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

In the Matter of:	:	
	:	
JONATHAN C. DAILEY,	:	
	:	Board Docket No. 16-BD-071
Respondent.	:	Disciplinary Docket Nos.
	:	2015-D104 & 2015-D246
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 448141)	:	

REPORT AND RECOMMENDATION OF THE
AD HOC HEARING COMMITTEE

I. PROCEDURAL BACKGROUND/SUMMARY OF ALLEGATIONS AND RECOMMENDATIONS

In a four-count Specification of Charges (the "Specification"), the Office of Disciplinary Counsel ("ODC") alleges that Respondent violated the Rules of Professional Conduct (the "Rules," or, in the singular, "Rule") in connection with his work on three different client matters (Counts I-III), and through misuse of his client trust account (Count IV). Count I alleges that Respondent violated Rule 1.7(b)(4) because his representation of a client (Ms. Tabitha Fitzgerald) was adversely affected by his own property interest. Count II alleges that Respondent violated Rules 1.15(a), (c), and (d) (including alleged intentional misappropriation of funds) in his dealings with a third party (Lawsuit Financial Corporation, hereinafter sometimes referred to as "Lawsuit Financial" or "LFC") which loaned Respondent funds to be

repaid out of legal fees Respondent might receive in connection with various contingent fee personal injury cases, including a particular medical malpractice case (hereinafter, the "*Hedgepeth* case" or "*Hedgepeth*"). Count III alleges that in his representation of Mr. John Mack, a plaintiff in a personal injury claim, Respondent violated Rule 1.15(c) by failing to deliver funds promptly to a third party entitled to receive them, and that Respondent violated Rules 1.15(a) and (d) by reckless misappropriation of funds he received in the course of that representation. Count IV alleges that Respondent violated Rule 1.15(a) by commingling personal and entrusted funds in his client trust account, and by failing to keep and preserve complete records of funds of clients and third parties in that account.

The evidentiary hearing of this case was held on August 21-22, 2017. ODC was represented by Hamilton P. Fox, III, Esq. Respondent, although represented by counsel through the stage of filing an Amended Answer to the Specification, appeared *pro se* thereafter and at the hearing. During the hearing ODC called four witnesses[1] and submitted 107 documentary exhibits,[2] all of which were admitted into evidence, subject to certain objections by Respondent discussed in Section III(A) of this Report and Recommendation. Respondent testified on his own behalf, but did not submit any documentary

[1] Tabitha Fitzgerald (hereinafter, "Ms. Fitzgerald"); Joel S. Aronson, Esq. ("Mr. Aronson"); Mark Bello, Esq. ("Mr. Bello"); and Charles Anderson, an investigator for ODC ("Mr. Anderson"). However, transcript citations herein to the testimony of those individuals identify them solely by their last names.

[2] Lettered exhibits A through D, and numbered exhibits 1 through 103.

exhibits or call any witnesses. Prior to the hearing, on August 8, 2017, the parties had filed a document entitled "Agreed Stipulations," stipulating as to certain factual matters relating to the Specification; references herein or in the attached Appendix to paragraphs or subparagraphs in that document are designated with the prefix "Stip. ¶ ___."

After the conclusion of all testimony and closing argument by ODC and Respondent, the Hearing Committee recessed in executive session pursuant to Board Rule 11.11 to determine on a preliminary, non-binding, basis whether ODC had proved a violation of at least one disciplinary rule. Upon resuming proceedings, the Chair announced that the Hearing Committee had made such an affirmative determination. Upon inquiry by the Chair, ODC stated that there was no prior disciplinary record of Respondent to be introduced into evidence in aggravation of sanction. Tr. 497:4-498:12.[3] Respondent testified briefly on his own behalf in mitigation of sanction. Tr. 502:7-503:22.

ODC recommends that Respondent be disbarred (ODC Br. at 30[4]), pointing out that in all cases of misappropriation, disbarment is the only appropriate sanction unless the conduct resulted from simple negligence. *See In re Addams*, 579 A.2d 190 (D.C. 1990) (en banc). Respondent asserts that

[3] References herein to the transcript of the hearing are designated with the prefix "Tr. ___"; references to documents introduced into evidence by ODC are designated with the prefix "DCX ___."

[4] References herein to the initial post-hearing brief filed by ODC are designated with the prefix "ODC Br. ___"; and references herein to the post-hearing brief filed by Respondent are designated with the prefix "Resp. Br. ___."

no misappropriation occurred, nor did he violate any Rule other than through his admitted commingling of personal and entrusted funds in, and his failure to maintain proper records for, his IOLTA escrow account, for which Respondent contends the appropriate sanction is "a private reprimand." Resp. Br. at 2, 15.[5]

The Hearing Committee concludes there is clear and convincing evidence that Respondent represented a client despite knowing that the client's interests were adverse to Respondent's own financial and property interests, without first obtaining a knowing waiver of that conflict as appropriate; intentionally misappropriated funds in the Lawsuit Financial matter; recklessly misappropriated funds in the Mack matter; intentionally commingled personal and trust funds; and failed to maintain proper books and records of his trust account transactions. Furthermore, there are no extraordinary countervailing circumstances which Respondent brought to the attention of the Hearing Committee (Tr. 502:7-503:22). While a lawyer found to have engaged in representing a client with whose interests the lawyer had a conflict may be subject to a sanction of a suspension, Respondent has not shown any remorse or even recognition of the impropriety of his actions. Because the Hearing Committee, however, also finds Respondent, by clear and convincing evidence, intentionally misappropriated funds entrusted to

[5] D.C. Bar Rule XI, § 3(a)(4), provides for "reprimands" and § 3(a)(5) authorizes "informal admonitions"; there is no provision in that rule for a "private reprimand."

him that were claimed by a third party in connection with his representation (Count II) and recklessly misappropriated and commingled trust funds (Counts III and IV, respectively), Respondent should be disbarred pursuant to *Addams*, *supra*.

Part II of this Report and Recommendation contains the Hearing Committee's findings of fact relating to each of the four Counts in the Specification. Section II(A) provides findings of fact relating to the Fitzgerald matter (Count I of the Specification); Section II(B) deals with the Lawsuit Financial matter (Count II of the Specification); Section II(C) provides findings of fact concerning the Mack matter (Count III of the Specification); Section II(D) and the Appendix incorporated therein provide findings of fact concerning the commingling of funds in Respondent's IOLTA trust account (hereinafter, the "Trust Account") and his failure to make and retain required records for that account (Count IV of the Specification).

Part III of this Report and Recommendation contains the Hearing Committee's recommended conclusions of law, including first a discussion and recommendation concerning Respondent's evidentiary objections. Part IV of this Report and Recommendation contains the Hearing Committee's discussion of its sanction recommendation.

II. FINDINGS OF FACT[6]

1. Respondent is a member of the Bar of the District of Columbia Court of Appeals, having been admitted by motion on October 2, 1995, and subsequently assigned Bar Registration No. 448141. Amended Answer, ¶ 1; DCX A; Stip. ¶ 1; Tr. 239:10-11 (Respondent).[7]

2. By e-mail dated November 2, 2016, Respondent's then-counsel agreed to accept service of the Specification and the Petition Instituting Formal Disciplinary Proceedings in this matter on behalf of Respondent, and receipt of such service was confirmed in writing on November 4, 2016. DCX C.

A. Fitzgerald (Count I)

3. In 1996, Respondent purchased condominium unit no. 2006 (the "Condominium Unit") in the Georgetown Park Condominium (the "Condominium Association"), located in the District of Columbia. DCX 10 at 69-70, ¶ 9.

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[6] References in this Report to the paragraph numbers of the findings of fact made in this Part II are identified with the prefix "FF ¶ ___." The following is an index of the findings of fact in this Part II, and the matters to which they relate:

[7] Respondent is also admitted to practice in Virginia and Maryland. Tr. 239:6-12 (Respondent).

4. In 2003, Respondent entered into an agreement with a third party ("Mr. Park") whereby Respondent would sell the Condominium Unit to Mr. Park, but continue to occupy it as a renter and retain an option to repurchase. DCX 10 at 70-71, ¶ 10. Mr. Park subsequently purchased the Condominium Unit from Respondent. *Id.*

5. In 2003 (Tr. 241:1-3 (Respondent)) or 2004 (Tr. 150:21-22 (Fitzgerald)), Respondent formed a romantic relationship with Ms. Fitzgerald.

6. After the sale of his Condominium Unit to Mr. Park, Respondent moved to Colorado to attempt to pursue a career in investment banking. Tr. 241:8-10 (Respondent).

7. Respondent subsequently decided to return to the District of Columbia and resume the practice of law there on a full-time basis. Tr. 242:5-8 (Respondent).

8. In connection with his return to the District of Columbia, Respondent sought to exercise his option to repurchase the Condominium Unit from Mr. Park, but Mr. Park refused to re-sell the property to Respondent and litigation between them ensued. DCX 10 at 71, ¶ 11.

9. Respondent and Mr. Park eventually settled their legal dispute, and by 2007 Respondent obtained the clear right to re-acquire the Condominium Unit. *Id.*; Tr. 151:1-152:8 (Fitzgerald).

10. In the period from 2003 or 2004 to 2007, Ms. Fitzgerald and Respondent remained romantically involved, albeit sometimes at long

distance and sporadically (Tr. 151:1-3; 181:12-13 (Fitzgerald)), and there had been some discussion between them about possibly getting married (Tr. 167:10-14 (Fitzgerald)).

11. When Respondent finally obtained the clear right to re-acquire the Condominium Unit, he was unable to qualify for a purchase-money mortgage. Tr. 152:6-9 (Fitzgerald); 242:10-15 (Respondent).

12. In order to re-acquire the Condominium Unit, Respondent arranged for title to be taken in the name of Ms. Fitzgerald, and it was agreed between them that Respondent would live in the Condominium Unit and pay the mortgage payments for it, as well as the related condominium fees and assessments and real estate taxes (Stip. ¶ 2; Tr. 332:17-20 (Respondent)), but Respondent paid no rent to Ms. Fitzgerald for his right to occupy the property (Tr. 153:2-3 (Fitzgerald)).

13. Settlement on re-acquisition of the Condominium Unit occurred on March 27, 2007. DCX 10 at 71, ¶ 12. Shortly thereafter, on April 24, 2007 (DCX 10 at 71, ¶ 13), Ms. Fitzgerald did a "cash-out" refinancing (Tr. 179:14-15 (Fitzgerald)) of the Condominium Unit with a 100% loan (Tr. 180:9-14 (Fitzgerald)). Ms. Fitzgerald contributed approximately $1,700 to the costs of the refinancing (Tr. 180:18-19 (Fitzgerald)), and Respondent kept tens of thousands of dollars of the cash generated by it (Tr. 179:16 (Fitzgerald)). Ms. Fitzgerald was the sole party obligated on both the March 2007 acquisition loan and the April 2007 refinancing loan. DCX 10 at 71-72, ¶ 13.

14. As part of Ms. Fitzgerald's agreeing to take title to the Condominium Unit and become the person obligated on the loans for acquiring and refinancing the property, Ms. Fitzgerald, to protect herself against Respondent,[8] required Respondent to agree to exercise his option to re-purchase the Condominium Unit from her within "a year or two" (Tr. 153:7-12; 181:9-18; 183:1-184:2 (Fitzgerald)). Respondent had agreed to pay Ms. Fitzgerald the amounts due the mortgage company and make payment of the condominium assessments directly to the Condominium Association. Tr. 154:7-9 (Fitzgerald).

15. Approximately in 2010 or early 2011,[9] Respondent, with no explanation to Ms. Fitzgerald, stopped giving her the money to pay the mortgage company and stopped paying the condominium assessments for the Condominium Unit. Tr. 153:21-154:2; 155:11-17; 156:2-4 (Fitzgerald); 332:21-333:3 (Respondent). By that time, too, the romantic relationship between Ms. Fitzgerald and Respondent had ended. Tr. 156:5-8 (Fitzgerald); 243:21-244:2 (Respondent).[10]

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[8] "When I put the condo in my name, I was well aware of what he did to the Parks and I wasn't going to put myself in a position, should things not work out." Tr. 181:9-12 (Fitzgerald).

[9] Respondent's lending agreements with Lawsuit Financial are dated April 21, 2010 (DCX 31) and July 15, 2010 (DCX 32). *See* FF ¶¶ 44 and 52, *infra*.

[10] "Then I fell behind on the payments, and when I fell behind we were also to the point in our relationship when we're ending our boyfriend and girlfriend relationship." Tr. 243:21-244:2 (Respondent).

16. Ms. Fitzgerald learned of Respondent's failure to keep up with the payment of condominium assessments for the Condominium Unit when she received a foreclosure notice from the Condominium Association (Tr. 155:6-10 (Fitzgerald)), and on May 25, 2011, the Condominium Association sued her in the Superior Court of the District of Columbia, Civil Action No. 2011 CA 4148 (hereinafter, the "Fee Litigation") to recover unpaid condominium assessments and to foreclose on the Condominium Unit in order to satisfy the Condominium Association's lien for the unpaid assessments (DCX 1 at 21, 24; Stip. ¶ 3).

17. On July 26, 2011, Respondent filed an Answer on behalf of Ms. Fitzgerald in the Fee Litigation, and thereafter represented her as the defendant in that lawsuit. DCX 1 at 24.

18. When Respondent undertook the defense of Ms. Fitzgerald in the Fee Litigation, she had the right to assert a third-party claim against him based on his agreement (FF ¶ 12) to be the party responsible for all costs associated with the Condominium Unit. Tr. 286:8-17 (Respondent); 202:6-204:13 (Aronson).

19. Respondent "never even thought about" (Tr. 287:10 (Respondent)) the possibility of there being a conflict of interest with Ms. Fitzgerald in the Fee Litigation, and he did not obtain her informed consent with respect to that conflict (Tr. 287:10-288:10 (Respondent)). Respondent claimed he would

represent Ms. Fitzgerald to "help" her so she did not have to hire a lawyer; he said to her, "I'll take care of it." Tr. 244:17-22 (Respondent).

20. Respondent never discussed with Ms. Fitzgerald the possibility that her interests and his in the Fee Litigation might be adverse (Tr. 287:11-16; 289:4-8 (Respondent);[11] 158:4-8 (Fitzgerald)), although he concedes she could have interpleaded a claim against him (Tr. 286:14-17 (Respondent)).

21. In undertaking to represent Ms. Fitzgerald in the Fee Litigation, although Respondent claims he informed Ms. Fitzgerald that she could hire another lawyer (Tr. 288:18-22 (Respondent)), he admitted he did not advise her to consult another attorney (Tr. 287:19-21; 289:1-3 (Respondent)), nor did he make any written disclosures to her about possible conflicts of interest (Tr. 157:13-22 (Fitzgerald)).

22. During the course of the Fee Litigation, in order to keep the Condominium Association "at bay," but without explaining to her the ramifications of signing a confessed judgment, Respondent told Ms. Fitzgerald she had to execute a confessed judgment in favor of the Condominium Association, in the original principal amount of $17,000. Tr. 158:9-159:4; 171:3-17; 172:5-9; 177:13-17; 184:14-18 (Fitzgerald). Ms. Fitzgerald understood from Respondent that he would then pay the outstanding arrears and future obligations. Tr. 159:11-18 (Fitzgerald).

[11] "What we discussed was that I was going to take care of everything." Tr. 287:15-16 (Respondent).

23. The only person who benefitted from Ms. Fitzgerald's execution of the $17,000 confessed judgment was Respondent, because he was the only person living in the Condominium Unit (FF ¶ 12), and in 2007 he had already cashed out as much equity from the property as he could through a 100% refinancing of the property (FF ¶ 13).

24. In January of 2013, Ms. Fitzgerald told Respondent that he had twelve months to resolve all problems pertaining to the Condominium Unit, by sale or otherwise, or else she would sell the Condominium Unit herself. Tr. 160:13-161:1 (Fitzgerald). Respondent described this conversation as "very acrimonious" (Tr. 245:9 (Respondent)),[12] and that Ms. Fitzgerald was "yelling and screaming" (Tr. 245:18-19 (Respondent)).

25. On August 16, 2013, although he still represented Ms. Fitzgerald in the Fee Litigation, Respondent filed suit in the Superior Court of the District of Columbia against Ms. Fitzgerald, the Condominium Association, and various lienholders, seeking, *inter alia*, a declaration that he − not Ms. Fitzgerald − was the actual owner of the Condominium Unit, the case being docketed as Civil Action No. 2013 CA 5637 (hereinafter, the "Title Litigation"). DCX 10 at 67, 70, 75; Stip. ¶ 4.[13]

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[12] In Respondent's words, Ms. Fitzgerald said "she had had it, she was up to there with it, and she was going to sell the condo" (Tr. 245:10-11 (Respondent)), and she "threaten[ed] to sell [Respondent's] house and home out from under him, making him homeless" (Resp. Br. at 3, ¶ 7).

[13] The Complaint filed by Respondent states he is a citizen and resident of the District of Columbia. DCX 10 at 68, ¶ 1.

26. Respondent did not give his client, Ms. Fitzgerald, advance notice that he was going to sue her. Tr. 162:7-9 (Fitzgerald).

27. On August 22, 2013, Respondent filed in the Fee Litigation a "Motion to Set a Status Conference for Defense Counsel to Withdraw as Counsel for Defendant." DCX 2 at 26. Respondent's motion stated, approximately eight months after his acrimonious conversation with Ms. Fitzgerald described in FF ¶ 24, *supra*, "due to recent events involving the condominium in question, there have arisen conflicts of interest that force undersigned counsel to withdraw as counsel for the Defendant" (DCX 2 at 26, ¶ 4), and "[g]iven the immediacy of these recent events, there has not been occasion for a request from [Ms. Fitzgerald] or counsel for the [Condominium Association] for consent to this motion" (DCX 2 at 27, ¶ 5). After his acrimonious conversation with Ms. Fitzgerald, Respondent had consulted counsel and been advised "the only thing I could do was to file a declaratory-judgment action." Tr. 246:2-4 (Respondent).

28. Notwithstanding the "immediacy of [the] recent events" that Respondent stated precipitated his motion to withdraw in the Fee Litigation, he nevertheless asked the court to set a status conference 45 days after the filing of the motion so that settlement discussions of the Fee Litigation could be pursued. DCX 2 at 27, ¶ 6.

29. On November 20, 2013 (DCX 3), the court denied without prejudice Respondent's motion to withdraw as Ms. Fitzgerald's attorney in the Fee

Litigation, on the ground that he had not complied with the requirements of D.C. Super. Ct. Civ. R. 101(c)(2).[14]

30. On October 15, 2013, Ms. Fitzgerald (through her counsel, Mr. Aronson) filed an answer to the complaint in the Title Litigation. DCX 9 at 56. Ms. Fitzgerald's answer denied Respondent's claim that he was the beneficial owner of the Condominium Unit, and counterclaimed that Respondent had entered into a written agreement with her which conditioned his right to reacquire title to the Condominium Unit; that Respondent had breached his agreement with her by failing to make timely payments of the mortgages and condominium association fees for the Condominium Unit; and sought damages from Respondent for breach of contract. The counterclaim also included claims for costs and attorney's fees. DCX 13 at 82, 84.

31. On November 15, 2013, the court held an initial scheduling hearing in the Title Litigation. DCX 9 at 55. At that hearing Mr. Aronson, as counsel for Ms. Fitzgerald, raised the issue of Respondent's having a conflict of interest in suing Ms. Fitzgerald in the Title Litigation because he was also

[14] D.C. Super. Ct. Civ. R. 101(c)(2) states:

> Unless the client is represented by another attorney or the motion is made in open court in the client's presence, a motion to withdraw an appearance shall be accompanied by a certificate of the moving attorney listing the client's last known address and stating that the attorney has served upon the client a copy of the motion and a notice advising the client to obtain other counsel, or, if the client intends to represent himself or herself or to object to the withdrawal, to so notify the Clerk in writing within 10 days of service of the motion upon the client.

representing her as a defendant in the Fee Litigation. Tr. 197:14-21 (Aronson).

