THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

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

In the Matter of:	:	
	:	
JONATHAN R. SCHUMAN	:	
	:	
Respondent.	:	Board Docket No. 18-BD-020
	:	Disc. Docket No. 2014-D089
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 459087)	:	

REPORT AND RECOMMENDATION OF
THE AD HOC HEARING COMMITTEE

Respondent, Jonathan R. Schuman, is charged with violating Rules 1.15(a) (commingling of client and firm funds; misappropriation; records failure), 1.15(c) (notification and delivery of client funds), and 8.4(c) (conduct involving dishonesty, deceit or misrepresentation) of the District of Columbia Rules of Professional Conduct (the "Rules").

The allegations arise from Respondent's handling of nearly 2,000 refund checks for filing fees paid by Respondent's current and former clients. Disciplinary Counsel contends that Respondent committed all of the charged violations, and should be disbarred as a sanction for his misconduct. Respondent admits to retaining refund checks for his own and his firm's use, but argues that he did not have the requisite intent to misappropriate client funds due to mental illness.

As set forth below, the Hearing Committee finds that Disciplinary Counsel has proven all but the records failure allegations by clear and convincing evidence

* Consult the 'Disciplinary Decisions' tab on the Board on Professional Responsibility's website (www.dcattorneydiscipline.org) for more information about this case.

and that Respondent's mental illness did not create a disability sufficient to form a *Kersey* defense to the charges.

We find several novel non-*Kersey* factors not of Respondent's doing which cause some sympathy for Respondent. Because we are bound by precedent, the Committee feels obliged to recommend disbarment for intentional misappropriation. However, the Committee recommends that the Board carefully consider the alternative of suspending disbarment and instead imposing a four-month suspension followed by unsupervised probation for five years.

The Committee recognizes that, under current law, a finding of knowing and intentional misappropriation requires it to conclude that disbarment is the required sanction. But we also recommend that the Board consider enlisting the little used "extraordinary exception" proviso to show some leniency. The Committee believes it is beyond its authority to do so and, therefore, its formal recommendation is disbarment, despite our belief that justice would be better served under these unique circumstances by a lesser sanction.

I. PROCEDURAL HISTORY

On March 12, 2018, Disciplinary Counsel served Respondent with a Specification of Charges ("Specification"). Respondent filed both an answer and an intent to raise disability in mitigation, on April 2, 2018.[1] On April 18, 2018,

[1] Respondent thereafter filed an "Amended," and a "Second Amended" Intent to Raise Disability in Mitigation on April 18, 2018 and May 24, 2018 respectively.

Respondent filed a motion to dismiss certain parts of the Specification. We include a recommended disposition of Respondent's motion below.

A pre-hearing was originally scheduled for May 15, 2018. Respondent thereafter filed a Motion to Continue, requesting an extension of 60-90 days. The Chair of this Hearing Committee, James A. Kidney, Esq., granted the motion in part and postponed the pre-hearing by one month. On August 2, 2018, Respondent filed a "Motion to Dismiss as a Matter of Law Counts A, B, C and D" – we include a recommended disposition of Respondent's motion below.

A hearing was held on August 20, 21, 31, and October 19, 2018.[2] Respondent was present and was not represented by counsel. The following exhibits were received in evidence: DX 1-20, RX 3-4.[3]

Upon conclusion of the hearing, the Hearing Committee made a preliminary non-binding determination that Disciplinary Counsel had proven at least one of the

[2] The hearing was originally scheduled for August 20, 21, 27, 28, and 31, 2018. The merits phase of the hearing spanned from August 20-21. After the Committee made its preliminary non-binding decision that Respondent violated at least one Rule, Respondent mentioned his intention to raise *Kersey* mitigation (*see* Board Rule 11.11), but did not prepare and file the proper motion (*see* Board Rule 11.13) until August 23. As a result, the Chair scheduled the hearing to resume on August 31. On August 31, Respondent informed the Committee that his expert witness, Dr. Nuha Abudabbeh, was unable to testify that day, Tr. 481-82. The Committee scheduled an additional hearing date, October 19, 2018, for this testimony. Dr. Abudabbeh was sworn as a witness testifying remotely via video on October 19 and was qualified as an expert witness, but after a few minutes asked to be excused for illness. Tr. 615-621. Testimony was terminated and recommenced with Dr. Abudabbeh testifying in person to conclusion on November 2, 2018, at which time the testimonial record was closed.

[3] "DX" Refers to Disciplinary Counsel's exhibits. "RX" refers to Respondent's exhibits. "HCX 1" refers to the exhibit introduced by the Hearing Committee. "Tr." refers to the transcript of the hearing held on the above dates.

ethical violations set forth in the specification of charges. Tr. 441; *see* Board Rule 11.11. In the sanctions phase of the hearing, Disciplinary Counsel submitted DX 21 and 23-26. Tr. 557-58. Respondent submitted RX 2[4] (Tr. 506) and RX 3-6 (Tr. 342-44, 509-510).

II. FINDINGS OF FACT

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

A. Schuman & Felts

1. Respondent Jonathan R. Schuman ("Respondent") has been a member of the D.C. Bar since 1998. He also is licensed in Maryland. Specification of Charges ("Spec.") ¶ 1; Answer to Specification of Charges ("Answer") ¶ 1.

2. Upon becoming a member of the Bar, Respondent joined his father's law firm, Schuman & Felts. DX 3 at 2. The firm represented property managers and owners of residential and commercial properties in the District of Columbia and Maryland. Spec. ¶ 2; Answer ¶ 2. A substantial part of the practice involved suing tenants for eviction. Tr. 42-43.

[4] The version of RX 2 that was admitted — an unredacted version of Respondent's doctor's notes — was offered by Disciplinary Counsel. Tr. 504-06. DX 21 is a fuller version of the notes, also offered by Disciplinary Counsel. Both were admitted.

3. Respondent and another associate, Timothy Cole, became equal partners with Respondent's father upon the death of Mr. Phillip Felts in 2009. The firm remained "Schuman & Felts." Spec. ¶ 3; Tr. 77-78. Mr. Cole testified that he and Respondent "did not have a particularly good relationship" due to the fact that Respondent was the son of the senior partner and because Mr. Cole did not like Respondent to work on his cases. Tr. 79. For his part, Respondent agreed he and Mr. Cole did not get along. Tr. 41. Respondent testified that Mr. Cole was sloppy in his practice and that Mr. Cole's subordinate was especially difficult. Tr. 349-50.

4. As of 2003, the firm consisted of four partners, two associates and about 14 support staff. Tr. 585-86. By the time of the hearing, Schuman & Felts consisted of Respondent, one associate, one full time support staff and a part-time bookkeeper who was a contractor. Tr. 579-80.

5. When Respondent's father retired in early 2012, he transferred his one-third share of the partnership to his son, resulting in Respondent owning two-thirds of the firm. Spec. ¶ 4; Tr. 80. Mr. Cole testified that he had expected to be an equal partner with Respondent upon the retirement of the senior Schuman. Tr. 80, 82. When that did not occur, he left the firm in early 2012, taking many Schuman & Felts clients with him, possibly as many as 70 percent. Spec. ¶¶ 4-5; Tr. 83 ("There were a lot of clients that left" with Mr. Cole); DX 3 at 45-46; Tr. 107-09, 187-88.

6. Upon his father's retirement, Respondent became managing partner. After Mr. Cole's departure, he was the sole partner. Tr. 40-42, 82-83. Respondent

testified, "I had everything on my shoulders and I was working as a lawyer and also working to do all the administrative stuff and make sure we met payroll." Tr. 359.

7. Respondent testified that even before Mr. Cole departed, "overhead was growing and income was sinking." Tr. 354. Loss of clients to Mr. Cole's new firm caused considerable additional financial damage to Schuman & Felts. The record also contains some hearsay evidence that Mr. Cole and others at his new firm spread a rumor that Schuman & Felts was going out of business and told former clients they could write off balances owed to Schuman & Felts. Tr. 135-36, 161-62, 167, 171-72. Whether true or not, the information surely increased Respondent's anxiety about firm finance. In any event, the need for additional income to replace that lost to Mr. Cole's firm became critical by early 2013. *See* Tr. 42.

B. <u>The Writ Restitution Program</u>

8. The U.S. Marshals Service oversees evictions ("Writ of Restitution") in the District of Columbia.

9. Prior to 2010, the representing attorney or the landlord would pay a fee to the registry of the D.C. Superior Court for a Writ of Restitution. Before 2010, and since a time which is not reflected in the record, the fee was $165 for the Marshals and a $10 court clerk fee. This fee was changed in November 2011 to add an eight dollar administrative fee for the Marshals. The fees were increased again in October 2013 to $195 for the writ, $8 for the Marshals for an administrative fee and $10 to the Clerk's office as a fee. HCX 1 at 11.

10. Prior to February 2010, the U.S. Marshals retained all writ fees, whether a writ was executed or not, unless a refund for an unexecuted writ was requested by the landlord or the landlord's counsel. The record does not reflect how much money was retained by the Marshals prior to February 2010, but, based on data for refunds subsequent to 2010, the amount likely was in the several million dollar range. *Id.*; Tr. 115.

11. Beginning in approximately February 2010, the D.C. Superior Court held all writ fees in the registry until the U.S. Marshals Service invoiced the court for completed writs of execution. "All other funds from unexecuted writs, quashed writs, writs that are cancelled via phone or writs stayed are refunded back to the Landlord or Representing Attorney that paid the original fee to the Courts." HCX 1 at 11.

12. At some point subsequent to February 2010, the Marshals Service provided the Financial Operations Branch of Superior Court a listing of approximately 6,500 cases in which refunds were authorized to be disbursed for unexecuted writs. The total dollar value of the refunds was approximately $1,076,790. *Id.* The Specification of Charges at ¶ 9 asserts that the fees represented cases only "going back as early as 2009." Respondent admits to ¶ 9. The total amount of funds retained over the years by the U.S. Marshals before altering the system to one of invoicing only for executed writs is not in the record. Nor is the annual dollar amount of refunds for each year through the relevant period, 2014,

disclosed in the record. Only the amount paid to Schuman & Felts is disclosed. HCX 1 at 11.

13. The Superior Court began issuing refunds of fees for unexecuted writs beginning in late 2012. These were distributed check-by-check in the amount of $165 per writ, with only a docket number indicating the purpose of the payment. A recipient knew only three things on receipt of a check: The amount, that it was somehow tied to a landlord/tenant docket number, and that it had to be cashed within 60 days of the date on the check. *See, e.g.*, DX 20B at 12. Schuman & Felts began receiving these checks in early 2013. Spec. ¶ 9; Answer ¶ 9; Tr. 43.

14. Some mailings included only one check; others included hundreds of separate $165 checks. Tr. 140. The checks indicated they had to be cashed within 60 days from the date of issuance, but, due to court delays, many times the checks were not received by law firms or landlords, including Schuman & Felts, until only a few days were left to deposit them before they went stale. Tr. 90.

15. The Superior Court offered no cover letter or other guidance to landlords or their counsel about the origin of the checks, their purpose or any other information except the docket number on the $165 check. HCX 1 at 12; DX 8 at 3-58, Tr. 170.[5]

[5] A hearing witness, Mr. Cole, testified to receiving memos from the court explaining the writ refund plan, and that he believed one such email was sent before the refunds were issued. Tr. 87-88, 93. No such memos, other than a brief email in 2014, DX 10A, were produced. DX 10A was a year after the refunds began and was intended only to remind recipients the checks would go stale 60 days after issuance. The absence of any correspondence from the court explaining the checks was further confirmed by the Schuman & Felts office manager. Tr. 170, 174-75.

16. Nor does the record reflect that any guidance was provided by the U.S. Marshals Service. The D.C. Bar offered no guidance. HCX 1 at 1, ¶ 1; *id.* at 12; Tr. 363-64. The checks were simply received "over the transom" without warning or explanation. "The check showed up at the door," according to Respondent. Tr. 363.

17. In fact, the only effort by the Superior Court Landlord and Tenant Branch to communicate with landlord counsel about the writ restitution checks was on January 17, 2014 – well over one year after initial distribution began – informing a number of landlords and counsel that 2012 restitution checks would be mailed "soon." DX 10-A. Otherwise, the court, the Marshals Service, and the Bar were silent.

18. Although it may be inferred from the record that millions of dollars in unexecuted writ fees properly owed to landlords were retained and spent by the U.S. Marshals Service over the years, and that many attorneys active in the landlord-tenant court surely received a drip-drip of $165 checks from the Superior Court from 2012 with no suggestion of their purpose or proper disposition, only Respondent had come under investigation by Disciplinary Counsel as of October 2018 for failing to forward funds to clients. HCX 1 at 1, ¶ 2.

19. The record does not, and probably could not, disclose whether Respondent was the only lawyer with landlord clients to pocket the $165 checks, or if he was the only one to do so who had a former partner who may have been motivated to turn him in to the Bar rather than first seek to warn him of the need to return the funds to former clients, many of whom were represented by the informant.

