THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

Issued
April 14, 2021

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

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

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

This matter arises out of Respondent's role as trustee of a trust. An Ad Hoc Hearing Committee concluded that Respondent violated District of Columbia Rules of Professional Conduct (the "Rules") 1.1(a), 1.3(a), 1.3(b)(1), 1.3(c), 1.15(a), 1.15(c), 8.4(c), and 8.4(d), and a majority recommended that he be suspended for eighteen months, with reinstatement conditioned upon completing nine hours of CLE and proving that he is fit to practice law. The Chair of the Hearing Committee dissented in part by disagreeing with some of the majority's analysis of Rules 1.3(b)(1) and 8.4(c), its finding of false testimony, and its sanction recommendation; he instead recommended that Respondent be suspended for one year, with reinstatement conditioned upon only the completion of nine hours of CLE.

Respondent has taken exception to several of the factual and legal findings of the Hearing Committee majority. While he admits that substantial evidence exists

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

in the record to support a number of the charges, and adopts much of the analysis in the Chair's dissent, he argues for the imposition of a six-month suspension, with the addition of either nine hours of CLE or appropriate supervision and instruction from the D.C. Bar's Practice Management Advisory Service. Disciplinary Counsel supports the Hearing Committee's Report and Recommendation. The Board agrees with the Hearing Committee that Respondent violated Rules 1.1(a), 1.3(a), 1.3(b)(1), 1.3(c), 1.15(a), 1.15(c), 8.4(c), and 8.4(d), but on narrower grounds, and recommends that the Court impose the sanction recommended by the Hearing Committee Chair: a one-year suspension, with reinstatement conditioned on completion of nine hours of CLE.

I. STANDARD OF REVIEW

Disciplinary Counsel bears the burden of proving the alleged Rule violations by clear and convincing evidence, which 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." *In re Cater*, 887 A.2d 1, 24 (D.C. 2005) (citation and quotation marks omitted). In deciding whether Disciplinary Counsel has carried this burden, we are required to accept the factual findings of the Hearing Committee that are supported by substantial evidence in the record as a whole, even where the evidence also may support a contrary view. *In re Robbins*, 192 A.3d 558, 564 (D.C. 2018) (per curiam); *In re Martin*, 67 A.3d 1032, 1039 (D.C. 2013). "Substantial evidence means enough evidence for a reasonable mind to find sufficient to support the conclusion reached." *In re Thompson*, 583 A.2d 1006, 1008 (D.C. 1990) (per curiam). We

review *de novo* the Hearing Committee's legal conclusions and its determination of "ultimate facts," that is, those facts "that have a clear legal consequence." *In re Micheel*, 610 A.2d 231, 234-35 (D.C. 1992). When making our own findings of fact, the Board employs a "clear and convincing evidence" standard. *See* Board Rule 13.7.

The Hearing Committee's findings of fact, which are supported by substantial evidence, are summarized below, along with supplemental findings supported by clear and convincing evidence.

II. FINDINGS OF FACT

June McCloud hired Respondent's firm in February 2006 to advise her on estate planning and to draft a trust for her granddaughter (hereinafter referred to as the "Beneficiary"), who suffered from cognitive impairment and was not able to manage money on her own. Findings of Fact ("FF") 6-10. Respondent created an inter-vivos revocable trust ("the Trust") for Beneficiary's sole benefit, naming Ms. McCloud as the trustee and himself as the successor trustee. FF 10, 12. The Trust's assets included the house where Ms. McCloud resided with Beneficiary, a bank account, and outstanding loans owed by Ms. McCloud's pastor, Steven Tucker, and by Pastor Tucker's church (listed on the Schedule of Property for the Trust at the time it was established as totaling $18,800). FF 11.

Ms. McCloud died in October 2009. FF 19. The Trust required Respondent, as successor trustee, to: (1) pay any valid claims against the estate; (2) sell the family home, where Beneficiary lived, "as expeditiously as practicable" to maximize its

value and allow Beneficiary "to find safe living accommodations – preferably in an assisted-living facility"; and (3) transfer all remaining assets to a special needs trust for the benefit of Beneficiary. FF 13. Respondent proceeded to take control of the Trust bank account and to petition the D.C. Superior Court for the appointment of a guardian and conservator for Beneficiary. FF 20-21. The court ultimately appointed Mathew Hertz as Beneficiary's attorney (in November 2009) and Karen Walker as her guardian ad litem (in January 2010). FF 22, 32.

