition simply clarified the meaning of the existing rule. The predecessor DR 2-106(A) barred the collection of an illegal or clearly excessive fee and there is no reason to think that the 1991 revision was intended not to carry forward the concept of illegality.

While Virginia Rule 1.5 does not include explicit language stating that an illegal fee is *per se* unreasonable, Virginia similarly has held that an illegal fee charged by an attorney is necessarily unreasonable. *See, e.g.*, *In re Prince*, VSB Docket No. 08-032-074356, at 4 (Aug. 2, 2010) (attorney fees in worker's compensation services which were in excess of that approved by the Commission and contrary to the requirements of Virginia Code § 65.2-714, "amounted to illegal

and unreasonable fees"). We thus turn to the question of whether Respondent's violations of the prior approval requirements in the applicable bankruptcy statute and rules were unlawful. We conclude that the interpretation of the analogous Maryland Rule in *Nicholas* is persuasive as applied to D.C. Rule 1.5(a) and Virginia Rule 1.5(a), for the wordings of the District of Columbia and Virginia Rules are substantively the same as the corresponding Rule in Maryland and the analogy to probate court requirements is persuasive because of the equivalent interests, in our view, in protecting the assets of trust or estate beneficiaries and bankruptcy court petitioners.

Accordingly, the Hearing Committee recommends that the Board find that Disciplinary Counsel has proved by clear and convincing evidence that Respondent violated Maryland Rule 19-301.5(a) in Count I (*Fields*) and Count III (*G. Boones*); District of Columbia Rule 1.5(a) in Count II (*Siler*) and Count V (*Bello*), and Virginia Rule 1.5(a) in Count IV (*Z Lights*).

B. RESPONDENT ACKNOWLEDGES AND DISCIPLINARY COUNSEL HAS PROVED BY CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT VIOLATED MARYLAND RULE 19-301.15(A), DISTRICT OF COLUMBIA RULE 1.15(A) OR VIRGINIA RULES 1.15(B)(3) AND 1.15(C) IN THE COURSE OF EACH OF THE FIVE REPRESENTATIONS BY FAILING TO MAINTAIN COMPLETE RECORDS OF THE CLIENT FUNDS HE WAS HOLDING OR WAS SUPPOSED TO HOLD.

Respondent concedes that he failed to maintain complete records of entrusted funds in each of the five matters. R. Merits Br. at 16-17. He did not maintain a book-keeping system "from the date he began his work-from-home solo practice in 2013 until the end of 2017." *Id*. at 16.

District of Columbia Rule 1.15(a), Maryland Rule 19-301.15(a) and Virginia Rules 1.15(b)(3) and 1.15(c) require an attorney to maintain complete records. "The purpose of maintaining 'complete records' is so that the documentary record itself tells the full story of how the attorney handled client or third-party funds and whether the attorney complied with his fiduciary obligation that client or third-party funds not be misappropriated or commingled." *In re Clower*, 831 A.2d 1030, 1034 (D.C. 2003) (per curiam) (quoting Board Report).

During its investigation Disciplinary Counsel asked Respondent, through counsel, to identify the accounts into which he deposited the advanced legal fees he received in all five matters (from Mr. Fields, Mr. Siler, G. Boones, Z Lights and Ms. Bello). FF 69. In response, Respondent's counsel stated that it was "likely" that: $6,500 from Mr. Fields was deposited into the #5318 account, and $7,500 from Z Lights was deposited into the #6138 account. *Id.* As to the other fees, Respondent did not know where he deposited the funds. *Id*. Although the Rules require attorneys to keep comprehensive records showing how entrusted funds are handled, Respondent could not provide the most basic information his records should have shown – where he deposited the entrusted funds.

By failing to keep records showing how he handled advanced legal fees, Respondent violated the applicable District of Columbia, Maryland and Virginia Rules. *See Clower*, 831 A.2d at 1034 (finding recordkeeping violation where attorney's records did not explain distributions of client funds to third parties not listed on disbursement statement); *Attorney Grievance Comm'n v. Roberts*, 904 A.2d

557, 566 (Md. 2006) (finding recordkeeping violation where attorney had no business records showing how much money he was holding for client and medical providers); *El-Amin v. Virginia State Bar*, 514 S.E.2d 163, 169 (Va. 1999) (finding violation of predecessor rule where, relevant in part, the respondent did not keep a record of the work he performed).

Accordingly, the Hearing Committee recommends that the Board find that Disciplinary Counsel has proved by clear and convincing evidence that Respondent violated Maryland Rule 19-301.15(a) in Count I (*Fields*) and Count III (*G. Boones*), District of Columbia Rule 1.15(a) in Count II (*Siler*) and Count V (*Bello*) and Virginia Rules 1.15(b)(3) and 1.15(c) in Count IV (*Z Lights*) by failing to maintain complete records of the client funds he was holding or supposed to hold.

C. RESPONDENT ACKNOWLEDGES AND DISCIPLINARY COUNSEL HAS PROVED BY CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT VIOLATED MARYLAND RULE 19-301.15(C) OR DISTRICT OF COLUMBIA RULE 1.15(B) IN FOUR OF THE REPRESENTATIONS BY FAILING TO DEPOSIT ADVANCED LEGAL FEES INTO A TRUST ACCOUNT AT AN APPROVED DEPOSITORY -- (*FIELDS* (MD), *SILER* (DC), *BOONES* (MD) AND *BELLO* (DC)).

Respondent admits that he committed the trust account violations charged by Disciplinary Counsel in four matters. *See* R. Merits Br. at 15-16. Respondent admits that he failed the "general expectation that client payments received before a lawyer performs any work need to be placed in a trust account" *Id*.