C. How Schuman & Felts Handled the Writ Restitutions

20. From January 15, 2013 through February 24, 2014, Respondent deposited or caused to be deposited approximately 1,920 $165 writ refund checks totaling $316,220 into the Schuman & Felts operating account at Capitol One Bank ending in #2841.[6] This account was intended for operating – not client – funds. Spec. ¶ 14; Answer ¶ 14; DX 3 at 4-44 (letter from Respondent's counsel, April 23, 2014); DX 20A; Tr. 222-23 (testimony of Kevin O'Connell, investigator for Disciplinary Counsel).[7]

21. The writ refunds were for cases dating back to 2009. Typically, Schuman & Felts paid the writ fees and then billed their clients for the cost, which the client then usually paid. So, when the refunds began arriving in 2013, many clients had already reimbursed the firm for the fee being refunded. Tr. 44, 70, 73-74.

22. The refund checks came in wildly varying numbers. The initial deposit on January 15, 2013, was for 25 checks. Three weeks later, on Feb. 6, only five checks were deposited. But two days later, 162 checks were deposited, each at $165 and only a docket number on the check disclosing its relevance to Schuman & Felts.

[6] 1920 x 165 = 316,800. The $588 discrepancy, equivalent to 3.5 refund checks, is not explained in the record, but is immaterial.

[7] References to DX 20A will be to the exhibit substituted on motion August 13, 2018, granted by order on August 15, 2018, and addressed in Mr. O'Connell's testimony beginning at Tr. 222. The substitute exhibit substantively is the same as the original with the addition of calculations better showing the financial reliance of Schuman & Felts on retained writ refunds.

The peak number of checks deposited at one time was 205 on May 13, 2013, with another 108 deposited the next day. DX 20A.

23. Because the writ refunds had not happened in the past, there was no firm policy on handling the funds when received. Tr. 69, 131.

24. According to Katherine Parker, who was office manager at Schuman & Felts until mid-April 2014, "there was a lot of confusion at that time, as to who the money actually belonged to." Tr. 131, 151. Upon receipt of the initial checks from Superior Court, Respondent consulted with his office staff about how to handle the funds. Tr. 44. "Most of the original conversations were about two major clients, who owed the firm substantial amounts of money, and who had outright told us they were not going to pay for any of the expenses that we had forward costs for," Ms. Parker testified. Tr. 132.

25. "I believe we probably talked about it at least, like, once every couple of days, for the first month when they started coming in as we had not done anything with those checks. We needed to do something with them, and we talked at least every other day to figure out what we were going to do with the checks," Ms. Parker testified. Tr. 132-33.

26. Ms. Parker talked to the clerk of the landlord/tenant division of Superior Court who was "in charge of the financial portion" to determine what the checks were for and why suddenly they were being sent. Tr. 134.

27. Conversations among Ms. Parker, the firm's bookkeeper and secretary, Ms. Theresa Hampl, and Respondent concluded that the refunds should be returned

to paid-up clients who were still using the firm, "as a matter of goodwill," (*e.g.*, DX 3 at 182-290) and to apply the refunds to outstanding balances of current clients, after obtaining client consent.[8] Most of the clients with outstanding balances chose to allow the firm to deposit the funds in the operating account and reduce the outstanding debt. Refunds for clients who had left the firm, some of whom had left an unpaid balance, were deposited into the firm's operating account. Tr. 44-45, 63-65, 134, 137-38, 157-160, 192-94, 361-62.

28. No one – Respondent or the support staff with whom he consulted – ever suggested depositing the writ refunds in the firm's IOLTA account. Tr. 370-71.

29. Presented a list of former Schuman & Felts clients (DX 3), Ms. Parker testified that many of them left the firm with "pretty substantial" unpaid balances. Tr. 154-56.

30. Respondent concedes that regardless of the role of support staff, he was responsible for disposition of the funds: "We agree that the *buck stops* ultimately with Mr. Schuman . . . ." (Italics in original). DX 5 at 2 (Letter from Respondent's counsel, Sept. 16, 2016); *see also* Spec. ¶ 12; Answer ¶ 12; Tr. 45 ("Q: . . . [W]ho made the decision on how to handle those writ refunds? [Respondent]: I made the decision."); Tr. 51 ("I just know it was being done. And I approved it being done. .

[8] Respondent clarified during the hearing that by "goodwill," he meant that he was demonstrating his attentiveness to his clients, rather than presenting them with a windfall. Tr. 431. His firm's cover letters to clients included brief statements such as: "Enclosed please find checks issued by DC Superior court representing refund(s) for writ(s) cancelled by the U.S. Marshals Office, which we have endorsed to you for the following tenant(s) . . . ." *E.g.*, DX 3 at 287.

. ."); Tr. 362 ("[Q]: So you take responsibility for this? [Respondent]: Yes."). Ms. Hampl, the bookkeeper/secretary who participated in discussions about handling the refunds, testified that Respondent made the final decision. Tr. 191.

31. Respondent's former partner and current competitor, Mr. Cole, testified that after his firm returned writ refunds to a client who formerly was a client at Schuman & Felts, the client asked if it was entitled to refunds from unexecuted eviction writs filed when the client was represented by Schuman & Felts. Tr. 96-98. This prompted Mr. Cole to email Respondent asking if the client had received refunds of writ payments. Spec. ¶ 16; Answer ¶ 16; DX 1 at 2-3 (Cole complaint to D.C. Bar), 6; Tr. 52-53, 100.

32. Respondent replied by email that "I endorsed the backs of the checks and they were forwarded to the clients," failing to note that this was true only for current clients of the firm. Upon further inquiry by Mr. Cole, Respondent emailed only 12 minutes later, "My staff checked our records and we did not keep a list of all of the case numbers. Anything that came in for WDC-1 should have gone to them." DX 1 at 4-5; Tr. 52-53, 101. Respondent admitted in testimony that the response was not true. Tr. 424. Respondent testified that he made the false statement based on information given to him from Ms. Parker, Tr. 53, 60-61; however, Ms. Parker testified that Respondent never asked her to look into the WDC-1 refunds. Tr. 152.

33. Respondent prevaricated when confronted with the email response at the hearing, claiming not to remember what he knew at the time. But he admitted

that, to his recollection, his administrator checked the records and determined the refund check had been deposited in the firm's operating account. Tr. 53-63.[9]

34. Mr. Cole asked the D.C. Courts Financial Operations Budget and Finance Division to send him the front and back copies of two writ refund checks for his client's cases. He received the check copies on March 6, 2014. The copies showed the checks were made payable to Schuman & Felts and were deposited into the firm's operating account. Spec. ¶ 19; Answer ¶ 19; DX 1 at 3, 7-9; Tr. 101-02.

35. Without presenting the evidence to Respondent and offering Respondent a chance to correct his writ refund policy with respect to former clients, Mr. Cole quickly filed a complaint with Disciplinary Counsel alleging that Respondent improperly deposited refund checks for the former client, now Mr. Cole's client, into the firm operating account rather than in a trust account or sending the funds to the client. DX 1; Tr. 105-07, 116.

36. On March 24, 2014, Disciplinary Counsel forwarded the complaint to Respondent for a response. DX 3 (Bar Counsel letter). Before that time, on March 21, 2014, prompted by Mr. Cole's inquiry, Respondent had consulted a lawyer and began sending writ refunds to former clients, including the client about whom Mr. Cole inquired. Spec. ¶ 21; Answer ¶ 21. Before word of the Bar complaint was

[9] The Committee does not find the issue of whether Respondent's answer to Mr. Cole is material, whether Respondent lied or there was a miscommunication with his assistant. Mr. Cole never confronted Respondent with the issue to clarify because he did not consult with Respondent after learning the WDC-1 check was deposited in the firm operating account.

received by Respondent, he caused refunds owed to all former clients to begin. Tr. 48, 344.

37. On March 24, 2014, the date Disciplinary Counsel mailed Mr. Cole's complaint, Respondent opened a new IOLTA account at Capital One Bank, ending in #9786, and began depositing funds into that account, including, on March 28, 2014, $199,485 obtained by Respondent from his father to pay former clients the writ refunds owed to them. Spec. ¶¶ 20-24; Answer ¶¶ 20-24; DX 3, unnumbered pp. 4-49.

38. Mr. Cole's inquiry "made me second guess myself" and consult with counsel, Respondent testified. Tr. 66-67. Respondent testified – and the date of initial refunds is consistent with his testimony – that Respondent started sending writ refunds to former clients BEFORE he received notice from Disciplinary Counsel of a formal complaint. Tr. 367-68. DX 3 at 46 (initial refunds on March 14, 2014); DX 2 (letter informing Respondent of Bar complaint dated March 24, 2014); DX 3 at 173-74 (cashier's check dated March 21, 2014 to Daro Realty for $2,640 in writ refunds), 175-78 (cashier's check dated March 21, 2014 to WDC-1 for $12,375 in writ refunds), 179-181 (cashier's check dated March 21, 2014 to The Woodner Apts. for $6,270 in writ refunds). In fact, on the date the Bar letter was sent, Respondent already had arranged to receive nearly $200,000 from his father to fund sending checks to former clients. DX 3 at 49-51; Tr. 424-25, 431-32.[10]

[10] Respondent testified that he had "heard a rumor" of a complaint being filed before he received correspondence from Disciplinary Counsel. Tr. 369. Respondent never made an effort to consult with the Bar to determine how to proceed. *Id.*

39. Respondent admits his decision to keep the funds was an error. "I don't know why I wasn't thinking straight. I mean, like, I do know why, but – I can't rationalize anything. It was totally wrong – or explain it." Tr. 68. He also testified that, "as ridiculous as it sounds," it did not occur to him that the retention of refunds was being paid twice by clients for the same service. Tr. 70-71. He later characterized his decision as "stupid . . . it was the wrong decision. I should have given the money back. It was a mistake." He told a psychiatrist retained by Disciplinary Counsel as an expert witness that he "would never in a zillion years take money that didn't belong to me." DX 24 at 6 (Report of expert witness, Dr. Philip Candilis).

40. No one raised the issue with him in 2013-14 until Mr. Cole's email, and Respondent never sought advice on the subject from anyone other than his administrative staff before that time. Tr. 71; DX 24 at 6.

41. Subsequent to March 2014, Schuman & Felts has deposited most of the writ refunds in its IOLTA account and then forwarded the funds to clients and former clients. Tr. 369-370.

42. In total, between March 21, 2014 and March 28, 2014, Schuman & Felts sent refunds amounting to $257,400 to former clients representing writ refunds sent to the firm by the Superior Court from January 2013 to March 2014. Spec. ¶ 25; Answer ¶ 25; DX 3 at 45-46 (totals), 52-290 (detail of payments to clients); Tr. 50-51. This amount was approximately $58,820 less than the amount of writ refunds deposited in the firm operating account during that period. The difference is in

dispute. Respondent asserted that the funds were either returned to clients via checks written from the operating account or were credited to clients' invoices that were not paid after they left the firm, with client approval. Respondent produced records intending to account for the disposition of the $58,820 when asked to do so by Disciplinary Counsel pursuant to subpoena. These accounted for only $24,429 of the underage. Spec. ¶ 25; Answer ¶ 25; DX 19B.

43. Disciplinary Counsel's investigator, Mr. O'Connell, who calculated various balances based on banking and accounting documents produced by Respondent, testified that DX 19B and the documents therein accounted for $24,429 of the $58,820. Tr. 246-47. He testified that documents produced by Respondent at DX 3 and in response to later subpoenas failed to account adequately for the remaining $34,391. Tr. 247, 259-261, 267.

44. Disciplinary Counsel maintains that the remaining $34,391 of $58,820 is unaccounted for due to poor recordkeeping. Respondent produced a large number of documents, such as billing statements, payment and payroll records and accounts receivable (*e.g.*, DX 3, DX 7, DX 9, DX 12, DX 13, DX 15, DX 19A) to establish that the $58,820 was an amount used to cover outstanding balances of former clients or paid to current clients. Tr. 230-241 (colloquy among counsel and the bench after which DX 20A was admitted), 243-261.

45. The testimony of Schuman & Felts office managers describes a reasonable system of billing and accounting for a small firm. Tr. 162-67.

46. The firm retained copies of all checks received from the refund program, divided into those sent out to current clients and those deposited in the firm's operating account for former clients. Tr. 144-45. This system allowed Schuman & Felts to quickly send funds to former clients when Respondent changed the policy in response to Mr. Cole's questions.

47. Respondent testified that he responded as fully as possible to subpoenas from Disciplinary Counsel. "I provided detailed explanation for every penny." Tr. 380, 377-384. The records identified in the paragraph above substantiate Respondent's position and, although Disciplinary Counsel contacted Respondent's clients to confirm the veracity of the records, no doubts about the integrity of the documents were found. RX 5. The testimony of Respondent's associate, Mr. Morgenthaler, was to the effect that Respondent's firm used computerized recordkeeping to keep clients up-to-date on matters affecting them. RX 15; Tr. 562-65.