A. Accountings

Respondent was required under the terms of the Trust and pursuant to D.C.'s Uniform Trust Code to provide an accounting to the Estate's personal representative and Beneficiary. FF 24-25. In advance of a scheduled December 17, 2009 D.C. Superior Court hearing to consider Beneficiary's capacity to manage her own affairs (FF 23), Mr. Hertz, as Beneficiary's attorney, posed a number of questions by email to Respondent regarding the Trust, including questions as to the assets in the Trust and how the Trust was funded. FF 26. Because Respondent failed to provide an accounting of the Trust assets as required and as specifically requested by Mr. Hertz, at the December 17 hearing Mr. Hertz requested extended discovery, including a deposition of Respondent. The court granted the request to depose Respondent. FF 27-28. Documents provided by Respondent at the deposition showed that the Trust's bank account balance was $67,379.90 as of December 2009. FF 29. Respondent stated his intention to pay himself attorney's fees from the Trust account; one week after the deposition he paid his firm $14,400. FF 30-31.

In February 2010, Respondent filed two responsive pleadings in D.C. Superior Court in which, in providing information on the Trust account balance, he referred to the date-of-death balance of approximately $70,000, without referencing the $14,400 in fees he withdrew in December 2009. FF 33-36. In November 2010, Respondent provided Ms. Walker with a bank statement for the Trust at her request. FF 42. He did not provide additional statements thereafter, nor did Ms. Walker request them. FF 43.

In July 2012, Ms. Walker filed a petition to remove Respondent as trustee, alleging in part that Respondent had failed to provide required accountings. FF 44. In an August 8, 2012 verified pleading to the Probate Division, Respondent opposed the petition, stating in part that no report regarding the Trust estate had been "generated due to inactivity in the Trust estate." *See* DX 42 at 5, cited at FF 45. Subsequently, Respondent also offered the explanation that one reason for not having provided the requested accounting or report was that he did not believe there was any change in the bank statements. *See* Respondent's Responsive Post-Hearing Brief, filed with the Hearing Committee on Nov. 7, 2019, at 6 (¶ 28), cited at FF 45. In fact, bank records showed six checks drawn on the Trust account for insurance payments, from October 2010 to April 2011. FF 46. Also, in the August 2012 verified pleading, Respondent offered to provide a report or accounting to Ms. Walker within 30 days; he never did so. FF 45-47. The July 2012 petition to remove respondent as trustee was ultimately denied without prejudice. FF 128.

B. The Family House and Property Taxes

As stated above, a principal asset of the Trust was the house where Ms. McCloud had lived with Beneficiary. A 2006 appraisal valued the property at $525,000. FF 48. The deteriorating condition of the house, as well as the real estate market crash of 2008, however, complicated Respondent's ability to sell the property after Ms. McCloud died. FF 49-54. In April 2010, the house was appraised at only $280,000; Respondent opted to wait until the market rebounded to sell the house. FF 55. He did not actively try to sell the house after April 2010. FF 60. Before the Hearing Committee, Respondent called an expert witness, who endorsed Respondent's decision and stated that the ideal time to sell would have been 2013 or later. FF 56-59. Maintaining ownership of the house in the Trust, however, resulted in Beneficiary continuing to live in the property in unsafe conditions; further, without proceeds from a sale of the house, Respondent was unable to set up a special needs trust for Beneficiary as required by the Trust. FF 64-70.

Respondent and Ms. Walker disagreed over who was responsible for upkeep of the house and for Beneficiary's welfare. FF 88. In a January 13, 2010 email, Respondent urged Ms. Walker to find alternative housing for Beneficiary, due to Beneficiary's lack of care for the house and the resulting deteriorating condition of the house. FF 89. Respondent wrote: Beneficiary "is fast rendering the house uninhabitable," urging Ms. Walker, among other things, "to seek alternative housing for [Beneficiary] ASAP before the house becomes uninhabitable or the health department condemns it." FF 89, *citing* DX 86 at 3. In her July 2012 petition to