32. On January 17, 2014 − five months after Respondent stated in his August 22, 2013 motion to withdraw that "due to recent events involving the condominium in question, there have arisen conflicts of interest that force undersigned counsel to withdraw" (FF ¶ 27), and approximately two months after the court advised Respondent of the actions he needed to take to withdraw as Ms. Fitzgerald's attorney in the Fee Litigation (FF ¶ 29) − Respondent appeared as Ms. Fitzgerald's attorney at a status conference in the Fee Litigation to discuss settlement of the case. DCX 1 at 22; Stip. ¶ 5.

33. On April 29, 2014 − approximately five months after the court denied his initial attempt to withdraw as Ms. Fitzgerald's attorney in the Fee Litigation (FF ¶ 29), and Mr. Aronson's declaration in court on November 15, 2013, of the existence of a conflict of interest (FF ¶ 31) − Respondent filed in the Fee Litigation a motion to withdraw as counsel for Ms. Fitzgerald. DCX 6. Respondent's new motion to withdraw was accompanied by a certification pursuant to D.C. Super. Ct. Civ. R. 102(c) (DCX 6 at 38), and stated, "[i]rreconcilable differences have arisen between [Ms. Fitzgerald] and [Respondent] as a result of [Respondent's] filing of a lawsuit against [Ms. Fitzgerald] . . . ." DCX 6 at 36, ¶ 1. Nothing was said in Respondent's second motion to withdraw about the nature of the "recent events" and their

"immediacy" (FF ¶ 27) that caused the filing of Respondent's first motion to withdraw without obtaining Ms. Fitzgerald's consent. DCX 6.

34. Respondent continued to represent Ms. Fitzgerald in the Fee Litigation until May 6, 2014, when the court granted Respondent's second motion to withdraw as counsel for Ms. Fitzgerald. DCX 1 at 22; Stip. ¶ 5.

35. On July 3, 2014, the Condominium Association filed a motion for leave to file a cross-claim against Ms. Fitzgerald in the Title Litigation, asserting that in the Fee Litigation "[the Condominium Association] and Fitzgerald entered into a consent order and Fitzgerald was making payments pursuant to the order [but] all payments . . . stopped in or about July 2013 and the delinquency on the [Condominium Unit] has grown . . . ." DCX 23 at 141, ¶ 3. On July 23, 2014, the court granted the Condominium Association's motion for leave to pursue its cross-claim against Ms. Fitzgerald. DCX 24.

36. On October 23, 2014, after the Condominium Association was granted leave to pursue its financial cross-claim against Ms. Fitzgerald in the Title Litigation (FF ¶ 35), the court dismissed the Fee Litigation. DCX 1 at 21.

37. On March 10, 2015, a jury trial of the issues between Respondent and Ms. Fitzgerald in the Title Litigation concluded, in which all of Respondent's claims were denied (DCX 28 at 188), and the jury entered a special verdict finding that there had been a contract between Ms. Fitzgerald

and Respondent; that Respondent had breached the contract; and that Ms. Fitzgerald had been damaged in the amount of $176,000 (DCX 29 at 190).

38. On June 14, 2016, the District of Columbia Court of Appeals issued a Memorandum Opinion and Judgment affirming the jury's verdict against Respondent. DCX 30.

39. As of the time of the hearing in this matter, Respondent had not paid any part of the $176,000 judgment against him (Tr. 166:12-14 (Fitzgerald)); the Condominium Association was still pursuing its confessed judgment against Ms. Fitzgerald, which had grown to over $60,000 including principal, interest, and legal fees (Tr. 185:4-15 (Fitzgerald)); as a result of that confessed judgment Ms. Fitzgerald's credit had been "destroyed" (Tr. 159:22 (Fitzgerald)); and because Ms. Fitzgerald works in the financial services industry, her job mobility had been compromised due to her financial difficulties (Tr. 159:22-160:3 (Fitzgerald)).

40. When asked if he had any doubts about how he had represented Ms. Fitzgerald, Respondent stated (Tr. 465:20-466:22 (Respondent)):

> No, not at all. I feel she was put in an untenable situation by me. I had a duty to help her as a friend. You know, it was a horrible situation. So I felt an absolute obligation to represent her.
>
> * * *
>
> What I should have done more quickly . . . I should have run down to the courthouse more quickly to withdraw.

B. Lawsuit Financial Corporation (Count II)

41. Respondent represented an individual named Mr. Hedgepeth as the plaintiff in a contingent fee tort suit. Stip. ¶ 6.

42. Respondent's practice is approximately 95% concentrated in litigating plaintiffs' claims for personal injuries or medical malpractice on a contingent fee basis. Tr. 240:8-11 (Respondent).

43. Lawsuit Financial Corporation is engaged in the business of providing "nonrecourse" funding, primarily for clients involved in personal injury litigation, and also "some funding" for attorneys. Tr. 71:2-5 (Bello). Mark Bello is the founder and chief operating official of the company. Tr. 70:18-72:9 (Bello).

44. Respondent initiated contact with LFC by applying for financing (Tr. 79:15-18 (Bello)), and on April 21, 2010, Respondent entered into a multi-page "Pending Litigation Purchase Agreement With Purchase Price Rebate Schedule" (hereinafter, "Loan Agreement No. 1") with LFC. DCX 31.

45. Loan Agreement No. 1 identifies the location of Respondent's practice as being in the District of Columbia. DCX 31 (top of page, preceding "Recitals").

46. Loan Agreement No. 1 states that Respondent is an attorney pledging legal fees contemplated in connection with certain lawsuits. DCX 31 at 195, first "Recital."

47. Loan Agreement No. 1 identifies "cases in progress that are the subject of this Agreement," and then specifies two lawsuits, the second of which, *Hedgepeth*, was then pending before a District of Columbia court. DCX 31 at 195, second "Recital"; Stip. ¶ 6.

48. Loan Agreement No. 1 further states that "in order to afford [Respondent] sufficient funds to adequately pay for the pursuit of the Litigation [capitalization in original] . . . [LFC] has agreed to accept certain proceeds which may arise from settlement or verdict resulting from the Litigation." DCX 31 at 195, fourth "Recital."

49. Loan Agreement No. 1 continues [bolding and capitalization in original]:

> NOW THEREFORE, for and in consideration of **$10,000** . . . [LFC] and [Respondent] agree as follows:
>
> 1. [Respondent] unconditionally and irrevocably transfers and conveys to [LFC] all of [Respondent's] control, right, title and interest in the first **$40,000** or 10% of the gross recovery, whichever is lower, paid to [Respondent] from the Proceeds, as hereinafter defined . . . . For purposes of this agreement, "Proceeds" shall be defined as the gross attorney fees due attorney for handing the subject litigation . . . ."
>
> 2. [Respondent] hereby grants to [LFC] a lien and/or security interest in that portion of Proceeds of [sic] equal to the sum of **$40,000** . . . .
>
> 3. . . . This agreement is expressly stated to be a sale by [Respondent] to [LFC] only of a portion of the specified Proceeds that may flow to [Respondent] if the result of the Litigation referred to above is favorable . . . . This sale and/or Agreement is not the sale or assignment of the [Respondent's]

> cause of action against any responsible party . . . . No control, input, influence, right or involvement of any kind as concerns . . . the Litigation is contemplated by any party to this agreement.

DCX 31 at 195-96.

50. Loan Agreement No. 1 contains the following language relating to disputes:

> 9. This Agreement shall be construed and interpreted in accordance with the laws of the State of Utah . . . . Venue for any dispute arising hereunder shall lie in the state and county where [Respondent] currently resides.
>
> 10. ARBITRATION: Any dispute between [Respondent] and [LFC] arising out of this Agreement will be resolved first, by good faith negotiation for a period of 30 days, then by binding arbitration through the American Arbitration Association before a single arbitrator. Arbitration shall take place in the American Arbitration Association office closest to where [Respondent] currently resides.

DCX 31 at 196.[15]

51. Part of Loan Agreement No. 1 was a separate notarized page entitled "**LIEN**" (bolding and underlining in original), which states, in pertinent part (capitalization in original):

> I, Jonathan Dailey, HEREBY PROMISE AND/OR AGREE TO PAY DIRECTLY TO [LFC] SUCH SUMS AS MAY BE DUE AND OWING FOR THE ADVANCING OF

[15] For the purposes of ¶¶ 9 and 10 of Loan Agreement No. 1, venue for any arbitration or suit was the District of Columbia. Respondent re-established residence in the District of Columbia prior to 2007. FF ¶¶ 7-9. Respondent lists his address in the Title Litigation, filed August 16, 2013, as "1080 Wisconsin Avenue, NW, Unit No. 2006, Washington, D.C. 20007" (DCX 10 at 67), and LFC's suit against Respondent docketed November 19, 2015 (DCX 51 at 295) specifies a Washington, D.C., address as Respondent's residence.

> FUNDS RENDERED TO ME ARISING OUT OF THE "PENDING LITIGATION AGREEMENT" . . . .
>
> THE AMOUNT DUE MUST BE WITHHELD FROM THE ATTORNEY FEE PORTION OF ANY SETTLEMENT, JUDGMENT OR AWARD I RECEIVE . . . .
>
> * * *
>
> I FULLY UNDERSTAND THAT I AM DIRECTLY AND FULLY RESPONSIBLE FOR SUMS DUE UNDER SAID AGREEMENT. I FURTHER UNDERSTAND THAT IT IS MY OBLIGATION TO PAY FOR THE FINANCIAL SERVICES RENDERED AGAINST MY REPRESENTATION OF THE PLAINTIFFS IN THE ABOVE CAPTIONED LAWSUIT FROM ATTORNEY FEES GENERATED BY THE SETTLEMENT, JUDGMENT OR VERDICT THAT I OBTAIN FOR THE PLAINTIFFS AS A RESULT OF MY HANDLING OF THE CASE THAT GIVES RISE TO THE SERVICES RENDERED BY [LFC].

DCX 31 at 200.

52. On July 15, 2010, Respondent executed a second "Pending Litigation Purchase Agreement With Purchase Price Rebate Schedule" with LFC (hereinafter, "Loan Agreement No. 2"). DCX 32. The operative terms of Loan Agreement No. 2, including the "LIEN" document (DCX 32 at 205)[16] are the same as Loan Agreement No. 1, except that in consideration of the additional $15,000 loaned to Respondent pursuant to Loan Agreement No. 2, ¶ 1 of that agreement requires a payment to LFC of $60,000 or 10% (whichever was lower) of the gross recovery "Proceeds," and ¶ 2 of Loan Agreement No. 2 grants LFC an additional lien amount of $60,000 to secure

[16] This lien document clearly indicates that it was notarized in the District of Columbia.

the repayment due LFC (DCX 32 at 202). (Loan Agreement No. 1 and Loan Agreement No. 2 are hereinafter jointly referred to as the "Loan Agreements," or, in the singular, as a "Loan Agreement.")

53. Four cases are listed in Loan Agreement No. 2 as the source of repayment and the collateral for the loan and lien established by Loan Agreement No. 2, including the two cases previously listed in Loan Agreement No. 1, and two additional cases, one of which ("*Jones v. Children's Hospital*") was, like *Hedgepeth*, a case then pending in a District of Columbia court. DCX 32 at 202.

54. Taken together, pursuant to the Loan Agreements Respondent borrowed a total of $25,000 from LFC. DCX 31; DCX 32.

55. The combined effect of ¶¶ 1 and 2 of the Loan Agreements and the "LIEN" documents included in the Loan Agreements was:

(a) to establish a non-recourse repayment obligation by Respondent to LFC of the lesser of $100,000 or 20% of any gross attorney fee "Proceeds" that Respondent received from the cases listed as collateral; and

(b) to establish a separate aggregate $100,000 lien obligation that Respondent agreed to withhold from those "Proceeds" in order to secure Respondent's repayment obligation (DCX 31 at 195 and 200; DCX 32 at 202 and 205).

56. During his 23 years of law practice, Respondent has engaged in many loan transactions such as those embodied in the Loan Agreements, and

he is very well acquainted with the contingent fee case financing industry. Tr. 250:4-251:1; 336:13-14 (Respondent).

57. Of the four cases listed as collateral in Loan Agreement No. 2, Respondent advised LFC that only *Hedgepeth* succeeded in producing any payment of legal fees to Respondent. Tr. 85:15-86:1 (Bello); 255:4-257:6 (Respondent).

58. Respondent testified that his loss of the three contingent fee cases other than *Hedgepeth* which he had pledged to LFC as collateral was financially "devastating" to Respondent. Tr. 255:12-257:7 (Respondent).

59. LFC did not check independently the status of cases listed as collateral for its loans but relied on Respondent's integrity as an attorney to keep LFC informed of the status and outcome of the cases that were the potential sources of repayment of LFC's loans, to pay LFC the amounts due under the Loan Agreements, and to escrow LFC's share of the "Proceeds" of a case that generated legal fees in the event of a dispute.

(a) The Loan Agreements contain no periodic reporting or other information sharing requirement. DCX 31-32.

(b) Paragraph 3 of each Loan Agreement expressly states that LFC has "[n]o control, input, influence, right or involvement of any kind as concerns . . . the Litigation." DCX 31 at 196; DCX 32 at 203.

(c) The "LIEN" document included in each Loan Agreement established a personal duty of Respondent to withhold and pay arising from

his client representation, stating, "[t]he amount due *must be withheld* from the attorney fee portion of any settlement, judgment, or award *I receive* as a result of the filing of the lawsuits," "I fully understand that *I am directly and fully responsible* for sums due under said agreement," and "I further understand that *it is my obligation* to pay for the financial services rendered *against my representation of the plaintiffs in the above captioned lawsuit* from attorney fees generated . . . *as a result of my handling of the case*." DCX 31 at 200; DCX 32 at 205 (emphasis added; capitalization deleted).

(d) Mr. Bello testified that he relied on Respondent's word as an attorney, rather than any external verification, that all three cases other than *Hedgepeth* resulted in no recovery (Tr. 123:6-7; 126:9-127:8; 128:5-7 (Bello)) because "dealing with lawyers, you expect a Brother [sic] counsel to be honest with you . . . . That's what I expected" (Tr. 127:12-16 (Bello)).

(e) Mr. Bello further testified that he relied on Respondent, because Respondent was as an attorney, to escrow funds the ownership of which was disputed. Tr. 103:14-22; 117:2-12 (Bello).

60. In a communication to Mr. Bello on June 30, 2011,[17] Respondent complained about the concept of having to repay everything owed to LFC out

[17] Respondent stopped paying his basic housing expenses for the Condominium Unit where he lived approximately in 2010 or early 2011. FF ¶ 15.

of the legal fees in just one case (*Hedgepeth*). DCX 33 at 221 (entry at top of page).[18]

61. In a communication to Mr. Bello on July 5, 2011, Respondent stated that prior to settling *Hedgepeth* he wanted a resolution of the amount that LFC would receive from the case so there would be no "lingering questions of fee liens." DCX 33 at 220 (third entry from bottom of page).

62. Mr. Bello responded the same day stating, *inter alia*, "I presume when an attorney solicits a contract, reads it, accepts its terms and executes it, a 'claim' against that contract is both 'legitimate' and 'rational.' . . . That three cases out of four failed is certainly one factor, but we need to know what attorney fees are being generated by the entire package of cases we funded." *Id.* (third entry from top of page).

63. On August 14, 2012, Respondent advised Mr. Bello there were settlement negotiations in *Hedgepeth*, and that "[e]veryone will be taking a large loss in his case." DCX 33 at 219 (second entry from top of page).

64. On the morning of August 20, 2012, Respondent advised Mr. Bello regarding *Hedgepeth*, "we may have an agreement . . . . It is confidential (and not yet concluded), but I can tell you that my client − after seven years of litigation and two appeals − will net approximately $150,000." DCX 33 at

[18] DCX 33 is a compilation of summaries or transcriptions of conversations or e-mails between Respondent and Mr. Bello or others in Mr. Bello's office. Respondent objected to the admission of DCX 33 on the grounds that it is hearsay. The Hearing Committee has chosen to accept as evidence DCX 33 as the most reliable, contemporaneous report of the communications between LFC and Respondent. *See* discussion in Section III(A), *infra*.

219 (top of page). Later that day Respondent advised LFC that his legal fee in *Hedgepeth* would be just over $100,000. DCX 33 at 218 (entry at bottom on page). These monetary figures understated both the amount of the gross client recovery in *Hedgepeth*, as well as the amount of Respondent's legal fee in that case. *See* FF ¶¶ 66 and 83, *infra*.

65. On August 21, 2012, Mr. Bello answered the prior day's communications from Respondent by saying the minimum return LFC could accept was $47,500, with further payments to be extended over time. DCX 33 at 218 (second entry from bottom of page).

66. On August 27, 2012, Respondent deposited in his Trust Account a settlement check for $390,000 made out to himself and Mr. Hedgepeth; at least one-third of this amount represented Respondent's contingency fee. Stip. ¶ 7. Respondent disbursed his legal fee in *Hedgepeth* directly to his office management account. Tr. 327:12-20 (Respondent). In doing so, Respondent did not consult a lawyer specializing in legal ethics (or anybody else) concerning his duties to escrow sums due LFC, nor did Respondent perform any independent research concerning that issue. Tr. 293:3-294:7 (Respondent).

67. Between July 5, 2011, when Respondent told LFC of his desire to resolve any "lingering questions of fee liens" before settling *Hedgepeth* (FF ¶ 61), and August 27, 2012, when Respondent deposited the *Hedgepeth* settlement check (FF ¶ 66), there is no indication in the record that LFC and

Respondent reached any agreement as to the amount Respondent owed LFC out his legal fee in *Hedgepeth* which would vary the terms of the Loan Agreements.

68. On September 19, 2012, Mr. Bello e-mailed Respondent to ask for an update on the *Hedgepeth* case, noting it had been nearly 30 days since their last communication (*see* FF ¶ 64, *supra*). Respondent replied that day, not telling LFC he had already received the settlement proceeds in *Hedgepeth*, but stating instead, "we are going to have to work out a compromise where I may agree to a total owed, but it will not come solely from Hedgepeth because that is not even possible." DCX 33 at 218 (third entry from bottom of page).

69. On September 24, 2012, Mr. Bello e-mailed Respondent, stating, "Our investors have instructed us to involve legal representation if we do not get an immediate response from you." DCX 33 at 218 (second entry from top of page).

70. On September 27, 2012, Respondent replied to LFC, stating, "You can involve whomever you want," and again without informing LFC that Respondent had already received the settlement proceeds in *Hedgepeth*, further stating, "[w]e are in the final stages of resolution." DCX 33 at 218 (top of page).

71. On September 27, 2012, LFC replied to Respondent's communication earlier that day, asking, "Can you give us resolution details

please? What is your timetable? What is the status of negotiations?" DCX 33 at 217 (bottom of page).

72. On September 28, 2012, Respondent replied to Mr. Bello's inquiry on the previous day, and again without informing LFC that Respondent had already received the *Hedgepeth* settlement proceeds, stated, "We are at a confidential number that now nets my client approximately $150,000. . . . I will be in touch." DCX 33 at 217 (third entry from bottom of page).

73. On October 25, 2012, Mr. Bello communicated with Respondent, noting, "It's been almost a month so I just [sic] following up on the Hedgepeth settlement." DCX 33 at 217 (third entry from top of page).

74. On October 25, 2012, Respondent replied to Mr. Bello's communication earlier that day, again without informing LFC that Respondent had received the *Hedgepeth* settlement proceeds, stating, "I cannot agree to a full payment of the non-recourse loan . . . . full payback of this loan is not only impossible, it is unfair. I am preparing a breakdown of what I can tell you to start negotiations − but a few agreements between attorneys/clients/costs owed before I can make a proposal to you." DCX 33 at 217 (second entry from top of page).

