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:	:	
	:	
TIMOTHY GUY SMITH	:	
	:	
Respondent.	:	Board Docket No. 18-BD-012
	:	Bar Docket No. 2010-D371
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 417768)	:	

REPORT AND RECOMMENDATION
OF THE AD HOC HEARING COMMITTEE

Respondent Timothy Guy Smith ("Smith" or "Respondent") is charged with violating Rules 1.15(a) (reckless and/or intentional misappropriation, commingling, failing to maintain complete records) and 8.4(d) of the District of Columbia Rules of Professional Conduct (the "Rules"), arising from his handling of funds subject to a special needs trust. Disciplinary Counsel contends that Respondent committed all of the charged violations and should be disbarred. Respondent admits to many of the record facts but denies that any Rule was violated or, alternatively, contends that only negligent misappropriation may be found on this record.

As set forth below, the Hearing Committee finds that Disciplinary Counsel proved by clear and convincing evidence that Respondent violated Rule 1.15(a) by commingling and recklessly misappropriating entrusted client funds; that

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

Disciplinary Counsel proved by clear and convincing evidence that Respondent failed to maintain complete records in violation of Rule 1.15(a), and that this conduct substantially interfered with the administration of justice in violation of Rule 8.4(d). The Hearing Committee recommends that Respondent be disbarred pursuant to District of Columbia Court of Appeals precedents, there being no extraordinary circumstances asserted by Respondent.

I. PROCEDURAL HISTORY

On February 1, 2018, Disciplinary Counsel served Respondent with a Specification of Charges ("Specification"); Respondent filed an Answer on February 20, 2018 ("Answer"). A hearing was held on August 8, 2018, before this Ad Hoc Hearing Committee comprised of Thomas E. Gilbertsen (Chair), Kaprice L. Gettemy-Chambers (Public Member), and Miriam Smolen (Attorney Member).[1] Respondent was present and represented by counsel. The following exhibits were received in evidence: DX 1 to 20B-3-a; RX 1–29.[2] *See* Exhibit Forms, *filed* Aug. 8, 2018; Tr. 112, 266. Disciplinary Counsel's exhibit number 2 ("DX 2") was received under seal. *See* Tr. 267.[3]

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[1] Due to unforeseen circumstances, Ms. Gettemy-Chambers was unable to participate in the Hearing Committee's decision after post-hearing briefing had closed. Ms. Gettemy-Chambers did not participate in the drafting of this Report and Recommendation. The Ad Hoc Hearing Committee proceeded with a quorum of two pursuant to Board Rule 7.12.

[2] "DX" refers to Disciplinary Counsel's exhibits. "RX" refers to Respondent's exhibits. "Stip." refers to the Joint Stipulations, *filed* August 8, 2018. "Tr." refers to the transcript of the hearing held on Aug. 8, 2018.

[3] The Board Chair granted Disciplinary Counsel's unopposed motion for a protective order to prevent the public disclosure of DX 2, the settlement agreement between the parties to the litigation

Disciplinary Counsel submitted its Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction on September 24, 2018 ("ODC Br."); Respondent filed a Response Brief and Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction on October 24, 2018 ("R. Br."). Disciplinary Counsel filed its Reply on November 7, 2018 ("ODC Reply Br.").

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 facts sought to be established").

1. Respondent is a member of the Bar of the District of Columbia Court of Appeals, having been admitted by motion on March 20, 1989 and assigned Bar number 417768. DX A; Stip. ¶ 1.

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that was placed under seal by the court that approved the terms of the settlement, so that the terms remain under seal during these disciplinary proceedings. Order, *In re Timothy Guy Smith*, Board Docket No. 18-BD-012 (BPR Aug. 14, 2018). In order to comply with the Board's protective order, substantive references to the sealed exhibit are set forth in a "Confidential Appendix to Report and Recommendation" (hereinafter "Confidential Appendix") that the Ad Hoc Hearing Committee files under seal concurrently with and as part of this Report and Recommendation. To maintain the confidentiality of DX 2, the hearing transcript and the parties' briefs are placed under seal. Disciplinary Counsel is directed to file an appropriately redacted transcript within fourteen (14) days of the issuance of this Report and Recommendation, and both parties are directed to file redacted versions of their post-hearing briefs within fourteen (14) days.

2. At all relevant times, Respondent maintained multiple accounts at Sandy Spring Bank, including his law office's Small Business Checking Account ("Operating Account" or "SBCA"), an Interest on Lawyer's Trust Account ("IOLTA"), and a T.S. Supplemental Needs Trust Account ("T.S. Trust Account") that Respondent opened in connection with the engagement at issue in this proceeding. DX 18, 19, 20; Stip. ¶ 2.

3. In November 2006, M.P. (the parent of T.S.) filed an action against a D.C. facility in the Superior Court for the District of Columbia. DX 1; Stip. ¶ 3. The relevant details of the action are discussed in the attached Confidential Appendix, ¶ 3.

4. In June 2008, the D.C. facility entered into a confidential settlement agreement with M.P. that was approved by the Superior Court by Consent Order. The relevant details of the approved settlement and provisions of the Consent Order are discussed in the attached Confidential Appendix, ¶ 4.

5. In the summer of 2008, Ms. Kechia R. Adams-Miller contacted Respondent to assist her in setting up a supplemental needs trust for T.S. Tr. 120–21. Ms. Adams-Miller apparently knew T.S.'s family in connection with a church where she was a pastor, and she knew Respondent because he had assisted the church with legal matters in the past. Tr. 120–21. Respondent met T.S.'s family and, working with another lawyer that he retained, began drafting the proposed trust instrument. Tr. 121–23.

6. In the fall of 2008, Respondent and Ms. Adams-Miller petitioned the Probate Division of the Superior Court for the District of Columbia to establish a supplemental needs trust for T.S (hereinafter the "T.S. Trust"). The relevant details of the petition are discussed in the attached Confidential Appendix, ¶ 6.

7. On September 30, 2008, Respondent opened an account at Sandy Spring Bank for the T.S. Trust and deposited funds in the T.S. Trust Account. The relevant details of the account and deposit are discussed in the attached Confidential Appendix, ¶ 7.

8. From September 30 to December 7, 2008, while his petition to establish the T.S. Trust was still pending—and before the court had approved the trust instrument—Respondent began distributing T.S. Trust funds. *See* DX 5, 18, 18A-2 to 18A-3; Tr. at 199–200. On November 5, 2008, Respondent paid himself $4,410 in legal fees from the T.S. Trust funds. Stip. ¶¶ 8, 10. Respondent did not seek or receive the court's permission to pay himself legal fees from the T.S. Trust funds. Stip. ¶¶ 8, 10. Tr. at 199–200.

9. Also during the period before the court approved the T.S. Trust petition, Respondent twice deposited T.S. Trust funds into his law practice's IOLTA account. The relevant details of the two deposits are discussed in the attached Confidential Appendix, ¶ 9.

10. Respondent testified that he had a good faith belief that the terms of Article 3 of the T.S. Trust allowed for his "retroactive" fee payments and distributions prior to the court's approval of his pending petition to establish the

trust. *See* Tr. 162–66, 200, 208–09; DX 5. Respondent understood there was no trust until the court approved it. Tr. 194–99. The Hearing Committee accordingly finds that Respondent's testimony on this point is not credible. For this, and additional reasons discussed in the attached Confidential Appendix ¶ 10, the Hearing Committee finds that Respondent's good faith belief was not objectively reasonable.

11. The Superior Court, Probate Division did not approve the T.S. Trust until December 5, 2008, with notice of same issued on December 8, 2008. DX 5. The court's order approving the T.S. Trust was virtually identical to the order that Respondent submitted in his September 2008 petition. DX 5; Stip. ¶ 11.

12. Article 8 of the T.S. Trust is titled "Trustee." DX 5 at 5-14 to 5-15 (§§ A–K). Together with Article 9 ("Powers of Trustee"), these provisions set out the terms of the trustee's service. DX 5 at 5-14 to 5-16. Article 8 identified Ms. Adams-Miller and Respondent as the trustees, and § E provided for their compensation:

> The Trustee shall be entitled to receive such reasonable compensation for work performed on behalf of the Trust in accordance with the manner of awarding compensation to Conservators in the District of Columbia.

DX 5 at 5-14.

13. Disciplinary Counsel and Respondent agree that at the time the court approved the T.S. Trust in December 2008, and for the following several months in 2009 during which Respondent acted as its trustee, conservator compensation was governed by Title 21 of the District of Columbia Code ("Fiduciary Relations and Persons with Mental Illness,") Chapter 20 ("Guardianship, Protective Proceedings, and Durable Power of Attorney"). *See* R. PFF 16; R. Br. at 27–28; ODC PFF 16.