remove Respondent as trustee, Ms. Walker wrote: "[Trustee] has refused to use trust assets to maintain or repair the real property and instead has required [Beneficiary], who lives in the house, to use her own limited assets to pay for necessary upkeep." DX 41 at 2. In his August 2012 response, Respondent stated that Ms. Walker "***never*** notified [him] that [Beneficiary] lived in the Property, much less that the Property required funds for upkeep." FF 91, *citing* DX 42 at 3 (emphasis in original). Subsequently, at an April 2013 hearing, Respondent told the court: "It is not my responsibility to take care of [Beneficiary]. I knew the house was in bad shape. I didn't know it was as bad as was represented to the Court last week, but that was not my obligation." DX 48 at 15. When asked by the court why he did not inquire about or determine Beneficiary's living conditions, Respondent replied that he never "had questions about habitability of [the] property" and that "it was not [his] responsibility." FF 95, *citing* DX 48 at 15, 18.

Respondent did not pay property taxes for the house in 2011 or the first half of 2012, despite the fact that Ms. Walker had provided him with a tax bill in March 2011. FF 112-14. In July 2012, Ms. Walker provided Respondent with a notice from the District of Columbia stating its intent to sell the house due to unpaid taxes, at which point Respondent paid the overdue balance. FF 114-16.

Beneficiary moved out of the house in May 2013, a few weeks before Respondent was removed as trustee. FF 96. In February 2014, the successor trustee sold the house for $450,000. FF 63, 175.

C. Social Security Checks

Beneficiary received $649 per month in Social Security benefits due to her disability. FF 71. Ms. McCloud had been the representative payee before she died, and payments were made directly to the Trust's bank account. *Id.* After Ms. McCloud's death, the Social Security Administration made three additional deposits for Beneficiary into the Trust account in November and December 2009. FF 48, 72, 74. The bank immediately reversed the second payment, however, stating that federal law required it to return benefits paid to the Trust after the date of Ms. McCloud's death. FF 73. Despite repeated requests from Ms. Walker and Beneficiary's attorney to do so, Respondent refused to provide to Beneficiary the funds from the remaining two payments due to his stated concern that these payments might also be reclaimed by the government. Respondent took no action himself, however, to contact the Social Security office or the bank to resolve disposition of these payments; he continued to hold these Social Security funds of Beneficiary in the Trust as of the time he was removed as trustee in May 2013 – over three years after the Social Security Administration deposited the funds into the Trust account. FF 74-77.

D. Loans

When the Trust was established, outstanding loans owed to Ms. McCloud by Pastor Steven Tucker and by the New Commandment Baptist Church were significant assets of the Trust. FF 97. The Schedule of Property for the Trust document includes an outstanding loan of $12,300 to Pastor Tucker and an

outstanding loan of $6,500 to the church, as assets. DX 76 at 13. In April 2010, however, Ms. Walker identified a significantly larger total of $87,800 in debts owed to Ms. McCloud by Pastor Tucker, his church, and a jobs program run by the church; Ms. Walker provided an unsigned IOU listing these debts to Respondent. Whatever the actual amount owed, documentation for these loans was informal, inconsistent, and spotty. FF 103.

Respondent initially intended to collect the loans, but, in speaking with Pastor Tucker and his wife, met resistance; they insisted that Ms. McCloud had forgiven the loans. FF 104. After consulting with his law partners, Respondent decided not to pursue Pastor Tucker in court for repayment of these loans. Respondent testified at the hearing as to several credible reasons why it would have been difficult to prevail in litigation; these reasons included the absence of admissible documentation and the running of the statute of limitations on a number of the loans. FF 105-08. Short of commencing actual litigation, and apart from initially speaking with the Pastor and his wife, Respondent took no other, informal steps to pursue collection before he was removed as successor trustee in May 2013; instead, he wrote off the loans as uncollectable. FF 108. Pastor Tucker was ultimately compelled to appear before the Auditor-Master, leading to a settlement with the new successor trustee in September 2013 in which Pastor Tucker acknowledged and agreed to pay a debt of $125,000. FF 109-111, 172.