75. On December 13, 2012, Mr. Bello e-mailed Respondent, stating, "I need a resolution plan and I need it yesterday." DCX 33 at 216 (second entry from bottom of page). Respondent replied the same day, stating, "I'll have a proposal soon" (DCX 33 at 216 (third entry from bottom of page)), which he

amplified on December 21, 2012, by stating that "soon" meant "by mid-January." DCX 33 at 216 (fifth entry from bottom of page).

76. LFC sent reminders to Respondent on January 16, 2013, and January 22, 2013 (DCX 33 at 216). On February 1, 2013, Respondent replied, "I can only ask that you be patient as I work toward showing all parties a 'break down' that satisfies all lien holders." DCX 33 at 216 (fourth entry from top of page).

77. On April 17, 2013, Mr. Bello e-mailed Respondent, stating, "'January' did not happen. * * * I understand there are multiple liens on the Hedgepeth file . . . . I would be willing to discuss a compromised amount now and alternative collateral for the balance due. However I can't have that conversation with myself . . . ." Respondent replied that same day, and without informing LFC that his legal fees were actually at least one-third of $390,000 (FF ¶ 66), stated, "The two major lien holders assert as you just described. * * * the return after 8 years and two appeals was very, very minor." DCX 33 at 215 (third entry from bottom of page).

78. Mr. Bello e-mailed Respondent again on April 17, 2013, stating, "You told us that the client would be netting $150,000. So, what is the attorney fee on the case? It should be in the $75,000 range. I can work with that number. Any other liens on the fee portion besides ours?" DCX 33 at 215 (top of page).

79. On April 18, 2013, Respondent replied to Mr. Bello, stating "funds allocated to me or my client, they were nominal." DCX 33 at 214 (bottom of page). Mr. Bello answered the same day, asking, "What kind of payment plan can you offer?" DCX 33 at 214 (top of page).

80. Absent a further response from Respondent, Mr. Bello e-mailed Respondent on May 30, 2013, asking for an update. DCX 33 at 213 (second entry from bottom of page). Respondent replied on May 31, 2013, stating, "The update is that we are going to have to work out pledges on other cases as collateral. * * * The so-called 'break-down' is possible to send, but the final amount of the settlement is, by agreement, confidential." DCX 33 at 213 (third entry from bottom of page).

81. Mr. Bello answered Respondent on May 31, 2013, stating, "While the settlement terms may be confidential, your ATTORNEY FEE, as it relates to our lien, is NOT. * * * I am willing to accept partial payment on Hedspeth [sic] and alternate case collateral for future payments, as long as you are forthcoming about the Hedspeth [sic] fee . . . ." DCX 33 at 213 (top of page) (capitalization in original).

82. In testifying before the Hearing Committee, Respondent agreed with the statement of Mr. Bello in the preceding paragraph that no confidentiality provisions relating to the *Hedgepeth* settlement prevented Respondent from disclosing the amount of Respondent's *Hedgepeth* legal fee to LFC. Tr. 300:4-9 (Respondent).

83. On June 11, 2013, approximately ten months after Respondent received the *Hedgepeth* settlement funds (FF ¶ 66), he finally advised Mr. Bello that his legal fee in the case was $160,000, and asked Mr. Bello to send forms for other cases to post as collateral. Respondent also stated, "I suffered a tremendous loss on this case." DCX 33 at 212 (bottom of page).

84. On June 11, 2013, Mr. Bello replied to Respondent's communication earlier that day, stating, "the entire $100,000 obligation to Lawsuit Financial is due out of the Hedgepeth fee," adding that Mr. Bello was willing to accept additional collateral provided a "good faith payment" was made, and suggesting the amount of $40,000. DCX 33 at 212 (top of page).

85. On June 19, 2013, Respondent sent Mr. Bello an e-mail stating, in pertinent part, "Let me propose a resolution to the other lien holder. I do not believe there will be immediate cash for resolution, but let's see what we can do to make everyone happy . . . ." DCX 33 at 211 (third entry from bottom of page). Mr. Bello replied the same day, asking, "Are you suggesting that there are other lien holders on the ATTORNEY FEE side?" DCX 33 at 211 (third entry from top of page) (capitals in original). Respondent replied to Mr. Bello on June 20, 2013, stating, "No. But my agreement with my client at settlement affects all aspects . . . ." DCX 33 at 211 (second entry from top of page).

86. On June 26, 2013, Respondent sent Mr. Bello an e-mail, stating, "how about a new agreement? We agree on an exact amount owed . . . and

then you have a lien on a number of different cases to satisfy that amount." DCX 33 at 211 (top of page).

87. On July 9, 2013, Mr. Bello responded to Respondent's June 26, 2013 suggestion, stating, "'New deal' with your proposed 'fixed return' must include 1. a good faith down payment, 2. new, alternative, case collateral and 3. specific time parameters for flat fee return." DCX 33 at 210 (fourth entry from bottom of page).

88. On July 19, 2013, Respondent e-mailed Mr. Bello, stating, "I am working on specifics, agreements from other clients to have liens (not client liens), and the other lien holder' [sic] consent. I will contact you soon." DCX 33 at 210 (third entry from top of page).

89. On August 13, 2013, Mr. Bello sent Respondent an e-mail asking, "Any luck yet getting us the specifics . . . ?" DCX 33 at 209 (fourth entry from bottom of page). On August 14, 2013, Respondent replied, "I'll have something for you by the end of the day" (DCX 33 at 209 (fifth entry from bottom of page)), but DCX 33 discloses no such communication from Respondent.

90. On August 16, 2013, Mr. Bello sent Respondent an e-mail stating, in pertinent part, "if we do not receive a check or a payment schedule by the end of next week we will be hiring a Washington DC collection attorney." DCX 33 at 209 (fourth entry from top of page).

91. On August 19, 2013, Respondent sent LFC an e-mail stating, in pertinent part, "your frustration is understood . . . . * * * I am willing to collateralize other cases as a good faith gesture, but you are not the only party asserting lien. Hence, why this is taking a long time." DCX 33 at 209 (third entry from top of page). DCX 33 discloses no further substantive communications between Respondent and LFC, and Respondent testified that "August 19th of 2013 . . . just about squares with my recollection of when they stopped contacting me" (Tr. 260:3-6 (Respondent)).

92. The recitation of the interchanges between Respondent and LFC contained in FF ¶¶ 60-91 establishes several summary conclusions supported by clear and convincing evidence:

(a) Beginning even a year before Respondent received the settlement proceeds in *Hedgepeth* (FF ¶ 60), and continuing through the end of the communications set forth in DCX 33 (FF ¶ 91), a dispute existed between Respondent and LFC about whether Respondent was going to pay LFC anything from a recovery in the *Hedgepeth* case.

(b) Although Respondent testified before the Hearing Committee that under a proper mathematical interpretation of the Loan Agreements he owed LFC only $32,000 (Tr. 262:22-263:12; 270:3-13 (Respondent)), in the year of negotiations between Respondent and LFC after he received the *Hedgepeth* settlement proceeds, Respondent never made a firm offer to pay LFC $32,000 or any other specific dollar amount.

(c) Beginning a year before Respondent received the settlement proceeds in *Hedgepeth*, and continuing through the end of the negotiations covered by DCX 33, Respondent and LFC repeatedly discussed LFC's having a "lien" interest in Respondent's *Hedgepeth* fee. FF ¶¶ 61, 76-79, 81, 85-86, 88, and 91.

(d) Although at various times Respondent indicated to LFC the total settlement amount of *Hedgepeth* was confidential (*e.g.*, FF ¶¶ 64, 72, and 80), Respondent never suggested that LFC enter into a confidentiality agreement binding LFC to protect that confidentiality (as the arbitrator *sua sponte* ordered in the arbitration proceeding, hereinafter discussed, between Respondent and LFC; FF ¶ 100, *infra*).

(e) The circumstances indicate that Respondent intended to delay any payment to LFC out of *Hedgepeth* for as long as possible in order to (i) attempt to get LFC to agree to repayment from the results of other cases; and (ii) keep and make use of all of the *Hedgepeth* fees for himself. *See, e.g.*, FF ¶¶ 58 (Respondent suffers devastating losses in his legal practice); 66 (Respondent appropriates all of the *Hedgepeth* legal fee); 68 (Respondent refuses to repay LFC out of his *Hedgepeth* fee); 74 (same); 80 (same); 83 (same); 86 (same); 88 (same).

93. On June 5, 2014, legal counsel for LFC wrote to Respondent pursuant to ¶ 10 of each Loan Agreement, to provide Respondent with formal

notice of a 30-day period within which to attempt to negotiate a resolution of the dispute between LFC and Respondent. DCX 34.

94. On December 4, 2014, pursuant to ¶ 10 of each Loan Agreement, LFC filed a arbitration claim against Respondent with the American Arbitration Association ("AAA") in order to recover sums due LFC under the Loan Agreements. DCX 35.

95. On April 22, 2015, counsel for LFC wrote to the AAA arbitrator assigned to the arbitration proceeding between LFC and Respondent (hereinafter, the "AAA Arbitrator"). DCX 36. The letter from LFC's counsel stated, *inter alia*:

(a) "[Respondent] has indicated via email that he will not pay for, and possibly not participate in this arbitration" (DCX 36 at 247, first paragraph);[19]

(b) "[Respondent] considers the 'gross recovery' he received a 'net' loss because [*Hedgepeth*] took so long, thus he postures that doesn't [sic] owe anything" (DCX 36 at 247, second paragraph);[20]

[19] Respondent testified that he consulted an attorney to try to settle the arbitration claim, and that Respondent "stalled" on the payment of AAA fees because paying the AAA fees would just be a "waste of money" if he could use those funds to pay LFC. Tr. 263:18-264:6 (Respondent).

[20] *See* FF ¶ 83, in which Respondent presaged this defense to LFC's claim by asserting in connection with his continued failure to make any payment to LFC from the *Hedgepeth* settlement, "I suffered a tremendous loss on this case."

(c) "[W]e would ask that you remain the arbitrator and continue the arbitration initially with [LFC's] portion of the fee alone" (DCX 36 at 247-48); and

(d) "Subject to your determination, I have enclosed for your review [LFC's] First Request for Information from [Respondent]. If you find the request suitable, I would request that . . . should [Respondent] refuse to answer the interrogatories within the allotted time, that he be compelled to do so . . . ." (DCX 36 at 248, first full paragraph).

96. In the "Request for Information" LFC filed in the AAA arbitration, Interrogatory No. 3 asked, "Please state your understanding of the terms of the subject transactions entered into between you and [LFC] . . . ." (DCX 36 at 251), and Interrogatories 11 and 12 asked specifically about the compensation Respondent received in connection with *Hedgepeth* (DCX 36 at 252-53).

97. On April 22, 2015, counsel for LFC wrote to Respondent, reminding him of his obligations under and the requirements of Rule 1.15, requesting confirmation and documentation from Respondent as to the amount of and the account in which LFC's interest in the *Hedgepeth* legal fee received by Respondent was being held. DCX 37. The record in this case contains no reply to that letter from Respondent.

98. On May 1, 2015, AAA informed LFC's counsel and Respondent by e-mail of the AAA Arbitrator's response to the April 22, 2015 letter to him

from LFC's counsel (FF ¶ 95). DCX 38. The AAA Arbitrator noted that LFC had filed a timely request for information and documents pursuant to a scheduling order previously entered by the AAA Arbitrator, and the answers or objections were due from Respondent by May 6, 2015. *Id.* The AAA Arbitrator stated that Respondent's continuing failure to make required payments to the AAA was an independent violation of the terms of the Loan Agreements, but that despite Respondent's failure the AAA Arbitrator would continue his involvement in the arbitration and address the issue of Respondent's non-payment to AAA at a later date. *Id.*

99. On May 7, 2015, an e-mail from an attorney for Respondent disclosed to LFC's legal counsel the gross amount of the *Hedgepeth* settlement. DCX 39 at 265. (The gross amount Respondent deposited into his Trust Account from the *Hedgepeth* settlement is likewise indicated in the Agreed Stipulations; *see also* FF ¶ 66.)

100. On May 11, 2015, the AAA Arbitrator entered a "Ruling and Protective Order." DCX 39.[21] In that document the AAA Arbitrator stated that Respondent had not answered or objected to LFC's "Request for Information" (FF ¶ 96), and directed Respondent to respond forthwith to LFC's Interrogatories 1 through 12. DCX 39 at 258, ¶ 1. The AAA Arbitrator

[21] In summarizing the facts of the contractual relationship between LFC and Respondent, the AAA Arbitrator noted that LFC's rights were premised on Respondent's "receiv[ing] a contingent fee from representing his client in any of specified pending tort actions," and that LFC's loans were "needed and used by [Respondent] to defray expenses incurred in connection with the tort litigation." DCX 39 at 258, n.1.

also required Respondent to produce forthwith any documents relating to Respondent's interrogatory answers, but (noting that Respondent stated during a telephone scheduling conference that documents relating to the *Hedgepeth* settlement were confidential) *sua sponte* conditioned that requirement on LFC and its agents, officers, and employees agreeing to maintain the confidentiality of any *Hedgepeth* settlement documents produced by Respondent. DCX 39 at 260, ¶¶ 6-8.

101. By letter dated June 24, 2015 (DCX 39 at 262), LFC's counsel informed the AAA Arbitrator that Respondent, contrary to the directions in the AAA Arbitrator's May 11, 2015 ruling (FF ¶ 100), had not provided any interrogatory answers or documents.

102. By separate letter dated June 24, 2015 (DCX 40 at 266), LFC's counsel wrote to Respondent in an attempt to forestall discovery disputes, and requested receipt of Respondent's interrogatory answers by July 3, 2015, waiving responses to interrogatories 5-10. On June 26, 2015, the AAA informed LFC's counsel and Respondent by e-mail that the AAA Arbitrator asked Respondent to submit any objections or comments regarding LFC's prior submissions by July 3, 2015. DCX 48.

103. On June 29, 2015, the AAA informed Respondent and LFC's counsel by e-mail (DCX 49 at 281) of the AAA Arbitrator's intention pursuant to the AAA's rules of procedure to enter an "Interim Award and Special Allocation of Costs" against Respondent if he failed to comply by July 3,

2015, with the AAA Arbitrator's May 11, 2015, ruling that ordered Respondent's "forthwith" response to LFC's discovery requests. *See* FF ¶ 100, *supra*.

104. By letter dated July 7, 2015, LFC's counsel informed the AAA Arbitrator that no discovery responses had been received from Respondent by July 3, 2015. DCX 40 at 267.

105. On August 6, 2015, the AAA Arbitrator entered an "Interim Award of and Special Allocation of Costs" against Respondent (DCX 49), noting that Respondent had continually been obstructive and dilatory during the course of the arbitration. DCX 49 at 283-86, ¶¶ 3-12. The AAA Arbitrator made the following findings:

(a) Respondent failed to enter an appearance or submit an answer to LFC's arbitration claim within the time provided by AAA's rules. DCX 49 at 283, ¶ 3.[22]

(b) Respondent did not communicate with the AAA until a notice concerning a preliminary scheduling hearing had been sent out, and even then did so only orally during the telephone scheduling conference, during which Respondent alleged that he owed nothing to LFC because he had actually lost money on the *Hedgepeth* case.[23] *Id.*

[22] *See also* FF ¶ 95(a) n.19 (Respondent purposely avoided paying administrative fees due to the AAA).

[23] There is no indication in the record that Respondent raised in the arbitration case a theory he later decided to advance (Tr. 267:20-268:4 (Respondent)) when he was sued by LFC,

(c) Respondent resisted LFC's attempt to establish in the arbitration proceeding the financial outcome of the *Hedgepeth* case[24] on the ground of alleged confidentiality, which was logically inconsistent with Respondent's assertion that he would attempt to prove he lost money on the case. *Id.*

(d) "[I]n keeping with Respondent's announced program of resistance, Respondent . . . engaged in dilatory conduct aimed at obstructing [the arbitration] proceeding" (DCX 49 at 283-84, ¶ 4), including failure to comply with an order of the arbitrator to provide information and documents requested by LFC (DCX 49 at 284-85, ¶¶ 5 and 7), and failure to pay Respondent's share of AAA administrative charges despite Respondent's contractual obligation (FF ¶ 50) to resolve disputes with LFC pursuant to AAA rules (DCX 49 at 285, ¶ 8).

106. On the same day as the Interim Award of and Special Allocation of Costs discussed in the preceding FF ¶ 105, the AAA Arbitrator entered an "Order of Suspension" with respect to the arbitration proceeding, referring to Respondent's "obstructive tactics" (DCX 49 at 288-89, ¶ 1) and his failure to

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i.e., that he was not indebted to LFC because the Loan Agreements were unenforceable against him under an interpretation of Rule 5.4(a) of the Utah Rules of Professional Conduct. *See* FF ¶ 108, *infra*.

[24] However, Respondent had already informally disclosed those terms to LFC; *see* FF ¶ 99, *supra*.

abide by an agreement to provide documents and information by July 3, 2015 (DCX 49 at 289, ¶ 3).

107. On November 17, 2015 (DCX 50 at 294), LFC sued Respondent in the Superior Court of the District of Columbia.[25]

108. On May 11, 2016, Respondent filed a motion (DCX 52) pursuant to D.C. Super. Ct. Civ. R. 12(b)(6) to dismiss LFC's suit for failing to state a claim on which relief could be granted, on the ground that the Loan Agreements allegedly violated Rule 5.4(a) of the *District of Columbia's* Rules of Professional Conduct and were therefore unenforceable. DCX 52 at 302. Respondent's motion argued that − although neither the District of Columbia Court of Appeals nor the Utah Supreme Court had squarely addressed the issue (DCX 52 at 306) − because of the Utah choice of law clause in the Loan Agreements (FF ¶ 50) and the existence of a 1997 Utah legal ethics opinion (DCX 52 at 311-12) deeming a non-recourse loan to an attorney made on the security of the attorney's fee interest in a contingent fee case to be a violation of Rule 5.4(a) of the *Utah* Rules of Professional Conduct, the Loan Agreements were void as against the public policy of the District of Columbia (DCX 52 at 303-07).

109. On July 25, 2016, Judge Di Toro of the Superior Court of the District of Columbia denied Respondent's motion to dismiss. DCX 53. *Inter*

[25] LFC's complaint was docketed on November 19, 2015. DCX 51 at 295.

alia, Judge Di Toro's decision stated the gross amount of the recovery in the *Hedgepeth* case,[26] and that "[LFC] agreed to finance [Respondent's] litigation of several personal injury lawsuits" (DCX 53 at 313). Judge Di Toro ruled:

(a) Under Utah's substantive law, a contract can be voided on grounds of public policy only when "an established public policy 'has been expressed in either constitutional or statutory provisions or the common law'" (DCX 53 at 318 (quoting *Penunuri v. Sundance Partners, Ltd*., 301 P.3d 984, 991 (Utah 2013)), and "courts have a 'duty to employ any reasonable construction to declare contracts lawful and not in contravention of public welfare'" (*id.* (quoting *Ockey v. Lehmer*, 189 P.3d 51, 57 (Utah 2008)).

(b) "[A]llowing an attorney to use his own breach of ethical rules as a procedural weapon to void his contract obligations would appear to violate public interest." DCX 53 at 319.

110. On April 20, 2017 (DCX 50 at 291) Respondent and LFC entered into a "Judgment by Consent" to permit Judge Di Toro to rule on the amount due LFC under the Loan Agreements, an issue on which Judge Di Toro had not ruled as of the time of the hearing in this matter (Tr. 438:6-9 (closing argument by Respondent)).