At the time the T.S. Trust was approved in December 2008, D.C. Code § 21-2060 ("Compensation and expenses") required conservators to obtain a court order ***before*** taking any fees from estate assets. D.C. Code § 21-2060(a) (2008). This statutory requirement was incorporated into Probate Court Rule 308(a), which provides, in relevant part, that any attorney or conservator "is entitled to reasonable compensation for services rendered," and that "[c]ompensation paid from the assets of the subject of the proceeding, protected individual or ward . . . must be approved by Order of the Court before being paid."

14. Respondent maintains that the following D.C. Code sections also guided the scope of authority for a trustee's payment of legal fees:

D.C. Code § 21-2063 ("General duty of conservator"), which provides that:

> A conservator, in relation to powers conferred by this subchapter, or implicit in the title acquired by virtue of the proceeding, shall act as a fiduciary and observe the standards of care applicable to trustees[; and]

D.C. Code § 21-2070 ("Powers of conservator in administration"), which provides that:

> c) A conservator, acting reasonably in efforts to accomplish a purpose of the appointment, may act without court authorization or confirmation, to perform the following:
> . . .
> 20) Pay taxes, assessments, compensation of the conservator, and other expenses incurred in the collection, care, administration, and protection of the estate; . . . .

15. While the T.S. Trust document that Respondent submitted to the court may have adopted an ambiguous standard for awarding trustee compensation—

because sections 21-2060 and 21-2070 may be read to observe conflicting protocols for conservator compensation—Respondent testified at the hearing that he took no steps to apprise himself of the rules for compensating conservators during this period. Tr. 166–67. Instead, Respondent testified that he "did not appreciate that the manner of awarding compensation to conservators was any different than the manner of awarding compensation to trustees, which is specifically set forth in the document." Tr. 166–67. The Hearing Committee therefore finds that Respondent's testimony on this point is not credible.

16. The T.S. Trust, Article 9 § B, also authorized the trustees to exercise all powers permitted by law, providing that:

> To the extent not inconsistent with the purpose of the Trust, the Trustee may exercise all powers of a trustee permitted by District of Columbia statutory and common law as amended from time to time.

DX 5 at 5-16.

17. Article 5 of the T.S. Trust, titled "Administration of Trust," authorizes the trustee to administer the trust in various ways, including the payment of taxes (§ B), and it defines Permissible Expenditures (§ C), Impermissible Expenditures (§ D), Reimbursement (§ F), and Enforcing Rights (§ G). DX 5 at 5-7 to 5-10. Reimbursement (§ F) states:

> The Trustee may reimburse himself and others (including the legal guardian of [T.S.] and family members) for expenses that might be incurred in connection with providing services and facilities to meet the needs of [T.S.]. Such reimbursement or payment shall not be made if it shall have consequences under the law that the

creation of the Trust was designed to prevent.

DX 5 at 5-10. Enforcing Rights (§ G) states in part: "The Trustee may seek support for [T.S.] from all available public resources . . . . All related costs, including reasonable attorney's fees, shall be a proper charge to the Trust." *Id.*

Respondent's brief cites these trust provisions as sources of authority for reimbursing himself for legal fees, but these provisions clearly apply to reimbursements for payments made to third parties on behalf of T.S.—including attorneys that may need to be hired to enforce the trust beneficiary's rights—and not to the trustee's own compensation, which is specifically addressed by the T.S. Trust Article 8 § E. *See* R. Br. at 19. Although Respondent argues that he "never previously set up or managed a conservatorship," he was not a neophyte practitioner in this area. R. Br. at 26; *see* Tr. 118–19; 166. There is no evidence that Respondent believed the T.S. Trust authorized him to pay his own compensation without prior court approval. To the contrary, on three separate occasions shortly after he was removed as trustee of the T.S. Trust, Respondent admitted that it was not appropriate for him to pay himself when his conduct was raised before the court, incorporated into the Auditor-Master Report, and in response to Disciplinary Counsel's investigation. *See* DX 10 at 10-1 ("The prior trustee has agreed that he should not have paid himself fees without Court permission."); DX 13 at 13-3, 13-10 to 13-13; DX 15 at 15-3 ("I candidly acknowledge that a mistake was made in reimbursing this office for attorney fees without first obtaining the Order of the Court and upon acknowledging the error, those monies were immediately

reimbursed to the Trust.").

18. Respondent also cites section F of Article 8 of the T.S. Trust, titled "Trustee," DX 5 at 5-14, and proposes a factual finding that this provision set out terms applicable to trustee compensation, as follows:

> Subject to court review, the Trustee and others providing services for the benefit of [T.S.] pursuant to this Trust shall be entitled to reimbursement for any and all costs, charges or expenses reasonably incurred and necessary or proper for administration of the Trust, such as travel and related costs to attend to administrative duties under this trust, counsel fees, court costs, and such other expenses incurred by the relatives of [T.S.] who may be asked to undertake services on behalf of the Trustee or Trust when, in the Trustee's judgment such services and actions are reasonable and proper.

DX 5 at 5-14 to 5-15; *see* R. PFF 3. This provision relates to the reimbursement of out-of-pocket expenses incurred by trustees, and not to their compensation—which is the subject of another provision specifically addressed to trustee compensation (T.S. Trust Article 8 § E). DX 5 at 5-14. Nor is there any contemporaneous evidence that Respondent relied upon this trust provision or believed that it authorized him to pay his own fees without prior court approval. We therefore find that this provision does not support a good faith or reasonable reliance on this trust provision for the conduct at issue, if in fact Respondent did rely upon it, which the evidence indicates he did not.

19. Respondent also cites D.C. Code § 19-1308.15(a) (General powers of trustee) in support of Respondent's good faith belief that the law authorized him to

pay his own fees without prior court approval. R. Br. at 8. That statute provides that a trustee, without authorization by the court, may exercise:

> (1) Powers conferred by the terms of the trust; and
>
> (2) ***Except as limited by the terms of the trust***:
>
> > (A) All powers over the trust property which an unmarried competent owner has over individually owned property;
> >
> > (B) Any other powers appropriate to achieve the proper investment, management, and distribution of the trust property; and
> >
> > (C) Any other powers conferred by this chapter.

D.C. Code § 19-1308.15(a) (emphasis added).

The problem with relying on this statute—to either justify Respondent's conduct or cloak it in a "good faith belief" that the Code authorized Respondent's unauthorized compensation—is that by its own terms, the statute's application is "limited by the terms of the trust." D.C. Code § 19-1308.15(a)(2). Nor is there contemporaneous evidence that Respondent believed he was complying with or relying upon this Code provision when he paid himself from the T.S. Trust funds.

20. After the court approved the T.S. Trust and it became effective, Respondent did not use the T.S. Trust Account he had opened at Sandy Springs Bank in September 2008 for deposits of T.S. Trust funds. He continued depositing checks for the trust directly into his law office's SBCA, an operating account. The relevant details of checks for the trust are discussed in the attached Confidential Appendix, ¶ 20. There is therefore clear and convincing evidence that Respondent's business

account contained both the T.S. Trust's funds and Respondent's own funds at the same time.

21. On February 2–4, 18, and 24–25, 2009, the balance in Respondent's SBCA fell below the amount of previously-deposited T.S. Trust funds. DX 20A-2 at 20-14 (Sandy Spring Bank February 2009 Statement for Timothy Guy Smith's Small Business Account); Answer at ¶ 12; Stip. ¶ 13.

22. On February 26, 2009, Respondent deposited another check for the T.S. Trust into his law office's SBCA. The relevant details of check for the trust is discussed in the attached Confidential Appendix, ¶ 22. On that day, the balance in Respondent's SBCA stood at $54,760.65, an amount that included the entrusted funds and Respondent's own funds. DX 20A-2 at 20-14 and 20B-2 to 20B-2-A; Stip. ¶ 14.

23. On March 1, 2009, the mother of T.S. (M.P.), and her husband wrote to the court expressing concerns about the manner in which the T.S. Trust was being administered by Respondent, and their inability to communicate with Respondent. DX 6; Stip. ¶ 19.

24. On March 6–10, 12, and 16–23, 2009, the balance in Respondent's SBCA fell below the amount of previously deposited T.S. Trust funds. Stip. ¶ 15; DX 20A-3 at 20-18 (March 2009 Account Statement).

25. On March 24, 2009, Respondent deposited another check for the T.S. Trust into his law office SBCA. As of that date, the balance of Respondent's SBCA

fell below the total amount of T.S. Trust checks he had deposited. The relevant details are discussed in the attached Confidential Appendix, ¶ 25.