District of Columbia Rule 1.15(b) and Maryland Rule 19-301.15(c) require an attorney to deposit advanced legal fees, which are considered entrusted funds, into a

trust account.[12] *See also* D.C. Rule 1.15(e). The retainer pre-payments Respondent received from his bankruptcy clients consisted of advanced legal fees. Respondent knew he could not convert them to his own use until he applied for and received approval from the bankruptcy court. *See* 11 U.S.C. § 330. Respondent did not at any relevant point in time have a trust account and therefore did not deposit any of the funds into a trust account. FF 4. Instead, he deposited the funds into his #5318 money market account or his #6138 joint checking account that he held with his wife. FF 7 (*Fields*), 21 (*Siler*), 31 (*Bello*), 78 (*G. Boones*). By failing to deposit and hold any of the monies in trust, Respondent violated both the District of Columbia and Maryland Rules. *See In re Stovell*, Board Docket No. 16-BD-046 (BPR Feb. 7, 2018), appended HC Rpt. at 57 (Oct. 31, 2017), *recommendation adopted with no exceptions filed*, 187 A.3d 554 (D.C. 2018) (per curiam); *Attorney Grievance Comm'n v. Smith*, 177 A.3d 640, 645-46, 664 (Md. 2018).

Accordingly, the Hearing Committee recommends that the Board find that Disciplinary Counsel has proved by clear and convincing evidence that Respondent violated Maryland Rule 19-301.15(c) in Count I (*Fields*) and Count III (*G. Boones*) and District of Columbia Rule 1.15(b) in Count II (*Siler*) and Count V (*Bello*) by failing to deposit advanced legal fees into a trust account at an approved depository.

D. RESPONDENT ACKNOWLEDGES AND DISCIPLINARY COUNSEL HAS PROVED BY CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT VIOLATED

[12] D.C. Rule 1.15(b) must be read in conjunction with Rules 1.15(a) and (e). Rule 1.15(e) states that "[a]dvances of unearned fees and unincurred costs shall be treated as property of the client pursuant to paragraph (a)." Rule 1.15(a) states that "[f]unds of clients or third persons that are in the lawyer's possession (trust funds) shall be kept in one or more trust accounts maintained in accordance with paragraph (b)."

DISTRICT OF COLUMBIA RULE 1.15(A) OR MARYLAND RULE 19-301.15(A) IN THE COURSE OF THREE OF THE REPRESENTATIONS BY DEPOSITING FEES ADVANCED BY HIS CLIENTS INTO HIS AND HIS WIFE'S PERSONAL CHECKING ACCOUNT WHICH ALSO CONTAINED THEIR PERSONAL FUNDS -- (*SILER* (DC), *BOONES* (MD) AND *BELLO* (DC)).[13]

Respondent concedes that, as Disciplinary Counsel charged, he failed to keep entrusted funds separate from his personal funds in three matters. R. Merits Br. at 23-24; *see also* FF 21, 31, 78.

District of Columbia Rule 1.15(a) and Maryland Rule 19-301.15(a) require an attorney to keep entrusted funds separate from personal funds. *See In re Berryman*, 764 A.2d 760, 767 (D.C. 2000); *Attorney Grievance Comm'n v. Cherry-Mahoi*, 879 A.2d 58, 71-72 (Md. 2005). "By mingling client funds with the attorney's own, the client's funds become more difficult to trace and are subject to the risk that they may be taken by creditors of the attorney." *In re Hessler*, 549 A.2d 700, 702 (D.C. 1988).

In the *Siler* and *G. Boones* matters, Respondent deposited advanced legal fees into his #6138 joint checking account, which also held personal funds at the time. FF 21, 78. In the *Bello* matter, Respondent's advanced legal fee of $7,500 is still unaccounted for because its deposit is not reflected in any of the bank accounts disclosed by Respondent (FF 32), but Respondent admittedly failed to keep Ms. Bello's advanced expense (filing fee) of $1,700 separate from his personal funds. *See* FF 31. By mixing entrusted funds with personal funds Respondent violated both of the applicable District of Columbia and Maryland Rules. *See Roberts*, 904 A.2d

[13] Disciplinary Counsel acknowledges that it did not include commingling charges in the Counts arising from Respondent's *Fields* and *Z Lights* representations. ODC Merits Br. at 27, n.5.

at 566 (finding commingling violation where attorney transferred entire settlement from trust account into operating account, including money that belonged to client and medical providers).

Accordingly, the Hearing Committee recommends that the Board find that Disciplinary Counsel has proved by clear and convincing evidence that Respondent violated District of Columbia Rule 1.15(a) in Count II (*Siler*) and Count V (*Bello*), and Maryland Rule 19-301.15(a) in Count III (*G. Boones*) by depositing advanced fees and advanced expenses into his and his wife's personal checking account which also held their personal funds.

E. DISCIPLINARY COUNSEL HAS PROVED BY CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT VIOLATED MARYLAND RULE 19-301.15(A), DISTRICT OF COLUMBIA RULE 1.15(A) OR VIRGINIA RULE 1.15(B)(5) IN THE COURSE OF EACH OF THE FIVE REPRESENTATIONS BY INTENTIONALLY MISAPPROPRIATING ENTRUSTED CLIENT FUNDS.

"'[M]isappropriation is any unauthorized use of client's [or a third party's] funds entrusted to [the lawyer], including not only stealing but also unauthorized temporary use for the lawyer's own purpose, whether or not [the lawyer] derives any personal gain or benefit therefrom.'" *In re Smith*, 70 A.3d 1213, 1216 n.1 (D.C. 2013) (per curiam) (first, third and fourth alterations in original) (quoting *In re Harrison*, 461 A.2d 1034, 1036 (D.C. 1983)). It occurs where "the balance in the attorney's . . . account falls below the amount due to the client [or third party], regardless of whether the attorney acted with an improper intent." *In re Edwards*, 990 A.2d 501, 518 (D.C. 2010); *see also In re Buckley*, 535 A.2d 863, 865 (D.C. 1987).