48. In a letter to Disciplinary Counsel's office dated April 23, 2014, Respondent, through counsel, volunteered that his firm had failed to reimburse writ refunds in far more than the two instances referenced in Mr. Cole's complaint.

> Mr. Schuman wants to be utterly candid and cooperative with Bar Counsel. The two checks referenced to in the complaint were not the only writ refund checks Schuman & Felts received. Schuman & Felts received writ refund checks for other clients relating to cases the firm handled in the years of 2009, 2010, 2011 and 2012. Upon receipt of these checks, the writ refunds were deposited into the firm's operating account because they were initially viewed as refunds of money the firm had paid on behalf of its clients. Mr. Schuman realizes now that his decision to deposit the writ refunds into the firm's operating account

> was wrong, but feels it was the product of his impaired judgment due to the stress of dealing with his and his wife's extensive medical problems as discussed below.
>
> After Mr. Schuman became fully aware of the situation and the complaint filed against him, he immediately forwarded all writ fees to his clients. . . .

DX 3 at 1-2 (Respondent response to Disciplinary Counsel letter).

49. Accompanying the letter was a spreadsheet plus 249 additional pages detailing repayment of $257,400 in writ refunds to former clients of Schuman & Felts. DX 3.

50. In February 2014, the ending balance in account #2841 was $85,878.60. Spec. ¶ 15; Answer ¶ 15. Had all writ refunds been distributed to current and former clients, according to Disciplinary Counsel's calculations, the operating account balance as of February 14, 2014, would have been *negative* $230,341.40. Tr. 229. The calculations at DX 20A, p. 2, based on bank statements, discloses that monthly firm income, exclusive of writ refunds, was in the negative beginning in February 13, 2013 (*i.e.*, monthly expenses exceeded income), and continued to be so through February 2014, with the exception of November 2013. DX 20A at 2; Tr. 226-29, 242. Respondent admitted at the hearing that he used the writ refunds intended to be returned to former clients to "float the firm," Tr. 9, and "that we would be operating at a loss if we didn't have those funds." Tr. 386, 403.

51. Schuman & Felts payroll reports for 2013 and 2014, DX 12, establish that Respondent paid himself a salary of $232,000 in 2013 and $72,680 for the first four months of 2014, or a total of $304,680 for the 16 months in which writ refunds

were retained to "float the firm." Tr. 262-63. The amount of writ refunds deposited in the operating account during this time amounted to only $11,540 more than Respondent paid himself in salary. Absent retention of writ refunds, Respondent's salary would have been substantially less, or possibly zero. DX 20A at 2; DX 12; Tr. 262-63; 401-02.

52. Respondent's counsel wrote that "Mr. Schuman acknowledges that his actions were in violation of the D.C. Rules of Professional Responsibility." DX 3 at 3. Later in the disciplinary proceedings, Respondent agreed that retaining the refunds due to former clients was improper. Tr. 48.

53. On April 24, 2014, Respondent, through counsel, filed his answer to the disciplinary complaint. Respondent admitted that Schuman & Felts received writ refund checks for many cases the firm handled from 2009 through 2013 and further admitted that "his decision to deposit the writ refunds into the firm's operating account was wrong." He stated that once he "became fully aware of the situation and the complaint filed against him, he immediately forwarded all refunded writ fees to his clients." Spec. ¶ 27; Answer ¶ 27. The evidence supports this contention.

D. <u>Respondent's *Kersey* Defense: Depression</u>

54. Upon completion of the presentation of evidence as to the Specification of Charges, the Committee concluded that Disciplinary Counsel had met its burden of proof as to at least one charge, thus triggering Respondent's burden to present evidence of the *Kersey* defense he pleaded at ¶ 12, Defenses and Mitigating Factors,

in page 5 of his Answer, and in his Notice of Intent to Raise Disability in Mitigation, DX D, at pages 8-11.

55. Respondent's *Kersey* defense, *i.e.*, that due to mental or physical cause beyond his control Respondent was unable to prevent a violation of the Bar's ethical rules, was as follows:

> Respondent suffers from major depressive order [*sic*], and the charged conduct was a result of mental health issues that prevented him from properly managing his law firm. Respondent now has his major depressive order [*sic*] under control and continues to work with his psychiatrist to ensure that there is not a relapse.

Answer at 5; *see also* DX 5 at 3:

> Mr. Schuman has suffered from depression for most of his adult life. During the period under review here, Mr. Schuman's personal and professional lives were in utter chaos. Mr. Schuman was unable to manage his depression during this chaos and his depression became crippling. As a result of this crippling depression, Mr. Schuman did not question his staff's rationale for differentiation in handling of refunds to then-current clients as compared to former clients.

56. There is no doubt or disagreement that Respondent has suffered from depression since at least his undergraduate days to the present. He was treated sporadically for mental health and exhaustion issues, with occasional medications, until he began more regular treatment by a psychiatrist in 2008. DX 24 at 3-5 (Report of Disciplinary Counsel's expert witness, Dr. Candilis).

57. The intensity of his depression seemingly increased after his father retired from the firm and Mr. Cole, angry at a perceived denial of a greater partnership share, left to start his own firm, taking a substantial number of Schuman & Felts clients with him. Respondent was now solely responsible for the firm and

meeting its expenses, including payroll, with a declining firm income. DX 3 at 2-3 (letter from Respondent's counsel); RX 1 (Johns Hopkins Hospital Department of Psychiatry Affective Disorders Consultation Clinic Evaluation, Nov. 8, 2012); Replacement RX 2 (hereinafter, "RX 2") (treatment notes of Dr. Lauren R. Hodas, treating psychiatrist, Nov. 30, 2012 to May 15, 2014);[11] Tr. 733 (testimony of Respondent's expert, Dr. Abudabbeh); DX 24 at 5.

58. Respondent testified that after Mr. Cole left the firm, taking with him a number of clients, "it was very, very stressful, you know. Every day I had clients to leave. And I don't know if it [is] directly related, but it was – once again, when there were clients that I had relationships with and all of a sudden, you know, they're gone because of lower prices or whatever, I was really in a bad place." Tr. 374-75.

59. Respondent testified that he had no intention to misappropriate or steal funds from his clients or to defraud them in any way. But he did have an understanding that the writ refunds were properly due to the clients and not the firm. Tr. 375.

60. Respondent began counseling with a new psychiatrist, Dr. Hodas, in late 2012. She altered his medications to better treat his depression. The change in medication appears to have relieved the worst symptoms, and by the middle of 2013

[11] A tape recorded telephone interview of Dr. Hodas was conducted by Disciplinary Counsel in or about August 2018, on order of the Chair of this Committee. Tr. 24-25. Respondent was permitted to attend in person or by telephone, but did not do so. A transcript of the recording was made available by Disciplinary Counsel to Respondent. Neither Respondent nor Disciplinary Counsel chose to offer the transcript or any part of it into evidence. Tr. 628. Thus, although Dr. Hodas was subjected to questioning by Disciplinary Counsel, only her notes at RX 2 are in the record. DX 21 is a more complete version of the same notes. Tr. 709-710. This report relies on RX 2, which was relied upon at the hearing, unless otherwise noted.

Respondent had reduced the number of counseling visits and his symptoms had improved significantly. *See generally* RX 2.

61. The notes of his treating psychiatrist in late 2012, when writ refunds began, state that among Respondent's symptoms were "wants to always be in bed," terror, a "deer in headlights" feeling, "lots of interpersonal stress and friction," worry, constant sweating, heart palpitations, muscle tension, including twitching, physical exhaustion and lack of endurance. RX 2 at 3-4. There was no reference to any inability to make personal or business decisions.

62. In addition, there is evidence that Respondent's wife had serious health problems and that their marriage was a troubled one as of late 2012 when the writ refunds commenced. DX 3 at 2; RX 1 at 3; RX 2 at 5-6 ("saw marital counselor"); Tr. 578, 721. An associate at Respondent's law firm hired in about 2014 testified that he witnessed arguments between Respondent and his wife, who sometimes worked in the law firm office, which would cause Respondent to be "a little unfocused," but that otherwise he did not see any conduct arising from stress or mental health that affected his practice. Tr. 578.

63. The medical record shows that by January 2013 Respondent's mental condition had begun to improve under his new psychiatrist, Dr. Hodas, and a rebalancing of his medications. Writing about counseling on January 2, 2013, Dr. Hodas noted that Wellbutrin had helped with Respondent's anxiety, he was feeling better physically, was sleeping well, "don't have deer in headlight feeling," and his concentration had improved. Although Respondent reported he had no motivation

and that he "still feels sadness all the time," he told Dr. Hodas that "things [are] going well at law firm . . . not obsessing & worrying constantly." RX 2 at 7.

64. Based on the treatment notes of his psychiatrist, Respondent did not consult with her in person between January 2 and February 13, 2013. There was a telephone conversation on February 1 in which Respondent reported he was feeling better, having more energy. But he also reported anxiety and deep – but not crippling – worry. RX 2 at 8. The remainder of the treatment notes through May 2014, usually on a monthly basis, generally show continued mental improvement on the part of Respondent, who reported more energy, less worry, and more optimism. RX 2 at 10-16.[12]

65. Dr. Nuha Abudabbeh, a clinical and forensic psychologist who possesses a Ph.D. in psychology and has been licensed in the District of Columbia since 1972, Tr. 607-08, was qualified as an expert witness in support of Respondent's *Kersey* defense. Tr. 611. She was retained solely for purposes of this proceeding and was the only expert for Respondent who testified at the hearing subject to cross-examination. Her resume was marked as RX 17. Tr. 603. Dr. Abudabbeh has examined attorneys on behalf of the Office of Disciplinary Counsel and on behalf of respondents in disciplinary proceedings, but had not done so for the Bar or other professional organizations since approximately 2005. Tr. 604-05, 609-

[12] An exception to the continued progress was noted in a March 28, 2014 phone call in which Dr. Hodas wrote that Respondent "flipped out," "got something at work – should have returned it to clients. Bar looking into it. Might have license taken away." This was the approximate date on which Disciplinary Counsel's letter notifying Respondent of a Bar investigation arrived at Respondent's office. RX 2 at 15. By May 15, 2014, Respondent had retained a career counselor. RX 2 at 16.

610. The purpose of her examination was to determine if Respondent's mental status had any relationship to the behavior for which they were the subject of a disciplinary action. Tr. 605.

66. Dr. Abudabbeh did not prepare a written expert report. She did not know Respondent in 2012-2014, the time frame relevant to these proceedings. Dr. Abudabbeh prepared for her testimony by interviewing Respondent on three occasions during the summer of 2018. She also administered him at least two psychological tests and reviewed his mental health records. Tr. 715-16, 728. She also reviewed the written report prepared by Disciplinary Counsel's expert witness. Tr. 729-730.

67. In addition to the records at RX 1 and RX 2 (Johns Hopkins evaluation and Dr. Hodas notes), Dr. Abudabbeh reviewed RX 8, an opinion letter written in December 2017 by Dr. John R. Lion, a clinical professor of psychiatry at the University of Maryland, and another written in June 2017 by Denise Perme, a licensed clinical social worker retained by the D.C. Bar Lawyer Assistance Program, RX 9. Tr. 613-15. She did not conduct any "collateral interviews" with relevant persons other than Respondent. Tr. 844.

68. Dr. Lion's letter was admitted into evidence as one of the sources of information relied upon by Dr. Abudabbeh. Dr. Lion was not called as a witness or otherwise subjected to cross examination. He met with Respondent for a total of three hours in November and December 2017 and relied on the written materials to that date by Johns Hopkins, Dr. Hodas and Ms. Perme, as well as the Bar complaint.

His letter essentially summarizes the earlier examinations of Respondent and concludes:

> It is my opinion, within a reasonable degree of medical certainty, that Mr. Schuman suffered from a Major Depressive Disorder during the time of his alleged misconduct. The depressive condition was the cause of Mr. Schuman's misconduct and substantially affected it. There is presently significant evidence of rehabilitation which allows Mr. Schuman to practice law.

RX 8.

69. Ms. Perme's letter was admitted as a source of information upon which Dr. Abudabbeh relied. She met with Respondent for a total of three hours in June 2017, reviewed the Johns Hopkins evaluation and the notes of Dr. Hodas. "[She] also had lengthy telephone consultations with Dr. Hodas and with Mr. Schuman's marital and family therapist, Dr. Michael Stutz." RX 9.

70. After recounting notes and conversations with Dr. Hodas and his marriage counselor, and concluding he was seriously depressed in the fall of 2012, Ms. Perme reported that by the time she met Respondent in June 2017, "the treatment appears to have progressively alleviated the severity of his symptom. He reports his mood and concentration are greatly improved since 2012 and the first months of 2013 when he had just begun treatment." RX 9.