26. Respondent maintains that the entrusted funds he placed into his firm's SBCA constituted partial payments for legal services rendered and reimbursement of expenses incurred on behalf of the T.S. Trust, and therefore Respondent had a "good faith" belief the funds no longer belonged to T.S. at the time he deposited them into his own law firm accounts. R. Br. at 9; *see* Tr. at 145–47. Respondent maintains that since his legal fees were apparently undisputed by T.S. and her mother, M.P., it was appropriate to deposit directly into the firm's operating account. Tr. 145–47, 133, 152–153, 200. The Hearing Committee finds this testimony not convincing because Respondent had told T.S. and her mother, M.P., that while he would send them a monthly invoice, they should "not . . . worry about them" because they would be "taken care of out of the trust." Tr. at 133. They were unlikely to object to invoices about which Respondent had told them "up front" not to worry. *See id.*

27. Respondent maintained no separate ledger or accounting record whereby the timing of his receipt and use of T.S. Trust funds may be tracked. Respondent's receipt and use of T.S. Trust funds was reconstituted after the fact in a laborious review of bank records, available receipts, and Respondent's fee invoices conducted by the Auditor-Master of the Superior Court, Probate Division. Tr. at 70–76; *see* DX 11–13. While many of Respondent's reimbursements for expenditures on behalf of the T.S. Trust appear to have been proper, at the end of the Auditor-

Master inquiry there remained $521.39 for which Respondent could not account. DX 13 at 13-10 to 13-13.

28. At the disciplinary hearing, Respondent asserted that he maintained three firm operating accounts during this period of late 2008 through mid-2009, and that at all relevant times at least one of these accounts maintained adequate funds above any amounts that may have been owed to the T.S. Trust. RX 1–3; Tr. , 171–75, 180. Respondent also testified about his belief that the T.S. Trust document allowed him to withdraw his own fees – and make all other expenditures at issue – without further authorization by the court. Tr. 150–53, 162–66. But Respondent also acknowledged that in response to Disciplinary Counsel's investigation in 2010, Respondent admitted that "a mistake was made" by withdrawing his fees from the T.S. Trust funds without first obtaining court approval. DX 15 at 15-3 (Respondent Letter of Sept. 16, 2010); *see* Tr. 202–05. And throughout Disciplinary Counsel's investigation, while Respondent at times "took issue with" the characterization of his conduct as commingling or misappropriation, he never contended that the T.S. Trust document allowed him to take his fees without the court's prior authorization. DX 15 at 15-3; *see* Tr. 202–05. For this reason, Respondent's testimony about any contrary belief during the period at issue is not credible.

29. On May 15, 2009, M.P.'s counsel petitioned the court to amend the T.S. Trust and replace Respondent and Ms. Adams-Miller as co-trustees. DX 7; Stip. ¶ 20. Their petition cited numerous "errors in the Trust document and the quality of service offered by Mr. Smith" as grounds for amending the T.S. Trust and replacing

Respondent as a trustee. DX 7 at 7-5. That petition also asserted that Respondent was "unfit" to administer the T.S. Trust effectively because, among other stated reasons, he was (a) disbursing trust funds without adequate consultation with T.S. or her family; (b) limiting his contact with the trust beneficiary and her family; and (c) not responding promptly to repeated requests for T.S. Trust financial records. DX 7 at 7-4 to 7-5 (Petition to Amend Trust and Substitute Trustee). The Petition also asserted that Respondent's co-trustee (Kechia R. Adams-Miller) had played no significant role as co-trustee. DX 7 at 7-5.

30. On July 1, 2009, the court granted the petition and issued an order removing Respondent and Ms. Adams-Miller as co-trustees and appointing a successor trustee. The court also allowed the amendments correcting other errors in the original T.S. Trust instrument. DX 8; Stip. ¶¶ 21, 22.

31. On October 15, 2009, Respondent filed with the probate court his first and final accounting for his handling of the T.S. Trust assets. DX 9; Stip. ¶ 23. The successor trustee objected to the accounting, due in part to Respondent's failure to follow proper procedures for stating an account. DX 11 at 11-6.[4]

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[4] Respondent objected to Disciplinary Counsel's proposed finding on this fact, arguing that while the successor trustee's objection is reflected in the court's order of reference, DX 11 at 11-6, there was no testimony from the successor trustee regarding this matter nor any documents submitted from the successor trustee to support such a claim. R. Br. at 13. Respondent also argues that there is no relevance to the successor trustee's opposition in relation to the pending disciplinary action. *Id.* The Hearing Committee finds that the subject matter is relevant because it relates to the adequacy of Respondent's accounting of the T.S. Trust funds, which is directly at issue in the charge that Respondent failed to maintain adequate records of entrusted funds and that he substantially interfered with the administration of justice by, among other things, failing to so account to the court. Moreover, the cited exhibit, DX 11, is a probate court record that came into

32. On October 28, 2009, the court issued an order requiring Respondent to return the fees he paid himself from T.S. Trust funds, by October 30, 2009. The court observed that Respondent "has agreed that he should not have paid himself without Court permission." DX 10. The Auditor-Master later found that Respondent returned the $7,080 to the trust in November 2009. DX 13 at 13-40; Stip. ¶¶ 25-26. This amount was made up of the $4,410 Respondent took as legal fees before the court order creating the trust, and the balance ($2,670) which he took after the trust was created, but still without the court's permission. DX 13 at 13-3, 13-40 ; Stip. ¶¶ 10, 25-26.

33. On January 27, 2010, the probate court issued an Order of Reference appointing and directing an Auditor-Master to conduct meetings with the parties, make appropriate findings and recommendations to the court, and state the final account for Respondent as co-trustee. DX 11 at 11-1 to 11-3; Stip. ¶ 24. Approval for the final accounting, however, would follow only after the successor trustee had resolved questions relating to the disposition of the lump-sum settlement amount Respondent had invested in KH Funding, a financial institution in which Respondent was an investor and also represented as counsel on other matters. *See* DX 12 at 12-4 to 12-8, 12-12 to 12-13; DX 17 at 17-6 to 17-30 (Correspondence showing successor trustee efforts to retrieve funds from bankrupt KH Funding enterprise

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evidence at this proceeding without any objection from Respondent, and therefore constitutes a part of this record for all purposes.

continuing in 2011); DX 17 at 17-1 to 17-2 (Respondent's February 2, 2012 letter explaining his connections to KH Funding).[5]

34. On June 21, 2010, the Auditor-Master held an evidentiary hearing to examine Respondent's handling of the T.S. Trust assets during his tenure as trustee. DX 11 at 11-7; DX 12 at 12-4. Respondent, M.P., her spouse, and T.S. attended the hearing, with the successor trustee participating by telephone. *See* DX 12 at 12-3 to 12-4, 12-11. Ms. Adams-Miller did not attend and had not communicated with Respondent, T.S.'s family, or the court in many months. DX 12 at 12-3.

35. With the substantial assistance of the successor trustee and T.S.'s family, the Auditor-Master reviewed Respondent's trusteeship to determine whether an accounting of the T.S. Trust funds could be substantiated and finalized for that period of time. *See* DX 12 at 12-11 to 12-80. While Respondent submitted some invoices for his own reimbursements, listing his purchases, it was "hard [for the Auditor-Master] to see the flow going back and forth" in the accounts. Tr. 73 (Arrington). Despite Respondent's inability to produce "third party receipts"—i.e. receipts generated by the vendors of the products and services purchased by Respondent with T.S.'s funds—this laborious process enabled the Auditor-Master

[5] Respondent objects and moves to strike facts related to his investment of the T.S. Trust funds into KH Funding. R. Br. at 14. There are no disciplinary charges directed at Respondent's investment of the T.S. Trust funds into KH Funding. Evidence about that matter is included here to support the chronology of events, the cited facts set forth in court records, Respondent's own letters to Disciplinary Counsel, and other exhibits that were admitted into evidence without objection from Respondent.

to substantiate expenditures corroborated by the family, as well as the payment for the bond. *See* Tr. 70–76 (Arrington).[6]

36. On July 30, 2010, the Auditor-Master submitted its report to the court. Stip. ¶ 25; *see* DX 13 at 13-1, 13-14.

37. The Auditor-Master Report concluded that Respondent engaged in commingling and misappropriation during his nine-month tenure as trustee of the T.S. Trust. DX 13 at 13-11 to 13-12; *see* DX 4, DX 8. The Auditor-Master included Bar Counsel Wallace E. Shipp, Jr. on the service list of the report. DX 13 at 13-15. The Auditor-Master found Respondent had failed to maintain required and adequate records of his handling of estate assets: "Because of [Respondent's] failure to maintain adequate records, the expenditures that he made from his funds do not correspond to transfers from the trust account." DX 13 at 13-10 ¶ 56; *see* Tr. 70–74. Respondent had an opportunity to object in probate court to any or all aspects, findings and conclusions of the Auditor-Master's Report, but did not do so. While