In each of the five Chapter 11 bankruptcy cases, Respondent received advanced legal fees and advanced expenses and deposited them into either his #5318 or his #6138 account. FF 7 (*Fields*); 21 (*Siler*); 31 (*Bello*); 78 (*G. Boones*); 87-88 (*Z Lights*). In three of these Chapter 11 bankruptcy cases, Respondent received additional interim fees, yet Respondent did not file the required supplemental disclosure with the courts and deposited them into his #6138 account. FF 9-10 (*Fields*); 71, 73 (*Siler*); 37-38 (*Bello*). After representing to the courts in his applications for employment that he would petition for approval before disbursing legal fees to himself, Respondent instead spent the five retainers and three interim payments without doing so – causing the balance to drop below the amount he should have been holding. *See* FF 27, 29, 39 51, 54, 74, 81, 91.

In District of Columbia probate cases where court approval for legal fees is required, the Court of Appeals has consistently held that taking a legal fee without court approval constitutes misappropriation. *See In re Fair*, 780 A.2d 1106, 1109-10 (D.C. 2001); *In re Utley*, 698 A.2d 446 (D.C. 1997). This is true even if the attorney earned the fee. *In re Bach*, 966 A.2d 350, 352 (D.C. 2009) (court "unmoved by . . . expectations of (or wagers on) after-the-fact ratification").

Respondent questions whether client/petitioner fees in bankruptcy matters are entrusted funds in the same way or to the same extent as beneficiary funds are in probate matters. R. Merits Brief at 25-26. In our view, the same logic applies to Chapter 11 bankruptcy cases where attorney's fees are conditioned on court approval. *See Attorney Grievance Comm'n v. Nussbaum*, 934 A.2d 1, 5, 21-22 (Md.

2007) (attorney disbarred for repeatedly knowingly and intentionally using advanced fees received in Chapter 11 bankruptcy cases without court approval). A court supervises payment of fees in the probate context and the bankruptcy context for the same reason – to ensure the integrity of funds committed to lawyers' care during complex court proceedings that are often extended, often complex and nearly always of critical financial importance to the beneficiaries or petitioners or parties in interest.[14] In his applications for employment as debtor's counsel in each of the five matters, Respondent himself certified that his hourly fees would be paid only upon notice to interested parties (*i.e.*, creditors) and approval by the Bankruptcy Courts. When the Bankruptcy Courts approved Respondent's employment as debtor's counsel, they each ordered that "the compensation, if any, to be paid to the Attorney shall remain subject to review and allowance of this Court, upon periodic application, with notice and an opportunity for parties in interest to object." The

[14] Respondent observes in a footnote, "It is also noteworthy that the D.C. Code now contains a safe-harbor that would prevent the very analogy on which Disciplinary Counsel's case rests." R. Sanctions Brief at 8, n.3 (citing D.C. Code § 20-753(c)). D.C. Code § 20-753 involves the filing of petitions by interested persons for the purpose of contesting the reasonableness of a personal representative's fees, not the taking of fees without the probate court's prior approval. Pursuant to the compensation review permitted by section 20-753, if the reviewing court agrees with the interested party that the fees were unreasonable, a subsequent order reducing a personal representative's fees "shall not in and of itself be considered to be a taking or misappropriation of client funds under (or any other such violation of) any applicable ethical or disciplinary statutes or rules by that attorney." D.C. Code § 20-753(c). Here, Disciplinary Counsel's misappropriation analogy to probate case law is not based on fee reductions for reasonableness but on the unauthorized taking of fees without prior court approval. Respondent admitted that his fees required the bankruptcy court's approval and "notice to and an opportunity for parties in interest to object," *see* FF 6, 8, 34-35, 79-80, 89-90, yet he repeatedly took fees without seeking court approval and without providing any notice to interested persons, who, accordingly, could not then object.

parallel to the court-appointed fiduciaries in probate proceedings results because the Bankruptcy Courts must initially approve the employment of Respondent and Respondent, himself, promised the courts that he will conduct himself in accordance with their rules regarding compensation.[15]

We turn next to the question whether Respondent's misappropriations were intentional, reckless or negligent. Factfinders generally infer intent from a person's behavior; evidence of intent will almost always be circumstantial. *See In re Ukwu*, 926 A.2d 1106, 1116 (D.C. 2007) ("Intent must ordinarily be established by circumstantial evidence, and in assessing intent, the court must consider the entire context. . . .[I]t is generally in the interests of justice that the trier of fact consider the entire mosaic." (internal citation and quotation marks omitted)); *In re Starnes*, 829 A.2d 488, 500 (D.C. 2003) (per curiam) (appended Board Report) (circumstantial evidence was sufficient to prove respondent's state of mind as "more direct proof . . . such as an outright assertion of an individual's intent, is rarely available"). We conclude for the following reasons that the facts and circumstances surrounding Respondent's taking and use of the legal fees he received from Mr. Fields, Mr. Siler, G. Boones, Z Lights and Ms. Bello establish by clear and convincing evidence that his misappropriations were intentional.

[15] *See, e.*g., *In re Pleshaw*, 2 A.3d 169, 171 (D.C. 2010) (attorney appointed by the court as attorney and guardian/conservator committed reckless misappropriation by repeatedly withdrawing attorney fees without court approval); *Bach*, 966 A.2d at 350-51 (court-appointed conservator committed intentional misappropriation by paying himself unapproved fees from estate account that he controlled); *Utley*, 698 A.2d at 449-450 (court-appointed conservator committed misappropriation by repeatedly paying herself without prior court approval from estate account that she controlled).

In the *Fields* representation, Respondent deposited an initial $5,000 fee payment from Mr. Fields into the #5318 account on October 15, 2013. FF 7. He deposited a second $5,000 from Mr. Fields (originally intended for the purchase of claims but subsequently mutually agreed to be used for attorney's fees) into the #6138 account on June 9, 2014. FF 9, 10. Respondent did not at any point in time file disclosures of the receipt of these funds or applications for authorization to disburse these entrusted funds. FF 7, 10. Between October 11, 2013 and May 10, 2017, the balances in the #5318 and the #6138 accounts fell below $5,000 on numerous occasions. FF 51, 54. The balance of the #6138 account was $1,299.86 on June 27, 2017. FF 60. Respondent did not at any point in time file applications for bankruptcy court approval of the disbursement of these funds.