111. Despite Respondent's testimony agreeing that LFC was "owed money" (Tr. 284:14 (Respondent)), during the month of November 2013,

[26] In making this finding, Judge Di Toro referred to ¶ 4 of LFC's complaint, and an exhibit attached to the complaint. The amount of the gross recovery in *Hedgepeth* was therefore no secret. *See* FF ¶ 99, *supra*.

before November 27th, the balance in Respondent's Trust Account was less than $32,000, and was also less than $25,000. Tr. 213:2-14 (Anderson); DCX 98 at 425-26. During the month of April 2014, there were also occasions when the balance in the Trust Account was less than $32,000 (the amount Respondent conceded was owed LFC), and also less than $25,000. Tr. 213:15-214:12 (Anderson); DCX 94. On May 28, 2014, and May 30, 2014, the balance in the Trust Account went below $32,000. Tr. 214:13-215:12 (Anderson); DCX 95. At all times during the month of June 2014, the balance in the Trust Account was less than $25,000. Tr. 215:13-20 (Anderson); DCX 96. Respondent agreed in his testimony that he failed to maintain in his Trust Account the funds that LFC claimed were owed by him. Tr. 282:8-14 (Respondent).

C. Mack (Count III)

112. Respondent, as successor legal counsel, undertook representation of Mr. Mack as a plaintiff in a personal injury claim. Stip. ¶ 9; DCX 54.

113. Respondent was aware that Mid-Atlantic Permanente Medical Group (hereinafter, "Kaiser Permanente") had a claim for fees for medical services provided to Mr. Mack as a result of the accident in which Mr. Mack was injured. On February 24, 2009, Kaiser Permanente provided Mr. Mack's previous counsel with a document asserting a lien against any sums recovered by Mr. Mack as a result of that accident, in the amount of $554. Stip. ¶ 10.

114. On June 8, 2010, Respondent deposited $9,000 in his Trust Account as a settlement of Mr. Mack's case. Respondent withheld $1,000 of the settlement for medical fees owed to Kaiser Permanente. Stip. ¶ 11; DCX 56.

115. On March 15, 2011, Respondent wrote a letter to Mr. Mack in which Respondent represented that Respondent was going to pay $554 to Kaiser Permanente and pay Mr. Mack the $446 balance of the withheld $1,000 referred to in the preceding paragraph. Enclosed was a "Disbursement Statement" for Mr. Mack to sign and return to Respondent authorizing the payment of $554 to Kaiser Permanente. Stip. ¶ 12; DCX 57.

116. As of April 22, 2011, the balance in Respondent's Trust Account was $490.12, *i.e.*, less than the amount of Kaiser Permanente's $554 lien. Stip. ¶ 14; DCX 101.

117. As of May 1, 2011, the opening balance in Respondent's Trust Account remained at $490.12. DCX 102.

118. On May 6, 2011,[27] Respondent wrote a check on his Trust Account to Kaiser Permanente in the amount of $554 to satisfy its lien. Stip. ¶ 15; DCX 58. On that date, the balance in Respondent's Trust Account remained below $554. DCX 102.

[27] The Agreed Stipulations state that the date was May 6, 2012, but ODC and Respondent agreed at the outset of the hearing in this matter that the year "2012" was a typographical error, and should instead be "2011." Tr. 11:13-13:5.

119. On May 11, 2011, Respondent issued check no. 1131 in the amount of $2,737.23 on his Trust Account for the purpose of paying a personal office rent expense. That Trust Account check was not honored by the bank due to insufficient funds, and the check caused a negative balance in Respondent's Trust Account on May 12, 2011, of -$2,247.11. *See* Appendix ¶ 4. When that check was rejected, the balance in the Trust Account returned to $490.12. DCX 102 at 433.

120. On May 12, 2011, the bank holding Respondent's Trust Account debited that account for a $30 insufficient funds check fee, resulting in a Trust Account balance of $460.12. *Id*.

121. The balance in Respondent's Trust Account remained below $554 until May 12, 2011, when Respondent made a transfer to the Trust Account of $500 from a personal bank account he had at Colorado Community Bank. Stip. ¶ 16; DCX 102 at 433.

122. Respondent admitted that if he had kept a ledger or similar documentation for his Trust Account (which he did not maintain; *see* FF ¶ 127, *infra*), doing so would have prevented the decrease in the amount of the Trust Account that contributed to his failure to preserve in his Trust Account all of the funds due Kaiser Permanente. Tr. 282:3-7 (Respondent).

123. On May 23, 2011,[28] the $554 check to Kaiser Permanente cleared Respondent's Trust Account. Stip. ¶ 16; DCX 102.

D. Misuse of Trust Account (Count IV)

124. During the period from at least May 21, 2010 (DCX 68) through May 22, 2015 (DCX 67) Respondent's Trust Account no. xxxxxxxxx1200, was maintained at the Bank of Georgetown, located in the District of Columbia.[29] Deposits of non-client-related funds to the Trust Account described in the Appendix to this Report were made while Respondent also was holding entrusted funds in the Trust Account. Stip. ¶ 17 (preamble).

125. A chronological listing and description of transactions into and from Respondent's Trust Account is provided in the Appendix to this Report. Upon reviewing this list of transactions, the Hearing Committee finds clear and convincing evidence that Respondent commingled non-client-related funds with entrusted funds in his Trust Account. It was not an inadvertent or isolated occurrence; it was protracted, and took place throughout the approximate five-year period covered by the Appendix, occurring on at least 16 separate occasions.[30]

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[28] *See supra* note 27, re: typographical error; "2012" in Agreed Stipulations was actually "2011."

[29] *See, e.g.*, DCX 90 at 403 (endorsements on the backs of checks issued from Respondent's Trust Account indicate they cleared through the Georgetown Branch of the Bank of Georgetown).

[30] *See* Appendix ¶¶ 1, 7, 11, 14, 16, 19, 22, 26, 27, 32-35, 37, 40, and 42-43.

126. On February 23, 2016, ODC issued a subpoena to Respondent, which was served on him that day (Tr. 227:11-15 (Anderson)), in connection with Disciplinary Docket No. 2015-D246 (one of the disciplinary cases involved in this proceeding). DCX 99 at 427. That subpoena required Respondent, *inter alia*, to produce all documents accounting for the funds of clients or third parties in the Trust Account or any other depository in which he deposited client and third-party entrusted funds for the period January 1, 2011, through December 31, 2015. DCX 99 at 428, ¶ 2.

127. Respondent failed to produce any records in response to the ODC subpoena referred to in the preceding paragraph. Tr. 228:5-9 (Anderson). Furthermore, Respondent did not produce any ledger documents for his Trust Account because he did not keep a ledger or other similar records for his Trust Account. Tr. 280:10-281:4; 344:5-9 (Respondent); DCX 100 at 429, paragraph "Second."[31] The records for the Trust Account that ODC did obtain were provided by the bank at which the Trust Account was maintained. DCX 100 at 429, paragraph "Second."

128. In the absence of ledger documentation for the Trust Account as referred to in the preceding paragraph, Mr. Anderson − a trained investigator with a professional background in accounting, having approximately 24 years

[31] Letter to ODC dated May 31, 2016, from legal counsel then representing Respondent, stating, in pertinent part,". . . you note that you did not receive [Respondent's] records accounting for client and third-party funds held in trust for the time period 2011-2015. *[Respondent] did not keep a ledger*." DCX 100 at 429 (emphasis added).

of experience as a Special Agent for the FBI and about 13 additional years of experience as an ODC investigator (Tr. 210:17-211:8 (Anderson)) – could not determine whether transfers from Respondent's Trust Account came from client funds or from Respondent's personal funds. Tr. 233:14-234:4 (Anderson).

129. Respondent admitted that he failed to maintain for a period of five years records of entrusted funds which were in his possession, and that he maintained client files from which the tracing of entrusted funds might have been derived only for three years. Tr. 278:19-279:17; 320:22-321:15; 344:12-345:11 (Respondent). Respondent further testified, "I did not know the ethical rules require 5 years." Tr. 321:16-17 (Respondent).

130. In his testimony before the Hearing Committee, Respondent admitted that he knowingly put personal and third-party checks into his Trust Account (Tr. 275:8-11 (Respondent)), and that he paid personal expenses directly from the Trust Account. Tr. 278:9-12 (Respondent); *see also* Stip. ¶ 18.

131. On an aggregate basis, the transactions described in the Appendix resulted in Respondent's commingling approximately $40,000 of non-client-related funds in the Trust Account (ODC Br. at 14, ¶ 42; Resp. Br. at 6, ¶ 42[32]),

[32] Respondent agrees in his brief that he "mismanaged" his Trust Account, and does not question ODC's computation of the aggregate amount of non-client funds he deposited in the Trust Account. Resp. Br. at 6.

and Respondent's paying approximately $100,000 of personal/non-client expenses from the Trust Account (ODC Br. at 16, ¶ 44; Resp. Br. at 6, ¶ 44[33]).

III. CONCLUSIONS OF LAW

This Part III presents the Hearing Committee's conclusions on the Rule violations alleged against Respondent. Section III(A) first provides recommendations pursuant to Board Rule 7.16(a) on evidentiary objections Respondent presented at the outset of the hearing. Section III(B) then deals with the substantive allegations of the Specification. Subsection III(B)(1) discusses Respondent's alleged violation of Rule 1.7(b)(4); subsection III(B)(2) discusses Respondent's alleged violations of Rule 1.15(a); subsection III(B)(3) discusses Respondent's alleged violations of Rule 1.15(c); and subsection III(B)(4) discusses Respondent's alleged violations of Rule 1.15(d). Within each subsection, after stating the Hearing Committee's conclusions with respect to an alleged Rule violation, the subsection first quotes the text of the Rule allegedly violated; then reviews applicable principles for finding a violation of that Rule, as articulated in relevant case law and/or Comments to the Rule; and then discusses the Hearing

[33] Respondent does not question ODC's computation of the aggregate amount of personal/non-client expenses paid from the Trust Account, but avers there was nothing wrongful about his making such payments from the Trust Account.

Committee's conclusions and the findings of fact supporting the conclusions.[34]

A. Recommendations Regarding Evidentiary Objections

At the outset of the hearing Respondent raised an objection to the Hearing Committee's receiving testimony from two potential witnesses identified by ODC prior to the hearing. Tr. 19:16-17 (Respondent).[35]

[34] The following is an outline/index of this Part III:

[35] One of the two proposed witnesses objected to by Respondent was Howard Walsh, Esq., an attorney who represented Lawsuit Financial Corporation in arbitration proceedings and

Respondent also raised objections to certain documents included in ODC's proposed exhibits.[36]

With respect to proposed witness Joel S. Aronson, Esq., an attorney who represented Ms. Fitzgerald in the Title Litigation, Respondent asserted that Mr. Aronson lacked any personal knowledge concerning matters alleged in the Specification (Tr. 19:16-20; 20:6-7; 22:19-21 (Respondent)), and had "nothing to offer" in the way of testimony about matters occurring after May 6, 2014, when Respondent withdrew as counsel for Ms. Fitzgerald in the Fee Litigation (Tr. 20:8-11 (Respondent)). However, in his short testimony (Tr. 188-207), Mr. Aronson largely focused on matters occurring prior to May 6, 2014, and this Report does not cite his testimony with regard to anything after that date. Mr. Aronson provided relevant information about the status of, and Respondent's simultaneous involvement in, both the Fee Litigation and the Title Litigation prior to that date, as well as about prior circumstances[37] which should have alerted Respondent to the fact that his representation of Ms. Fitzgerald in the Fee Litigation was adversely affected by his own property

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in litigation against Respondent. As it turned out, ODC never called Mr. Walsh as a witness, so Respondent's objection in that regard is moot.

[36] Respondent also presented the Hearing Committee with copies of an e-mail from him to ODC dated August 20, 2017, outlining his objections. The Chair ordered that e-mail to be filed with the Board and made a part of the record in this case. Tr. 15:20-18:6.

[37] *See, e.g.*, FF ¶ 18 (in the Fee Litigation, Respondent had an interest adverse to Ms. Fitzgerald because she had a third-party claim against him based on his agreement to pay the condominium assessments and mortgage costs for the Condominium Unit).

interests. Accordingly, the Hearing Committee recommends that Mr. Aronson's testimony should remain a part of the evidentiary record in this proceeding.

With regard to documents, Respondent objected to DCX 18-30 (*i.e.*, pleadings and orders filed in the Title Litigation after the May 6, 2014 date of Respondent's withdrawal as counsel for Ms. Fitzgerald in the Fee Litigation) on the ground that court filings after that date are irrelevant to the allegations of the Specification. The Hearing Committee agrees that DCX 18-22 (pleadings and an order concerning pre-trial depositions in the Title Litigation) and DCX 25-27 (an order denying Respondent's motion for summary judgment in the Title Litigation, as well as the Joint Pretrial Statement and the Pretrial Order in that case) are irrelevant; they are not relied on in this Report, nor are they cited in any of ODC's post-hearing briefs. The Hearing Committee therefore recommends that DCX 18-22 and 25-27 should not be considered as evidence in this case. However, the Hearing Committee finds DCX 23-24 and DCX 28-30 relevant, and recommends that they should be considered as part of the record in this case because all of those documents relate to Respondent's conflict of interest in representing Ms. Fitzgerald in the Fee Litigation, and the harm suffered by her.[38]

[38] DCX 23 is the Condominium Association's motion for leave to file a cross-claim against Ms. Fitzgerald in the Title Litigation on the ground that after she became the owner of the Condominium Unit, payment of condominium fees and assessments became delinquent, and that despite the entry of a consent order in the Fee Litigation concerning monies owed to the Condominium Association, all payments stopped as of July 2013. DCX 24 is the

At the outset of the hearing Respondent also objected to admitting into evidence DCX 33 as hearsay (Tr. 20:22-21:19 (Respondent)), and to DCX 34-53 as being both hearsay and irrelevant (Tr. 20:12-22:19 (Respondent)). The Hearing Committee recommends that Respondent's objections should be overruled, and that all of those exhibits should be considered as evidence in this case.

First, as to hearsay generally, Board Rule 11.3 provides:

> Evidence that is relevant, not privileged, and not merely cumulative shall be received, and the Hearing Committee shall determine the weight and significance to be accorded all items of evidence upon which it relies. The Hearing Committee may be guided by, but shall not be bound by the provisions or rules of court practice, procedure, pleading, or evidence, except as outlined in these rules or the Rules Governing the Bar.

Second, because disciplinary cases are not subject to the strict rules of evidence, hearsay evidence is generally admissible and may be sufficient to establish a violation of the disciplinary rules. *See In re Shillaire*, 549 A.2d 336, 343 (D.C. 1988) (FBI agent's affidavit was admissible hearsay evidence and the "only legitimate issue . . . [was the] weight that should be accorded to

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court order granting the Condominium Association's motion for leave to file a cross-claim against Ms. Fitzgerald. DCX 28-29 are the Judgment and Verdict Form in the Title Litigation, in which Respondent was found liable to Ms. Fitzgerald in the amount of $176,000 (the Verdict Form, as a special verdict, sets out the jury's specific findings that there was a contract between Respondent and Ms. Fitzgerald concerning the Condominium Unit; that Respondent breached the contract; and that Ms. Fitzgerald was damaged as a result of Respondent's breach, in the amount of $176,000). DCX 30 is the Court of Appeals' memorandum opinion and judgment denying Respondent's appeal from the jury's verdict. Both Ms. Fitzgerald (Tr. 165:16-166:14) and Respondent (Tr. 247:1-13) testified during the hearing about the jury's $176,000 verdict, and the denial of Respondent's appeal.

it"); *see also In re Kennedy*, 605 A.2d 600, 603 (D.C. 1992) (per curiam) (citing *Shillaire*, 549 A.2d at 343).

Third, and specifically with regard to DCX 33 (a chronological compendium of communications between Respondent and LFC dating from May 14, 2010, through August 19, 2013), the conversations Mark Bello (chief operating official of LFC (FF ¶ 43)) had with Respondent were largely reported by Mr. Bello to a staff member who recorded in DCX 33 what Mr. Bello said about the conversations. Tr. 132:10-133:10 (Bello). Mr. Bello also was present in person at the hearing to testify and be cross-examined about the contents of DCX 33 and about communications between Mr. Bello and Respondent included in it. Indeed, many of the communications cited in FF ¶¶ 60-91 are directly between Respondent and Mr. Bello. ODC, through Mr. Bello, also laid a proper foundation for admitting DCX 33 under the business records hearsay exception.[39] Furthermore, because Respondent introduced no

[39] To qualify a document as evidence under the business records exception to the hearsay rule, the proponent of the evidence must show:

> (1) that the record was made in the regular course of business, (2) that it was the regular course of the business to make such records, (3) that the record was made at the time of the act, transaction, occurrence, or event, or within a reasonable time thereafter; and (4) that the original maker has personal knowledge of the information in the record or received the information from someone with such personal knowledge and who is acting in the regular course of business.

Dutch v. United States, 997 A.2d 685, 689 (D.C. 2010). Mr. Bello testified that: (1) DCX 33 was a database printout of contacts and dates between himself and staff members of LFC with, primarily, Respondent (Tr. 73:6-10; 78:2-5); (2) that a database such as that represented by DCX 33 was kept by LFC for all cases that LFC financed to ensure that

exhibits of his own,[40] DCX 33 is the best and only written documentation available to the Hearing Committee regarding the interchanges between Respondent and LFC concerning their relationship. In his cross-examination of Mr. Bello (Tr. 110-125), Respondent not only failed to adduce any testimony that would bring into question the accuracy of DCX 33, but also Respondent voluntarily questioned Mr. Bello concerning Respondent's own communications included in DCX 33 (Tr. 118:21-119:2). Last, the Hearing Committee finds a high level of verisimilitude in the entries of DCX 33, indicating that many communications (apparently from e-mails) were included verbatim; other entries in DCX 33, while not verbatim, appear to reflect with reasonable accuracy communications from Respondent or a person at LFC. *See, e.g.*, DCX 33 at 214-15 (exchanges between "Mark" (*i.e.*, Mr. Bello) and "Jonathan" (*i.e.*, Respondent) on April 18, 2013, and April 17, 2013); DCX 33 at 217 (entries for October 25, 2012). Again, Respondent, who was present for any communications he is represented in DCX 33 as

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LFC had an accurate status of what was going on from inception to closure of a funding case (Tr. 73:22-74:2; 78:15-21); (3) that information is entered into the database when "a conversation or written communication comes in, it's scanned and put in the file" (Tr. 73:16-18); and (4) the entry of a communication in the database is "recorded *by the person who has it* or dictated *by the person who has it* to one of the administrative people and a notice placed in the file" (Tr. 73:18-21 (emphasis added); *see also* Tr. 75:4-18). Mr. Bello then proceeded to describe in detail how persons making entries into the database could be identified (Tr. 74:16-75:3; 76:10-17; 77:16-78:1).

[40] At one point, Respondent said he had some rebuttal exhibits he intended to introduce into evidence (Tr. 125:1-7 (Respondent)), but he never did so (Tr. 349:11-16) (Respondent rests without submitting any rebuttal documents).

having made, has not introduced oral or written evidence calling into question the contents of DCX 33.

Each of the foregoing considerations is a sufficient independent basis for admitting DCX 33 into evidence; taken together, they provide an overwhelming basis for doing so.

With regard to Respondent's objection to DCX 34-53[41] on the ground of relevance, the Hearing Committee recommends that those documents should remain in evidence for two independent reasons.

First, Respondent in his own direct testimony voluntarily testified about the AAA arbitration proceeding in order to give his version of those events. Tr. 263:18-266:3 (Respondent). Therefore, the subject of the AAA arbitration between LFC and Respondent is legitimately before the Hearing Committee.