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[6] Without objecting to the underlying factual finding, Respondent objects to the use of or reference to a "laborious process" in connection with the Auditor-Master's proceeding. R. Br. at 15. Respondent's objection is frivolous. Although Respondent's tenure as a trustee of the T.S. Trust lasted only nine (9) months, the Auditor-Master's report—an exhibit admitted into evidence without objection by Respondent—demonstrates that (a) a hearing in that proceeding was postponed to accommodate Respondent; (b) the final accounting was delayed for over a year pending recovery of Respondent's $621,000 investment of T.S. Trust funds into KH Funding; (c) Respondent's expenditures for the T.S. Trust did not correspond to his transfers from the trust account; (d) Respondent lacked sufficient documentation for numerous expenditures, which were only allowed after T.S.'s family or the successor trustee supported the claimed expenses; (e) Respondent was assessed $21,932.34 in unapproved transactions, for which $21,401.95 was credited back to him with the assistance of T.S.'s family and successor trustee, and after he reimbursed $7,080 in unapproved legal fees to the trust; and (f) a difference of $521.39 remained unaccounted for at the conclusion of the Auditor-Master's proceeding. DX 13. "Laborious process" fairly characterizes the foregoing.

not relying on the Auditor-Master's Report for the truth of the matter asserted, or in an issue preclusive way, the Hearing Committee affords it the weight it deserves.[7]

38. The "UE" (unapproved transactions) section of the Auditor-Master's Report identified $21,923.34 of claimed expenses for the T.S. Trust which could not be verified by Respondent's records, although Respondent had acted as trustee of the trust for only nine months. DX 13 at 13-9, 13-38; Tr. 71-73, 81; *see* DX 4; DX 8. Respondent failed to provide receipts for certain expenditures, and the documents he did produce did not permit the Auditor-Master to account for the validity of all claimed expenses. Tr. 73. The Auditor-Master credited certain of Respondent's claimed expenditures only after they were confirmed by the family. Tr. 73–74; DX 12 at 12-32 to 12-42. At the end of the investigation, the Auditor-Master concluded that Respondent still could not account for $521.39 of the T.S. Trust funds, and that he failed to maintain records of trust property. DX 13 at 13-11.

39. The Auditor-Master confirmed the court's own finding that on November 5, 2008, Respondent paid himself $7,080 in legal fees without the court's approval. DX 13 at 13-3. The court's October 28, 2009 order recorded Respondent's admission that he "agreed that he should not have paid himself without

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[7] Respondent objects to Disciplinary Counsel's reliance upon and citations about the Auditor-Master Report conclusions that Respondent commingled and misappropriated T.S. Trust funds. R. Br. at 16–18. Respondent argues that the Auditor-Master was not tasked with considering whether Respondent engaged in misappropriation or commingling. *Id.* Respondent's argument goes to the weight of this evidence, not its admissibility. Pursuant to Board Rule 11.3, the Hearing Committee shall receive relevant evidence, and "shall determine the weight and significance to be accorded all items of evidence." The content of the Auditor-Master Report is among the relevant evidence that the Hearing Committee will consider in deciding whether Disciplinary Counsel has proven the charged Rule violations by clear and convincing evidence.

court permission." DX 10 at 10-1. Respondent took $4,410 in fees before the court order creating the trust. Stip. ¶ 10. Accordingly, he took the balance ($2,670) after the trust was created, but still without seeking the court's permission.

40. The Auditor-Master found that Respondent engaged in commingling because, without court authority and without any separate bookkeeping or accounting records, Respondent routinely deposited into his law firm's operating accounts checks made payable to the T.S. Trust. Tr. 83, 102; DX 13 at 13-11. The Auditor-Master concluded that Respondent engaged in misappropriation because he took his legal fees from the T.S. Trust's assets without the court's prior permission and before the trust had even been created by the court. Tr. 83–85; DX 13 at 13-11. The Hearing Committee does not rely on these findings as being conclusive of the commingling and misappropriation issues presented here, but the Auditor-Master's inquiry, findings and report have some relevance to the charge that Respondent failed to maintain adequate records, seriously interfered with the administration of justice, and also to the extent that Respondent did not object to the findings of the Auditor-Master's report which triggered Disciplinary Counsel's immediate investigation.

41. As of the date of the Auditor-Master's report (July 30, 2010), Respondent had returned to the trust the $7,080.00 in legal fees he had previously taken. DX 13 at 13-10. On August 5, 2010, he reimbursed the trust the $561.47 in unaccounted expenses he took from trust assets, plus interest. RX 27; *see* DX 13 at 13-12.

42. Although Respondent has no prior history of disciplinary investigations or actions by the Office of Disciplinary Counsel of the District of Columbia since his 1989 admission, he testified about being the subject of prior discipline and receiving an informal admonition by Maryland bar authorities in a matter that involved client authorizations for disbursements. Tr. 210-211.

III. CONCLUSIONS OF LAW

A. Motion to Dismiss

Respondent requested dismissal of these proceedings in his Answer to the Specification of Charges after asserting that his conduct did not violate any of the charged Rules, but he did not argue any grounds for dismissal in either his Answer or his post-hearing brief. *See* Answer at 5. The Hearing Committee is not authorized to rule on a motion to dismiss, but instead includes a recommended disposition of the motion in its report to the Board, after hearing all of the evidence. *See* Board Rule 7.16(a); *In re Ontell*, 593 A.2d 1038, 1040 (D.C. 1991). Once a Contact Member has approved a petition, "the underlying purposes of the Board require that we proceed directly to a hearing on the merits rather than being detoured into questions of pleading and form." *In re Stanton*, 470 A.2d 281, 285 (D.C. 1983) (per curiam) (appended Board Report). Pursuant to Board Rule 7.16(a), we address Respondent's motion to dismiss. Because the majority of the Hearing Committee finds that Respondent violated Rule 1.15(a) (misappropriation), and because each of the Specification of Charges' other alleged Rule violations set forth sufficient facts upon which the requested relief could have been granted if proven, we recommend

that the Board deny the motion to dismiss.

B. Rule Violations

Disciplinary Counsel asserts that by the foregoing conduct, Respondent engaged in intentional and/or reckless misappropriation, commingling, incomplete recordkeeping, and conduct that seriously interfered with the administration of justice. Specification ¶ 27(a)-(d). Respondent asserts he did not violate any Rules, or alternatively that his conduct "at most" constitutes simple negligence. R. Br. at 42. For the reasons set forth below, we unanimously conclude that Respondent engaged in commingling and reckless misappropriation, violated his ethical duty to maintain complete records, and that Respondent's conduct seriously interfered with the administration of justice.

1. Disciplinary Counsel Proved by Clear And Convincing Evidence That Respondent Violated Rule 1.15(a) by Commingling and Recklessly Misappropriating Entrusted Funds.

There can be no genuine dispute that Respondent commingled and misappropriated T.S. Trust funds when he paid his own fees from the entrusted funds before the court had approved the trust instrument and without seeking the court's prior permission to do so. FF 8. Once the trust was approved, Respondent continued to pay his own fees from T.S. Trust funds without seeking or obtaining prior court approval, as required. FF 39. Only a few months later, Respondent admitted to the court that he should not have paid himself without court permission. FF 17; DX 10. Throughout his brief nine-month tenure as the T.S. Trust trustee, Respondent routinely deposited checks for the trust directly into his firm's operating accounts,

intermingling those entrusted funds with his own and failing to maintain a separate account that would demonstrate who owned those funds. FF 20–22, 25, 27, 37. Respondent demonstrated at the hearing that on many of the occasions when he deposited T.S. Trust checks into his firm's operating accounts, he was already owed reimbursement for earlier expenditures made on behalf of T.S. FF 26–28. That showing demonstrates that on those occasions, the funds at issue belonged to Respondent by the time he deposited them. Under D.C. Code § 21-2070(c)(20), Respondent was allowed to reimburse himself for expenses incurred in the administration of the trust without prior court approval. FF 14. But despite Respondent's showing, Disciplinary Counsel proved the commingling and misappropriation charges based on clear and convincing evidence that (1) Respondent could not account for the $521.39 shortfall in the T.S. Trust funds during the Auditor-Master's inquiry or this disciplinary proceeding; and (2) Respondent paid his own legal fees from the T.S. Trust without prior court approval. FF 17, 26, 27–28, 32. It therefore follows that at the time he deposited these latter funds into his firm operating accounts, commingling occurred because that money represented entrusted funds which did not belong to Respondent.

At the hearing, Respondent advanced several interpretations of different legal standards governing the conduct of trustees and conservators in probate court matters. FF 14, 16–19. But these other legal standards are largely inapposite, and the record is clear that Respondent never had them in mind while administering the T.S. Trust. For example, the Auditor-Master found that Respondent commingled

and misappropriated T.S. Trust funds in a report that was served upon Respondent, the court and the Office of Disciplinary Counsel. FF 37; DX 13. Respondent never objected to the report, although he had the opportunity to do so. In response to the Auditor-Master's Report, Disciplinary Counsel immediately initiated its own investigation into Respondent's handling of the T.S. Trust funds. In response to that investigation, Respondent again admitted that his unauthorized fee payments were "a mistake" and that he "acknowledged" the error. FF 28. These contemporaneous admissions belie Respondent's assertions that he was acting with a good faith belief that his unauthorized fee payments were legitimate under the trust document or District of Columbia law.