The circumstances surrounding the transfer of Mr. Siler's funds out of the #5318 account also clearly demonstrate Respondent's intentional misappropriation. On July 16, 2015, Respondent transferred the Siler funds from his #5318 money market account into his #6138 personal account, one day before paying his wife's American Express bill. FF 25-26. There were insufficient funds in the #6138 account to cover the American Express payment without the funds received from Mr. Siler. FF 26; DX 30 at 2.

Later, Respondent stopped using the #5318 account and began depositing advanced legal fees directly into the #6138 personal account he shared with his wife. The second payment he received from Mr. Siler – an additional $11,000 – went into the #6138 account, was not disclosed to the court, and was spent within two daysto

pay a credit card bill that the balance his personal account would not have otherwise covered. *See* FF 37-39 (two days after receipt of the $11,000, balance of $2,598.90). No recordkeeping error or failure to track the money in his account led to those actions. Respondent knew when he removed the funds that they were fees in the *Siler* matter. FF 37. Respondent also had to know that he had not asked the Bankruptcy Court to approve those fees. *See* FF 22, 37; DX D at ¶5.

Thus, even if, in the beginning, Respondent attempted to keep advanced legal fees separate from his personal funds by using the #5318 money market account (FF 7, 21), Respondent eventually spent the funds received from Mr. Fields and Mr. Siler without obtaining, or even seeking, court approval. FF 25-29, 51, 54.

In the *G. Boones* and *Z Lights* cases, Respondent deposited $6,500 and $7,500 respectively into his #6138 personal account. FF 78, 88. He then filed applications for employment in both matters on the same day, April 17, 2017, promising he would not take his fee until the court approved it. FF 79, 89. But by the time he made those statements to the court, the balance in his #6138 account was $11,493.10, already below the $14,000 he should have been holding for both clients. DX 34 at 7. Roughly six weeks later, without applying to the court for approval, Respondent had spent that personal checking account down to $332.06. FF 81, 91. In the *Bello* case, Respondent had received $15,500 in fee payments from Ms. Bello by June 23, 2017. FF 32, 70. At least $8,000, the second fee payment, was deposited into the #6138 account. FF 71. By July 19, 2017, that account was overdrawn, having a balance of

-$58.51. FF 74. Respondent did not receive bankruptcy court authorization for the disbursement of Ms. Bello's funds to himself until July 25, 2017. FF 75.

In sum, Respondent's misappropriations were intentional because he treated the advanced legal fees as if they were his own. *See In re Bach*, 966 A.2d 350, 365-66 (D.C. 2009) (citing *In re Anderson*, 778 A.2d 330 (D.C. 2001)). Thus, in every instance, clear and convincing evidence shows that Respondent treated fees advanced by his clients as his own from the moment he received them. Respondent himself testified that once the money went into his personal checking account it was treated as his own – to be spent on whatever personal expenses arose. Tr. 150. We are convinced that Respondent knowingly and intentionally misappropriated funds belonging to his clients.[16]

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[16] Although we have concluded that Respondent's repeated misappropriations were intentional, we note that, if not intentional, Respondent's misappropriations were reckless because he handled entrusted funds "in a way that reveals . . . a conscious indifference to the consequences of his behavior." *Anderson*, 778 A.2d at 339; *see also In re Berryman*, 764 A.2d 760, 768–770 (D.C. 2000). The hallmarks of recklessness 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 (D.C. 2001).

Several of those hallmarks are present here. By repeatedly depositing advanced fees into his personal account Respondent indiscriminately commingled them with his own. FF 4, 9, 25, 31, 37, 53, 71, 78, 88. Once those funds were in his personal account Respondent failed to track them. FF 69. He also overdrew the account on at least one occasion. FF 74. When confronted with inquiries about the Fields funds, Respondent lied to cover up his misconduct. FF 50-64.

Respondent also failed to adjust his methods for handling entrusted funds after being alerted to his deficiencies. Respondent was under investigation by OUST at the time he received payments from G. Boones, Z Lights, and Bello. FF 82, 92, 70-73. The ongoing investigation regularly reminded Respondent of his obligation to safeguard advanced legal fees. By continuing to take and spend advanced legal fees without court approval, '"[Respondent] engaged in a pattern or course of conduct demonstrating an unacceptable disregard for the welfare of entrusted funds.'"

Respondent disputes this conclusion by comparing his misconduct to that in *Anderson*, 778 A.2d at 330, and *In re Nave*, 197 A.3d 511 (D.C. 2018) (per curiam), claiming that he disbursed the funds negligently rather than recklessly or intentionally. R. Merits Brief at 28; *see also id.* at 21. In *Anderson*, the Court held that Disciplinary Counsel could not prove recklessness by presenting evidence only of "inadequate record-keeping" together "with commingling and misappropriation." *Anderson*, 778 A.2d at 340. That did not happen in this proceeding. Here, Disciplinary Counsel presented evidence that the Maryland OUST investigation put Respondent on notice of problems with his recordkeeping and handling of client funds. An attorney on notice of such problems, who does not take steps to learn what went wrong and correct them, crosses the line from negligence to recklessness when he misappropriates again. *In re Ahaghotu*, 75 A.3d 251, 257 (D.C. 2013). Even if Respondent's misappropriation in the *Fields* matter might be considered negligent in the first instance, a finding that we have not made, Respondent then attempted to cover it up after Maryland OUST discovered his failures to disclose and asked him to explain. Even as the Maryland OUST inquiry continued, Respondent deposited funds he received in the *G. Boones*, *Z Lights* and *Bello* matters into his personal checking account and spend them without Bankruptcy Court authority. FF 74, 82, 91-92, 93.