71. Respondent informed Ms. Perme that due to his Major Depressive Disorder he was unable to properly review the decisions of his staff to send writ refunds to existing clients but to retain the refunds for former clients.

> These two protocols for staff handling of court refunds were established at the beginning of 2013, when Mr. Schuman was in the initial phase of

> treatment for his mental health disorder. At that time, he agreed with his staff and let them handle the refund checks. Mr. Schuman did not revisit these protocols until he received the bar complaint in 2014.

RX 9, unnumbered p. 2.

72. Ms. Perme concluded that "But for the Major Depressive Disorder, particularly criteria 8 [identified earlier in her report as "diminished capacity to think or concentrate, coupled with a level of indecisiveness, nearly every day"], Mr. Schuman would not have allowed the deposit of the subject court refunds to the firm's operating account." RX 9, unnumbered p. 3.

73. Dr. Abudabbeh concluded, based on Respondent's health records at the time, especially from Johns Hopkins, that Respondent suffered from a "major depressive disorder" in January 2013.[13] Tr. 716-17.

74. Dr. Abudabbeh testified that Respondent's depression and associated anxiety had a "connection" to his decisions about handling writ refunds:

> I think there was a connection. And the connection I made by reading all your [Respondent's] reports and meeting with you is that there probably was a lacking in sufficient concentration due to the remnants of your depression, because at the time I was just looking at all the different dates when things were being done and it looked like it was a period during which, at least the way I saw it, when medication was being still kind of monitored and being, you know, decided and changed and you were being stabilized during that period.
>
> So, although you may have been in what we call "partial remission" from the major depressive disorder, there may have been some

[13] The transcript states "2012," but from the context it is clear the question referenced January 2013.

> remnants of that depression that might have affected you at that time. That's the way I read it at least.

Tr. 719-720.

75. "Partial remission" implies that some symptoms might have abated and some remain. Tr. 726.

76. Dr. Abudabbeh noted that Respondent was dealing with major disruptive events in late 2012 and early 2013, including the loss of a firm partner that challenged the law firm's financial stability, a shift in who was running the firm and, later, marital issues. In addressing Respondent, Dr. Abudabbeh testified, "So, your personal life was not that stable, your career-wise, you know – your law firm was not terribly stable and you were dealing, in addition to that, with a major mental illness – major depressive disorder is a very serious disorder." Tr. 720-21.

77. Dr. Abudabbeh testified that, based on her evaluation, Respondent's conduct in determining to retain writ refunds for the firm was not "intentionally wrong." Tr. 722. Presumably this was intended to mean that, in her expert opinion, Respondent was unable to form the requisite intent to violate the disciplinary rules by misappropriating client funds owed to them through the writ refund program.

78. Dr. Abudabbeh repeatedly noted that her conclusions about Respondent's mental condition and its impact on his decision-making with respect to writ refunds was based on her review of Dr. Hodas' records. "That's all I can attest to. I don't know – I wasn't there." Tr. 739. "What we know today is not going to tell us what he was like before because we're talking about, you know, post proper medication, post a lot of stuff." Tr. 761.

79. On cross examination, Dr. Abudabbeh was asked if it was possible that Respondent could adequately perform many tasks in his professional life and that his depression could impact only his decision on handling of writ refunds. She replied:

> It's very possible. And that's why I mention his personality is such; the man is highly committed. That's why he's fighting tooth and nail for this. He's highly committed to his application in life. He's a lawyer. That's all – that's what he wants to do in life. He must be completely driven by that . . . . And that's, you know – that might have pushed him to do whatever was required to run that firm. He needed all – whatever energy he might have left with the depression to run that firm and that some of the details may have escaped him, because he was also relying on others to do the work, and he may have made the wrong decisions there.

Tr. 740-42.

80. Asked if Respondent's mental health would allow him to handle his work even while suffering active symptoms of major depression, Dr. Abudabbeh testified that his talents as a "smart, energetic man, in general" could have ameliorated some of his symptoms of depression.

> In his case, we do have the – know that he has very good, you know, positive attributes; clearly very smart, clearly very ambit(ious) and very committed in certain ways to be able to do certain things, probably extremely well. And then it might have impacted other areas of his functioning . . . .

Tr. 733-34.

81. Respondent's expert concluded, further, that based on her recent testing, Respondent was not exhibiting any of the symptoms on the depression scale. Tr. 722. "He is in full remission, thanks to the medication." Tr. 749.

82. Disciplinary Counsel's expert was Dr. Philip Candilis, acting medical director of St. Elizabeth's Hospital in Washington and developer of the forensic psychiatry program at the hospital. For 19 years, he was a consultant performing psychological evaluations for medical boards, police departments, emergency medical service personnel and the like. Tr. 767-68. "A great deal of my work is related to the ethics and professionalism of my profession and others." Tr. 768. Dr. Candilis has conducted forensic evaluations and written reports about them for 20-25 years. Tr. 773.

83. This is the first attorney disciplinary case in which Dr. Candilis has testified as an expert witness. He testified that all of his work in professional evaluation was relevant to the matters addressed in this case. Tr. 770, 775-76. Dr. Candilis' resume was admitted as DX 23. His 15-page written forensic evaluation of Respondent was admitted as DX 24. Dr. Candilis was admitted in this case as an expert witness in psychiatry. Tr. 793.

84. Dr. Candilis testified he was asked to answer three questions in this case: Whether depression had something to do with Respondent's conduct with writ refunds, whether there was rehabilitation to make it safe for Respondent to continue practicing, and whether there "was a direct nexus between the depression and the behavior." Tr. 777; DX 24 at 1.

85. Dr. Candilis reviewed the same psychiatric and psychology reports reviewed by Dr. Abudabbeh, as well as other exhibits in this matter referenced in his

report. He also interviewed Respondent, Ms. Parker, Mr. Cole and Dr. Hodas. Tr. 796-97.

86. Dr. Candilis agreed with Dr. Abudabbeh and the Johns Hopkins evaluation that Respondent has suffered from depression for many years. He called it "more of a chronic depressive problem" than "major depression," but "for purposes of our discussion" agreed that Respondent was diagnosed with major depressive disorder. Tr. 798.

87. But Dr. Candilis concluded that Respondent's condition was not a disabling one as required in a *Kersey* defense. Tr. 803, 818. "Mr. Schuman's mental condition did not interfere with his capacity to make appropriate decisions with the writ refund checks," he opined in his report prepared at the request of Disciplinary Counsel. DX 24 at 13.

88. "Everyone who is depressed is not disabled," Dr. Candilis testified. Tr. 799. A diagnosis of depression pursuant to symptoms identified in the fifth edition of the Diagnostic and Statistical Manual ("DSM-5") does not necessarily equate to a disability for purposes of professional evaluation. Tr. 799-800.

89. DX 25 is an excerpt from a cautionary statement for application of DSM-5 to forensic psychology prepared under the auspices of the American Psychiatric Association. The statement emphasizes that "it is important to note that the definition of mental disorder included in DSM-5 was developed to meet the needs of clinicians, public health professionals and research investigators rather than

all of the technical needs of the courts and legal professionals." DX 25, unnumbered p. 25, first paragraph. A couple of paragraphs later, the cautionary statement adds:

> When DSM-5 categories, criteria, and textual descriptions are employed for forensic purposes, there is a risk that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis. In most situations, the clinical diagnosis of a DSM-5 mental disorder such as intellectual disability (intellectual developmental disorder), schizophrenia, major neurocognitive disorder, gambling disorder, or pedophilic disorder does not imply that an individual with such a condition meets legal criteria for the presence of a mental disorder or a specified legal standard (e.g., for competence, criminal responsibility, or disability). For the latter, additional information is usually required beyond that contained int he DSM-5 diagnosis, which might include information about the individual's functional impairments and how these impairments affect the particular abilities in question. It is precisely because impairments, abilities and disabilities vary widely within each diagnostic category that assignment of a particular diagnosis does not imply a specific level of impairment or disability.

DX 25 at 25, last paragraph.

90. Dr. Candilis testified that Respondent was capable of handling all matters in his personal and professional life and that the sole matter for which he claimed a disability was as a defense to this action. Relying on contemporaneous progress notes of Respondent's counselor from 2012 to the present, and the background information therein, Dr. Candilis testified:

> So, as in the Cautionary Statement, as in any diagnosis, we have to determine whether there is a functional impairment. So, for someone like Mr. Schuman, who graduated high school on time, went to an elite university, graduated law school, deconstructed and reconstructed a law firm, took care of an ailing wife, it doesn't appear that he was disabled at any point. He may have been affected by symptoms, but he's not

> functionally impaired in all these areas that I am talking about, social, occupational, professional functioning.

Tr. 801-02.

91. Nor did Respondent have any ethical lapses during the roughly 30 year period during which he had symptoms of depression. "So decision-making of this kind was not impaired, even when he was – even when his condition was unrecognized and under-treated." Tr. 802. Dr. Candilis testified that Dr. Hodas told him that Respondent was no different in his ethical decision-making from when he was a young adult to the period of the writ refund decisions, and that she believed him to be pretty honorable. Tr. 814, 818.

92. It is clear that, for the most part, Respondent was able to cope with his depression during the relevant period. He was able to conduct himself as a responsible lawyer with respect to client matters (other than refunding writ refunds to former clients); he was able to hire and retain law firm staff, including administrators and new associates; he and his wife sold one house and bought another. RX 2 at 11 ("bought a house"); Tr. 817-18.

93. Dr. Candilis testified that Respondent told him that he wanted to make sure no one was fired during a hardship time for the firm. "He was very clear he wanted to take care of his employees. And, at one point, he said that he recognized that the writ funds were floating the firm." Tr. 805-06. He confessed to Dr. Candilis that his decision how to handle the writ funds was illogical and a mistake, but Dr. Candilis noted logic was present: Return funds to existing clients and not to former clients. *Id.*

94. Respondent told Dr. Candilis that at the time decisions were made on writ refunds, "he was stressed; that he was like a deer in the headlights; that he relied heavily on his staff." But based on discussions with Respondent, his former assistant, Ms. Parker, and his former partner, Mr. Cole, "it seemed clear that he [Respondent] was maintaining his schedules, his deadlines, his cases; he was meeting payroll, having meetings with staff; he seemed to be involved in the day-to-day activities of a busy law firm." This "wasn't consistent with his having – being a deer in the headlights or being unable to manage the day-to-day functioning of his firm." Tr. 806-07.

95. Disciplinary Counsel's expert witness also reviewed the treatment notes of Dr. Hodas, DX 21(substituted) and RX 2 (original submission). Those notes are the only contemporaneous notes on Respondent's mental condition during the period in which writ refunds were retained by the firm. Dr. Candilis concluded that, although Respondent had symptoms of depression, "they're not necessarily affecting him in the way that might affect someone whose decision-making is compromised. And this is throughout this 14-month period, from January 2013 to March 2014. In fact, I think that there are more positive comments about the symptoms than negative ones." Tr. 809-810.

96. Dr. Candilis noted places in Dr. Hodas' notes in which Respondent reported in early 2013 feeling his concentration was good, his mind not wandering,

and other positive symptoms. He testified that a disability would be evident in more than a single action:

> If I were to say it in my own words, I'd say that they [disabilities] would be evident in other parts of his life. So, there's no illness that simply chooses moral decision-making. There's no stroke that simply takes out one's ethics. It has to be shown somewhere else.
>
> So, if you look at people who are ill in the APA [American Psychiatric Association] literature, it's people who can't do the other things: They can't work; they cannot take care of children; they are influenced in the occupational functioning in ways that would [be] recognized.
>
> So, if someone is making payroll, is making their deadlines, is doing their casework, then it's not possible to identify – forensically speaking – to identify something that creates that singular disability.

Tr. 810-12.

97. The fact that Respondent met with Dr. Hodas only about seven times plus some telephone consultations in about 14 months "indicates a stable illness; it doesn't indicate a relapsing and remitting course." Tr. 815-16. "This is not a schedule for someone who is severely ill." Tr. 855.

98. Disciplinary Counsel's expert concluded that Respondent was "rehabilitated" from his depressive disorder, although, in his view, there was really nothing sufficiently disabling from which he needed to be rehabilitated. Tr. 818-821.

E. <u>Other Mitigation Factors</u>

99. Until this action, Respondent had never been the subject of a disciplinary proceeding. The record contains no complaints from clients, current or former.

100. The Marshals Service and the Superior Court of the District of Columbia were reckless in the slipshod manner in which they distributed writ refunds. They were sent with no notice or explanation. They were sent in varied size batches, one $165 check at a time, seemingly at random intervals. Delays in mailing the checks resulted in unnecessarily tight deadlines for depositing the checks before they were stale. The Bar offered no assistance to its members in advising its members of how the proceeds should be deposited and distributed.

101. Prior to being informed of a Bar complaint, but after the issue of writ refund treatment was raised by a former partner, Respondent immediately undertook steps to refund writs to former clients, including obtaining financing of $200,000 from his father. DX 3 at 2; Tr. 424-25.