Second, DCX 34-53 outline Respondent's actions after his failed negotiations with LFC attempting to forestall payment to it from the *Hedgepeth* case (FF ¶¶ 60-91), and those subsequent actions by Respondent appear to the Hearing Committee to be a continuation of his evasive course of conduct with LFC. Indeed, the AAA Arbitrator expressly found Respondent to have been dilatory and obstructive (FF ¶¶ 105-06), and when the arbitration was suspended due to Respondent's lack of cooperation (FF ¶ 106), LFC pursued its claim against Respondent through litigation (DCX 50-53). The

[41] DCX 34-49 relate to the AAA arbitration between LFC and Respondent described in Section II(B) of this Report. DCX 50-53 relate to the lawsuit filed by LFC against Respondent.

Hearing Committee has found (FF ¶ 92(e)) that it was Respondent's intention to deprive LFC of any recovery under the Loan Agreements from *Hedgepeth*. Respondent's actions in the arbitration and litigation described in DCX 34-53 were simply a continuation of the evasions he displayed in his direct negotiations with LFC, outlined in FF ¶¶ 60-91. The repetition of a course of conduct can be taken as evidence of intent. *In re Haupt*, 444 A.2d 317, 323-24 (D.C. 1982) (en banc) (per curiam) (appended Board Report) (pattern of neglect serves to establish intentional action); *In re Frison*, Bar Docket Nos. 2008-D538 & 2010-D129 (BPR May 24, 2013), appended HC Rpt. at 175 (Dec. 20, 2012) ("The knowing character of Respondent's action is . . . emphasized by his repetition of the same misconduct . . . ."), *recommendation adopted*, 89 A.3d 516 (D.C. 2014) (per curiam). Furthermore, "it is generally in the interests of justice that the trier of fact 'consider an entire mosaic'" of conduct. *In re Ukwu*, 926 A.2d 1106, 1116 (D.C. 2007) (citing *Carter-Obayuwana v. Harvard Univ.*, 764 A.2d 779, 794 (D.C. 2001)). DCX 34-53 are therefore relevant to the issue of Respondent's intent.

B. Rule Violations Alleged in the Specification

1. Rule 1.7(b)(4)

ODC alleges that Respondent violated this Rule only in the Fitzgerald matter (Count I). Specifically, ¶ 6 of the Specification alleges that Respondent violated Rule 1.7(b)(4) because his representation of Ms. Fitzgerald was adversely affected by his own property interests. The Hearing Committee

concludes that ODC has proved by clear and convincing evidence that when Respondent undertook to represent Ms. Fitzgerald in the Fee Litigation he had a conflict of interest because of his own property interests; that Respondent failed to obtain Ms. Fitzgerald's informed consent with respect to the conflict; and that Respondent later also failed to withdraw from representing Ms. Fitzgerald after it became indisputable their interests were adverse when he sued her to protect his own personal and financial interests.

(a) Text of the Rule

> (b) Except as permitted by paragraph (c) below,[42] a lawyer shall not represent a client with respect to a matter if:
>
> * * *
>
> (4) The lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests.

(b) Applicable Principles

Rule 1.7 deals generally with the subject of attorney conflicts of interest. Comment [1] to Rule 1.7 states, "Rule 1.7 is intended to provide clear

[42] Rule 1.7(c) states:

> A lawyer may represent a client with respect to a matter in the circumstances described in paragraph (b) above if
>
> (1) Each potentially affected client provides informed consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation; and
>
> (2) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.

notice of circumstances that may constitute a conflict of interest. * * * Rule 1.7(b) sets out those circumstances in which representation is barred in the absence of informed client consent."

Rule 1.7(c) (*see supra* note 42) governs exceptional situations where a lawyer may represent a client even though the lawyer's professional judgment reasonably may be affected by the lawyer's own property interests. With respect to such exceptions, *In re James*, 452 A.2d 163, 167 (D.C. 1982) holds:

> 'Full disclosure' includes a clear explanation of the differing interests involved in the transaction and the advantages of seeking independent legal advice. It also requires a detailed explanation of the risks and disadvantages to the client entailed in the agreement, including any liabilities that will or may foreseeably accrue to him.

Such a disclosure might include (1) alternative courses of action that would be foreclosed, (2) interests of the lawyer that brought about the conflict, (3) the nature of the resulting representation, and (4) the consequences of a future withdrawal of consent. Charles W. Wolfram, *Modern Legal Ethics* 345-46 (2d ed. 1986).

While under the exception in Rule 1.7(c) a lawyer may represent a client despite the existence of a conflict, the lawyer must first obtain "informed consent," which is defined in Rule 1.0(e) ("Terminology") as

> the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

Comment [28] to Rule 1.7 states, "It is ordinarily prudent for the lawyer to provide at least a written summary of the considerations disclosed and to request and receive a written informed consent," and that in any event, "under the District of Columbia substantive law, the lawyer bears the burden of proof that informed consent was secured."

(c) Discussion of Conclusions

There is clear and convincing proof that Respondent violated Rule 1.7(b)(4) because his representation of Ms. Fitzgerald in the Fee Litigation was, and could reasonably have been foreseen to be, adversely affected by his own financial, property, and personal interests. The Fee Litigation involved the Condominium Unit, a property where Respondent lived (FF ¶ 12), where he was responsible for paying all condominium fees, mortgage costs, and real property taxes (*id.*), and which he thought he desired to eventually have titled in his own name (FF ¶¶ 14, 25). When the Condominium Association sued Ms. Fitzgerald in 2011, it was actually Respondent's own debt that was in question, and when he undertook to represent her in the Fee Litigation he had an immediate conflict of interest because, at a minimum, she had a likely third-party claim against him under their separate agreement. FF ¶¶ 12, 14, 18. Any competent, objective, independent attorney would have advised her of that fact, as Mr. Aronson did (FF ¶ 30) but Respondent did not (FF ¶¶ 19-20). Respondent, however, kept Ms. Fitzgerald in the dark about her potential claims against him (FF ¶¶ 20-22), while he worked out an arrangement with

the Condominium Association by having Ms. Fitzgerald (without being informed by Respondent that she could consult independent counsel (FF ¶ 21)) execute a $17,000 confessed judgment (FF ¶ 22) in favor of the Condominium Association.

If there was any doubt about that conflict of interest in 2011, it should have been erased in January of 2013 after the acrimonious confrontation between Respondent and Ms. Fitzgerald in which, as Respondent put it, she threatened to sell his home out from under him. FF ¶ 24.

Respondent, however, continued to represent Ms. Fitzgerald in the Fee Litigation, despite the obvious fact that her interests and his were at that point clearly adverse. By continuing to represent Ms. Fitzgerald in the Fee Litigation, Respondent was merely furthering his own financial and property interests, to her disadvantage. While Respondent claims his continued representation of Ms. Fitzgerald was to her benefit (FF ¶ 19), that was not the view of Ms. Fitzgerald's new lawyer, Mr. Aronson (FF ¶¶ 30-31), or the jury which ruled against Respondent in the Title Litigation (FF ¶ 37). Nor could that have been the view of any ethical attorney.

Respondent claims "the rules of ethics have no bearing in this context" because all he did was step up and defend "a friend for a problem he created" and no further disclosure was required: "she was an informed, intelligent young lady . . . she [was] a mortgage broker and understood his re-purchase" (Resp. Br. at 9-10). That misapprehends the requirement under Rule 1.7(c)

that a lawyer may represent a client despite a conflict of interest only after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation. There is no exception in the Rule excluding its protection from "informed, intelligent young ladies," and the record is clear that no such disclosure occurred. FF ¶¶ 19-21.

Respondent also attempts to excuse his conflicted representation of Ms. Fitzgerald by pointing out (Resp. Br. at 9) that, by representing Ms. Fitzgerald, she did not have to go out and "hire [a] lawyer." The short answer to this contention is that any independent, competent lawyer Ms. Fitzgerald might have hired would have immediately advised her that she had indemnification rights against Respondent for all condominium costs, as well as her right to seek legal fees against him, as Mr. Aronson did. FF ¶ 30. Therefore, by representing Ms. Fitzgerald in the Fee Litigation, Respondent was merely protecting his financial, property, and personal interests although they were in clear conflict with his client's.

The record is also clear that Respondent took no action to cease representing Ms. Fitzgerald in the Fee Litigation until after he filed the Title Litigation against her. FF ¶ 25-27. Respondent's failure to advise Ms. Fitzgerald in advance that he was going to sue her (FF ¶ 26) further emphasizes the adversarial nature of their relationship. And even after Respondent's initial motion to withdraw was denied on procedural grounds, he delayed for five months in properly re-filing his motion, meanwhile

continuing his admittedly conflicted (FF ¶¶ 27, 32) representation of Ms. Fitzgerald during settlement negotiations in the Fee Litigation (FF ¶ 32).

Last, the record further establishes that Respondent's conflicted representation of Ms. Fitzgerald caused serious financial harm to her. FF ¶ 39. The only person who potentially benefitted from that conflict was Respondent. FF ¶ 23.

2. Rule 1.15(a)

ODC alleges that Respondent violated Rule 1.15(a) in Counts II (Lawsuit Financial Corporation), III (Mack), and IV (Misuse of Trust Account). Subparagraph 14(d) of the Specification alleges that Respondent violated Rule 1.15(a) in the LFC matter through intentional misappropriation; ¶ 24(b) of the Specification alleges that Respondent violated Rule 1.15(a) in the Mack matter through reckless misappropriation; and ¶ 28 of the Specification alleges that respondent violated rule 1.15(a) through commingling, and by failing to keep complete records of the funds of clients and third parties in his possession. The Hearing Committee concludes that ODC proved by clear and convincing evidence that Respondent violated Rule 1.15(a) in each of the respects alleged in the Specification.

(a) Text of the Rule

Rule 1.15(a) states:

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

> shall be kept in one or more trust accounts maintained in accordance with paragraph (b). Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) Applicable Principles

General

The first sentence of Comment [1] to Rule 1.15 concisely states the guiding principle underlying all of that Rule: "A lawyer should hold property of others with the care required of a professional fiduciary." In applying that precept, it is good to bear in mind the observation of Chief Judge (later Justice) Cardozo that those in positions of trust are "held to something stricter than the morals of the market place" (*Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (N.Y. 1928)), and the counsel of Justice Holmes in *Rock Island A. & L. R. Co. v. United States*, 254 U.S. 141, 143 (1920), that − like those who deal with the government − when lawyers deal with other people's money they must "turn square corners."

Rule 1.15(a) imposes three main duties on lawyers. First, property of clients or third persons that is in the lawyer's possession in connection with a representation must be kept separate from the lawyer's own property. Second, funds of clients or third persons that are in the lawyer's possession must be kept in a special trust or escrow account maintained in accordance with the requirements of Rule 1.15; misappropriation occurs when the balance in that

account falls below the amount due to the clients or third persons. Third, complete records of such account funds and other property must be kept by a lawyer, and those records must be preserved for a period of five years after termination of a representation for the purpose of ensuring compliance with the Rule.

Property in a Lawyer's Possession
"In Connection with a Representation"

With respect to Rule 1.15, a preliminary issue regarding Count II (the LFC matter) is whether the *Hedgepeth* legal fee that Respondent received and in which LFC had an interest came into his possession "in connection with a representation." The Chair asked ODC and Respondent to address that issue in their post-hearing briefs (Tr. 515:22-519:21) because the nature of a lawyer's duties under Rule 1.15 regarding legal fees pledged to secure a non-recourse loan to the lawyer from − and contractually agreed by the lawyer to be withheld for − a third party[43] appears to be a subject on which neither the Board nor the District of Columbia Court of Appeals ("Court") has opined. The Hearing Committee therefore addresses that issue as part of its overall consideration of the allegation of misappropriation in Count II of the Specification.

[43] These types of funding arrangements, sometimes referred to as "alternative litigation finance" or "ALF," have become increasingly prominent in recent years. *See* American Bar Association Commission on Ethics 20/20, *Informational Report to the House of Delegates* (Feb. 2012).

Comment [3] to Rule 1.15 states, "Paragraph (a) concerns trust funds arising from 'a representation,'" but does not further elucidate what is meant by the phrase "arising from 'a representation.'" On several occasions, however, the Court and the Board have provided relevant guidance on the Rule 1.15 duties of a lawyer who, whether acting as an escrow holder or otherwise, is in possession of third party funds the disposition of which has not been dictated directly by the lawyer's client. The conclusion to be drawn from these cases is that whether such funds are in a lawyer's possession in connection with a representation for purposes of Rule 1.15 is intensely a fact-driven determination. The most critical analytical question in that determination is whether the facts show the transaction in question bears a reasonable relationship to the lawyer's conduct in his/her professional capacity as an attorney admitted to practice in the District of Columbia.

In *In re Confidential*, 664 A.2d 364 (D.C. 1995), a District of Columbia lawyer agreed to serve as an escrow holder for a Maryland real estate transaction (where the lawyer was not admitted to practice) in which the lawyer acted as a principal rather than as an attorney. The Court held that under DR 9-103(A) (the predecessor of Rule 1.15[44]) and the facts of that case, the lawyer had not misappropriated funds even though the balance in the

[44] The Court noted, 664 A.2d at 366, n.6, "Effective January 1, 1991, [DR 9-103(A)] was replaced with Model Rule 1.15 . . . . We have no occasion here to determine whether this new version would apply to the events here." The phrase "in connection with a representation" was in the new Rule 1.15, but not in DR 9-103(A).

lawyer's escrow account fell below the amount the lawyer had been given to hold in escrow. The Court stated that in analyzing whether a lawyer's handling of funds constitutes misappropriation, the critical factual question is "whether the fiduciary relationship bore a reasonable relationship to [the attorney's] conduct in his professional capacity as an attorney admitted to practice in the District of Columbia." *Confidential*, 664 A.2d at 367.

In re Green, Board Docket No. 13-BD-020, (BPR Aug. 5, 2015)[45] involved a factual situation where third parties entrusted funds to an attorney as an escrow holder in effecting the purchase of gold ingots from a foreign country. The Board stated, *id.* at 9, that "an attorney-client relationship is not a precondition for a finding of misappropriation under Rule 1.15(a)," and, relying on the quotation from *In re Confidential* cited above, adopted a hearing committee report which determined that under the facts of that case the lawyer had misappropriated funds held "in connection with a representation." *In re Green*, Board Docket No. 13-BD-020, at 31-32 (HC Rpt. Nov. 18, 2014), *recommendation adopted*, *Green*, Board Docket No. 13-BD-020, at 8-9. Among the relevant facts cited by the hearing committee were that the funds came into the lawyer's possession as a result of legal work performed in the District of Columbia (*id.* at 35), and that the parties relied on the trustworthiness of the attorney *as a lawyer* (*id*. at 34).

[45] *Recommendation adopted*, 136 A.3d 699 (D.C. 2016) (per curiam).

In re Bailey, 883 A.2d 106 (D.C. 2005), involved an ambiguous "authorization" withholding form signed by a client in favor of a third party medical service provider. Notwithstanding that ambiguity, the Court found the respondent attorney had misappropriated funds that came into the attorney's possession when the client's case settled, the critical fact being the attorney's having created *an independent contractual obligation of his own* to withhold funds in order to pay the medical services provider. The Court stated, 883 A.2d at 120 (square brackets added; concluding footnote omitted):

> The paragraph . . . that is most significant with respect to Dr. Garmon's right to be paid from the settlement funds is that above [the respondent attorney's] signature which states: "The undersigned, being attorney of record for the above patient/client . . . does hereby agree to observe all the terms of the above and agrees to withhold such sums from any settlement(s), judgment(s) or verdicts due said patient/client as may be necessary to adequately protect said doctor." A reasonable person in the position of the parties would interpret this clause as holding [the respondent attorney], the person to whom [the client's] settlement funds were sent, accountable for monies owed to Dr. Garmon . . . . This last paragraph of the authorization clearly stated that [the respondent attorney] agreed to withhold such monies owed to Dr. Garmon for his services from any settlements due [the client/patient] as may be necessary to "adequately protect" Dr. Garmon. Therefore, when [the client's] case settled . . . [the respondent attorney] was under a contractual obligation to withhold the $2,420.30 owed to Dr. Garmon out of the settlement funds, and Dr. Garmon had a "just claim" with respect to those funds.

The Court's use of the term "just claim" is a reference to what is now Comment [8] to Rule 1.15, which states, in pertinent part, "Third parties . . . may have just claims against funds or other property in a lawyer's custody."

Finally, under the facts of *In re Mitrano*, 952 A.2d 901 (D.C. 2008) (appended Board Report), the Court found a duty existed under Rule 1.15 for the benefit of non-client third parties who had financed a litigation, even though there was *no* contractual relationship between the respondent attorney and the third parties. In *Mitrano*, the attorney represented a company (Dano) in contract litigation involving the District of Columbia government. Dano was insolvent, and therefore Dano's parent (Williams Industries) and its president (Mr. Williams) − who were not the attorney's clients − loaned Dano the money to pay the attorney for the costs of the litigation. *Id.* at 910-11. Williams Industries also relied on the attorney to follow up with the District of Columbia government to obtain any funds due Dano, and eventually the attorney received a refund check payable to Dano. *Id.* at 911-12. While awaiting the refund, the attorney wrote to a former officer of Dano, stating, "'[T]here are expenses previously paid by others that are due to them,'" thereby acknowledging that the attorney knew others had an interest in the refund. *Id.* at 912. The attorney subsequently negotiated the refund check and used the proceeds for his own purposes without disbursing any funds to Williams Industries or Mr. Williams. *Id.* at 913. Even though Williams Industries and Mr. Williams had no client or contractual relationship with the attorney, and

had only an inchoate interest in the refund proceeds, the Court found under the foregoing facts that those non-client third parties nevertheless had "a sufficient interest in the proceeds of the check to preclude [the respondent attorney's] unilateral action to cash the check and retain the proceeds" (*id.* at 916), thereby violating Rule 1.15 (*id.* at 925-26).

Misappropriation

Turning more generally to the issue of misappropriation under Rule 1.15(a), although the Rule does not use the term "misappropriation," case law defines it as "any unauthorized use of client[] 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 Harrison*, 461 A.2d 1034, 1036 (D.C. 1983) (citation and quotation marks omitted); *see In re Cloud*, 939 A.2d 653, 659 (D.C. 2007). And while *Harrison* speaks in terms of "client" funds, as discussed more fully *infra*, the text of Rule 1.15 expressly and equally applies to the property of "third persons." As Comment [1] to Rule 1.15 states (emphasis added), "All property that is the property of clients *or third persons* should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts maintained with financial institutions meeting the requirements of this rule."

Misappropriation may be a *per se* offense that does not require proof of improper intent. *In re Anderson*, 778 A.2d 330, 335 (D.C. 2001). It occurs

where "the balance in the attorney's . . . account falls below the amount due . . . regardless of whether the attorney acted with an improper intent." *In re Edwards*, 990 A.2d 501, 518 (D.C. 2010) (appended Board Report). Thus, "when the balance in [a] [r]espondent's escrow account dip[s] below the amount owed[,]" misappropriation has occurred. *In re Chang*, 694 A.2d 877, 880 (D.C. 1997) (per curiam) (appended Board Report) (citing *In re Pels*, 653 A.2d 388, 394 (D.C. 1995)).

Intentional misappropriation occurs when an attorney is shown to have intentionally applied for personal use or business expenses funds which the lawyer holds for the account of others (*In re Mooers*, 910 A.2d 1046 (D.C. 2009) (per curiam)), a conclusion that can be established by circumstantial evidence (*In re Mabry*, 11 A.3d 1292, 1294 (D.C. 2011) (per curiam)).