In re Cloud, 939 A.2d 653, 660 (D.C. 2007) (quoting *Anderson*, 778 A.2d at 339).

Respondent's reliance on *Nave* is equally misplaced. There, the Court originally found Nave's misappropriations to be intentional and ordered her disbarred. *In re Nave*, 180 A.3d 86 (D.C. 2018) (per curiam). The Court later granted rehearing and found no misappropriation violations. *Nave*, 197 A.3d at 513. In doing so, however, the Court did not conclude that Nave's misappropriation was negligent rather than intentional. Instead, the Court took issue with Disciplinary Counsel's proof of the misappropriation itself, finding it did not introduce clear and convincing evidence of when Nave had received the entrusted funds. It concluded, "[w]e cannot say that there was no misappropriation, but we are satisfied that misappropriation was not clearly and convincingly proven. We therefore conclude that a finding of misappropriation is not warranted." *Id.* at 521. If clear and convincing evidence had shown when Nave received the funds, the Court may have found the misappropriation intentional. In this case, there is no question as to when Respondent received the various funds at issue, or that he spent them before obtaining court approval.

Continuing his argument that his misappropriations were negligent, not intentional or reckless, Respondent also compares his misconduct to that at issue in *In re Ray*, 675 A.2d 1381 (D.C. 1996); *In re Travers*, 764 A.2d 242 (D.C. 2000); and *In re Fair*, 780 A.2d 1106 (D.C. 2001). Respondent belatedly adduces these cases in connection with this issue for the first time in his sanctions brief. R. Sanctions Br. at 7-8. We nevertheless address Respondent's belated citations but find that none of those cases is analogous. *Ray* involved an attorney in a probate case

who misappropriated funds by taking fees from a portion of an estate's escrowed funds without properly accounting to the estate for those funds. *Ray*, 675 A.2d at 1387. The Court concluded that Ray's misappropriation was negligent because he did not know he was required to obtain court approval before taking his fee. *Id*. Here, in contrast, Respondent filed court pleadings reflecting that he knew that he was required to obtain court approval before taking his fees.

Travers involved another attorney who accepted an illegal fee in a probate matter. The Court found that – if a misappropriation had occurred, an issue that the Court did not resolve because of an unusual complication – Travers' misappropriation would have been negligent because he sincerely believed that the statute requiring court approval of fees did not apply to him, and the Court found that "'he was [in] no way trying to mislead [the court] or conceal his conduct.'" *Travers*, 764 A.2d at 249-50 (alterations in original). Here, Respondent knew that the statute requiring court approval of his fees applied to him. Yet, he repeatedly deposited advanced fees into his personal checking account, telling the court he would not spend those funds without approval – but then not obtaining court approval before he spent the funds. Respondent also tried to mislead Maryland OUST and conceal his misconduct.

Fair involved another attorney who misappropriated funds by taking a fee in a probate matter without court approval. Fair presented the testimony of a probate expert on the actual practice in probate court. The Court found that Fair's misappropriation was negligent because "it had become the accepted practice to

withdraw fees in advance of probate court approval and, less than a year later, the legislature eliminated the need for prior approval." *In re Hewett*, 11 A.3d 279, 285 (D.C. 2011) (explaining how the respondent in *Fair* acted negligently when misappropriating entrusted funds). Unlike Fair, Respondent did not present expert testimony that attorneys in Maryland, D.C. and Virginia routinely ignore the bankruptcy court rule requiring approval of advance fees in Chapter 11 cases. Moreover, the legislature has not repealed the statute requiring approval.

Accordingly, the Hearing Committee recommends that the Board find that Disciplinary Counsel has proved by clear and convincing evidence that Respondent violated Respondent violated Maryland Rule 19-301.15(a) in Count I (*Fields*) and Count III (*G. Boones*), District of Columbia Rule 1.15(a) in Count II (*Siler*) and Count V (*Bello*) and Virginia Rule 1.15(b)(5) in Count IV (*Z Lights*) when he intentionally misappropriated entrusted client funds on numerous occasions.

F. RESPONDENT ACKNOWLEDGES IN PART AND DISCIPLINARY COUNSEL HAS PROVED BY CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT VIOLATED MARYLAND RULE 19-308.4(C), DISTRICT OF COLUMBIA RULE 8.4(C) OR VIRGINIA RULE 8.4(C) IN THE COURSE OF EACH REPRESENTATION BY FALSELY STATING IN THE BANKRUPTCY COURT FILINGS THAT HE WOULD APPLY FOR PRIOR COURT APPROVAL OF FEE DISBURSEMENTS AND/OR BY MAKING MISREPRESENTATIONS DURING THE MARYLAND OUST INVESTIGATION.

The District of Columbia, Maryland and Virginia Rules prohibit conduct involving dishonesty. "Honesty is of paramount importance in the practice of law. Candor and truthfulness are two of the most important moral character traits of a lawyer." *Attorney Grievance Comm'n v. Agbaje*, 93 A.3d 262, 273 (Md. 2014)

(internal citations omitted) (citing *Attorney Grievance Comm'n v. Ellison*, 867 A.2d 259 (Md. 2005) and *Attorney Grievance Comm'n v. Myers*, 635 A.2d 1315 (Md. 1994)). The term "dishonesty" under D.C. Rule 8.4(c) includes not only fraudulent, deceitful or misrepresentative conduct, but also more generally encompasses "conduct evincing 'a lack of honesty, probity, or integrity in principle; [a] lack of fairness and straightforwardness.'" *In re Hager*, 812 A.2d 904, 916 (D.C. 2002) (alteration in original) (quoting *In re Shorter*, 570 A.2d 760, 767-68 (D.C. 1990) (per curiam) (citations omitted)).