102. When Disciplinary Counsel informed Respondent he was the subject of a complaint about failing to return refunds to two clients, Respondent volunteered that the number of refunds owed former clients was much higher than initially alleged by Disciplinary Counsel. DX 3 at 1.

103. Rather than treating Respondent's good-faith effort to cure his violations of the disciplinary rules by acting promptly as reason to work with Respondent in a constructive fashion, Disciplinary Counsel burdened him with four years of investigation, including numerous and sometimes onerous subpoenas for document production. *See, e.g.*, DX 18-20. His clients and former clients were contacted by Disciplinary Counsel for needless confirmation of payments which

other records clearly confirmed, in the course of which these clients were informed that Respondent was facing an ethical inquiry. RX 5.

104. Respondent demonstrates substantial remorse about his decisions with respect to retaining writ refunds. He accepts full responsibility for the decision, even while describing consultations with his staff and defending his conduct as a result of inattention due to depression.

105. The complaint leading to this action was filed by a former partner and current competitor, not a current or former client of Respondent's law firm. The former partner testified that, other than with respect to the subject addressed in this proceeding, to his knowledge, Respondent behaved honestly and truthfully. Tr. 114.

106. Respondent's secretary and bookkeeper for eight years testified she "never" saw him take any act she regarded as dishonest or underhanded. Tr. 211.

107. A witness who has been an associate at Respondent's law firm for five years testified that he had never received a complaint of any kind about Respondent and that Respondent was knowledgeable in his field of law, landlord-tenant law. Tr. 568-69. He further testified that if Respondent were suspended or disbarred from practice, "it would be very disruptive for the clients." Tr. 569.

108. Respondent's treating psychiatrist told Disciplinary Counsel's expert witness in an interview that, in her opinion, Respondent is "a pretty honorable man." DX 24 at 12.

109. Gail Lee, who worked as support staff at Schuman & Felts until 2003, 10 years before the events in question, testified favorably to Respondent's character as of that time. Tr. 587-92.

III. CONCLUSIONS OF FACT

110. Based upon the preceding findings in the record, and the Conclusions of Law discussed below, the Hearing Committee concludes, based upon clear and convincing evidence, that Respondent's conduct violated the following Rules:

111. Rule 1.15(a), in that Respondent commingled entrusted funds with his law firm's funds;

112. Rule 1.15(a) in that Respondent intentionally misappropriated entrusted funds;

113. Rule 1.15(c) in that Respondent failed to promptly notify his clients when he received funds that belonged to them, and failed to promptly deliver to the clients the funds they were entitled to receive;

114. Rule 8.4(c), in that Respondent engaged in conduct involving dishonesty, deceit, or misrepresentation.

115. The panel concludes that Disciplinary Counsel failed to prove by clear and convincing evidence that Respondent violated Rule 1.15(a), failing to maintain complete records relating to entrusted funds.

IV. CONCLUSIONS OF LAW

A. Overview

This case is an instructive example of how in our complex society responsibility is dispersed, while accountability can sometimes be quite focused.

Here, we have a U.S. Marshals Service that for an unknown number of years retained, and possibly spent for its own purposes (the record is silent), proceeds for eviction writs paid for by landlords for evictions never executed. These funds, most recently $165 per requested eviction, for many years were never refunded, except on specific request. The record does not record for how long this practice continued or how much was retained by the Marshals Service. Early in 2012, the Marshals Service and the Superior Court decided landlords routinely should be reimbursed these unearned fees paid as of 2009 and thereafter. FF ¶¶ 8-19.

The record does not state if the Superior Court of the District of Columbia, home of the landlord-tenant court where eviction proceedings are heard, exercised any supervision over the retention of these funds in earlier years, which surely amounted to millions of dollars. The record does show, however, that the Superior Court did a poor job, *i.e.*, none, in explaining to landlords and their lawyers what the checks arriving one-by-one in their mailboxes were for or suggest their proper disposition. FF ¶¶ 15-17.

Moreover, the testimony is that the Superior Court required checks at $165 per eviction, separately drawn and sent, to be cashed within 60 days, but often waited many days to put the checks in the mail, forcing recipients to cash them quickly and

under pressure. Nothing on or with the check indicated why it was sent except a landlord-tenant court docket number on the check itself. FF ¶¶ 14-15.

Not until one year after the distribution of refunds began did the Superior Court mention the purpose of the payments. It was in an email to the Bar – a belated, incidental and incomplete explanation, at that. FF ¶ 17.

The retention of the unearned funds by the marshals over many years was irresponsible. The manner of distribution by the Superior Court was negligent. A simple cover letter explaining the refund process and a more effective method of disbursement (i.e., combining multiple refunds in a single check with a list of docket numbers for which the refunds applied plus timely distribution of checks) would have been more responsible. There is blame to go around, but sanctions are meted to only one involved party – Respondent.

Respondent, Mr. Schuman, did what the U.S. Marshals Service did: He kept the money. In January 2013 these $165 checks began arriving at Schuman & Felts, without prior notice, in semi-weekly batches of a few to dozens, with no explanation and only a docket number to identify them. FF ¶¶ 20-22. This occurred as Respondent's firm was suffering financially from the departure of the other active partner, who left with many firm clients. In addition, Respondent was suffering difficult marital problems. FF ¶¶ 5-7; 48; 62.

These financial and domestic problems aggravated a nearly life-long depression, a depression with which the evidence shows he was able to cope, but which surely colored his views on his practice and his personal life. FF ¶¶ 56-58.

The checks were a windfall. The clients were long gone with the departing partner. Respondent knew the money was not his to keep, but the honest alternative was to refund the money to former clients and risk ending or diminishing his law firm along with his marriage. He chose to take the risk of not being found out. FF ¶ 59.

Respondent likely would have won his bet. There is no record of any other prosecution by the Bar of any lawyer retaining the $165 refund checks. But that is not to say that other lawyers did not do so. It does not require record evidence or extreme cynicism about the Bar to suggest it is possible that more than one lawyer, especially at a small firm, receiving a handful of checks for small amounts for long-forgotten evictions, would engage in at least small-bore misappropriation.

But two factors contributed to Respondent's downfall. First, the number of checks kept growing and growing until over only 14 months Respondent received nearly 2,000 checks for over $300,000. FF ¶ 20. The amount was far beyond *de minimis* or small bore. Respondent used the funds to meet payroll, mostly to himself, without revisiting whether to return the funds to former clients, who had already paid for the evictions when billed by the firm years before. FF ¶¶ 40, 51. The record clearly discloses that, whatever his mental health in January 2013, Respondent's condition significantly improved as the amounts refunded by the court grew. FF ¶ 60. Yet, at no time did Respondent revisit the issue of holding this unexpected manna and using it to pay himself rather handsomely.

Second, Respondent was a subject of this action because his former partner, Mr. Cole, turned him in, doing so with apparent alacrity. After first inquiring of

Respondent whether he had returned funds to a former client – a client who left with Mr. Cole – Mr. Cole learned that, in fact, the "writ refunds" as they are called were cashed by the firm, not the client to whom the funds were due. Believing that the funds were being misappropriated, Mr. Cole reported Respondent to the Bar, as he was required to do under Rule 8.3(a), and had no further contact with Respondent about the matter. FF ¶¶ 31-35.

Respondent obtained money from his father – the firm's founder – to repay the former clients even before he was notified that the Bar was investigating his conduct. No former clients complained to the Bar that they were not paid. Nevertheless, four years of investigation ensued, including the production of thousands of pages of additional firm records, leading to four days of hearings on essentially admitted facts to determine what sanction should issue. FF ¶¶ 37-38; 41-46.

The panel admits to considerable sympathy for Respondent due to his personal and professional problems, his genuine history of mental health issues, and the fact that, despite his personal and professional travails, there is no evidence that any client was unhappy with his work or that he was otherwise reckless or negligent in his practice. FF ¶¶ 47, 55-58, 91-94, 99.

But that sympathy is countered by the fact that Respondent seeks to rely on his long-time diagnosis of depression to claim he was not genuinely responsible for his decisions when, as is clear, he was otherwise able to conduct his practice, make decisions, buy a home and perform the other activities in the daily life of a lawyer

and citizen. Only when it came to the misappropriation of client funds needed to pay himself well and keep his firm afloat did Respondent claim the defense that he was disabled by his mental health. FF ¶¶ 90-94.

Our sympathy also is countered by the fact that Respondent paid himself over $300,000 during the fifteen months he wrongfully retained client funds, and did not seek to repay the money until he was caught by a former colleague and, soon thereafter, by the Bar. FF ¶¶ 37-38, 51. Our sympathies also are balanced against evidence that Respondent on occasion tried to blame his administrative and secretarial staff for decisions he, as the sole partner in the firm, was responsible for. FF ¶¶ 30-33.

We are clearly convinced by the evidence that Respondent knowingly violated Rule 1.15(a) by commingling entrusted funds with law firm funds and that he intentionally misappropriated those funds. We also are convinced by the evidence that Respondent violated Rule 1.15(c) by failing promptly to notify his clients when he received funds belonging to them and failed promptly to deliver those funds to his clients. We also are convinced that Respondent violated Rule 8.4(c) by engaging in conduct involving dishonesty, deceit or misrepresentation.

We find that the evidence has not met the standard of proof required that Respondent failed to maintain complete records relating to entrusted funds, another specification of Rule 1.15(a). Although there is confusion regarding disposition of a fraction of the funds, the bulk of the money is fully accounted for, as is the distribution to former clients. The firm's recordkeeping on this matter permitted full

payment to former clients speedily and accurately. FF ¶¶ 38, 41-49. It is not surprising that a law firm's records did not fully anticipate the need to account for client funds received under a new reimbursement program effected without warning or explanation years after the original payment. Complaining about the recordkeeping in this case truly adds insult to injury where logically, if not legally, the fault is shared with government institutions.

B. Legal Analysis[14]

1. Respondent Violated Rule 1.15(a) by Commingling Client and Firm Funds

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

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

Commingling occurs when an attorney fails to hold entrusted funds in an account separate from his own funds. *In re Moore*, 704 A.2d 1187, 1192 (D.C. 1997). 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

[14] The Committee recommends that Respondent's Motion to Dismiss Paragraphs 17, 18, 26, 28, 25 and 29 of the Statement of Charges, filed April 18, 2018, be denied. The Motion seems to confuse narrative statements limning the nature of the factual basis for specific charges with substantive claims. A Motion to Dismiss is not a basis for addressing contested facts.

We also recommend denial of Respondent's Motion to Dismiss as a Matter of Law counts A, B, C and D, filed August 2, 2018, and incorporate these Findings of Fact and Conclusions of Law as the basis therefore. Although we do recommend dismissal of the recordkeeping specification under Rule 1.15(a), we do so on the basis of facts adduced at a full evidentiary hearing, not on motion.

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 Hearing Committee Report at 12 (quoting *In re Hessler*, 549 A.2d 700, 707 (D.C. 1988)), *recommendation adopted where no exceptions filed*, 102 A.3d 293 (D.C. 2014) (per curiam); *see also In re Moore*, 704 A.2d 1187, 1192 (D.C. 1997) ("Commingling occurs when an attorney fails to hold entrusted funds in a special account, separate from his own funds."). To establish commingling, the entrusted and non-entrusted funds must be in the same account at the same time. "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).[15]

Disciplinary Counsel has carried its burden of proving by clear and convincing evidence that Respondent received funds that properly should have been forwarded to former clients, but failed to either notify them of receipt of those funds or to deposit them in a trust account for safekeeping. The result, as expected, was use of those funds to keep Respondent's firm "afloat," as Respondent presumably was reminded every time he took a draw and examined the firm's operating account statement.

[15] Respondent's post-hearing brief addresses all of the Rule 1.15 allegations in one section. We respond to these arguments after stating our conclusion on misappropriation, *infra*.

2. Respondent Violated Rule 1.15(a) by Intentionally Misappropriating Entrusted Funds

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

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

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

"Reckless misappropriation reveal[s] an unacceptable disregard for the safety and welfare of entrusted funds, and its hallmarks include: the indiscriminate commingling of entrusted and personal funds; a complete failure to track settlement proceeds; the total disregard of the status of accounts into which entrusted funds were placed, resulting in a repeated overdraft condition; the indiscriminate movement of monies between accounts; and finally the disregard of inquiries concerning the status of funds." *Ahaghotu*, 75 A.3d at 256 (internal quotation marks and citation omitted); *see also Anderson*, 778 A.2d at 339 ("[R]ecklessness is a state of mind in which a person does not care about the consequences of his or her action." (internal citations and quotation marks omitted)). Further, "'[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.'" *Anderson*, 778 A.2d at 339 (quoting 57 Am. Jur. 2d *Negligence* § 302 (1989)). Thus, an objective standard should be applied in assessing whether a respondent's misappropriation was reckless.