E. Misappropriation

In November 2012, Respondent withdrew $1,750 in cash from the Trust account, through a bank teller, and used it for personal expenses. FF 129. Respondent concedes that this was misappropriation but testified that he intended to withdraw the funds from another account and was unaware that it was even possible to withdraw funds from the Trust account in the transaction at issue. FF 133-38.[1] Although the Hearing Committee majority found aspects of Respondent's testimony on the circumstances surrounding this $1,750 withdrawal to be intentionally false (*see* HC Rpt. at 139-140), in light of Respondent's explanation the Hearing Committee nonetheless found that Disciplinary Counsel did not prove the withdrawal was anything more than a mistake. FF 138. Respondent did not notice the withdrawal in the Trust bank statements and did not promptly return the funds. FF 139-140.

[1] Respondent objects to Findings 134-37, which describe the bank's practices of requiring manager approval and displaying the proposed transactions to the customer before disbursing the funds. The Hearing Committee found that this evidence, supported by bank records and the testimony of a bank operations analyst, Andy Levy, undermined Respondent's testimony concerning how the transaction took place. Respondent takes issue with Mr. Levy's credibility (because Mr. Levy was unfamiliar with the specific bank branch at issue) and argues that the bank records do not contradict his own testimony. *See* R. Br. at 8-10. While the resolution of this question may impact Respondent's credibility generally, it does not impact the misappropriation analysis, because the Hearing Committee found that Disciplinary Counsel failed to prove reckless or intentional misappropriation irrespective of the perceived flaws in Respondent's testimony.

F. Respondent's Removal as Trustee

As noted above, in July 2012, Ms. Walker filed a petition to remove Respondent as trustee, alleging that Respondent failed to act in accordance with the terms of the Trust. FF 117. In his August 2012 opposition to the petition, Respondent criticized Ms. Walker's conduct as guardian ad litem and stated that Ms. Walker "refused to provide" him with property tax statements, "thus resulting in the delinquent payment of [these] taxes" by Respondent. FF 119-122. This statement by Respondent regarding the property tax statements was not true.[2] FF 123. The Court denied Ms. Walker's petition without prejudice due to a filing error; Ms. Walker did not re-file it. FF 128.

On April 4, 2013, prompted by a fee petition by Ms. Walker, D.C. Superior Court Judge Wolf *sua sponte* ordered Respondent to account for the Trust assets and appear at a hearing six days later before Judge Christian. FF 141-44. At the April 10, 2013 hearing, Judge Christian ordered Respondent to file an accounting by April 12, 2013 showing "where all the money went, every cent," and continued the hearing until April 15, 2013. FF 149, *citing* DX 46 at 34-35. In creating an accounting of the Trust in advance of the April 15 hearing, Respondent noticed the $1,750 withdrawal on November 15, 2012 from the Trust account discussed above and, in creating the accounting, wrote "To be confirmed" in the "Explanation" column next

[2] The Hearing Committee majority found that this statement was intentionally false, whereas the Chair found that it was only recklessly false. *See* pages 34-35, *infra*.

to this expense in order to flag that he needed to investigate the withdrawal. FF 146, *citing* Tr. 284-86 and DX 47 at 10; FF 151-153. It is unclear exactly when Respondent confirmed that this expense was the cash he withdrew for personal purposes, although at the disciplinary hearing in this matter, Respondent testified that he confirmed information about this withdrawal only sometime after the April 15, 2013 hearing before Judge Christian. FF 154. Even after discovering the misappropriation, however, Respondent did not refund the mistakenly withdrawn $1,750 to the Trust until June 27, 2013, as discussed below. FF 154-155, 174.

Also, at the April 15, 2013 hearing before Judge Christian, Beneficiary's attorney requested that Respondent be removed as trustee due to the lack of an accounting, Respondent's refusal to turn over the two Social Security payments, the condition of the house, and Respondent's failure to list it for sale. FF 156. In support of this request, Ms. Walker added that Respondent failed to retitle the house in the name of the Trust, which she argued impeded his ability to obtain notices and pay bills on time. FF 158.

In response to Ms. Walker's argument regarding his failure to retitle the house, Respondent stated at the April 15, 2013 hearing:

> [T]o this day I have not notified the District of Columbia – the property is still in Ms. McCloud's name because if I notified them that she is dead, the property taxes increase. I'm just trying to preserve what little I can where I can.

FF 159, *citing* DX 48 (transcript of the April 15, 2013 hearing) at 23-24.