In this case Respondent engaged in dishonesty by repeatedly representing to the courts that he would apply for compensation before taking his fees when he knew those advanced legal fees would be or already had been deposited into his personal checking account. *See, e.g.*, FF 5-7 (*Fields*); FF 20-22 (*Siler*); FF 31-35 (*Bello*); FF 77-79 (*G. Boones*); FF 86, 88-89 (*Z Lights*). Respondent had to know when he made those promises that the advanced fees actually would be spent whenever he needed them as they were immediately commingled with his other personal funds, he did not track his spending of the entrusted funds, and he spent the entrusted funds soon after receipt to pay balances owed on personal credit cards. Respondent also engaged in dishonesty by omission when he failed to disclose the three additional or interim payments he received from clients (after he had filed disclosures of compensation with the court) and deposited those payments directly into his personal checking account #6138. *See* FF 10, 37, 70.

Respondent's statements to Maryland OUST also were dishonest. He repeatedly provided limited or redacted information intended to mislead the Maryland OUST attorneys into believing that he handled entrusted funds in accordance with the professional responsibility and bankruptcy rules. FF 50-64. Respondent falsely claimed, using redacted bank statements, that his personal checking and money market savings accounts were trust accounts. FF 50, 53, 56. He falsely claimed that he had transferred Mr. Fields' initial $5,000 payment out of the #5318 money market account in February 2014 because the bank had converted it into a checking account, but the account was not converted until sometime after May 2015. FF 53. On June 29, 2017 he strategically and deceitfully provided a limited bank summary showing a temporarily inflated account balance of $16,686.84 to suggest to Maryland OUST that he had not spent entrusted funds, even though, just days before, the account held only $1,299.86, thousands less than the amount entrusted to him. FF 60-61, 72. When the Maryland OUST attorneys continued to question him, Respondent ultimately forged a bank document by removing his wife's name and inserting his tax identification number to conceal the nature of the joint checking account where he was depositing advanced legal fees from bankruptcy cases. FF 58-59, 61.

Respondent concedes that he violated Rule 8.4(c) by making false statements about his handling of the *Fields* funds in a proposed order he sent to Mr. Vetter. R. Merits Br. at 20. Respondent also admits that he violated Rule 8.4(c) by altering his personal checking account bank statement to remove his wife's name and replace it

with his Tax ID number and providing the altered document to Mr. Vetter's office. *Id*. at 20-21.

With respect to the other four matters – *Siler*, *G. Boones*, *Z Lights* and *Bello* – Respondent does not admit the other instances of alleged dishonesty related to his averments to the Bankruptcy Courts despite the fact that he was aware that he did not have a trust account and was not keeping track of the deposits. FF 4, 69. However, he also does not deny that he paid himself without obtaining court approval but, instead, complains that Disciplinary Counsel has relied in part on circumstantial evidence and on speculation that he "could have been completely unaware that he had failed to file proper disclosure forms or timely fee applications. . . ." R. Merits Br. at 20- 22; *see also* ODC Merits Br. at 36. The circumstances in this case, however, leave no doubt about Respondent's consciousness of his wrongdoing. Aside from admissions, Respondent's "awareness" only can be shown by circumstantial evidence. *See In re Starnes*, 829 A.2d 488, 500 (D.C. 2003) (per curiam) (appended Board Report) (direct proof of state of mind "rarely available"). Furthermore, as pattern jury instructions remind fact-finders around the country, the "law does not favor one form of evidence over another" and circumstantial evidence does not require more certainty than direct evidence. Criminal Jury Instructions for the District of Columbia (2015) (the "Redbook"), Instruction 2.109.

In the *Siler* matter in the District of Columbia, Respondent's actions establish that he knowingly took a fee to which he was not entitled. On July 16, 2015, he did not have enough money in his trust account to cover a payment to American Express.

FF 25-26. At that point he was still holding the *Siler* retainer fees in the #5318 account, separate from his personal funds in the #6138 account. *Id*. Respondent then transferred $4,250 out of the #5318 account and labeled the transaction, "Siler Fees." *Id*. He did not take money from the #5318 account without knowing whose money it was – like someone who made a mistake based on failure to keep records; he documented the transaction as "Siler Fees." Respondent also knew he had to apply for fees before taking them in Chapter 11 cases. FF 20, 22. Respondent had no reason to believe he had applied for and received approval to take the *Siler* fees. FF 25, 28, 37. Nor did he testify that he believed he had approval to take the money. Respondent dishonestly took the *Siler* fee, when it had not been approved by the court.

In 2017, in the *G. Boones* matter in Maryland and the *Z Lights* matter in Virginia, Respondent also acted dishonestly. In those matters he deposited advanced unearned fees into his personal checking account. FF 78, 88. He then told the Bankruptcy Court in his Application for Employment that he would not take his fee before applying for and receiving approval of compensation. FF 79, 89. Because he was aware that he had already treated the advanced fees as his own, Respondent could not reasonably have expected that he would wait for court approval before disbursing some or all of these fees to himself. He knew he did not have a trust account or any other kind of separate account where he was holding the *G. Boones* or *Z Lights* funds. He knew he had no system of record-keeping. Respondent knew that the funds had in fact already been deposited into his personal checking account – the account into which he generally deposited client funds after he ceased

using the separate #5318 account. Respondent also knew that once those funds went into his personal checking account, he would not track them in any way; he would simply spend them in the ordinary course as dictated by his personal needs. That is exactly what happened. Respondent spent the funds without obtaining court approval, knowing he had not filed any application for compensation.

Respondent's then-recent discussions with Mr. Vetter of Maryland OUST in May 2017 must also have reinforced Respondent's awareness of his obligations to disclose fees and safeguard unearned fees until approved by the court. FF 82, 92. His behavior in concealing the nature of his accounts in connection with those discussions shows his conscious awareness that he was doing wrong.