Arguably, when Schuman & Felts received the first checks from Superior Court in January 2013 for $165 each, it was reasonable to either set them aside for consideration of how they should be handled or, because the record suggests little time was left to deposit checks before they went stale, deposit them in a firm bank account, preferably the trust account, until their proper final disposition was resolved. It was less reasonable that they be deposited in the operating account until the genesis of the checks was established. Over the first few days on which checks were received, spending the money with no examination of its provenance, purpose or proper disposition could be deemed reckless.

But, very early in the game, the volume of checks and the combined amounts deposited required attention and inquiry. One of Respondent's assistants testified that she called the court to determine what the checks were for. FF ¶ 26. Respondent never has suggested he was unaware of the reasons for the refunds, but admitted the checks were keeping the firm going. FF ¶ 50. He paid himself a draw that exceeded the amount ultimately paid to former clients. FF ¶¶ 42, 50-51. Current clients received writ refunds immediately. Respondent and his assistant termed this distribution as "goodwill," but did not suggest to those clients that the refund was some sort of voluntary gesture by the firm. FF ¶ 27. Reimbursing the current clients proves that Respondent was fully aware that the refunds were owed clients. He has offered no reason, other than "goodwill," to distinguish current and former clients in this regard, assuming they did not owe a balance to the firm. As he wrote a check to himself, or ordered his administrative assistant to do so, it is inconceivable he did

not observe how the checks from Superior Court were collectively substantial, warranting further consideration of the justification for keeping the money.

Very quickly, what might have been reckless conduct became an intentional reliance on client funds to keep Schuman & Felts in business.

We do not rely for this conclusion as to intent on Respondent's representations to Mr. Cole when the latter inquired as to the firm's treatment of writ refunds for one client. We do not need to address whether Respondent lied in answering Mr. Cole. FF ¶¶ 31-35. It is not clear what the gravity of Mr. Cole's inquiry was at the time or whether Respondent intended to lie or simply to brush off the inquiry. We are reluctant to impose on the members of the Bar a strict ethical requirement that honesty apply to every possibly incidental conversation or email with a fellow lawyer, whether one competing for clients or an adversary in court. If Respondent did lie, it was *de minimis* compared to the much larger dishonest retention of over $250,000 in writ refunds owed former clients. It is sufficient for our conclusions that Respondent continued to keep client funds as the amount grew and became central to firm survival. Respondent ultimately admits that he was responsible for the decision. The conduct itself is clear and convincing evidence of intentional misappropriation.

Respondent's argument to the contrary on retention of funds, misappropriation and dishonesty is extremely weak. *See* Respondent's Post-Hearing Brief at 8-9. It amounts to denying that dollars are fungible and identifying case law where the circumstances in which counsel retained client funds are immaterially

different from those at bar. He argues that he did not misappropriate the writ funds because:

> The Firm paid the writ fees to the court with money that was the property of the Firm, not the clients. When the writ fees were refunded, the court was merely giving back the Firm the Firm's property. Respondent was wrong not to immediately pass the monetary benefit of writ refunds on to its clients, but he did not misappropriate.

Id. at 8.

The true facts are that the firm advanced funds to the client to pay the price of the writ of execution. The firm was reimbursed by the client – and therefore, was not financially diminished in any way. The firm was, in these circumstances, merely a pass-through vehicle for payment. When Respondent sold his home, and the buyer provided funds at settlement to pay off Respondent's bank loan, we imagine Respondent would consider it misappropriation – or worse – if the bank chose not to credit the payment to Respondent's debt, contending the funds originally came from the bank so they could be used any way the bank saw fit when they were "returned."

3. Disciplinary Counsel Failed to Prove by Clear and Convincing Evidence that Respondent Failed to Maintain Complete Records Related to Entrusted Funds

"[Rule 1.15(a)] requires that an attorney maintain complete records of all client funds in his possession." *In re Choroszej*, 624 A.2d 434, 436 (D.C. 1992). The purpose of the requirement of "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." *In re Edwards*, 990 A.2d 501, 522 (D.C. 2010). "Financial records are complete only when an attorney's documents are 'sufficient to demonstrate [the attorney's] compliance with his ethical duties.'" *Id.* The reason for requiring complete records is so that any audit of the attorney's handling of client funds by Disciplinary Counsel can be completed even if the attorney or the client, or both, are not available. *In re Clower*, 831 A.2d 1030, 1034 (D.C. 2003) (quoting Board Report).

Disciplinary Counsel contends that Respondent's firm records were unable to account for $34,391 of the writ refunds deposited in the operating account and, therefore, the rule was violated. Disciplinary Counsel presented no cogent analysis of this failure, contenting itself with introducing hundreds of pages of billing records under the auspices of its investigator's testimony and asserting the funds could not be accounted for. FF ¶¶ 42-49, 53.

However, even assuming a fuller examination was presented, it likely would be to no avail. It is hardly surprising that a law firm's records, no matter how sound for other purposes, do not account at the time they are prepared for a new and unexplained refund procedure adopted by the court years later. To illustrate: Let us assume the D.C. Bar compensated its attorneys for gasoline expenses by the mile. After years of doing so, the policy is changed. Receipts for gas purchases must be attached to expense submissions. The Bar then demands that its attorneys present gas receipts to justify past expense claims. Few could do so, and unfairness of demanding receipts for past expenses is obvious.

No current or former client of Schuman & Felts has complained about not receiving a writ refund in 2014. Disciplinary Counsel has not alleged any were unpaid or offered proof of non-payment.[16] Hundreds of refunds were accurately made, if belatedly. Even if true, we do not find the failure to have accounting records designed for a program not in existence when the records were written to be "clear and convincing" evidence of a violation of the recordkeeping rules. Could the records have contained more detail or been handled differently? Undoubtedly. But we find the proof of poor records for a program not in existence when the records were written weak at best and not well presented.

4. Respondent Failed to Notify Clients of Receipt of Entrusted Funds and Deliver Them Promptly

Rule 1.15(c) provides in relevant part that "Upon receiving funds . . . in which a client or third person has an interest, a lawyer shall promptly notify the client or third person." In addition to notifying, and "[e]xcept as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly

[16] Respondent attacks Disciplinary Counsel personally at pp. 22-25 of his post-hearing brief, alleging personal animus, false promises of possible settlement and other purportedly unfair tactics. If he wishes to complain about alleged ethical or conduct issues with Disciplinary Counsel, this is not the forum for resolution. Only one specific issue warrants mention here. We question whether it was necessary for Disciplinary Counsel to send emails to Respondent's former clients informing them of the ethics investigation and asking if they in fact received payments as represented by Respondent, despite the fact that checks and bank records alone confirmed the representation. This seems to have been an unnecessary step which damaged Respondent's reputation prematurely and unnecessarily. In general, it does appear that Respondent was given no practical credit for his rapid remedy of his violative conduct but was, instead, subjected to an additional four years of demands from Disciplinary Counsel to not much benefit to either party. We suspect this is more a result of institutional bias to turn over every rock than personal animus by lead Disciplinary Counsel to Respondent, however. Procedures and investigative policies for those who are quick to fix their errors might be a subject for the Office of Disciplinary Counsel to revisit, with credit applied to those who see the error of their ways quickly. *See Honey v. Vinegar*.

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

The undisputed facts are that Schuman & Felts received money initially advanced by the firm but billed to and paid for by clients, and were thus client funds. In the case of former clients, Schuman & Felts never notified them of receipt of the funds or timely delivered them. Cases cited at pages 8-9 of Respondent's post-hearing brief merely list instances in which the specific facts differ from those here (proceeds of insurance claims, royalties and settlements, for example). All of them prove the basic legal point: Funds that are not the firm's are to be returned to the client.

5. <u>Respondent Engaged in Conduct Involving Dishonesty, Deceit or Misrepresentation</u>

Rule 8.4(c) provides that it is professional misconduct for a lawyer to "[e]ngage in conduct involving dishonesty . . . deceit, or misrepresentation." Dishonesty is the most general category in Rule 8.4(c), defined as:

> fraudulent, deceitful or misrepresentative behavior [and] conduct evincing a lack of honesty, probity or integrity in principle; [a] lack of fairness and straightforwardness . . . . Thus, what may not legally be characterized as an act of fraud, deceit or misrepresentation may still evince dishonesty.

In re Shorter, 570 A.2d 760, 767-68 (D.C. 1990) (per curiam) (internal quotation marks and citation omitted); *see also In re Scanio*, 919 A.2d 1137, 1142-43 (D.C.

2007). Dishonesty in violation of Rule 8.4(c) does not require proof of deceptive or fraudulent intent. *In re Romansky*, 825 A.2d 311, 315 (D.C. 2003). Thus, when the dishonest conduct is "obviously wrongful and intentionally done, the performing of the act itself is sufficient to show the requisite intent for a violation." *Romansky*, 825 A.2d at 315. Conversely, "when the act itself is not of a kind that is clearly wrongful, or not intentional, [Disciplinary] Counsel has the additional burden of showing the requisite dishonest intent." *Id.* A violation of Rule 8.4(c) may also be established by sufficient proof of recklessness. *See id*. at 316. To prove recklessness, Disciplinary Counsel must prove by clear and convincing evidence that the respondent "consciously disregarded the risk" created by his actions. *Id.*

Deceit is the "suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead . . . ." *Shorter*, 570 A.2d at 767 n.12 (citation omitted). To establish deceit, the respondent must have knowledge of the falsity, but it is not necessary that the respondent have intent to deceive or defraud. *In re Schneider*, 553 A.2d 206, 209 (D.C. 1989) (finding deceit where attorney submitted false travel expense forms but did not intend to deceive the client or law firm and there was no personal gain); *see also Shorter*, 570 A.2d at 767 n.12.

Misrepresentation is a "statement . . . that a thing is in fact a particular way, when it is not so." *Shorter*, 570 A.2d at 767 n.12 (citation omitted); *see also Schneider*, 553 A.2d at 209 n.8 (misrepresentation is element of deceit). Misrepresentation requires active deception or a positive falsehood. *Shorter*, 570

A.2d at 767. The failure to disclose a material fact also constitutes a misrepresentation. *See In re Outlaw*, 917 A.2d 684, 688 (D.C. 2007) (per curiam) ("Concealment or suppression of a material fact is as fraudulent as a positive direct misrepresentation.") (citations omitted); *Scanio*, 919 A.2d at 1139-1144 (respondent failed to disclose that he was salaried employee when he made a claim for lost income to insurance company measured by lost hours multiplied by billing rate); *In re Reback*, 513 A.2d 226, 228-29 (D.C. 1986) (en banc) (Court found deceit and misrepresentation where respondents neglected claim, failed to inform client of dismissal of case, forged client's signature onto second complaint, and had complaint falsely notarized).

Disciplinary Counsel has adduced clear and convincing evidence that Respondent engaged in dishonest conduct.

Respondent clearly did not premeditate seizing writ refunds and keeping them – their delivery was a surprise – and may even have been initially only reckless in retaining the funds. But well before the end of the 14-month retention period, as refunds mounted in both number and dollar volume, he knowingly and intentionally acted dishonestly by keeping and then spending (mostly on himself) funds belonging to his former clients.

We refrain from finding the conduct was "deceitful" (although it may have been) because it was not premeditated. We do not find misrepresentation because Respondent said nothing to his former clients about the refunds. Arguably, silence might be misrepresentation, but in the absence of any communication at all, the

conduct is more clearly dishonest. For reasons stated above, we find the misstatement to Mr. Cole in an email exchange *de minimis* and unnecessary to reach our conclusions.

Respondent has no coherent argument against finding he was dishonest except to cite the facts from a collection of decisions and conclude they are not the same facts as presented here. "The record shows that Respondent made a mistake and had not [sic] intent to deceive." Respondent's Post-Hearing Brief at 11. Even conceding early retention of funds could be considered a mere "mistake" (which we do not concede), the very first deposit of 25 checks for $4,125 on Jan. 15, 2013, followed by a deposit of 162 checks for $26,730 on Feb. 6, 2013 (DX 20-A), would have signaled to anyone that these unearned amounts belonged to clients, not to the firm. Respondent recognized this fact by promptly forwarding refunds to current clients. Keeping those of former clients for another year as the total amount added up, finally reaching a total of $316,200, went immediately from "mistake" to a willful refusal to address and conform to both the ethical rules of the legal profession and the laws against theft.

V. RECOMMENDED SANCTION DISCUSSION

In this case, Disciplinary Counsel has asked the Hearing Committee to recommend the sanction of disbarment. Respondent has requested that the Hearing Committee recommend dismissal of all claims. For the reasons described below, we recommend that Respondent be disbarred.

But we also recommend that the Bar and the Court of Appeals take note of the reckless and irresponsible conduct of the U.S. Marshals Service and the Superior Court in the manner in which writ refunds were retained and later distributed. We are tempted to recommend a sanction of less than disbarment, such as a lengthy suspension, as a signal to higher authorities that they had a part in creating the circumstances permitting Respondent to violate the disciplinary rules. We also have an unshakable sense that true justice is served by not imposing the full weight of sanctions on this respondent, who, although legally culpable, clearly was troubled by mental, professional and marital difficulties. The Marshals Service and the court constructed the doorway. Respondent is culpable for going through it.