In contrast, reckless misappropriation occurs when a respondent's conduct "reveal[s] an unacceptable disregard for the safety and welfare of entrusted funds . . . ." *Anderson*, 778 A.2d at 338; *see also id.* at 339 ("[R]ecklessness is a state of mind in which a person does not care about the consequences of his or her action.") (internal citations and quotation marks omitted). Stated another way, "'[r]eckless misconduct requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts that would disclose this danger to any reasonable person.'" *Id.* at 339 (quoting 57 Am. Jur. 2d *Negligence* § 302 (1989)). While the Court has rejected the proposition that recklessness

can be shown by inadequate record-keeping alone combined with commingling and misappropriation, (*Anderson*, 778 A.2d at 340), or failure to pay a single client obligation (*id.*), writing checks that are dishonored or that cause a trust account to be in overdraft can be taken as evidence of recklessness (*id.*), as can the failure to make any effort to reconcile an IOLTA trust account (*In re Abbey*, 169 A.3d 865, 873-75 (D.C. 2017)), or by a pervasive failure to maintain contemporaneous records accounting for the flow or disposition of client funds (*Pels*, 653 A.2d at 396). Misappropriation can occur even when the amount in question is relatively insignificant. *In re Robinson*, 583 A.2d 691 (D.C. 1990) (per curiam) (disbarment ordered for a defalcation of only $480, even though that amount was later repaid); *In re Berkowitz*, 801 A.2d 51, 57 (D.C. 2002) (per curiam) (appended Board Report) (disbarment ordered for a defalcation of $357.64, also later returned).

Commingling

Rule 1.15(a) states plainly and explicitly, "A lawyer shall hold property of clients or third persons that is in the lawyer's possession . . . separate from the lawyer's own property." Commingling occurs when an attorney fails to hold entrusted funds in an account separate from his/her own funds. *In re Moore*, 704 A.2d 1187, 1192 (D.C. 1997) (per curiam) (appended Board Report). Thus, "commingling is established 'when a client's money is intermingled with that of his attorney and its separate identity is lost so that it may be used for the attorney's personal expenses or subjected to the claims of

its creditors.'" *In re Malalah*, Board Docket No. 12-BD-038 (BPR Dec. 31, 2013) (appended HC Rpt. at 12) (quoting *In re Hessler*, 549 A.2d 700, 707 (D.C. 1988) (appended Board Report)), *recommendation adopted*, 102 A.3d 293 (D.C. 2014) (per curiam). As the Court has explained, "[t]he rule against commingling was adopted to provide against the probability in some cases, the possibility in many cases, and the danger in all cases that such commingling will result in the loss of the client's money." *Hessler*, 549 A.2d at 702. "The rule against commingling has three principal objectives: to preserve the identity of client funds, to eliminate the risk that client funds might be taken by the attorney's creditors, and most importantly, to prevent lawyers from misusing/misappropriating client funds, whether intentionally or inadvertently." *In re Rivlin*, 856 A.2d 1086, 1095 (D.C. 2004) (per curiam) (appended Board Report).

Required Record-Keeping

Rule 1.15(a) in straightforward language requires an attorney to keep "complete" trust account records, and requires the attorney to preserve those records for a period of five years. *See Edwards*, 990 A.2d at 522 ("Rule 1.15(a) requires lawyers to keep 'complete records of . . . account funds and other property' and [to] preserve them 'for a period of five years after termination of the representation.'"). The *Edwards* decision explained (*id.*) that "[f]inancial records are complete only when an attorney's documents are 'sufficient to demonstrate [the attorney's] compliance with his ethical duties'"

(quoting *In re Clower*, 831 A.2d 1030, 1034 (D.C. 2003) (per curiam)). The purpose of the requirement for "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, for example, the attorney misappropriated or commingled a client's funds." *Id.* at 522 (quoting *Clower*, 831 A.2d at 1034); *see also Pels*, 653 A.2d at 396. As stated in *Edwards*, 990 A.2d at 522, "[t]he records themselves should allow for a complete audit even if the attorney or client is not available." Comment [2] to Rule 1.15 (quoting *Clower*, *supra*) states:

> 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. Financial records are complete only when documents sufficient to demonstrate an attorney's compliance with his ethical duties are maintained.

Disbursement or settlement sheets alone for particular clients do not obviate the need to maintain separate trust or escrow account ledgers or books reflecting receipts and disbursements. *Anderson*, 778 A.2d at 333. A lawyer must maintain a ledger or check register for the trust account, and subsidiary client ledgers showing what was paid to or received from the lawyer's clients. *In re Choroszej*, 624 A.2d 434, 436 (D.C. 1992) (per curiam).

(c) Discussion of Conclusions

Lawsuit Financial Corporation (Count II)

Preliminarily, the Hearing Committee considers the issue under Rule 1.15 of whether the *Hedgepeth* settlement funds were in Respondent's

possession "in connection with a representation." We conclude that under the particular facts of the present case viewed as an entirety − the "mosaic" of Respondent's conduct to be considered under *Ukwu*, 926 A.2d at 1116 − Respondent's receipt and handling of the *Hedgepeth* settlement, and his clear financial obligations to LFC, meet the critical criterion stated in *In re Confidential*, *supra*: they bore "a reasonable relationship to [Respondent's] conduct in his professional capacity as an attorney admitted to practice in the District of Columbia." 664 A.2d at 367. Those facts are:

(1) Respondent is a member of the District of Columbia Bar, and provided legal services to Mr. Hedgepeth in the District of Columbia as the plaintiff in a contingent fee tort lawsuit that was litigated in the District of Columbia. FF ¶¶ 1, 41, 47. Unlike the lawyer in *In re Confidential*, *supra*, Respondent in *Hedgepeth* was acting at all times as a District of Columbia attorney.

(2) For many years Respondent's practice has consisted largely of representing plaintiffs in contingent fee tort cases, and during that time he has frequently financed his practice by pledging his interest in the contingent fee outcomes of those cases as collateral for third-party loans. FF ¶¶ 42, 56.

(3) Respondent pledged as collateral for LFC's loans his contingent fee interest in *Hedgepeth* as well as, initially, one other case and, subsequently, two additional cases, one of which was also being litigated in the District of Columbia. FF ¶¶ 47, 53.

(4) The Loan Agreements specifically recited that LFC's loans to Respondent were being made in order to conduct the "Litigation" identified therein (FF ¶ 48), which included *Hedgepeth*, a fact referred to both by Judge Di Toro in denying Respondent's motion to dismiss LFC's suit against him (FF ¶ 109), as well as by the AAA Arbitrator (FF ¶ 100, n.21).

(5) The legal fee Respondent received and which is the subject of the dispute between Respondent and LFC was clearly derived from a specific representation, *i.e.*, the *Hedgepeth* case. FF ¶ 66.

(6) Respondent clearly and expressly created a lien interest in favor of LFC against his potential fee recovery in *Hedgepeth*. FF ¶¶ 49, 51.

(7) In addition to creating LFC's lien interest, Respondent created an express contractual obligation and duty of his own to withhold payments due LFC from settlement funds that came into his possession from his *Hedgepeth* fee (and his fee in any other pledged case that resulted in a positive recovery) in order to repay LFC's loans to him to the extent required by the Loan Agreements. FF ¶ 51. *See Bailey*, *supra*. LFC's express contractual interest was even clearer and more specific than the inchoate interest of Williams Industries and Mr. Williams described in *Mitrano*, *supra*, where the Court found that misappropriation occurred.[46]

[46] The funds misappropriated by the lawyer in *Mitrano* came into his possession as a check payable to the lawyer's nominal client (Dano), in which third parties (Mr. Williams and Williams Industries) had an interest. The facts here are only different in that the funds misappropriated by Respondent came into his possession as legal fees resulting from the settlement of the *Hedgepeth* case. Otherwise, the facts are similar in that a third party

(8) Even before *Hedgepeth* settled, and throughout his negotiations with LFC as described in DCX 33, Respondent acknowledged to LFC − as the lawyer in *Mitrano*, *supra*, acknowledged − that he recognized LFC's lien interest under the Loan Agreements. FF ¶ 92(c).

(9) Because LFC had no control over or contractual right to supervise the cases that Respondent pledged as collateral, LFC was completely reliant on − and did rely on − Respondent's probity as an attorney to comply with the obligations of the Loan Agreements, as Mr. Bello explicitly testified. FF ¶¶ 49, 59. *See Green*, *supra*; *Mitrano*, *supra*.

(10) Respondent initially deposited the *Hedgepeth* settlement proceeds into his Trust Account, and subsequently transferred his entire legal fee in *Hedgepeth* directly to his office management account, ignoring LFC's lien. FF ¶ 66.

(11) In attempting to negotiate his way out of paying LFC from the proceeds of the *Hedgepeth* settlement, Respondent repeatedly offered LFC a lien interest in other cases from his practice. FF ¶¶ 68, 80, 83, 86, 88, 91.

The Hearing Committee does not mean to suggest that every commercial debt dispute by a lawyer requires withholding under Rule 1.15.

(LFC, in this case) had an interest in those funds (legal fees, in this case). The Hearing Committee finds the small factual difference between *Mitrano* and the present case to be insignificant, because in both instances third parties had an interest in funds coming into the lawyer's possession as a result of the lawyer's representation. As the Hearing Committee seeks to make clear *infra* in its discussion of Rule 1.15, the Rule, by its terms, protects third-party interests no differently from a client's creditor's funds.

To the contrary, the Hearing Committee recommends that Rule 1.15 be applied in a situation such as the present case, where a D.C. Bar member (a) focuses on contingent fee representation of personal injury plaintiffs and often pledges such fees to secure repayment of loans to finance his/her practice; (b) contracts to finance a specific case litigated in the District, to create a repayment lien for a lender from a contingent fee in that case, and to withhold from any settlement in that case the amount due the lender; (c) repeatedly acknowledges the existence of such a lien to the lender, who is relying on the lawyer to deal honestly; and (d) places the settlement proceeds from the case in his/her trust account but appropriates the entire fee and fails to withhold or pay any amount due under the lien. Such an appropriation and failure by a lawyer in those circumstances bear a reasonable relationship to the lawyer's professional conduct as a Bar member. LFC's interest in the *Hedgepeth* settlement therefore constituted funds in Respondent's possession "in connection with a representation," and Respondent's treatment of those funds is of legitimate concern to ODC.

When funds come into the possession of a lawyer as the result of a representation, as they did in *Hedgepeth*, Rule 1.15 does not treat the funds of third parties differently from client funds. Contrary to Respondent's argument (Resp. Br. at 11) that Rule 1.15 provides no notice of a duty to protect funds representing a third party's claim against a lawyer's legal fees, Rule 1.15(a) speaks repeatedly of the desire to protect the interests of "third persons" whose

funds may be held by a lawyer. The clear meaning of the phrase in Rule 1.15(d) covering "property in which interests are claimed by the lawyer and another person" amply encompasses funds in the possession of a lawyer resulting from a representation, the ownership of which is disputed by a finance company or third-party lender, or any other creditor. For example, in *Mitrano*, *supra*, the party protected by Rule 1.15 was a lender providing the funds used by the lawyer who represented Dano.

This broad reading of Rule 1.15 is confirmed by the Comments to the Rule. Comment [1] states (emphasis added):

> A lawyer should hold property of others with the care required of a professional fiduciary . . . . All property of clients *or third parties* should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts maintained with financial institutions meeting the requirements of this rule.

Furthermore, Comment [8] refers to third parties "*such as* a client's creditors" (emphasis added) who may have claims against funds in the lawyer's custody; the reference to a "client's creditors" is an example, and is not exclusive.

For these reasons the Hearing Committee concludes that funds in Respondent's possession from his *Hedgepeth* fee, the rightful ownership of which was being challenged by LFC, should be treated no differently from a client's funds or a client's creditor's funds in terms of Respondent's obligation to segregate those funds in a trust account until the dispute with LFC was resolved.

The Hearing Committee concludes that ODC has also demonstrated by clear and convincing evidence that once it became clear Respondent had received a $160,000 legal fee in *Hedgepeth*, Respondent not only failed to maintain in his escrow account the $32,000 he contends was the proper computation of LFC's interest under the Loan Agreements; but he also failed to maintain the lower $25,000 amount that LFC loaned him. FF ¶¶ 83, 111. In fact, Respondent testified that he removed his legal fee from the escrowed *Hedgepeth* settlement funds for use in his office operating account without setting aside or protecting any amount for LFC. FF ¶ 66. Even assuming there were some merit to Respondent's argument that Rule 5.4(a) of Utah's or the District of Columbia's legal ethics rules might preclude LFC from recovering the "fee-splitting" amount owed under the Loan Agreements, after Respondent's receipt of the $160,000 legal fee in *Hedgepeth* Respondent's "fee-splitting" argument would not affect LFC's right to recover its basic loan amount of $25,000.

In addition to proving Respondent's misappropriation by failing to keep in escrow funds owed to LFC after Respondent received his $160,000 *Hedgepeth* legal fee, ODC has also proved by clear and convincing evidence that Respondent intentionally misappropriated those funds. Respondent, finding himself in difficult financial circumstances, intended to delay any payment to LFC out of his legal fee in *Hedgepeth* for as long as possible, in an apparent effort to get LFC to agree to repayment from the results of other

cases and to keep and make use of all of the *Hedgepeth* fees for himself. FF ¶ 92(e). Respondent's stiff-arming LFC occurred when he was experiencing financial pressures − after suffering "devastating" losses in his legal practice (FF ¶ 58) − severe enough to prevent him from paying his basic housing expenses (FF ¶¶ 15, 35) and to cause him to write an insufficient funds office rent check on his Trust Account (FF ¶ 119). The history of Respondent's non-cooperation in the AAA arbitration and his stalling on paying AAA's administrative fees (FF ¶¶ 95(a) n.19, 105-06) further demonstrates Respondent's intention to deprive LFC of promptly recovering payments due under the Loan Agreements. In short, Respondent needed to misappropriate the funds due LFC, and he did so.

Respondent argues that a 1997 ethics opinion under Utah's rule 5.4(a) − which deems the creation of a lien interest in a lawyer's contingent fee to be unethical "fee-splitting" − violates District of Columbia public policy, thereby "implicitly" (Resp. Br. at 14) relieving Respondent of any duty under Rule 1.15 of the District's Rules of Professional Conduct with regard to LFC's interest in Respondent's *Hedgepeth* fee. The Hearing Committee rejects Respondent's contention for three independent reasons.

First, as a choice of law issue, only the District of Columbia's legal ethics rules govern the propriety of Respondent's conduct in the LFC matter. Rule 8.5(b) deals with choice of law matters, and under whichever part of Rule 8.5(b) one analyzes Respondent's conduct, the result is the same: Utah's

interpretation of that State's rule 5.4(a) is irrelevant for the purposes of this case. If one views Respondent's conduct pursuant to Rule 8.5(b)(1) as having occurred in connection with a matter pending before a tribunal, it is clear that *Hedgepeth* was litigated in the District of Columbia (FF ¶ 47), and venue for any dispute between Respondent and LFC regarding their financial relationship was likewise required to be placed in the District of Columbia (FF ¶ 50 n.15); therefore its ethics rules apply. If one views Respondent's actions under the "any other conduct" provisions of Rule 8.5(b)(2), then 8.5(b)(2)(i) is inapplicable because Respondent is admitted to practice in more than one jurisdiction (FF ¶ 1 n.7), but not in Utah; and under 8.5(b)(ii) the ethics rules of the District of Columbia − not Utah − are applicable to Respondent's conduct because the District of Columbia is the admitting jurisdiction where Respondent principally practiced. FF ¶¶ 7, 50 n.15, 124.[47]

Second, in denying Respondent's motion to dismiss LFC's lawsuit, Judge Di Toro negated the premise of Respondent's argument that under Utah's substantive law the Loan Agreements are void for reasons of public policy. FF ¶ 109(a). It would therefore be anomalous for the Hearing

[47] In denying Respondent's motion to dismiss LFC's lawsuit, Judge Di Toro also noted that under a standard "prevailing interest analysis" for choice of law purposes, the District of Columbia would ordinarily have the strongest contacts to the financial relationship between LFC and Respondent. DCX 53 at 316-17. Comment [5] to Rule 1.15 also indicates that a lawyer's IOLTA account should be maintained in the jurisdiction where the lawyer principally practices. It is therefore significant that Respondent maintained his Trust Account in a bank in the District of Columbia. FF ¶ 124.

Committee to conclude that reasons of public policy immunize Respondent from misappropriating LFC's interest in Respondent's *Hedgepeth* legal fee.

Third, the Hearing Committee further agrees with Judge Di Toro (FF ¶ 109(b)) that Respondent's own participation in a putative breach of Utah's legal ethics rules cannot be used by him as a procedural weapon. Respondent was no babe in the woods who got snookered by an unethical lender. Respondent willingly initiated (FF ¶ 44) and later expanded (FF ¶ 52) his financial relationship with LFC, and he was thoroughly familiar with "ALF" transactions as part of his practice (FF ¶ 56). Only after he appropriated the *Hedgepeth* fee (FF ¶ 66), then failed to get LFC to agree to take collateral other than *Hedgepeth* (FF ¶¶ 68, 80, 83, 88, 91, 92(e)), then failed to get the AAA Arbitrator to agree there was no debt to LFC because Respondent suffered a "net loss" in *Hedegepeth* (FF ¶¶ 95(b), 105(c)), and then was found by the AAA Arbitrator to have breached his agreement to resolve disputes with LFC through arbitration (FF ¶¶ 105-06) did Respondent belatedly come to the argument that he could challenge LFC's rights under Utah's interpretation of Rule 5.4(a) (FF ¶¶ 105(b) n.23, 108). That is hardly a factual record justifying Respondent's hiding under a "void as against public policy" cloak in seeking to rebut a misappropriation charge under Rule 1.15.

Mack (Count III)

There is clear and convincing evidence that Respondent recklessly misappropriated entrusted funds in the Mack matter, in violation of Rule

1.15(a). It is stipulated that Respondent knew Kaiser Permanente was due at least $554 out of the settlement funds Respondent received in the Mack case. FF ¶ 113. It is likewise stipulated that Respondent deposited the Mack settlement funds in his Trust Account on June 8, 2010. FF ¶ 114. It is further stipulated that as of April 22, 2011, the balance in Respondent's Trust Account was $490.12. FF ¶ 116. It is documented that this defalcation continued into the month of May 2011 (FF ¶ 117), and that on May 6, 2011, Respondent drew a $554 check to Kaiser Permanente which exceeded the balance in his Trust Account (FF ¶ 118). It is also documented that on May 11, 2011, Respondent drew a $2,737.23 check against his Trust Account for a personal office rent expense, which was dishonored by the bank due to insufficient funds and caused a -$2,247.11 negative Trust Account balance. FF ¶ 119. Due to a $30 insufficient funds fee for the dishonored check described in the preceding sentence, the balance in Respondent's Trust Account further fell to $460.12. FF ¶ 120. On May 12, 2011, Respondent made a $500 deposit of his personal funds to his Trust Account, which brought the balance in that account back above $554. FF ¶ 121. Finally, it is settled (and admitted by Respondent) that Respondent did not keep a ledger or other similar records for his Trust Account. FF ¶ 127.

The foregoing facts establish more than an oversight that might be excused under *Anderson*, *supra*, as mere negligence. The insufficient funds office rent check Respondent wrote against his Trust Account on May 11,

2011, indicates both that he had no idea what was going on in that account, and that he should have recognized the impoverished state his Trust Account was experiencing. Writing a check that is dishonored or causes a trust account to be in overdraft is evidence of recklessness. *Anderson*, *supra*, 778 A.2d at 340. It was also the entrusted funds being held by Respondent that sustained, at least initially, the $30 insufficient funds fee charged by Respondent's bank. As in *In re Abbey*, *supra*, Respondent's failure to keep a Trust Account ledger or similar documentation was a dereliction equivalent to the failure to reconcile his IOLTA trust account, and, under *In re Pels*, *supra*, constituted a pervasive failure to maintain contemporaneous records of the flow or disposition of client funds. Although Respondent contends (Resp. Br. at 15) that in the Mack matter there was only a "miscue" of about $63, the small amount in question is not necessarily controlling (*In re Robinson*, *supra*; *In re Berkowitz*, *supra*). It is clear from the Mack events plus Respondent's extensive history of commingling client and non-client funds in his Trust account (FF ¶ 125) that he neither knew, nor cared, how much money was in his Trust Account or whether the monies there were being properly held in a fiduciary manner.