With respect to the *Z* Lights matter, Virginia Rule 8.4(c) contains the additional element that the dishonesty must "reflect[] adversely on the lawyer's fitness to practice law." The element is satisfied where the dishonesty is related to the attorney's professional conduct. *See Morrissey v. Virginia State Bar*, 448 S.E.2d 615, 618-20 (Va. 1994) (finding violation of predecessor rule where state attorney deliberately failed to make full disclosure to non-client crime victim that $50,000 might be available to settle her civil claim); *Gunter v. Virginia State Bar*, 385 S.E.2d 597, 598, 622 (Va. 1989) (finding violation of predecessor rule where attorney surreptitiously wiretapped third party); *see also In re Garrison*, VSB Docket No. 02-080-3027 (Virginia State Bar Disciplinary Board, May 7, 2004) (finding a violation of the predecessor rule 1-102(4) where attorney engaged in check kiting scheme unrelated to professional conduct). Here, Respondent's dishonesty was directly

related to his conduct as an attorney. It occurred in filings made with the Bankruptcy Courts and included a protracted attempt, while under investigation by OUST, to cover up his failure to comply with bankruptcy statutes governing fees.

In the *Bello* matter in the District of Columbia, Respondent received a payment of $8,000 in the midst of Mr. Vetter's investigation and deposited it into his #6138 personal account. FF 70-71. Respondent then dishonestly used the inflated balance of his personal account in a deceitful attempt to persuade Mr. Vetter's office that he was still holding Mr. Fields' money. In addition to his intentionally dishonest misconduct with Maryland OUST, Respondent was at least recklessly dishonest in not disclosing the $8,000 additional payment to the court in the Application for Compensation he filed two days after receiving the money. FF 73.

Accordingly, the Hearing Committee recommends that the Board find that Disciplinary Counsel has proved by clear and convincing evidence that Respondent violated Maryland Rule 19-308.4(c) in Count I (*Fields*) and Count III (*G. Boones*), District of Columbia Rule 8.4(c) in Count II (*Siler*) and Count V (*Bello*), and Virginia Rule 8.4(c) in Count IV (*Z Lights*) by dishonestly stating in Bankruptcy Court filings that he would apply for prior court approval of fee disbursements and by making misrepresentations during the Maryland OUST investigation.

V. RECOMMENDATION AS TO SANCTION

A. THE FACTORS TO BE CONSIDERED

The Court of Appeals has instructed that, in determining the appropriate sanction for a disciplinary infraction, the factors to be considered include (1) the

seriousness of the misconduct, (2) the presence of misrepresentation or dishonesty, (3) Respondent's attitude toward the underlying conduct, (4) prior disciplinary history, (5) mitigating or aggravating circumstances, (6) whether counterpart provisions of the Rules of Professional Conduct were violated (*i.e.*, the total number of Rule violations), and (7) prejudice to the client. *See, e.g.*, *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc); *In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013); *see also In re Wright*, 702 A.2d 1251, 1256 (D.C. 1997) (per curiam) (appended Board Report); *In re Peek*, 565 A.2d 627, 632 (D.C. 1989).

The Court of Appeals has further instructed that the discipline imposed in a matter, although not intended to punish a lawyer, should serve to maintain the integrity of the legal profession, protect the public and the courts and deter future or similar misconduct by the respondent-lawyer and other lawyers. *Hutchinson*, 534 A.2d at 924; *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (en banc). Additionally, the sanction imposed must not "foster a tendency toward inconsistent dispositions for comparable conduct or . . . otherwise be unwarranted." D.C. Bar Rule XI, § 9(h)(1).

B. ANALYSIS

1. Seriousness of the Misconduct

The repeated instances of misappropriation of client funds and dishonesty toward the courts and Maryland OUST (as documented in Section IV, *supra*, and summarized in Section V.B.6, *infra*) embody the types of professional misconduct that have caused the deepest concern on the part of and have resulted in the most serious sanctions imposed by the Court of Appeals.

2. Misrepresentation or Dishonesty

As reported in Section IV.F, *supra*, Respondent exacerbated his mishandling of client funds through his misrepresentations to the Bankruptcy Courts and, especially, through his misrepresentations to and false submissions to Maryland OUST.

3. Respondent's Attitude Toward the Underlying Misconduct

Disciplinary Counsel argues, "Respondent does not accept full responsibility for his misconduct, nor does he acknowledge the seriousness of his misconduct." ODC Sanctions Brief at 6. We tend not to agree with that assessment and, if necessary, would likely conclude from Respondent's testimony, his demeanor and other evidence that he understands, acknowledges and regrets his misconduct. However, this often important, even crucial factor in sanction determinations does not need to be resolved here, for reasons that we explain in Section V.C, *infra*.

4. Prior Discipline

Respondent appears to have no prior disciplinary history.

5. Mitigating and Aggravating Circumstances

We have credited Respondent's testimony and other evidence of – and are sympathetic, of course, to – Respondent's life-long history of extremely serious and debilitating medical problems. We address the salience of these problems to the determination of a recommended sanction in this matter in Section V.C, *infra*.

Respondent also has an admirable record of *pro bono* service to the bankruptcy bar and, thereby, to its clients. Disciplinary Counsel acknowledges that there are no aggravating circumstances in this matter other than the seriousness and extent of the disciplinary infractions.

6. Number of Violations

We have concluded that Respondent violated Maryland Rule 19.301.5(a), District of Columbia Rule 1.5(a), or Virginia Rule 1.5(a) in each of the five representations at issue here by transferring to himself client fee payment without prior court authorization. We have also concluded, Respondent has acknowledged in part and we have recommended that the Board find, that Respondent violated District of Columbia Rule 8.4(c) in two of the representations at issue here, Maryland Rule 19-308.4(c) in two of the representations at issue here and Virginia Rule 8.4(c) in one of the representations at issue here. We have also concluded, Respondent has acknowledged and we have recommended that the Board find that Respondent violated D.C. Rule 1.15(a) in two of the representations at issue here and Maryland Rule 19-301.15(a) in one of the representations at issue here, by mixing advanced fees with his own. We have also concluded, Respondent has acknowledged and we have recommended that the Board find that Respondent violated Maryland Rule 19-301.15(a) in two of the representations at issue here, District of Columbia Rule 1.15(a) in two of the representations at issue here and Virginia Rule 1.15(c) or 1.15(b)(3) in one of the representations at issue here by failing to maintain complete records regarding client funds that he was holding. We