Disbarment is the presumptive sanction for intentional misappropriation of funds. Respondent's conduct satisfies all of the elements of misappropriation. But the Committee wishes to state its feeling that, in some ways, Respondent was a victim of negligent conduct by others, without in any way minimizing his own culpability. As we stated at the outset of these conclusions, responsibility (or irresponsibility) is diffuse, but accountability is specific to Respondent. The Committee is bound by precedent, which requires disbarment, but we would not be disappointed if some way to soften the sanction could be applied to recognize that the facts of this matter were not entirely of Respondent's making. We are reminded that, unlike a criminal court, the sanction is not to be deemed punitive, but as necessary for deterrence and protection of the Bar and the public. We believe a

substantial suspension would satisfy these goals, but find no basis in precedent for other than disbarment.

A. Standard of Review

The sanction imposed in an attorney disciplinary matter is one that is necessary to protect the public and the courts, maintain the integrity of the legal profession, and deter the respondent and other attorneys from engaging in similar misconduct. *See, e.g.*, *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc); *In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013); *In re Cater*, 887 A.2d 1, 17 (D.C. 2005). "In all cases, [the] purpose in imposing discipline is to serve the public and professional interests . . . rather than to visit punishment upon an attorney." *Reback*, 513 A.2d at 231 (citations omitted); *see also In re Goffe*, 641 A.2d 458, 464 (D.C. 1994) (per curiam).

The sanction also must not "foster a tendency toward inconsistent dispositions for comparable conduct or . . . otherwise be unwarranted." D.C. Bar R. XI, § 9(h)(1); *see, e.g.*, *Hutchinson*, 534 A.2d at 923-24; *In re Berryman*, 764 A.2d 760, 766 (D.C. 2000). In determining the appropriate sanction, the Court of Appeals considers a number of factors, including: (1) the seriousness of the conduct at issue; (2) the prejudice, if any, to the client which resulted from the conduct; (3) whether the conduct involved dishonesty; (4) the presence or absence of violations of other provisions of the disciplinary rules; (5) whether the attorney has a previous disciplinary history; (6) whether the attorney has acknowledged his wrongful conduct; and (7) circumstances in mitigation or aggravation. *See, e.g.*, *Martin*, 67

A.3d at 1053 (citing *In re Elgin*, 918 A.2d 362, 376 (D.C. 2007)). The Court also considers "'the moral fitness of the attorney' and 'the need to protect the public, the courts, and the legal profession . . . .'" *In re Rodriguez-Quesada*, 122 A.3d 913, 921 (D.C. 2015) (per curiam) (quoting *In re Howes*, 52 A.3d 1, 15 (D.C. 2012)).

The law regarding misappropriation is clear and consistent: absent "extraordinary circumstances," disbarment is the presumptive sanction for intentional or reckless misappropriation. *In re Addams*, 579 A.2d 190, 191 (D.C. 1990) (en banc); *In re Hewett,* 11 A.3d 279, 286 (D.C. 2011); *see also In re Mayers*, 114 A.3d 1274, 1279 (D.C. 2015) ("'In virtually all cases of misappropriation, disbarment will be the only appropriate sanction unless it appears that the misconduct resulted from nothing more than simple negligence.'") (quoting *Addams*, 579 A.2d at 191). The Court further held that "it is appropriate . . . to consider the surrounding circumstances regarding the misconduct and to evaluate whether the mitigating factors are highly significant and [whether] they substantially outweigh any aggravating factors such that the presumption of disbarment is rebutted." *Addams,* 579 A.2d at 195. The Court recognized that extraordinary circumstances are present when a respondent is entitled to mitigation under *In re Kersey,* 520 A.2d 321, 326 (D.C. 1987), but the Court warned that "mitigating factors of the usual sort" are not sufficient to rebut the presumptive sanction of disbarment, and "[o]nly the most stringent of extenuating circumstances would justify a lesser disciplinary sanction." *Id*. at 191, 193.

Accordingly, once misappropriation involving more than simple negligence has been established, the inquiry turns to whether sufficient mitigating factors rebut the presumption of disbarment. *Anderson*, 778 A.2d at 337-38 (citing *Addams*, 579 A.2d at 191).

B. Application of the Sanction Factors

Precedent strongly suggests that, absent *Kersey* disability, addressed below, the normal sanction factors are of little relevance to a sanction for intentional misappropriation. *See In re St. Louis*, 147 A.3d 1135, 1150-51 (D.C. 2016) (citations omitted) ("The usual mitigating factors, such as a lack of prior discipline, do not lead to a lesser sanction in cases of intentional or reckless misappropriation."). But we address them below.

1. The Seriousness of the Misconduct

Respondent's misconduct was serious, but perhaps less so than the headline – "Lawyer Keeps Over $300,000 in Client Funds" – would suggest. While cumulatively clearly a very significant amount, the individual checks delivered to Schuman & Felts amounted to little more than a half hour or, in some firms, a 15 minute billing error. Nor was there premeditation. Rather, Respondent can colorably claim initial confusion about what the checks were for and where the funds should go.

Nevertheless, with the passage of 14 months and accumulation of over $300,000, what may have started as a reckless or even negligent misuse of client

funds became a serious intentional misappropriation, even if the clients were unaware of the breach of trust.

2. Prejudice to the Client

Respondent withheld substantial cumulative sums from some former clients. The amounts ranged from $165 to $45,705 over 14 months. Respondent returned to at least eight former clients amounts in excess of $10,000. Most former clients realized payments for a few hundred dollars. DX 3 at 45-46 (April 22, 2013 letter from Respondent's counsel to Disciplinary Counsel).

3. Dishonesty

We have concluded that the misappropriation was in short order intentional. Although the ethical offense was not premeditated, in that it was not planned at the outset when the checks first arrived, the retention of mounting numbers of checks was inherently dishonest.

4. Violations of Other Disciplinary Rules

Although we have concluded that Respondent violated four ethical rules (misappropriation, commingling, dishonesty and failure to deliver client funds), this was a result of the same extended misconduct. There is no suggestion that Respondent or his firm have violated other disciplinary rules independent of retention of writ refunds.

5. Previous Disciplinary History

Respondent has no previous disciplinary history. However, "[t]he usual mitigating factors, such as a lack of prior discipline, do not lead to a lesser sanction

in cases of intentional or reckless misappropriation." *St. Louis,* 147 A.3d at 1150-51.

6. Acknowledgement of Wrongful Conduct

Although the record contains some prevarication, with the suggestion on occasion that Respondent was shifting blame to his staff, the basic conclusive fact established by the record is that Respondent acknowledged and corrected his wrongful conduct at the outset of the investigation. FF ¶ 52 ("Mr. Schuman acknowledges that his actions were in violation of the D.C. Rules of Professional Responsibility.").

7. *Kersey* Mitigation

Respondent urges the Committee to find *Kersey* mitigation due to his major depressive disorder. *In re Kersey*, 520 A.2d 321 (D.C. 1987); *see* Second Amended Notice of Intent to Raise Disability in Mitigation. The respondent in *Kersey* successfully proved alcoholism was a significant factor in his disciplinary rule violations, resulting in mitigation of his sanction for intentional misappropriation. 520 A.2d at 327-28. Other illnesses also qualify for *Kersey* mitigation, including depression and bipolar disorder. *See, e.g.*, *In re Peek*, 565 A.2d 627 (D.C. 1989); *In re Appler*, 669 A.2d 731 (D.C. 1995) (bipolar); *In re Cappell*, 866 A.2d 784 (D.C. 2004) ("major depression at the time of the misconduct").

To find *Kersey* mitigation, Respondent must demonstrate,

> (1) by clear and convincing evidence that he had a disability;
>
> (2) by a preponderance of the evidence that the disability substantially affected his misconduct; and

(3) by clear and convincing evidence that he has been substantially rehabilitated.

In re Lopes, 770 A.2d 561, 567 (D.C. 2001); *In re Stanback*, 681 A.2d 1109, 1114-15 (D.C. 1996).

> A respondent who establishes all three *Kersey* factors may be entitled to have the sanction stayed in favor of probation. *See, e.g., Kersey,* 520 A.2d at 528 (disbarment stayed in favor of probation); *In re Temple,* 629 A.2d 1203, 1210 (D.C. 1993) ('*Temple II*') (disbarment stayed in favor of probation); *Verra,* 932 A.2d at 505 (disbarment for reckless misappropriation stayed in favor of three years' probation). D.C. Bar R. XI, § 3(a)(7) provides that any period of probation shall be no more than three years.

In re Mardis, Board Docket. No. 14-BD-085 (BPR July 13, 2017), appended Hearing Committee Report at 76, *recommendation adopted where no exceptions filed*, 174 A.3d 868, 869 (D.C. 2017) (per curiam). As the Court emphasized in *Lopes*, "it was incumbent upon [respondent] to show that his illnesses, however labeled, deprived him of the meaningful ability to comport himself in his professional conduct in accordance with the basic norms of professional responsibility." 770 A.2d at 567 (internal quotations and citation omitted).

a. <u>Respondent Suffered from Depression</u>

To satisfy the first *Kersey* factor, the respondent must prove by clear and convincing evidence that he was suffering from a disability or addiction "that has been held to warrant *Kersey* mitigation." *Id.* at 568. As noted, depression can constitute a mitigating factor under *Kersey*. *See, e.g.*, *In re Mooers*, 910 A.2d 1046 (D.C. 2006) (per curiam); *Lopes*, 770 A.2d at 568 (depression is "a disability that has been held to warrant *Kersey* mitigation"); *see also In re Mayers*, Bar Docket No.

443-03 (BPR Nov. 9, 2007), appended Hearing Committee Report at 23-24 (citing cases), *recommendation adopted where no exceptions filed*, 943 A.2d 1170 (D.C. 2008) (per curiam).

All parties agree that Respondent suffered from depression since at least his undergraduate days, including during the period at issue (January 2013 to March 2014). FF ¶¶ 56, 86. Disciplinary Counsel contends, however, that Respondent's depression does not constitute a disability under *Kersey* because it was not "disabling" at the time. *See* Disciplinary Counsel's Post-Hearing Brief at 8-9 (citing *In re Stanback*, 681 A.2d 1109, 1113 (D.C. 1996)). In *Stanback*, however, there was no diagnosis of depression prior to the misconduct at issue. Here, the parties agree that Respondent was diagnosed with depression long before the misconduct occurred and that he has been managing it through medication. In those instances, the issue is one of causation under the second *Kersey* factor. *See, e.g.*, *Mardis*, Board Docket. No. 14-BD-085, appended HC Rpt. at 77-81 (no causation where the respondent was "functioning at a high level" despite her depression), *recommendation adopted where no exceptions filed*, 174 A.3d 868, 869 (D.C. 2017) (per curiam); *In re Verra*, Bar Docket. No. 166-02, at 25-27 (BPR July 20, 2006) (no causation where the expert could not pinpoint the beginning of the respondent's remission from depression), *recommendation adopted where no exceptions filed*, 932 A.2d 503, 505 (D.C. 2007) (per curiam). Thus, we address the substance of Disciplinary Counsel's argument in the section below.

b. Respondent's Depression Was Not a Substantial Cause of His Misappropriation

To satisfy the second *Kersey* factor, the respondent must prove by a preponderance of the evidence that his or her misconduct was "substantially caused" by the qualifying disability or addiction. *In re Zakroff*, 934 A.2d 409, 418 (D.C. 2007) (citations omitted). "Substantial cause" requires the respondent to show that "but for [the disabling condition], his misconduct would not have occurred." *Kersey*, 520 A.2d at 327. "The 'but for' test does not require proof that the attorney's disability was the 'sole cause' of the attorney's misconduct," instead it requires that the respondent establish a "sufficient nexus" between her misconduct and her disability or addiction. *See Zakroff*, 934 A.2d at 423 (citations omitted). As a result, the respondent does not need to prove that her disabling condition caused each and every disciplinary violation to satisfy the "but for" test. *Id.*

However, Respondent must demonstrate by a preponderance of the evidence that the alleged mental illness *was disabling at the time of the violation* alleged by Disciplinary Counsel. *See Verra*, 932 A.2d at 505 ("[W]hile [respondent] demonstrated a causal relationship between her disorders and her misconduct arising from her representation of [her client], she had not shown it to affect her misconduct in cooperating with Bar Counsel's investigation.").

Respondent has not identified any area of his life in which his depression disabled his conduct, except for purposes of defending this action. He maintained a practice that apparently was satisfactory to the clients he retained after Mr. Cole's departure from the firm. He created computer programs to better track client matter

activity. He hired staff. He sold his house and bought a new one. He reported improved mental health to his psychiatrist by early 2013. FF ¶¶ 87-94.