In response to this statement, Judge Christian told Respondent: "You can't go around the law because you're looking at a bill increasing." FF 160, *citing* DX 48

at 24. Previously, in his August 2012 opposition to Ms. Walker's petition to have him removed as trustee, Respondent had made essentially the same, erroneous, statement regarding the adverse tax consequences that would result from retitling the house, "do [*sic*] [to] the loss of the homestead exemption." FF 161, *citing* DX 42 at 3.

When questioned by the Hearing Committee on his statements regarding retitling the house, however, Respondent asserted that he did not mean to suggest – either in his August 2012 opposition or at the hearing before Judge Christian – that the reason he did not retitle the property was because, if he did so, the property taxes would increase. Respondent told the Hearing Committee that, because Beneficiary continued to live in the property, the homestead exemption would always have applied; Respondent testified that the real issue was that, if he had notified the District of Columbia, it might have mistakenly eliminated the homestead exemption, thus requiring him to make efforts to get the mistake resolved. FF 161. Respondent suggested to the Hearing Committee that because he was under pressure at the April 15, 2013 hearing, he "didn't explain enough to Judge Christian" about what he meant about retitling the property. But Respondent could not explain to the Hearing Committee why he had made the same incorrect statement about the consequences of retitling the property in his earlier pleading. FF 161, *including* FN 16.

Judge Christian removed Respondent as trustee in May 2013 and referred the matter to an Auditor-Master to assess Respondent's compliance and attorney fee billing. FF 162, 164.

G. Auditor-Master Proceedings

In June 2013, Respondent prepared an Amended First Accounting for the Auditor-Master explaining, for the first time, that the $1,750 "withdrawal was in error and is to be repaid at 10% interest." FF 167. Respondent asserted before the Hearing Committee that, prior to submitting this amended accounting, he had consulted with the Auditor-Master about how to account for the $1,750; the Hearing Committee found this assertion to be "without support" and "false." FF 168, *including* FN 17.[3] On the other hand, the Hearing Committee found that the evidence "may suggest that [Respondent] did speak with someone, [*i.e.*, other than the Auditor-Master] who advised him to offer this rate of interest." FF 168, FN 17. On June 27, 2013, Respondent returned to the Trust $1,750, plus interest of $102.13, as repayment of the money he had withdrawn from the Trust account on November 15, 2012. FF 174.

During proceedings before the Auditor-Master on September 19, 2013, Respondent also agreed to repay the Trust $17,624.84 (or 72%) of the total of $24,474.59 in attorney's fees he had charged to the firm. Respondent repaid these funds to the Trust on September 27, 2013. FF 173.

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[3] Respondent objects to Finding of Fact 168, arguing that the record does not conclusively establish the absence of an off-the-record conversation with the Auditor-Master, and that his testimony could not be characterized as inaccurate, or false, especially since the Committee later concluded it was not "dishonest." *See* R. Br. at 11-12; HC Rpt. at 143 ("[W]e believe that Mr. Marks's testimony that he spoke with the Auditor-Master before the June hearing was in error, but it was not dishonest or a violation of 8.4(c)."). In light of the Hearing Committee's explanation, we find Respondent's objection to be immaterial.

H. Mitigation

At the disciplinary hearing, Respondent presented the testimony of four character witnesses in mitigation of sanction, each of whom testified that they had never known Respondent to be dishonest or deceitful in any way. FF 179, 185.[4]

III. CONCLUSIONS OF LAW

A. Rules 1.1(a), 1.3(a), and 1.3(c)

The Hearing Committee concluded that Respondent violated Rules 1.1(a), 1.3(a), and 1.3(c) because he failed to effectively administer the terms of the Trust.[5]

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[4] Respondent takes exception to the Hearing Committee's purported failure to make detailed findings concerning Respondent's character witnesses. *See* R. Br. at 13. We find that Findings of Fact 180-85 adequately describe the testimony of those witnesses and consider it in mitigation of sanction.