We therefore conclude that while Respondent's conduct does not rise to the level of intentional wrongdoing, his repeated lack of compliance with court orders in administering the T.S. Trust funds and misappropriation of legal fees must be deemed reckless. The record simply cannot support the requisite "good faith belief" on which a negligence conclusion must be based.

a. Disciplinary Counsel Proved by Clear and Convincing Evidence That Respondent Commingled Entrusted Funds in Violation of Rule 1.15(a).

Rule 1.15 mandates, in pertinent part, that:

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

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) (per curiam) (appended Board Report). Thus, commingling is established "when a client's money is intermingled with that of his attorney and its separate identity is lost so that it may be used for the attorney's personal expenses or subjected to the claims of its creditors." *In re Hessler*, 549 A.2d 700, 707 (D.C. 1988) (appended Board Report); *see also In re Nave*, 197 A.3d 511 (D.C. 2018); *Moore*, 704 A.2d at 1192 ("Commingling occurs when an attorney fails to hold entrusted funds in a special account, separate from his own funds."); *In re Malalah*, Board Docket No. 12-BD-038 at 13–15 (BPR Dec. 31, 2013) (appended HC Rpt.), *recommendation adopted where no exceptions filed*, 102 A.3d 293 (D.C. 2014) (per curiam).

To establish commingling, the entrusted and non-entrusted funds must simply 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).

Although Respondent deposited the very first T.S. Trust checks into the T.S. Trust Account he had opened in September 2008, thereafter Respondent ignored the trust account and deposited his client's trust funds directly into his own law firm accounts containing Respondent's other funds. *See* FF 7, 20; *see* Tr. at 172–75 (describing types of funds in Respondent's different bank accounts).

Respondent argues that he placed the funds into his firm accounts "as payment for expenses incurred and for legal fees earned," and claims a good faith and reasonable belief that he had the authority to do so. R. Br. at 35. In reply, Disciplinary Counsel points out that Respondent's argument actually constitutes an admission of commingling. ODC Reply Br. at 9; *see* R. Br. at 35.

The record leaves no room for serious argument: Respondent indiscriminately deposited T.S. Trust funds into his own law firm bank accounts, such that neither bank records nor any ledger of Respondent's own—for he kept none—identified which funds belonged to the T.S. Trust and which belonged to Respondent's law practice. In his briefing and at the hearing, Respondent attempted to show by invoices and bank statements that the T.S. Trust often owed him reimbursement for expenses incurred on behalf of T.S., and for his own legal fees, at each moment he deposited a check for the T.S. Trust into his law firm bank accounts. FF 26–27; R. Br. at 35–37. But after considering all of the evidence, Disciplinary Counsel has proven by clear and convincing evidence that Respondent was not entitled to treat all of those funds as his own because (i) Respondent was not entitled to draw legal fees from the trust funds without prior court approval, (ii) Respondent was not allowed to make ***any*** disbursements—even for the trust beneficiary T.S.—before the probate court approved the trust instrument in December 2008; and (iii) Respondent was ultimately unable to account for all of the trust funds he deposited into his firm's bank accounts during his nine-month tenure as Trustee.

This case presents an object lesson about why commingling is prohibited. Respondent served as trustee for a relatively short nine-month period, and soon after he was removed, he could not properly account to the probate court for his handling of T.S. Trust funds. *See* FF 35; DX 4; DX 8. This failure to properly account required the probate court to appoint a special Auditor-Master to examine the available records, conduct a hearing, and attempt to reconcile Respondent's trust accounts. FF 33–35. This proved futile because, even after T.S. and her family assisted the Auditor-Master by vouching for many of Respondent's unsubstantiated expenditures, there remained funds for which Respondent could not account—then or now. FF 27, 38.

A conclusion that Respondent committed commingling in violation of Rule 1.15(a) is inescapable on this record.

b. Disciplinary Counsel Proved by Clear and Convincing Evidence That Respondent's Conduct Constituted Reckless Misappropriation in Violation of Rule 1.15(a).

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)) (second alteration added).

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. When entrusted funds are deposited into an attorney's operating account, misappropriation occurs when the balance in that account falls below the amount held in trust. *In re Micheel*, 610 A.2d 231, 233 (D.C. 1992). 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)). Further, the performance of compensable legal services does not excuse taking a fee from funds that are not properly available for that purpose. *See, e.g.*, *In re Bach*, 966 A.2d 350, 350–52 (D.C. 2009) (unauthorized use element satisfied where the respondent took estate funds to pay his fee without prior court approval, even though the probate court later approved the amounts); *In re Berryman*, 764 A.2d 760, 768, 773–74 (D.C. 2000) (unauthorized use element satisfied even though the probate court ruled that the respondent had earned the fee she had taken without prior court approval).

Second, Disciplinary Counsel must establish whether the misappropriation was intentional, reckless, or negligent. *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 occurs when the attorney's conduct demonstrates an "unacceptable disregard for the safety and welfare of entrusted funds," and its hallmarks include:

> [I]ndiscriminate 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.

In re Ahaghotu, 75 A.3d 251, 256 (D.C. 2013) (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.

Where Disciplinary Counsel establishes the first element of misappropriation (unauthorized use), but fails to establish that the misappropriation was intentional or

reckless, then nothing more than simple negligence has been shown. *Anderson*, 778 A.2d at 338 (quoting *In re Ray*, 675 A.2d 1381, 1388 (D.C. 1996)). "Negligent misappropriation is an attorney's non-intentional, non-deliberate, non-reckless misuse of entrusted funds or an attorney's non-intentional, non-deliberate, non-reckless failure to retain the proper balance of entrusted funds." *In re Abbey*, 169 A.3d 865, 872 (D.C. 2017) (citations omitted). The hallmarks of negligent misappropriation "include a good-faith, genuine, or sincere but erroneous belief that entrusted funds have properly been paid; and an honest or inadvertent but mistaken belief that entrusted funds have been properly safeguarded." *Id.*; *see also Anderson*, 778 A.2d at 339 (providing that negligent misappropriation occurs where "the unauthorized use was inadvertent or the result of simple negligence" (citations omitted)).

Negligent misappropriation may also occur where a respondent has a good faith but mistaken belief as to a question of law or fact. But a respondent's claimed subjective, but erroneous, belief that he or she was authorized to withdraw entrusted funds is not alone sufficient to make the misappropriation the result of simple negligence. Rather, a respondent's claimed mistake of law or fact must have also been "objectively reasonable." *In re Pierson*, 690 A.2d 941, 949 (D.C. 1997) (citing *In re Evans*, 578 A.2d 1141 (D.C. 1990) (per curiam)); *see, e.g.*, *Ray*, 675 A.2d 1386–87 (inexperienced attorney was unaware that he had to obtain court approval); *In re Travers*, 764 A.2d 242, 249–50 (D.C. 2000) (negligent misappropriation because he "sincerely believed" that the approval requirement did not apply to him).

Disciplinary Counsel's case distinguishes Respondent's conduct between pre-trust conduct (before the court approved the T.S. Trust) and post-trust conduct during the remaining six months before Respondent was removed as trustee.

i. Respondent's Pre-Trust Conduct.

Prior to the T.S. Trust's creation on December 5, 2008, Respondent misappropriated funds on November 5, 2008, when he took $4,410 from trust funds for his attorney's fees, without prior court approval as required by Probate Rule 308 and Article 8 § E of the pending Trust document. *See* FF 8, 12-13. When the probate court challenged this transaction, Respondent admitted he had no authority to pay himself without prior court approval. FF 32, 39. Over the following several months in the Auditor-Master proceeding and again in response to Disciplinary Counsel's investigation, Respondent admitted that his self-payment transactions were not authorized. *Id*.

Respondent advances several *post hoc* rationalizations asserting that he harbored a "good faith belief" that the T.S. Trust instrument or governing law allowed him to pay his own fees as they were incurred, and seek court approval later with periodic accountings submitted to the court. FF 17–19. None of these arguments suffice to excuse Respondent helping himself to the entrusted funds before the court created the trust because, regardless of what other rules and statutes may have provided, the court had already expressly prohibited pre-trust withdrawals and distributions of the type Respondent was routinely making before his T.S. Trust

petition was granted. FF 13; *see Pierson*, 690 A.2d at 947 n.18 (authority to divert entrusted funds cannot be granted retroactively).

Respondent argues that his conduct was merely negligent because (1) neither T.S. nor her mother M.P. objected to his invoices for legal fees; (2) he had a "good faith belief that the Trust would be approved by the Court in short order, which allowed for the payment of attorney's fees incurred"; (3) *Pierson* is inapposite because Respondent acted solely for the benefit of T.S.; (4) any actions Respondent took before the court approved the T.S. Trust were not in the capacity of T.S.'s attorney, which renders the ethical charges factually and legally invalid; and (5) D.C. Code § 19-1303.05 (Appointment of representative) allows "a trustee to act prior to official approval when doing so at the behest of the minor or incapacitated person's guardian." R. Br. at 23–26.