The seminal case, *Kersey*, describes a lawyer whose alcoholism impacted his professional life dramatically:

> By the late 1970's, Kersey's condition had degenerated to the point where he frequently drank more than a fifth of rum in a single day. By 1984, Kersey's law practice was in complete disarray. He frequently missed court appearances or arrived late. He was unshaven, ill-dressed, and disheveled. His eyes were bloodshot and his breath smelled of alcohol or peppermint. When he was late for a court date, others would call Kersey at home to wake him or cover for his absence. When he did appear in court, often he was confused, unprepared, and could not identify his clients. Kersey had no financial record-keeping system, failed to file Criminal Justice Act vouchers, and began to commingle client funds and to use them for his own purposes. Kersey was reprimanded and censured by the D.C. Bar for Code violations. In 1982, he was twice arrested for drunk driving and was involved in another alcohol-related accident. By 1984, alcohol completely dominated Franklin Kersey's life. He had experienced over 100 blackouts. Family, friends and colleagues tried to confront Kersey with his alcoholism, but their efforts were futile.

Kersey, 520 A.2d at 324.

Subsequent authorities in the *Kersey* line have not illustrated such desperate conditions or suggested such Dickensian requirements. We emphasize that qualifying for *Kersey* mitigation does not require one be either a falling down drunk in the courtroom or, in the case of mental health, suffer evident impairment. But Respondent must adduce a preponderance of evidence that his mental condition was such that it significantly altered his judgment, not only when he was called upon to make initial decisions about the dispensation of writ refunds, but also over the next

14 months as the amount of refunds grew to over $300,000. Respondent's proof falls far short.

There is evidence that in late 2012 Respondent was especially lethargic, suffering anxiety, and that his depression was building. Even absent a diagnosed mental illness, anxiety at this time would seem an appropriate reaction to Respondent's circumstances. His practice was suffering, he was newly in charge of the firm, responsible for its future, his former partner may have been slandering the firm with rumors of demise, his marriage was becoming a nightmare. But, with the help of writ refunds, Respondent was able to address all of these issues. There were practical reasons to retain the writ refunds. Viewed purely from the vantage of the firm's problems, a logical alternative among several was to keep the money. It was a vote not only for firm survival, but, as the refund amount grew, to maintain Respondent's very comfortable income.

Respondent first visited his psychiatrist in November 2012 and reported his lethargy, anxiety and other symptoms of depression. But by his next visit in January 2013, shortly before the first writ refund checks arrived, Dr. Hodas' notes reflect improvement, which appears to have continued without significant interruption for the rest of the year and into 2014. FF ¶¶ 60-64. Her notes are entitled to particular weight because they contain first hand observations and reports which are contemporaneous with the events at issue. At no time did Respondent complain that he was unable to cope with the problems at the firm.

Respondent's expert witness, Dr. Abudabbeh, at bottom was able to opine only that Respondent suffered from depression. FF ¶¶ 77-80. She acknowledged that she could only speculate as to whether that depression disabled Respondent's judgment in dealing with writ refunds, lamely concluding that despite Respondent's partial remission from major depressive disorder, "there may have been some remnants of that depression that affected [him] at that time." Tr. 720.[17]

Dr. Candilis, who submitted both a report and testified on behalf of Disciplinary Counsel, found little to no evidence of disabling depression among Dr. Hodas' notes. *See* Tr. 809-811; FF ¶¶ 82-98. He further opined that Respondent was fully functional in the affairs of both his personal and professional life, raising his illness as a disability only for purposes of this proceeding, strongly suggesting that the disability claim was one of convenience rather than the impact of an acknowledged illness. The Committee finds Dr. Candilis' logic and analysis far more persuasive than a simple formula "depression equals disability" with implied causation, which, in essence, was the methodology of the psychiatrist (Lion), psychologist (Abudabbeh) and social worker (Denise Perme) submitted in support of Respondent's arguments for mitigation.

In this one area of his life, Respondent has resorted to using his mental illness as a defense to bad judgment. While we sympathize with Respondent's difficult

[17] Both Dr. Abudabbeh and another psychiatrist whose report was admitted in this case, Dr. Lion, participated as experts for the respondent in *In re Merritt-Bagwell*, Board Docket. No. 13-BD-031 (HC Rpt. May 28, 2014). Dr. Abudabbeh prepared a report in that case, but the hearing committee "did not find it helpful on the *Kersey* issues presented in this matter."

circumstances in January 2013, and understand he was depressed, we cannot help but believe that resort to his illness as a defense is somewhat cynical at worst, and desperate at least. Mental illness is a disability for some, but can be an excuse for others. We find that Respondent's defense falls in the latter category.

c. Respondent Needs No Rehabilitation

To satisfy the final *Kersey* factor, Respondent must show that he or she is "substantially rehabilitated." A respondent is substantially rehabilitated when she "no longer poses a threat to the public welfare" or where "that threat is manageable and may be controlled by a period of probation . . . ." *In re Appler*, 669 A.2d 731, 740 (D.C. 1995); *see also In re Robinson*, 736 A.2d 983, at 989-990 (D.C. 1999).

Because we have concluded that Respondent was not disabled by his illness, there is no need to address whether he is rehabilitated from it. In any event, even Disciplinary Counsel's expert witness, Dr. Candilis, opined that Respondent's mental illness posed no threat to the legal profession or his clients. FF ¶ 98. There is record testimony from a client and current and former employees of the firm that Respondent is a solid landlord/tenant attorney able to conduct his practice in a professional and responsible manner. There is nothing in the record other than the allegations in this action to dispute that conclusion. FF ¶¶ 99; 106-110.

8. Do "Exceptional Circumstances" Mitigate the Usual Sanction?

Disbarment is the presumed sanction for Respondents found to have intentionally misappropriated client funds, absent *Kersey* mitigation. *In re Addams*,

579 A.2d 190, 191 (D.C. 1990).[18] But the Hearing Committee concludes that there are additional potentially mitigating factors, *sui generis* to these facts, which warrant consideration by the Board and the Court of Appeals. However, a lesser sanction cannot be recommended by this Committee in the absence of stronger precedent. *See Addams*, 579 A.2d at 195 (providing that a sanction less than disbarment may be appropriate where it is "clear" that doing so would be "consistent with protection of the public and preservation of public confidence in the legal profession"). Do "exceptional circumstances" exist warranting amelioration of the usual sanction?

The Court has recognized in one case that "extraordinary circumstances" outside of the *Kersey* factors can result in a sanction short of disbarment for intentional or reckless misappropriation. *In re Hewitt*, 11 A.3d 279 (D.C. 2011). We have found no subsequent case outside the *Kersey* analysis in which the Court of Appeals has again concluded "extraordinary circumstances" defeated disbarment.

[18] In *Addams*, the Court explained:

> We now reaffirm 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. While eschewing a *per se* rule, we adhere to the presumption laid down in our prior decisions and shall regard a lesser sanction as appropriate only in extraordinary circumstances. We have found such circumstances in *In re Kersey*, 520 A.2d 321 (D.C. 1987), and may find other circumstances calling for a lesser sanction in the future. But, as a matter of course, the mitigating factors of the usual sort, see, *e.g.*, *In re Reback*, 513 A.2d 226, 233 (D.C. 1986) (*en banc*), will suffice to overcome the presumption of disbarment only if they are especially strong and, where there are aggravating factors, they substantially outweigh any aggravating factors as well. In this case, the mitigating factors fail to meet this standard.

579 A.2d 190 (D.C. 1990).

See, e.g., *In re Brown*, 112 A.3d 913 (D.C. 2015); *In re Ahaghotu*, 75 A.3d 251 (D.C. 2013); *In re Loomis*, 84 A.3d 515 (D.C. 2014).

The facts in *Hewitt* are entirely different from those here. Hewitt misappropriated funds trying to help an elderly client maintain his Medicaid status to remain in a nursing home. The respondent in *Hewitt* acted as his client's guardian in the truest sense, even at the cost of violating disciplinary rules. Personal gain was not a motive. Such is not the case here.

The reason to consider "extraordinary circumstances" here has less to do with the nature of Respondent and his dishonest conduct than the nature of the circumstances in which he found himself. These circumstances were due to the irresponsible or reckless conduct of the U.S. Marshals Service and the Superior Court of the District of Columbia. Sanctioning Respondent with disbarment while ignoring the irresponsible conduct of administrators at Superior Court and the Marshals Service impresses the Committee as so one-sided as to warrant a reduction in the sanction due to extraordinary circumstances.

After years doing what Respondent did – keep the writ refunds – the Marshals Service decided to return them for recent years through the Superior Court. The court, in an incredible instance of gross mismanagement, distributed hundreds of thousands of dollars, if not millions, to both landlords and lawyers for landlords without a word of explanation or guidance. The court could not even be bothered composing a simple cover letter stating that the funds were reimbursements for evictions that never were executed.

Nor could the Court be "burdened" by calculating how much was due annually to each landlord or lawyer for landlords and sending a single check with a list of docket numbers (and a cover letter). Instead, it imposed a drip-drip of administrative torture on the lawyers by sending checks of $165, a few at a time, and often sending them so they arrived only a few days before the check would go stale.

The record is silent on whether any other members of the D.C. Bar took the checks and deposited them for their own use, deeming the amount too small and the eviction notice too old to warrant tracking down which client deserved a refund. We suspect that the number is more than a few. But only Respondent had a former partner with a roster of clients from Respondent's firm who learned those clients were not receiving writ refunds.

As the preceding pages of this Report show, we do not discount in any way that Respondent intentionally misappropriated the writ refunds and deserves a serious sanction. And we are unaware of any statutes or rules of conduct violated by either the Marshals Service nor the Superior Court. Nevertheless, we believe that had they conducted the writ refund program more professionally by providing information and a better system of payment, it is arguably likely that, all factors considered, Respondent would have handled the reimbursement properly.

Schuman & Felts and Jonathan Schuman, Respondent, were in practice for many years without any complaints to the Bar. The record discloses that clients had no issues with Respondent. His former administrative staff testified they knew of no dishonest habits or actions of their supervisor. An associate of the firm testified

that Respondent knew his field of law and was a good instructor for a newcomer to the profession. Respondent's demeanor at the hearing was one of a man surprised and scared to be facing a tribunal judging his honesty and professionalism.

Mr. Schuman was tending to a law practice in financial difficulty which he, in effect, inherited from his father. A partner had fled the firm, taking many clients with him. Suddenly, a bag of cash in the form of $165 checks appeared. Respondent kept the money, which is a few thousand dollars at first, but it grows to over $300,000. Was he wrong? Yes. But it is difficult not to think of Respondent also as a victim of institutional recklessness.

The Board on Professional Responsibility can do nothing directly about the conduct of the U.S. Marshals Service or the Superior Court. But it could find "extraordinary circumstances" as a basis to lessen the sanction on Respondent. The Court of Appeals could affirm, noting its disapproval of the system for which it bears some responsibility.

There is no evidence that Respondent requires rehabilitation or that he could not continue his practice responsibly. He is not a threat to the public or to clients. He should receive a serious sanction. But possibly less than disbarment.

To make clear, the Committee does not see a way within the relevant precedents to recommend less than disbarment. Most reviewers may conclude that the conduct of the Marshals Service and Superior Court are irrelevant to Respondent's sanction. Logic may be on their side. But we are left with a sour taste and sense that disbarment equates more with punishment than public protection for

a man who quickly corrected his error, albeit when discovered, but nevertheless suffered four years of investigation by the Bar while institutional errors escaped criticism.

VI. RECOMMENDED SANCTION

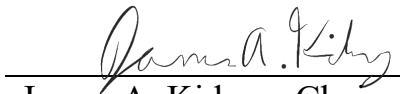
The Committee recommends disbarment for intentional misappropriation of client funds, especially in the cumulative amount of at least $257,400. However, the Committee also suggests that the Board and the Court consider that there is shared responsibility with agencies beyond the reach of this Committee which might warrant a reduced sanction.

VII. CONCLUSION

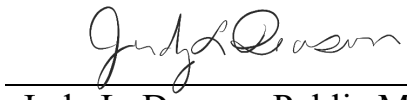
For the foregoing reasons, the Committee finds that Respondent violated Rules 1.15(a) (commingling and intentional misappropriation), 1.15(c) (notification and delivery of client funds) and 8.4(c) (conduct involving dishonesty). The Committee finds no violation of failure to keep adequate records in violation of Rule 1.15(a). With the qualifications referenced herein, the Committee recommends that

Respondent be disbarred. We further recommend that Respondent's attention be directed to the requirements of D.C. Bar R. XI, § 14, and their effect on eligibility for reinstatement. *See* D.C. Bar R. XI, § 16(c).

AD HOC HEARING COMMITTEE



James A. Kidney, Chair



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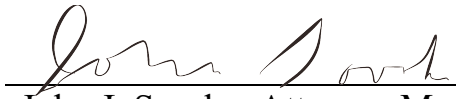

John J. Soroka, Attorney Member