have also concluded, and have recommended that the Board find, that Respondent violated Maryland Rule 19-301.15(a) in two of the representations at issue here, District of Columbia Rule 1.15(a) in two of the representations at issue here and Virginia Rule 1.15(b)(5) in one of the representations at issue here by intentionally misappropriating client funds. We have also concluded, Respondent has acknowledged and we have recommended that the Board find that Respondent violated Maryland Rule 19.301.15(c) in two of the representations at issue here, and District of Columbia Rule 1.15(b) in two of the representations at issue here by failing to deposit advanced fees into a trust account at an approved depository. In sum, we have recommended to the Board that it find that Respondent violated applicable rules of professional conduct in 27 distinct instances.

7. Prejudice to the Client

The record in this matter is devoid of any evidence of prejudice to any of Respondent's clients in the five matters at issue here. Respondent has not been charged with conduct that was seriously prejudicial to the administration of justice and therefore we do not consider Disciplinary Counsel's contention in this regard. *See* ODC Brief on Sanction at 8.

C. RECOMMENDED SANCTION

As reported in Section II of this Report, Respondent initially asserted a defense under *In re Kersey*, *supra*. However, Respondent subsequently withdrew that defense. We note that, in light of certain of our Findings of Fact – *see, e.g.*, FF 1, 3, 15, 16, 30, 40, 41, 42 – Respondent appears to have had a non-frivolous *Kersey*

defense to some or all of the charges in this matter under the Court of Appeals' decision in *In re Lopes*, 770 A.2d 561 (D.C. 2001), a case where the Court found that a *Kersey* defense had been established to the non-dishonesty charges on the basis of circumstances that are strikingly similar to those present in this matter. *Id.*at 565, 567 n.2, 568-69. Because Respondent has not pursued his *Kersey* defense, we turn to the rather straight-forward determination of the appropriate sanction in the absence of a *Kersey* defense.

Respondent's misconduct involved dishonesty for personal and financial gain. He dishonestly told the Bankruptcy Courts in all five matters that he would hold advanced legal fees until he applied for compensation and the court approved them. *See, e.g.*, FF 5-6 (*Fields*); FF 20, 22 (*Siler*); FF 33-34 (*Bello*); FF 77, 79 (*G. Boones*); FF 86, 89 (*Z Lights*). In fact, he had already spent, or knew he was highly likely to spend, those funds on personal expenses without seeking court approval. *See, e.g.*, FF 27, 29, 39, 51, 74, 81, 91. When Maryland OUST began investigating Respondent, he dishonestly claimed to have held fees for legal services in trust. FF 50. As Maryland OUST continued to question Respondent, he invented new fictions to support his false claim of having properly handled the attorney fees. *See, e.g.*, FF 53-59. For several months, Respondent took great pains to maintain the deception, even going so far as to forge a bank document to prevent Maryland OUST from learning the money was in a personal checking account he held jointly with his wife. *See, e.g.*, FF 56-61. Respondent's dishonesty during the Maryland OUST investigation alone warrants disbarment or at the very least a multi-year suspension

with fitness. *See In re Goffe*, 641 A.2d 458 (D.C. 1994) (per curiam) (attorney disbarred for submitting forged documents and lying in Tax Court proceedings); *In re White*, 11 A.3d 1226 (D.C. 2011) (per curiam) (appended Board Report and Hearing Committee Report) (attorney disbarred for lying and submitting falsified documents to City Council).

We have also concluded that Respondent knowingly and intentionally misappropriated entrusted funds. In virtually all cases of misappropriation, disbarment is the only appropriate sanction unless the misconduct resulted from nothing more than simple negligence. *In re Addams*, 579 A.2d 190, 191 (D.C. 1990) (en banc). Mitigating factors of the "usual sort" are not sufficient to rebut the presumptive sanction of disbarment for intentional or reckless misappropriation, and "[o]nly the most stringent of extenuating circumstances would justify a lesser disciplinary action." *Id*. at 191, 193. The Court of Appeals has found such exceptional circumstances in only one non-*Kersey* case, where the attorney's intentional misappropriation of funds was intended to, and actually did, benefit the ward. *See In re Hewett*, 11 A.3d 279, 289-90 (D.C. 2011). There are no such exceptional, non-*Kersey* circumstances here.

Because Respondent has withdrawn his *Kersey* defense, we have no alternative under the controlling decisions of the Court of Appeals but to recommend that Respondent be disbarred.

VI. CONCLUSION

It cannot be disputed that Respondent has borne Job-like physical and mental health afflictions throughout much of his life, conditions with which any observer must sympathize. We credit the testimony of Respondent and of his nephrologist that he frequently endured severe and often debilitating pain and other effects prior to and during the years at issue in this case. We also accept his description of his professional and emotional unpreparedness for entering into and pursuing a solo practice after 30+ years of practicing in multi-attorney law firms (which is not to say that we consider this factor exculpatory of his conduct).

However, for the reasons set forth in Section IV of this Report, we have concluded that the Board should find that Disciplinary Counsel has established by clear and convincing evidence that Respondent violated applicable Rules of Professional Conduct in 27 instances, as summarized in Section V.B.6 of this Report. Those ethical violations include serious and repeated instances of dishonesty and intentional misappropriation. Absent the assertion and establishment of *Kersey* mitigation grounds, we respectfully recommend that Respondent be disbarred. We further recommend that Respondent's attention be directed to the requirements of D.C. Bar R. XI, § 14 and their effect on eligibility for reinstatement. *See* D.C. Bar R. XI, § 16(c).

AD HOC HEARING COMMITTEE

Warren Anthony Fitch

Warren Anthony Fitch, Chair

Teresa N. Taylor

Teresa Taylor, Attorney Member