Because none of the foregoing supports authority for Respondent's pre-trust disbursements and legal fee payments, reliance on any or all of these arguments fails to establish an objectively reasonable "good faith belief" that Respondent's pre-trust conduct was permissible. Respondent's pre-trust distributions to himself and to T.S. were plainly prohibited by Probate Rule 308 and Article 8 § E of the pending Trust document. *See also* Confidential Appendix. This fact alone dispenses with Respondent's attempted defense of his pre-trust conduct. In *Pierson*, the Court of Appeals confirmed that a lawyer cannot rely on a belief in future authorization to justify using entrusted funds (690 A.2d at 949).

Nor does Respondent's claim to a subjective "good faith belief" in the validity of his pre-trust payments have any evidentiary support. No contemporaneous evidence supports Respondent's reliance on any of the arguments asserted. The record portrays an attorney who simply began disbursing funds—to himself, the beneficiary and others—without further inquiry and immediately upon coming into possession of the funds at issue. Such a record bespeaks a mind-set of recklessness or intentionality, not mere negligence.

ii. Respondent's Post-Trust Conduct.

After the T.S. Trust was approved by the Probate Court in early December 2008, Respondent deposited T.S. Trust checks directly into his law office's operating account and, on several occasions thereafter, the balance in that account fell below the amount that Respondent was required to hold for the estate. FF 20–22, 24–25. Respondent contends that the combined balance of his law firm's operating, IOLTA and trust accounts did not fall below the amount of the T.S. Trust checks deposited into his operating accounts. These arguments are simply unavailing because under *In re Pels* it is well-understood law that an attorney cannot defend against misappropriation claims on the ground that other accounts and assets remained sufficient to make the funds' beneficial owner whole. 653 A.2d 388, 394 (D.C. 1995). And while Respondent may have been owed reimbursement for trust expenses during most of his short tenure as trustee, there were $521.39 in T.S. Trust assets for which Respondent could not account, and on March 31, 2009, the balance

in his firm operating account—in which the T.S. Trust funds had been deposited—fell into a negative balance of "-$1,859.44." FF 24, 27; DX 20A-3.

Respondent also argues that he "never previously set up or managed a conservatorship," but nor was he a neophyte practitioner in this area. FF 17. Respondent had been practicing law in this subject matter for many years, had been a trustee on prior matters, and he had functioned as a chief financial officer in business. Respondent was a sophisticated, veteran practitioner by the time of these events, and it is therefore impossible to credit him with a beginner's mindset that might contribute to "good faith beliefs" held by a less-experienced lawyer.

Respondent attempts to avoid the T.S. Trust provision that applies directly to trustee compensation, and sow confusion about whether other terms in the trust instrument create ambiguity. As an initial matter, Respondent's approach runs contrary to established rules of contract and statutory construction holding that a specifically applicable provision must control over more general clauses when potentially inconsistent provisions are found in the same legal instrument. *See e.g.*, *Connerton, Ray & Simon v. Simon*, 791 A.2d 86, 88 (D.C. 2002). And in most instances, these other provisions clearly apply to situations where the trustee is paying *others* who provide services to the beneficiary. *See* FF 17. Respondent's reliance on perceived ambiguities in the governing statutes, probate rules, and the trust instrument is too convenient, and ultimately unavailing, because Respondent drafted and submitted the T.S. Trust document and should not now be seen exploiting ambiguities in the document. The T.S. Trust Article 8 § E applies directly

to trustee compensation and adopts the standard then-applicable to conservators—a standard that required prior court approval. FF 12–13. Respondent never apprised himself of that standard, and soon after being removed as trustee he admitted to the court, the Auditor-Master and Disciplinary Counsel that drawing his own fees from trust funds without prior court approval was indeed improper. FF 17. Respondent never cited to any other T.S. Trust provisions to support his practice: he candidly admitted it was a mistake. It is far too late in the day for Respondent to conjure new interpretations of his own handiwork (the T.S. Trust) to absolve himself from previously-admitted wrongdoing.

Respondent also argues that the "ultimate purpose" of the T.S. Trust should control this question, citing D.C. Code § 21-2001, and asserts that the purpose of the T.S. Trust was to benefit the beneficiary. Respondent argues that all of his conduct necessarily benefited T.S., as he is not accused of embezzlement or self-dealing. Relatedly, Respondent argues that the intent of the parties was for the trustee to be able to take funds without prior court approval under many different circumstances, and therefore his actions could not constitute misappropriation. R. Br. at 30–32.

Again, these arguments fall flat because they directly contradict the T.S. Trust's specific provision addressing trustee compensation. The judge who signed the order approving the T.S. Trust interpreted the trust instrument as requiring Respondent to seek and obtain court approval for his fees. Respondent admitted as much on many occasions before this matter came on for hearing in August 2018, so his argument about the trust parties having some contrary intent is simply not

credible, lacks any contemporaneous support, and runs counter to accepted rules of contract construction that give effect to specifically applicable provisions over clauses having more general scope. *Connerton*, 791 A.2d at 88.

Respondent distinguishes *Pels* on grounds that the attorney in that case maintained funds in his *personal* savings account, whereas Respondent placed entrusted client funds in a *firm* operating account. R. Br. at 35 (emphasis in original). Respondent misreads *Pels*, for that case indeed involved the deposit of entrusted funds into a lawyer's operating account. 653 A.2d at 395. Nor would *Pels* be inapplicable if Respondent has misdirected entrusted funds to any other account. As that Court held:

> We reject respondent's argument that because he simultaneously held thousands of dollars in the companion savings account, misappropriation did not occur when the operating account fell below the required balance. That argument is essentially no different than the one rejected in *In re Burton*, 472 A.2d 831 (D.C.), *cert. denied*, 469 U.S. 1071, 105 S.Ct. 563, 83 L.Ed.2d 504 (1984), in which the attorney asserted that by maintaining "sufficient funds [other than in a trust account] to satisfy the requirement of the trust," he complied with the duty to segregate client funds. *Id.* at 838. In adopting the Board's reasoning, we implicitly agreed with its conclusion that "even if respondent did have sufficient cash on hand to cover the shortages, it would not excuse his breach of the trust or his unauthorized use of trust funds." *Id.*
>
> . . . .
>
> . . . ***In short, a trust account is a trust account, not one dependent on discretionary infusions of money from another source.***

Pels, 653 A.2d at 394 (emphasis added).

The record demonstrates by clear and convincing evidence that Respondent engaged in misappropriation both before and after the T.S. Trust was approved.

Respondent paid his own legal fees from entrusted funds without seeking or obtaining the requisite court approval. FF 8, 26. And he routinely ignored the trust account he opened for T.S.'s benefit, repeatedly depositing T.S. Trust checks directly into his own operating accounts, the balance of which dropped below the amount of entrusted T.S. Trust funds many times. FF 20–22, 24–25. While it appears that Respondent was owed reimbursements from the T.S. Trust on some of those occasions, after being removed as trustee the Respondent was unable to submit his own satisfactory accounting to the court and even after the Auditor-Master's inquiry, there remained a significant amount of unaccounted-for funds from Respondent's tenure as trustee. FF 38. The inference of misappropriation "may be drawn from an attorney's unexplained (or inadequately explained) taking of a client's funds without authorization for a significant period of time and without keeping proper records." *In re Ingram*, 584 A.2d 602, 603 (D.C. 1991) (per curiam) (citing *In re Thompson,* 579 A.2d 218, 222 (D.C. 1990)). This record cannot support a finding of mere negligence.

Disciplinary Counsel argues that Respondent's misappropriation was reckless or intentional because he: (1) deliberately and intentionally treated funds designated for the T.S. Trust as if they were his own; (2) placed funds directly into his operating account and drew upon them as if they were his own, resulting in numerous occasions when his account fell below the amount due his clients; (3) indiscriminately commingled entrusted funds over the entire period of his stewardship of the trust; (4) reimbursed himself from the entrusted funds without the

permission of the court, allowing him engage in the sort of self-help that the conservator rules were designed to prevent; and (5) as a fiduciary, Respondent's ignorance of the statutes governing conservator compensation—a standard Respondent himself adopted in the T.S. Trust instrument—further evidences recklessness because he undertook to manage a vulnerable person's limited resources without apprising himself of his duties and responsibilities as a conservator under the T.S. Trust. ODC Br. at 15, 19–20.