Commingling/Required Record-Keeping (Count IV)

There is clear and convincing evidence that Respondent commingled funds in his Trust Account, and failed to keep records for that account of the kind and for the period of time required by Rule 1.15(a); indeed, Respondent

has admitted and/or stipulated to these violations of Rule 1.15(a). FF ¶¶ 124-25, 127 n.31, 129-30; Stip. ¶ 17. There is also clear and convincing evidence in the record that Respondent's failure to keep adequate records for his Trust Account frustrated one of the primary purposes of the record-keeping requirement: it prevented ODC from conducting a comprehensive audit of the Trust Account. FF ¶¶ 127-28.

3. Rule 1.15(c)

ODC alleges that Respondent violated Rule 1.15(c) in Counts II (Lawsuit Financial Corporation) and III (Mack). Specifically, ¶¶ 14(a) and (b) of the Specification allege that Respondent violated Rule 1.15(c) in the LFC matter by failing to notify LFC promptly of his receipt of funds in the *Hedgepeth* case in which LFC had an interest; and by failing to provide LFC with a prompt accounting of those funds after LFC requested one. In Count III of the Specification, ¶ 24(a) alleges that Respondent violated Rule 1.15(c) in the Mack matter by failing to deliver funds promptly to Kaiser Permanente, a medical services provider. The Hearing Committee concludes that ODC has proved by clear and convincing evidence that Respondent violated Rule 1.15(c) in both the LFC and the Mack matters.

(a) Text of the Rule

Rule 1.15(c) states:

> (c) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall

> promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property, subject to Rule 1.6.

(b) Applicable Principles

Unlike Rule 1.15(a), discussed *supra*, and Rule 1.15(d), discussed *infra*, Rule 1.15(c) does not require that funds subject to its provisions must be received "in connection with a representation." Instead, Rule 1.15(c) applies simply when the attorney "receiv[es] funds or other property in which a . . . third person has an interest."

Comment [8] to Rule 1.15 states, "Third parties . . . may have just claims against funds or other property in a lawyer's custody." Such "just claims" are subject to the duties stated in Rule 1.15(c) to "promptly deliver to the . . . third person any funds or other property that the . . . third person is entitled to receive and, upon request by the . . . third person, [to] promptly render a full accounting regarding such property . . . ."

A lawyer's duty to account under Rule 1.15(c) is, however, subject to an exception, *i.e.*, the requirement under Rule 1.6 to protect the secrets and confidences of the lawyer's client. But as noted in Comment [13] to Rule 1.6, nothing prevents a lawyer from "securing confidential legal advice about the lawyer's personal responsibilities to comply with these Rules," and Comment [14] also states it is not improper for a lawyer to give limited information to third parties for legitimate purposes, provided the lawyer exercises due care

in doing so and warns the third party that the information must be kept confidential.

With respect to what period of time constitutes "prompt" action under Rule 1.15(c), as the Board stated in *In re Nave*, Board Docket No. 12-BD-091, at 11 (BPR June 23, 2016):

> There is no bright-line test for what constitutes "prompt" payment. *In re Ross*, 658 A.2d 209, 211 (D.C. 1995). Rather, a case-specific inquiry is required. *In re Martin*, 67 A3d 1032, 1046 (D.C. 2013); *In re Moore*, 704 A.2d 1187 (D.C. 1997) (per curiam) ("no doubt" that six-month delay in paying medical providers is not "prompt"); *Ross*, 658 A.2d at 21 (11-month delay was not prompt).

(c) Discussion of Conclusions

Lawsuit Financial Corporation (Count II)

The Specification alleges that Respondent failed to promptly notify LFC, which had an interest in Respondent's *Hedgepeth* fee, of Respondent's receipt of those funds; and further failed to promptly render an accounting to LFC after LFC requested one. The Hearing Committee concludes in both regards that ODC has proved by clear and convincing evidence that Respondent violated Rule 1.15(c) in the LFC matter.

With respect to the prompt notification requirement of Rule 1.15(c), there is clear and convincing evidence that LFC had an express and documented lien interest in the legal fee Respondent derived from the *Hedgepeth* settlement. FF ¶¶ 51, 55(b). Respondent deposited the *Hedgepeth* settlement funds in his Trust Account on August 27, 2012. FF ¶ 66.

Respondent did not notify LFC of the amount of his legal fee in *Hedgepeth* until June 11, 2013, a delay of approximately nine and a half months. FF ¶ 83. That delay does not constitute prompt notification. *See, e.g.*, *Nave*, Board Docket No. 12-BD-091, at 11. The extended period of time during which Respondent kept LFC in the dark and guessing about his fees in *Hedgepeth* is outlined in FF ¶¶ 67-82. Respondent's delay is highlighted by his concession that despite any confidentiality provisions in the *Hedgepeth* settlement agreement, the amount of Respondent's legal fee in that case was not confidential. FF ¶ 82. Respondent therefore clearly violated the prompt notification requirement of Rule 1.15(c) with respect to LFC.

There is also clear and convincing evidence that Respondent violated the provisions of Rule 1.15(c) requiring prompt rendering of an accounting to LFC after LFC requested one. Even before the *Hedgepeth* case settled, when Respondent and LFC were engaged in preliminary discussions concerning repayment to LFC, Mr. Bello told Respondent on July 5, 2011, "we need to know what attorney fees are being generated by the entire package of cases we funded." FF ¶ 62. On September 19, 2012, Mr. Bello e-mailed Respondent to ask for an update on the *Hedgepeth* case, but Respondent did not tell LFC he had already received the *Hedgepeth* settlement proceeds. FF ¶ 68. On September 27, 2012, LFC − still being kept in the dark by Respondent as to the actual state of affairs − wrote to Respondent, asking, "Can you give us resolution details please? What is your timetable? What is

the status of negotiations?" FF ¶ 71. On October 25, 2012, Mr. Bello again requested information from Respondent. FF ¶ 73. Instead of doing that, Respondent replied that day (FF ¶ 74) again without informing LFC that *Hedgepeth* had settled, stating that he could not agree to a full repayment of LFC and that he was "preparing a breakdown of what I can tell you to start negotiations" in order to "make a proposal to you." *Id*. On December 13, 2012, Mr. Bello e-mailed Respondent asking for information, to which Respondent replied, "I'll have a proposal [*i.e.*, *not* an accounting] soon," meaning by mid-January of 2013. FF ¶ 75. LFC sent Respondent reminders on January 16, 2013, and January 22, 2013 (FF ¶ 76), and again − still in the dark − on April 17, 2013 (FF ¶ 78), asking "So, what is the attorney fee on the case?" This arm's-length dance between Respondent and LFC continued at least through August 19, 2013 (the end date of DCX 33) without Respondent providing any concrete information or monetary offer to LFC (FF ¶¶ 91, 92(b)) in connection with the *Hedgepeth* case, other than Respondent's belated disclosure on June 11, 2013, of the amount of his legal fee in *Hedgepeth* (FF ¶ 83).

In dealing with LFC about the *Hedgepeth* settlement, confidentiality concerns under Rule 1.6 did not realistically exist for Respondent because, as he agreed in his testimony, the amount of his legal fee was not confidential. FF ¶ 82. Furthermore, he eventually disclosed the gross settlement amount in *Hedgepeth* to legal counsel for LFC (FF ¶ 99) without seeking any

confidentiality agreement from LFC pursuant to Comment [14] to Rule 1.6 (FF ¶ 92(d)), and without seeking any outside advice pursuant to Comment [13] to Rule 1.6[48] concerning his responsibilities under Rule 1.15 or how he might meet them while allaying any confidentiality concerns (FF ¶ 66).

The entire tenor of Respondent's dealings with LFC as disclosed in DCX 33 − the "mosaic" to be considered pursuant to *In re Ukwu*, *supra* − was deceitful and far from that of a fiduciary. His concern was *not* for protecting confidentiality, since he ultimately disclosed the relevant information to LFC. FF ¶¶ 83, 99. Instead, Respondent's primary interest was (1) not paying LFC from the *Hedgepeth* settlement so he could use those funds to finance his practice (*e.g.* FF ¶¶ 66, 86); (2) instead, offering LFC collateral for repayment of its loans in the form of potential legal fees from other cases (*e.g.,* FF ¶¶ 68, 91); while (3) failing to provide prompt and accurate accounting to LFC in violation of Rule 1.15(c) (FF ¶¶ 67-91).

Mack (Count III)

There is clear and convincing evidence, most of it stipulated, that Respondent violated Rule 1.15(c)'s prompt payment requirement with respect to Kaiser Permanente in the Mack matter. Respondent was aware that Kaiser Permanente had a claim for fees for medical services provided to Mr. Mack as a result of the accident in which Mr. Mack was injured, and on February

[48] *See, e.g.*, *In re Robinson*, Board Docket No. 15-BD-053, at 15-16, ¶ 31 (HC Rpt. Dec. 29, 2016) (respondent attorney asked ODC for guidance while in the midst of a fee-sharing dispute with co-counsel).

24, 2009, legal counsel representing Mr. Mack prior to Respondent had already received a $554 lien claim from Kaiser Permanente. FF ¶ 113. On June 8, 2010, Respondent deposited the Mack settlement proceeds in his Trust Account, withholding $1,000 for medical fees owed to Kaiser Permanente. FF ¶ 114. Nine months later, on March 15, 2011, Respondent wrote a letter to Mr. Mack in which Respondent represented that Respondent was going to pay $554 to Kaiser Permanente, and seeking consent from Mr. Mack. FF ¶ 115. On May 6, 2011 − approximately eleven months after receiving the Mack settlement proceeds − Respondent wrote a check on his Trust Account to Kaiser Permanente in the amount of $554. FF ¶ 118. This length of delay did not constitute prompt payment under the circumstances.

4. Rule 1.15(d)

ODC alleges that Respondent violated Rule 1.15(d) in Counts II (Lawsuit Financial Corporation) and III (Mack). Subparagraphs 14(c) and (d) of the Specification allege, respectively, that Respondent violated Rule 1.15(d) in the LFC matter by failing to keep in his escrow account funds the ownership of which was disputed by LFC, and by intentional misappropriation. Subparagraph 24(b) of the Specification alleges that Respondent violated Rule 1.15(d) in the Mack matter through reckless misappropriation. The Hearing Committee concludes that ODC has proved by clear and convincing evidence that Respondent violated Rule 1.15(d) in both the LFC and the Mack matters. (The Hearing Committee's conclusion

that Respondent recklessly misappropriated funds in the Mack matter has already been discussed in subsection III(B)(2) of this Report, dealing with the Rule 1.15(a). That discussion and conclusion are incorporated herein by reference, as the basis for the Hearing Committee's conclusion that Respondent violated Rule 1.15(d) in the Mack matter. This subsection III(B)(4) therefore deals only with the issue of Respondent's alleged violation of Rule 1.15(d) in the LFC matter.)

(a) Text of the Rule

Rule 1.15(d) states:

> (d) When in the course of representation a lawyer is in possession of property in which interests are claimed by the lawyer and another person, or by two or more persons to each of whom the lawyer may have an obligation, the property shall be kept separate by the lawyer until there is an accounting and severance of interests in the property. If a dispute arises concerning the respective interests among persons claiming an interest in such property, the undisputed portion shall be distributed and the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. Any funds in dispute shall be deposited in a separate account meeting the requirements of paragraph (a) and (b).

(b) Applicable Principles

As is the case with Rule 1.15(a), Rule 1.15(d) applies only when "in the course of representation" a lawyer comes into possession of funds in which interests are claimed by the lawyer and another person.

Principles applicable to interpreting the phrase "in the course of representation" have been discussed above in subsection III(B)(2) of this

Report relating to Rule 1.15(a), and that discussion is incorporated herein by reference. Likewise, the Hearing Committee conclusion concerning Respondent's intentional misappropriation in the LFC matter has been discussed in subsection III(B)(2); that conclusion is applicable to the similar allegations under Rule 1.15(d), and is incorporated by reference in this subsection III(B)(4). The only separate issue which has not yet been discussed is therefore the allegation in ¶ 14(c) of the Specification that Respondent violated Rule 1.15(d) by failing to keep in his escrow account funds the ownership of which was disputed by LFC. That is the issue to which the Hearing Committee now turns.

When a dispute arises regarding funds in a lawyer's possession, Comment [7] to Rule 1.15 states, in pertinent part:

> [t]he disputed funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds should be promptly distributed.

(c) Discussion of Conclusions

There is clear and convincing evidence that Respondent violated Rule 1.15(d) by failing to keep in trust funds from Respondent's legal fee in the *Hedgepeth* settlement, in which Respondent and LFC each claimed an interest.

The existence of the dispute as to Respondent's and LFC's respective interests in Respondent's *Hedgepeth* legal fee is well established in the record. The dispute originated on June 30, 2011, when Respondent complained to

LFC about the concept of having to repay everything owed to LFC out of the legal fee in just one case. FF ¶ 60. On August 21, 2012, Mr. Bello told Respondent that LFC wanted a minimum of $47,500, with further payments to be extended over time. FF ¶ 65. On September 19, 2012, Respondent told LFC, "we are going to have to work out a compromise where I may agree to a total owed, but it will not come solely from Hedgepeth because that is not even possible." FF ¶ 68. On October 25, 2012, Respondent reiterated to LFC, "I cannot agree to a full payment of the non-recourse loan . . . . [F]ull payback of this loan is not only impossible, it is unfair." FF ¶ 74. On June 11, 2013, Mr. Bello told Respondent that LFC was claiming a $100,000 repayment, all payable out of the *Hedgepeth* fee, but would accept a "good faith payment" of $40,000, plus additional collateral. FF ¶ 84. On August 16, 2013, Mr. Bello sent Respondent an e-mail stating, "if we do not receive a check or a payment schedule by the end of next week we will be hiring a Washington DC collection attorney." FF ¶ 90. Thus, it could not be clearer that there was a dispute between Respondent and LFC concerning LFC's claim to funds arising from Respondent's *Hedgepeth* legal fee.

Despite the existence of that dispute, Respondent did not escrow any funds from his *Hedgepeth* fee to await a determination of his and LFC's respective rights, as required by the plain language of Rule 1.15(d). FF ¶ 66. Nor did Respondent honor the terms of the arbitration provision in ¶ 10 of the Loan Agreements. FF ¶¶ 50, 95(a) n.19, 105-06. Instead, Respondent moved

all of the *Hedgepeth* fee to his office management account. FF ¶ 66. During the month of November, 2013, before November 27th, the balance in Respondent's Trust Account was less than $32,000, and was also less than $25,000; during the month of April, 2014, there were also occasions when the balance in the Trust Account was less than $32,000, and also less than the $25,000 originally lent to Respondent by LFC; on May 28, 2014, and May 30, 2014, the balance in the Trust Account went below $32,000; and at all times during the month of June, 2014, the balance in the Trust Account was less than $25,000. FF ¶ 111. It is therefore also clear that Respondent not only failed to escrow amounts claimed by LFC, but he also failed to escrow the $32,000 Respondent computed was owed under the Loan Agreements (FF ¶ 92(b)), as well as the basic loan amount of $25,000 that LFC made to Respondent (FF ¶ 54). By failing to pay LFC even its basic loan amount of $25,000 or the $32,000 Respondent thought was the proper computation of the amount owed under the Loan Agreements, and by failing to escrow any amount in dispute until there was an accounting and severance of LFC's and Respondent's interests in the *Hedgepeth* legal fee, Respondent violated Rule 1.15(d). In addition, by failing to cooperate in the AAA arbitration (FF ¶¶ 95(a) n.19, 105-06), Respondent further violated his duty under Rule 1.15, as explained in Comment [7] to the Rule, to work toward a "prompt resolution of the dispute, such as [through] arbitration."

IV. RECOMMENDATION AS TO SANCTION

In *In re Thyden*, 877 A.2d 129, 144 (D.C. 2005), the Court cited seven factors relevant to determining a disciplinary sanction: (A) the seriousness of the conduct at issue; (B) the prejudice, if any, to the client which resulted from the conduct; (C) whether the conduct involved dishonesty and/or misrepresentation; (D) the presence or absence of violations of other provisions of the disciplinary rules; (E) whether the attorney has a previous disciplinary history; (F) whether the attorney has acknowledged the wrongful conduct; and (G) circumstances in mitigation or aggravation of the misconduct. Each of these factors is discussed below.

In re Hutchinson, 534 A.2d 919, 924 (D.C. 1987) (en banc) and *In re Cleaver-Bascombe*, 986 A.2d 1191 (D.C. 2010) also note the relevance in sanction determinations of the need to maintain the integrity of the legal profession, to protect the public and the courts, and to deter future or similar misconduct by the respondent and other lawyers. These additional factors are also discussed in this Part IV.

A. Seriousness of Misconduct

The Hearing Committee concludes that Respondent engaged in a serious, intentional, self-serving conflict of interest, in violation of Rule 1.7(b)(4), in his original representation of Ms. Fitzgerald, causing her significant harm. That was even more clear in his action to initiate the Title

Litigation against her − in protection of his own financial, property, and personal interest − while representing her in the Fee Litigation, and continuing to represent her for a lengthy period of time in the Fee Litigation while the other case was ongoing. His misconduct is made even more serious (and any hope of rehabilitation even less likely) by Respondent's refusal to recognize that he acted improperly or unethically in his handling of these legal matters, clearly implying he would handle himself in the same manner in the future, if the opportunity arose. In a case of this seriousness, a sanction of a multi-year suspension or even disbarment would be appropriate.

The Hearing Committee also concludes, however, that Respondent intentionally misappropriated funds in the LFC matter (Count II), and recklessly misappropriated funds in the Mack matter (Count III). In *Addams*, 579 A.2d at 191, the Court held that "in virtually all cases of misappropriation, disbarment will be the only appropriate sanction unless it appears that the misconduct resulted from nothing more than simple negligence." A lesser sanction may be appropriate only in "extraordinary circumstances," such as those found in *In re Kersey*, 520 A.2d 321 (D.C. 1987), where an attorney's alcoholism was taken to mitigate an intentional misappropriation committed during the period of alcoholism. *See Anderson*, *supra*, 778 A.2d at 335; *see also In re Hewett*, 11 A.3d 279 (D.C. 2011) (finding extraordinary circumstances where the motive for an intentional misappropriation was the protection of the client). Neither in his Answer to the Specification, nor in his

testimony before the Hearing Committee, nor in his post-hearing brief, has Respondent claimed the existence of any extraordinary circumstances that would excuse his misappropriation. Accordingly, there is no basis on which the Hearing Committee can recommend any disciplinary sanction other than disbarment.

Even were it not clear that disbarment under *Addams* is required, Respondent's misconduct in commingling funds in his Trust Account was extremely serious and would warrant the imposition of a substantial period of suspension as a sanction. Pursuant to *Hessler*, 549 A.2d at 703, even simple commingling is a serious violation of the Rules, warranting imposition of a serious sanction. *See also Chang*, 694 A.2d at 878 (six-month suspension for commingling and unintentional misappropriation, despite lack of a prior disciplinary record and presence of "impressive" mitigating factors); *In re Davenport*, 794 A.2d 602, 603 (D.C. 2002) (six-month suspension).

In cases involving commingling, *In re Osborne*, 713 A.2d 312, 313 n.2 (D.C. 1998) (per curiam) requires the Hearing Committee to consider as relevant circumstances whether the commingling was (1) advertent or knowing, (2) an isolated instance or protracted, (3) with or without injury to the client, (4) negligent or unintentional misappropriation, (5) with or without adequate record keeping, or (6) by experienced or inexperienced counsel. The Hearing Committee has found that Respondent's commingling was both knowing (FF ¶ 130) and protracted (FF ¶ 125); the Hearing Committee is

unable to determine if any client was injured by Respondent's commingling or if the commingling resulted in misappropriation because Respondent's inadequate record keeping for his Trust Account (FF ¶ 127) prevented ODC's audit from determining if transfers from Respondent's Trust Account came from client funds or from Respondent's personal funds (FF ¶ 128); as previously noted, Respondent's record keeping for his Trust Account was seriously deficient (FF ¶ 127); and Respondent has practiced law for many years (FF ¶ 56), so his commingling cannot be excused on the ground of inexperience. Viewing all of the *Osborne* factors as a whole, any sanction for Respondent's commingling − assuming no other violations of the Rules were involved in this case − would be a suspension of more than six months.