Respondent argues that if misappropriation is found, it was no more than "simple negligence" based on Respondent's "good faith belief" that he was authorized to deduct his own fees from entrusted funds without prior court approval. And under Respondent's new, albeit strained, reading of the applicable statutes, he claims that he was indeed entitled to take his fees from entrusted funds without prior court approval, citing D.C. Code §21-2070. R. Br. at 42–45. Respondent argues that to determine recklessness, Disciplinary Counsel must prove by clear and convincing evidence that Respondent purposely dealt with and used funds owed to T.S. as his own, or else that he consciously disregarded the risk that those funds would be used for unauthorized purposes. R. Br. at 44 (citing *Anderson*, 778 A.2d at 339). Respondent argues that he placed trust funds in his firm's operating accounts based on a "good faith belief" that had the authority to do so, and the funds were used as partial payments for outstanding balances. Respondent maintains that this practice was not "indiscriminate," but done "after deliberation" and with the purpose of bringing the T.S. Trust out of arrears for fees he invoiced to T.S. The

funds were never used for unauthorized purposes, according to Respondent, and never to the benefit of the Respondent or anyone other than T.S. R. Br. at 42-45.

In reply, Disciplinary Counsel argues that Respondent's pre-trust misappropriation was intentional because Respondent helped himself to $4,410 in legal fees and distributed entrusted funds to several others—including for items that T.S. asked him to purchase—before the trust was approved by the court. ODC Reply Br. at 4, 12. All of these distributions were unauthorized under Probate Rule 308, and Article 8 § E of the Trust document. These pre-trust distributions were also unauthorized for the reasons set forth in the Confidential Appendix. *See infra* pp. 58-59. Disciplinary Counsel also argues that Respondent's post-trust misappropriation was at least reckless because he demonstrated "a conscious indifference to the consequences of his behavior for the security of the funds" by commingling funds belonging to T.S. indiscriminately with his own before and throughout his tenure as the trustee, and by helping himself to the balance of his claimed legal fees without first obtaining approval from the court, and by remaining ignorant of the requirement that he must obtain the court's permission before taking his fees, does not negate the recklessness of his actions. ODC Reply Br. at 13 (quoting *Anderson*, 778 A.2d at 339).

Based on the foregoing and for the reasons set forth in the Confidential Appendix (*infra* pp. 58-59), we conclude that while Respondent's misappropriation may not rise to the level of intentional ethical violations, it readily meets the recklessness standard because Respondent demonstrated a conscious indifference to

the consequences of his behavior for the security of the entrust funds throughout his tenure representing T.S. and acting as her trustee. Respondent's misappropriation conduct was not an isolated incident, but played out repeatedly until T.S. and her mother, M.P., asked the probate court to remove Respondent as trustee.

2. Disciplinary Counsel Proved by Clear and Convincing Evidence That Respondent Failed to Maintain Adequate Records in Violation of Rule 1.15(a).

Rule 1.15(a) requires lawyers to keep "[c]omplete records of . . . account funds and other property" and preserve them "for a period of five years after termination of the representation." *See In re Edwards*, 990 A.2d 501, 522 (D.C. 2010) (appended Board Report). Disciplinary Counsel charged Respondent with failure to maintain complete records related to his handling of T.S. Trust funds, based on Respondent's failure to provide sufficient records in his accounting to the probate court and in the subsequent Auditor-Master's inquiry, and because Respondent could not account for $521.39 in expenditures. Specification ¶ 21–25, 27(c).

The *Edwards* decision explained that "[f]inancial records are complete only when an attorney's documents are 'sufficient to demonstrate [the attorney's] compliance with his ethical duties.'" 990 A.2d at 522 (quoting *In re Clower,* 831 A.2d 1030, 1034 (D.C. 2003) (per curiam) (finding Rule 1.15(a) and § 19(f) violations)) (second alteration in original). 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." *Edwards*, 990 A.2d at

522 (quoting *Clower*, 831 A.2d at 1034); *see also Pels*, 653 A.2d at 396 (finding Rule 1.15(a) violation when attorney showed a "pervasive failure" to maintain contemporaneous records accounting for the flow of client funds within various bank accounts). Thus, "[t]he records themselves should allow for a complete audit even if the attorney or client is not available." *Edwards*, 990 A.2d at 522.

Disciplinary Counsel argues that during the Auditor-Master's examination of the T.S. Trust, Respondent could not produce records to adequately explain the movement of entrusted funds in his several accounts nor produce records to explain certain expenditures. ODC Br. at 16; *see* FF 35. In fact, the Auditor-Master was required to confirm those expenditures by examining T.S. and her family at a hearing, but still could not account for $521.39 at the end of that proceeding. FF 34–35, 38.

Respondent argues that had he been provided with notice of the Rule violation consequences for not producing such documents, he would have located and provided them to the Auditor-Master. R. Br. at 39. Respondent argues that no such notice was provided, the shortfall amount was reimbursed immediately, and Respondent reasonably thought the missing receipts was a non-issue because there was no testimony or documentation presented to the Auditor-Master that any purchases by Respondent were for any purpose other than to benefit T.S. R. Br. at 39–40. Respondent argues that Disciplinary Counsel lacks any record to present in this disciplinary matter about what was or was not presented to the Auditor-Master in order to even consider the allegations. R. Br. at 40. Moreover, according to

Respondent, the Auditor-Master's findings were based on a preponderance of the evidence standard, not the clear and convincing evidence standard required in the disciplinary system. R. Br. at 39–40 (citing DX 11-14).

Disciplinary Counsel replies that Respondent could not find those documents in 2010, or he would have produced them to the Auditor-Master as he was duty-bound to do so. ODC Reply Br. at 10–11. Further, Respondent knew that the finding that he did not have receipts had significance for the disciplinary system, because the Auditor-Master referred him for a disciplinary investigation. ODC Reply Br. at 11; DX 13 at 13-5. While the Auditor-Master's referral is not "dispositive" of his record-keeping deficiencies, the transcript of the hearing before the Auditor-Master provides clear and convincing evidence that Respondent failed to meet his obligations to keep records that would "tell the story" of how he protected the funds entrusted to him. *See Clower*, 831 A.2d at 1034; *see also* Comment [2] to Rule 1.15(a); *In re Burka,* 423 A.2d 181, 182–83, 186–87 (D.C. 2003) (clear and convincing evidence that attorney violated DR 9-102(B)(3) (failure to maintain complete records and render appropriate accounts of client funds) by, among other things, failing to "render appropriate accounts" to an Auditor-Master); DX 12.

We conclude that the record clearly and convincingly establishes that Respondent failed to keep adequate records of his handling of T.S. Trust funds. The record demonstrates that Respondent served as trustee for only nine months, yet throughout this period he never maintained a separate ledger of accounts for the T.S. Trust. FF 6, 27, 30. Shortly after Respondent was removed as trustee at the request

of T.S. and her family, he was unable to submit a satisfactory accounting to the probate court. *See* FF 31–32. Thereafter, the Auditor-Master's inquiry was unable to account for Respondent's handling of T.S. Trust funds without substantial assistance from the beneficiary's family and the successor trustee. FF 35. Even after that process, there remained funds for which Respondent could not account. FF 38. The Hearing Committee concludes that Respondent's pervasive failure to keep timely, contemporaneous accounts for the T.S. Trust—and the insufficiency of his records to allow for a complete audit of his brief tenure as trustee—squarely meets the *Edwards* test.

3. Disciplinary Counsel Proved by Clear and Convincing Evidence That Respondent Seriously Interfered with the Administration of Justice in Violation Of Rule 8.4(d).

Disciplinary Counsel charges that Respondent seriously interfered with the administration of justice when his handling of the trust's funds resulted in removal proceedings, as well as an Auditor-Master review. Specification ¶¶ 17–20, 22–25, 27(d).

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

a *de minimis* way, i.e., it must have potentially had an impact upon the process to a serious and adverse degree. *In re Hopkins*, 677 A.2d 55, 60–61 (D.C. 1996). Rule 8.4(d) is violated if the attorney's conduct causes the unnecessary expenditure of time and resources in a judicial proceeding. *See In re Cole*, 967 A.2d 1264, 1266 (D.C. 2009).

Disciplinary Counsel argues that Respondent's improper conduct (i) contravened the rules governing the compensation for conservators and the requirement to maintain adequate records for the estate, *See In re L.R.*, 640 A.2d 697, 701 (D.C. 1994) (taking fees in violation of the Criminal Justice Act constitutes conduct prejudicial to the administration of justice); (ii) occurred in a proceeding before the Probate Division of the Superior Court; and (iii) tainted the judicial proceedings in more than a *de minimis* way because it necessitated an Auditor-Master inquiry and report to reconcile, where possible, Respondent's handling of estate assets. None of these resources would have been expended had Respondent kept adequate records showing that he properly administered his duties for the T.S. Trust. Disciplinary Counsel contends that the Auditor-Master proceeding in itself constitutes clear and convincing evidence to support a finding that Respondent violated Rule 8.4(d). ODC Br. at 17–18; ODC Reply Br. at 12.

Respondent argues that he did not engage in any conduct that seriously interfered with the administration of justice. There was a prompt and thorough response to every request from Disciplinary Counsel as well as the Auditor-Master. At no time has there been any allegation of obstruction or of misleading any

investigation that ensued. Additionally, there has been no allegation that the Respondent falsified any documents. Respondent argues that, at most, he made "good faith" mistakes handling T.S. Trust funds, but there was never any attempt to mask the activity. The allegations arise from Respondent's First and Final Accounting submitted to the court as part of his role as Trustee; however, when the court determined that the fees were paid prematurely, Respondent promptly returned the funds to the estate. R. Br. at 40–42.

We conclude that Respondent's conduct violated a court order, and also contravened applicable law governing conservator compensation as well as ethical rules obligating Respondent to maintain adequate records for the estate. Thus, his careless handling of T.S. Trust funds rose to such a level that it impaired the judicial process to a serious and adverse degree. In *In re Confidential*, 664 A.2d 364, 367 (D.C. 1995), the Court of Appeals stated that mishandling of funds by attorneys acting as court-appointed trustees or conservators "breached a fiduciary duty not only to the beneficiaries but to the court itself and prejudiced the administration of justice." (citations omitted).

The record permits only this conclusion under the *Hopkins* factors. First, Respondent's conduct was improper because he violated a court order. *See* FF 4. Secondly, that conduct bore directly upon the judicial process with respect to an identifiable case or tribunal, namely the court proceedings in which the violated

orders were entered, as well as the special Auditor-Master proceeding.[8] Third, Respondent's conduct tainted the judicial process in more than a *de minimis* way, as evidenced by (i) his removal as trustee of the T.S. Trust, (ii) his failure to file an adequate accounting after his removal; (iii) the special Auditor-Master proceeding that was necessitated by Respondent's failure to file an adequate accounting; and (iv) the ultimate failure of the Auditor-Master inquiry, after substantial effort and expenditure of time and resources, to account for all of the T.S. Trust funds that were under Respondent's stewardship. FF 30–31, 33, 38; *see Hopkins*, 677 A.2d at 60-61; *Cole*, 967 A.2d at 1266; *see also In re Burka*, 423 A.2d at 187 (attorney engaged in conduct prejudicial to the administration of justice in failing to "submit bank statements to the Auditor upon request").

IV. RECOMMENDED SANCTION

Disciplinary Counsel seeks disbarment in this matter, while Respondent requests a short suspension be recommended if this committee finds any Rule violations occurred. ODC Br. at 18; R. Br. at 44. For the reasons described below, we are constrained by binding Board and Court of Appeals precedents to recommend disbarment in this matter.

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[8] The Auditor-Master inquiry is also a "judicial proceeding" because it was commenced by the Probate Court under Superior Court Rule of Civil Procedure 53, and that delegation of judicial authority required the Auditor-Master to conduct an inquiry and thereafter file a report and recommendations with the court. *See* DX 11. After conducting its inquiry, which included a transcribed hearing, DX 12, the Auditor-Master submitted a report which the Probate Court adopted in its entirety—making it an order of the Probate Court and entering judgment thereon against Respondent. DX 13–14.

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); *Cater*, 887 A.2d at 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." *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (en banc) (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 3acknowledged 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)).

Because this case involves reckless misappropriation, the presumptive sanction is disbarment. 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 of Appeals 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." *Addams*, 579 A.2d 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).

On the whole, Respondent's mitigation arguments cannot establish the type of "extraordinary circumstances" that rebut a presumption of disbarment. *See Addams,* 579 A.2d at 191. First, Respondent argues that he admitted his wrongdoing. R. Br. at 46. But in fact, during this proceeding Respondent tried to reel back prior admissions about the impropriety of his conduct and argue for the first time that his handling of T.S. Trust funds was indeed proper under an "ambiguous" trust document that he himself wrote and submitted for court approval. *See* FF 14–19. Respondent's posture in this matter does not constitute a candid "admission of wrongdoing" of the type that mitigates for leniency.

Respondent argues that he fully cooperated with disciplinary authorities in this matter, which appears to be true. R. Br. at 46. Respondent also cites his prompt return of disputed funds to the T.S. Trust, which we also credit. *Id*. at 46–47. Respondent cites his unblemished record as a District of Columbia bar member since 1989, although he acknowledged a prior disciplinary proceeding in Maryland on a somewhat similar issue that involved Respondent's authority to issue disbursements for a client, but which resolved with an informal admonishment. *Id*. at 47.

Respondent argues that he "always acted in the best interests of [T.S.]." R. Br. at 47–48. But his sentiments on this issue are wholly subjective and not otherwise supported by the record. In the Superior Court motion they filed to remove Respondent as trustee during his first year of service, T.S. and her family clearly did

not share Respondent's perspective. *See* DX 6. Nor was Respondent able to account for his client's trust funds after the conclusion of his trustee stewardship. FF 31, 35. We cannot agree that the record supports Respondent on this mitigation factor.

Respondent also argues that Disciplinary Counsel's eight-year delay between initiating its investigation and filing the Specification of Charges prejudiced his defense and serves as a mitigating factor. R. Br. at 48–49. "Extended delay in prosecuting a case may be a mitigating factor with respect to the discipline imposed; it may result in a shorter period of discipline, but not in the elimination of the proposed sanction." *In re Saint-Louis*, 147 A.3d 1135, 1147–48 (D.C. 2016). Respondent must show how the delay impaired his defense. *Id*. And "the circumstances of the individual case must be sufficiently unique and compelling to justify lessening what would otherwise be the sanction necessary to protect the public interest." *In re Fowler*, 642 A.2d 1327, 1331 (D.C. 1994). The cases also recognize that the cloud of delayed disciplinary charges often comes with a silver lining: respondents remain free to practice law during the pendency of a disciplinary proceeding. *In re Howes*, 52 A.3d 1, 18 n.22 (D.C. 2012); *In re Morrell*, 684 A.2d 361, 370 (D.C. 1996).

While the Hearing Committee recognizes that the eight-year interval is very long, Respondent did not appear to suffer any unfair prejudice as a result of time lapsing between Disciplinary Counsel's initiating its investigation in 2010, and ultimately filing its Specification of Charges in 2018. During that interval, Disciplinary Counsel continued to pursue its investigation and communicate with

Respondent, so he was not being lulled into a false sense of security. *See* DX 16 (2012 Disciplinary Counsel Letter to Respondent). Respondent argues that the Attorney Advisor to the Auditor-Master had problems recalling all details about her 2010 audit of the T.S. Trust, and that some records from that audit were not maintained. R. Br. at 49. But Respondent identifies no particular issue on which the Attorney Advisor to the Auditor-Master's lack of recall—or missing audit materials—impacted the defense of this case. Many financial records from the Auditor-Master proceeding were maintained, and these are materials which were—or should have been—maintained in the care, custody or control of Respondent, as the T.S. Trust trustee. Respondent was on notice of Disciplinary Counsel's investigation shortly after the Auditor-Master's Report issued in July 2010. *See* FF 37; DX 13 (Auditor-Master Report of July 30, 2010); DX 15 (Respondent Response to Disciplinary Counsel's Initial Inquiry, dated Sept. 16, 2010). Knowing that the Auditor-Master Report triggered a formal inquiry by the Office of Disciplinary Counsel, Respondent himself was on notice and had a duty to preserve all relevant materials. He therefore cannot demonstrate unfair prejudice if some of the records from his earlier tenure as trustee of the T.S. Trust were not maintained by him or the Auditor-Master.

Nor is it the case that this Hearing Committee relied upon the Attorney Advisor or the Auditor-Master's memory—or the Auditor-Master's Report—as conclusively establishing Respondent's misconduct. In his Answer and the Joint Stipulations, Respondent admitted to many of the factual findings that establish his

misconduct. And here, Disciplinary Counsel submitted into evidence—which the Hearing Committee accepted without objection—the relevant court orders, trust instruments, correspondence, and bank account statements that establish Respondent's reckless commingling and misappropriation by clear and convincing evidence.

Respondent's mitigation arguments are of the type that the Court of Appeals deems insufficient to overcome the disbarment presumption. *See Ahaghotu*, 75 A.3d at 258–59. While a majority of this Hearing Committee might recommend a lesser sanction if the Court of Appeals precedents allowed it, we are constrained to recommend disbarment based on a largely undisputed record of court orders and financial transactions that support the presumptive sanction for reckless misappropriation. *Addams*, 579 A.2d at 191.

V. CONCLUSION

For the foregoing reasons, the Hearing Committee finds clear and convincing evidence that establishes that Respondent violated Rule 1.15(a) by commingling and recklessly misappropriating entrusted client funds; that Respondent violated Rule 1.15(a) by failing to keep records; and that Respondent violated Rule 8.4(d) by engaging in conduct that seriously interferes with the administration of justice. The Hearing Committee recommends that, under *Addams*, 579 A.2d 190, Respondent be disbarred for reckless misappropriation in violation of Rule 1.15(a). 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

Thomas E. Gilbertsen, Chair

Miriam Smolen, Attorney Member