However, there are additional Rule violations in this case. Leaving aside Respondent's intentional misappropriation and related misconduct under Rules 1.15 (a), (c), and (d) in the LFC matter, and his reckless misappropriation in the Mack matter, the Hearing Committee has also concluded that Respondent violated Rule 1.7(b)(4) through his conflicted representation of Ms. Fitzgerald, and also violated Rule 1.15(c) in the Mack matter by failing to deliver prompt payment to Kaiser Permanente of funds to which it was entitled. Thus, if Respondent is not disbarred for misappropriation pursuant to *In re Addams*, these additional Rule violations would indicate the propriety of a minimum of a multi-year suspension.

B. Prejudice to the Client

Ms. Fitzgerald was prejudiced by being deprived of fair representation through independent legal counsel, and by actions that Respondent took solely for his own benefit (FF ¶ 23) and to her severe financial detriment through having her execute a confessed judgment in the Fee Litigation and damage to her credit rating and reputation (FF ¶¶ 22, 39).[49]

C. Conduct Involving Dishonesty

ODC has not charged Respondent with violating Rule 8.4(c). This does not mean, however, that Respondent's conduct was free of dishonesty. To the contrary, as stated in *In re Shorter*, 570 A.2d 760, 768 (D.C. 1990) (per curiam), "what may not legally be characterized as an act of fraud, deceit or misrepresentation may still evince dishonesty," and such dishonesty may "encompass[] conduct evincing 'a lack of honesty, probity or integrity in principle'" or a "'lack of fairness and straightforwardness'" (quoting *Tucker v. Lower*, 200 Kan. 1, 4, 434 P.2d 320, 324 (1967)). Measured by that standard, Respondent's conduct in the LFC and Fitzgerald matters lacked the probity, integrity, and straightforwardness described in *Shorter*.

[49] LFC, while not a client of Respondent, was prejudiced by being deprived of funds to which it was entitled, and by having to spend additional funds in an arbitration proceeding that Respondent obstructed (FF ¶¶ 95(a) n.19, 105-06), as well as by having to sue Respondent (FF ¶ 107).

D. Presence of Other Rule Violations

As set forth in Part III of this Report, Respondent's misconduct involves multiple Rule violations.

E. Previous Disciplinary History

As noted at the outset of this Report, ODC did not bring to the attention of the Hearing Committee any previous disciplinary action against Respondent. The fact that an attorney has no prior disciplinary history is "highly relevant and material" to the determination of a sanction, *In re Cope*, 455 A.2d 1357, 1361 (D.C. 1983), and the Hearing Committee has given full weight to that consideration. Lack of a prior disciplinary history, however, cannot excuse intentional misappropriation and a pattern of misconduct. *In re Berryman*, 764 A.2d 760, 773 (D.C. 2000) ("absence of a prior disciplinary record . . . even when coupled with other mitigating factors, is not a sufficient [sic] to overcome the presumption of disbarment"); *see also In re Pierson*, 690 A.2d 941, 949-50 (D.C. 1997); *In re Clarke*, 684 A.2d 1276, 1281 (D.C. 1996) (per curiam); *Robinson*, 583 A.2d at 692. This is particularly true where, as here, Respondent's failure to maintain records for five years may have kept from view other examples of Rule violations. Accordingly, the sanction required by *In re Addams* appears to be appropriate notwithstanding Respondent's lack of prior disciplinary infractions.

F. Acknowledgement of Wrongful Conduct

In his post-hearing brief, Respondent acknowledges responsibility for − but minimizes the seriousness of − the commingling in his Trust Account. Resp. Br. at 15. He also admitted in his testimony before the Hearing Committee (FF ¶ 129), but leaves un-discussed in his brief, his failures to make and preserve documentation for his Trust Account as required by Rule 1.15(a), or his astonishing statement (Tr. 321:16-17), "I did not know the ethical rules require 5 years." Furthermore, Respondent maintains that he did not violate Rule 1.7(b)(4) in representing Ms. Fitzgerald (Resp. Br. at 9-10), or violate Rule 1.15 in any respect (Resp. Br. at 10-15).[50] The Hearing Committee therefore cannot find that Respondent has acknowledged the major portion of his misconduct.

G. Aggravation/Mitigation

As noted at the outset of this Report, ODC did not introduce any evidence in aggravation of sanction. Respondent testified briefly on his own behalf in mitigation of sanction (Tr. 502:7-503:22), but nothing in that testimony rises to the level of "extraordinary circumstances" under *In re Addams*, *supra*, which would justify a sanction other than disbarment, or otherwise materially affect the sanction recommendation of the Hearing Committee.

[50] Respondent's questionable characterization of his misappropriation in the Mack matter as a being merely a "miscue" is discussed *supra*, in subsection III(B)(2) of this Report.

H. Additional Factors

Protecting clients and the judicial system is a principal – if not the principal – function of the disciplinary system. *In re Goffe*, 641 A.2d 458, 464 (D.C. 1994) (per curiam); *In re Haupt*, 422 A.2d 768, 771 (D.C. 1980) (per curiam); *In re Kleindienst*, 345 A.2d 146, 147 (D.C. 1975) (en banc) (per curiam). Deterring future and similar misconduct is likewise an important purpose of the disciplinary system. *In re Kline*, 11 A.3d 261, 265 (D.C. 2011); *In re Kennedy*, 542 A.2d 1225, 1231 (D.C. 1988); *Hutchinson*, 534 A.2d at 924.

Of special concern to the Hearing Committee in this proceeding is Respondent's mishandling of his Trust Account: he failed to obey three bright red "stop signs" in Rule 1.15(a). Respondent repeatedly commingled funds; he failed to keep separate and verifiable records for his Trust Account; and he failed to maintain Trust Account records for a period of five years, and was not even aware that he had to do so. Although a sanction of disbarment may moot any separate sanction for those violations of Rule 1.15(a), any ultimate decision on this Report should serve to reemphasize to the Bar the importance of those simple but essential requirements of Rule 1.15(a).

V. CONCLUSION

For the reasons set forth above, the Hearing Committee recommends that Respondent should be disbarred pursuant to *In re Addams* for intentional misappropriation as alleged in Count II of the Specification, and for reckless misappropriation as alleged in Count III of the Specification.

Respectfully submitted,

/MS/
Martin Shulman, Esq., Chair

/AJW/
Dr. Arthur J. Wilson, Public Member

/DCS/
Daniel C. Schwartz, Esq., Attorney Member

IN THE MATTER OF JONATHAN C. DAILEY

Board Docket No. 16-BD-071
Disciplinary Docket Nos. 2015-D104 & 2015-D246

APPENDIX TO THE REPORT AND RECOMENDATION
OF THE AD HOC HEARING COMMITTEE

CHRONOLOGICAL LIST OF TRUST ACCOUNT TRANSACTIONS

1. Via check dated May 21, 2010, Respondent made a deposit of $954.92 to his Trust Account,[1] representing non-client-related funds received from the sale of a condominium unit he owned in Colorado. Stip. ¶ 17(b);[2] DCX 68.[3]

2. On October 28, 2010, Respondent made a wire transfer in the net amount of $4,275[4] from his Trust Account to Ms. Fitzgerald. DCX 103; Tr. 223:7-21[5] (Anderson).

3. On March 31, 2011, Respondent made a wire transfer in the net amount of $3,500[6] from his Trust Account to Ms. Fitzgerald. DCX 76; Tr. 224:7-19 (Anderson).[7]

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[1] As used in this Appendix, the term "Trust Account" has the same meaning as it does in the Hearing Committee's Report, *i.e.*, account no. xxxxxxxxxxx1200 that Respondent maintained at the Bank of Georgetown as his lawyer's trust account.

[2] In this Appendix, as in the Hearing Committee's Report, the prefix "Stip." refers to the Agreed Stipulations jointly filed by the Office of Disciplinary Counsel and Respondent in this proceeding.

[3] In this Appendix, as in the Hearing Committee's Report, the prefix "DCX" refers to exhibits introduced into evidence by the Office of Disciplinary Counsel.

[4] The gross amount of the wire transfer was $4,290, from which a $15 wire transfer fee was deducted.

[5] In this Appendix, as in the Hearing Committee's Report, references to the transcript of the hearing in this case are designated with the prefix "Tr. ___."

[6] The gross amount of the wire transfer was $3,515, from which a $15 wire transfer fee was deducted.

4. On May 11, 2011, Respondent issued check no. 1131 in the amount of $2,737.23 on his Trust Account for the purpose of paying an office rent expense. That check was not honored by the bank due to insufficient funds, and the check caused a negative balance in the Trust Account on May 12, 2011, of -$2,247.11. DCX 102; Tr. 219:16-221:11 (Anderson). (*See also* Appendix ¶ 10, *infra*; on March 11, 2012, Respondent again issued a check against his Trust Account to pay his office rent. Respondent's use of his Trust Account on May 11, 2011, to pay his office rent was therefore not the only occasion on which he did so.)

5. On November 25, 2011, Respondent made a wire transfer of $6,000 from his Trust Account to Ms. Fitzgerald. DCX 77; Tr. 225:8-15 (Anderson).

6. On December 8, 2011, Respondent issued check no. 1119 on his Trust Account for $58 to Potomac Wine and Spirits. Stip. ¶ 18(c); DCX 90 at 403.

7. Via check dated December 28, 2011, Respondent made a deposit of $300 to his Trust Account, representing non-client-related funds received from his mother. Stip. ¶ 17(a)(i); DCX 59.

8. On January 18, 2012, Respondent made a wire transfer of $6,000 from his Trust Account to Ms. Fitzgerald. DCX 78; Tr. 225:16-21 (Anderson).

9. On February 28, 2012, Respondent made a wire transfer of $3,000 from his Trust Account to Ms. Fitzgerald in order to fund the payment of condominium mortgage expenses and/or condominium fees for the Condominium Unit.[8] Stip. ¶ 18(a)(ii);[9] Tr. 225:22-226:4 (Anderson); DCX 79.

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[7] In testifying about DCX 76, Mr. Anderson may have misread the amount involved, because DCX 76 clearly indicates a net transfer of $3,500 rather than $2,500 as the transcript states.

[8] In this Appendix, as in the Hearing Committee's Report, the term "Condominium Unit" means the residential dwelling where Respondent lived and of which Ms. Fitzgerald became the mortgagor; the term "Condominium Association" refers to the Georgetown Park Condominium in which that residential unit was located.

10. On March 11, 2012, Respondent issued check no. 1179 on his Trust Account for $2,000 to CX Management for office rent. Stip. ¶ 18(d); DCX 91 at 406.

11. Via check dated April 4, 2012, Respondent made a deposit of $300 to his Trust Account, representing non-client-related funds received from his mother. Stip. ¶ 17(a)(ii); DCX 60.

12. On July 11, 2012, Respondent made a wire transfer of $3,000 from his Trust Account to Ms. Fitzgerald in order to fund the payment of condominium mortgage expenses and/or condominium fees for the Condominium Unit. Stip. ¶ 18(a)(i); DCX 80.

13. On July 31, 2012, Respondent made a wire transfer of $1,000 from his Trust account on behalf of Ms. Fitzgerald to the trust account of a law firm representing the Condominium Association[10] in connection with the Condominium Unit. Stip. ¶ 18(b)(i); DCX 82.

14. Via check dated September 7, 2012, Respondent made a deposit of $750 to his Trust Account, representing non-client-related funds received from Black River Dock Company as the balance on a boat repair. Stip. ¶ 17(c); DCX 69.

15. On October 3, 2012, Respondent made a wire transfer of $4,000 from his Trust Account on behalf of Ms. Fitzgerald to the trust account of a law firm representing the Condominium Association in connection with the Condominium Unit. Stip. ¶ 18(b)(ii); DCX 83.

16. Via checks dated November 23, 2012, Respondent made a deposit of $768 to his Trust Account, representing non-client-related funds received

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[9] The Hearing Committee notes that the $8,000 amount referred to in this subparagraph of the Agreed Stipulations may be a typographical error, because the wire transfer documentation to Ms. Fitzgerald for that date provided as DCX 79, as Mr. Anderson testified, appears to indicate a wire transfer amount of only $3,000.

[10] *See supra* note 8 in this Appendix.

as two refund checks from U.S. Airways, each in the amount of $384. Stip. ¶ 17(d); DCX 70.[11]

17. On December 3, 2012, Respondent made a wire transfer of $3,000 from his Trust Account to Ms. Fitzgerald. DCX 81; Tr. 226:6-11 (Anderson).

18. On December 10, 2012, Respondent made a wire transfer of $3,000 from his Trust Account on behalf of Ms. Fitzgerald to the trust account of a law firm representing the Condominium Association in connection with the Condominium Unit. Stip. ¶ 18(b)(iii); DCX 84.

19. Via check dated December 14, 2012, Respondent made a deposit of $300 to his Trust Account, representing non-client-related funds received from his mother. Stip. ¶ 17(a)(iii); DCX 61.

20. On February 1, 2013, Respondent made a wire transfer of $1,000 from his Trust Account on behalf of Ms. Fitzgerald to the trust account of a law firm representing the Condominium Association in connection with the Condominium Unit. Stip. ¶ 18(b)(iv); DCX 85.

21. On February 28, 2013, Respondent made a wire transfer of $1,000 from his Trust Account on behalf of Ms. Fitzgerald to the trust account of a law firm representing the Condominium Association in connection with the Condominium Unit. Stip. ¶ 18(b)(v); DCX 86.

22. Via check dated March 22, 2013, Respondent made a deposit of $200 to his Trust Account, representing non-client-related funds received from his mother. Stip. ¶ 17(a)(iv); DCX 62.

23. On April 5, 2013, Respondent made a wire transfer of $1,000 from his Trust Account on behalf of Ms. Fitzgerald to the trust account of a law

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[11] One of the two $384 checks appears to be payable to "Gilda Scott" (*see* DCX 70 at 360), but it was nevertheless negotiated by Respondent and deposited by him in his Trust Account. "Gilda Scott" is also referred to in ¶ 26 of this Appendix as the source of an additional $1,000 in personal funds stated in Stip. ¶ 17(e) to have been deposited by Respondent into his Trust Account, but Ms. Scott was not otherwise identified in testimony during the hearing. Ms. Scott also received two transfers from Respondent's Trust Account; *see* ¶¶ 29-30 in this Appendix, *infra*.

firm representing the Condominium Association in connection with the Condominium Unit. Stip. ¶ 18(b)(vi); DCX 87.

24. On May 2, 2013, Respondent made a wire transfer of $3,000 from his Trust Account on behalf of Ms. Fitzgerald to the trust account of a law firm representing the Condominium Association in connection with the Condominium Unit. Stip. ¶ 18(b)(vii); DCX 88.

25. On June 13, 2013, Respondent made a wire transfer of $2,000 from his Trust Account on behalf of Ms. Fitzgerald to the trust account of a law firm representing the Condominium Association in connection with the Condominium Unit. Stip. ¶ 18(b)(vii) [sic][12]; DCX 89.

26. Via check dated June 20, 2013, Respondent made a deposit of $1,000 to his Trust Account, representing non-client-related funds received from an individual named "Gilda Scott."[13] Stip. ¶ 17(e); DCX 71.

27. Via check dated August 2, 2013, Respondent made a deposit of $1,600 to his Trust Account, representing non-client-related funds received from a company named Market Street Diamonds, Inc.[14] Stip. ¶ 17(f); DCX 72.

28. On October 22, 2013, Respondent made a wire transfer from his Trust Account for $6,500 to "The Loose Diamond" for the purchase of jewelry. Stip. ¶ 18(e); DCX 92.

29. On October 30, 2013, Respondent issued check no. 1745 on his Trust Account for $800, payable to "Gilda Scott."[15] DCX 97; Tr. 226:12-22 (Anderson).

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[12] This paragraph of the Agreed Stipulations is mis-numbered and should be "18(b)(viii)."

[13] "Gilda Scott" is also referred to in ¶¶ 29-30 of this Appendix as the transferee of funds from Respondent's Trust Account.

[14] The reference line on the check for this deposit states, "Consignment # 24005, Watch Purchase # 707675."

[15] "Gilda Scott" is also referred to in ¶ 26 of this Appendix as the source of funds that Respondent deposited into his Trust Account on June 20, 2013.

30. On October 31, 2013, Respondent issued check no. 1740 on his Trust Account for $2,000, payable to "Gilda Scott" (the same name as referred to in the preceding paragraph). DCX 98;[16] Tr. 227:5-10 (Anderson).

31. On December 3, 2013, Respondent made a wire transfer from his Trust Account for $37,000 to "Planet Hospital," a medical tourism company. Stip. ¶ 18(f); DCX 93.

32. On December 5, 2013,[17] Respondent made a deposit of $300 to his Trust Account, representing non-client-related funds received from his mother. Stip. ¶ 17(a)(v); DCX 63.

33. On December 26, 2013,[18] Respondent made a deposit of $500 to his Trust Account, representing non-client-related funds received from his mother. Stip. ¶ 17(a)(vi); DCX 64.

34. Via check dated December 30, 2013, Respondent made a deposit of $2,000 to his Trust Account, representing non-client-related funds received from his sister. Stip. ¶ 17(g); DCX 73.

35. Via check dated January 7, 2014, Respondent made a deposit of $100 to his Trust Account, representing non-client-related funds received from his mother. Stip. ¶ 17(a)(vii); DCX 65.

36. On April 21, 2014, Respondent made a payment of $1,000 from his Trust Account to American Express. Stip. ¶ 18(g)(i); DCX 94 at 414.

37. Via check dated May 12, 2014, Respondent made a deposit of $673.01 to his Trust Account, representing non-client-related funds received from IndyMac Mortgage Services as a mortgage refund. Stip. ¶ 17(h); DCX 74.

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[16] The reference line on this check states that it was for a "Business Expense."

[17] The check for this deposit is dated November 29, 2013 (DCX 63 at 340).

[18] The check for this deposit is dated December 16, 2013 (DCX 64 at 343). The reference line on the check for this deposit states that it was for "Christmas/Jonathan & Gilda & family."

38. On May 12, 2014, the same day as the preceding transaction, Respondent made a payment of $500 from his Trust Account to American Express. Stip. ¶ 18(g)(ii); DCX 95 at 416.

39. On June 9, 2014, Respondent made a payment of $300 from his Trust Account to American Express. Stip. ¶ 18(g)(iii); DCX 96 at 419.

40. Via check dated June 12, 2014, Respondent made a deposit of $17,200 to his Trust Account, representing non-client-related funds received from "We Buy Any Car.com"[19] for the sale of an automobile. Stip. ¶ 17(i); DCX 75.

41. On June 16, 2014, Respondent made a payment of $600 from his Trust Account to American Express. Stip. ¶ 18(g)(iv); DCX 96 at 420.

42. On March 18, 2015, Respondent received a wire transfer deposit of $9,000 in his Trust Account, representing non-client-related funds received from his mother. Stip. ¶ 17(a)(viii); DCX 66.

43. On May 22, 2015, Respondent received an additional wire transfer deposit in his Trust Account of $5,000, representing non-client-related funds received from his mother. DCX 67; Tr. 221:22-223:2 (Anderson).

[19] In ¶ 17(i), the Agreed Stipulations states the drawer of this check was "We Buy Any Car.com"; however, the actual check in DCX 75 at 376 indicates that the drawer was "CarGroup Holdings, LLC. T/A webuyanycar.com".