[5] As explained on pages 73-75 of the Hearing Committee Report, the Rules of Professional Conduct applied to Respondent as a trustee, and since there was no traditional attorney-client relationship, we evaluate Respondent's conduct based on how he carried out his obligations under the terms of the Trust. *See In re Speights*, 189 A.3d 205, 208-09 (D.C. 2018). Specifically, as stated by the Hearing Committee:

> The charges involve actions that Mr. Marks is alleged to have taken or failed to take as the trustee of the McCloud Trust, rather than actions he took in the course of a legal representation itself. Disciplinary Counsel and Mr. Marks agree that "the District of Columbia Rules of Professional Conduct apply to attorneys serving as fiduciaries." Respondent's Pre-Hearing Brief at 2 (citing *In re Krame*, Board Docket No. 16-BD-014 (BPR July 31, 2019)); *see also* Disciplinary Counsel's Pre-Hearing Brief at 5-6 (citing among other authorities in addition to *Krame*, *In re Burton*, 472 A.2d 831, 837 (D.C. 1984) (per curiam) (appended Board Report) (disciplinary rules "should apply whenever an attorney assumes a fiduciary relationship and violates his duty in a manner that would justify disciplinary action if the relationship had been that of attorney and client); *In re Speights*, 189 A.3d 205 (D.C. 2018) (applying Rule 8.4(d) to a personal representative); *In re Wilson*, 953 A.2d 1052 (D.C. 2008) (applying Rule 1.15(a) to a guardian)).

HC Rpt. at 73-74.

Specifically, the Hearing Committee found that Respondent failed to: provide an accounting for the Trust, make sufficient attempts to collect the loans made to Pastor Tucker, maintain a habitable property, and pay property taxes. *See* HC Rpt. at 85-100, 104-110. Respondent concedes that there is "substantial evidence" in the record to support a finding of these violations. R. Br. at 15.

Rule 1.1(a) requires a lawyer to "provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." A lawyer who has requisite skill and knowledge, but who does not apply it for a particular client, violates Rule 1.1(a). *In re Drew*, 693 A.2d 1127, 1132 (D.C. 1997) (per curiam) (appended Board Report). The comments to Rule 1.1 state that competent representation includes "adequate preparation and continuing attention to the needs of the representation to assure that there is no neglect of such needs." Rule 1.1, cmt. [5].

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

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

902 A.2d 56, 69-70 (D.C. 2006) (per curiam) (appended Board Report) (citations omitted). To prove a "serious deficiency," Disciplinary Counsel must prove that the

conduct "prejudices or could have prejudiced the client." *In re Yelverton*, 105 A.3d 413, 422 (D.C. 2014).

Rule 1.3(a) provides that an attorney "shall represent a client zealously and diligently within the bounds of the law," and Rule 1.3(c) provides that an attorney "shall act with reasonable promptness in representing a client." "Neglect [of client matters] has been defined as indifference and a consistent failure to carry out the obligations that the lawyer has assumed to the client or a conscious disregard of the responsibilities owed to the client." *In re Wright*, 702 A.2d 1251, 1255 (D.C. 1997) (per curiam) (appended Board Report) (citing *In re Reback*, 487 A.2d 235, 238 (D.C. 1985), *adopted in relevant part*, 513 A.2d 226 (D.C. 1986) (en banc) ("*Reback II*")). Disciplinary Counsel does not need to prove that the client was prejudiced in order to establish a violation of Rule 1.3(a). *See In re Speights*, 173 A.3d 96, 101 (D.C. 2017) (per curiam) (failure to take action for a significant time to further a client's cause – whether or not prejudice to the client results – violates Rule 1.3(a)); *In re Lewis*, 689 A.2d 561, 564 (D.C. 1997) (per curiam) (appended Board Report) (Rule 1.3(a) violated even where "[t]he failure to take action for a significant time to further a client's cause . . . [does] not [result in] prejudice to the client").

Rule 1.3(c) provides that an attorney "shall act with reasonable promptness in representing a client." "Perhaps no professional shortcoming is more widely resented by clients than procrastination," and "in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed." Rule 1.3, cmt. [8]. The Court has held that failure to take action for a

significant time to further a client's cause, whether or not prejudice to the client results, violates Rule 1.3(c). *See, e.g.*, *Speights*, 173 A.3d at 101. Comment [8] to Rule 1.3 provides that "[e]ven when the client's interests are not affected in substance . . . unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness," making such delay a "serious violation."

As summarized above, the Hearing Committee found, and the record in this matter establishes, that Respondent did not: (1) provide an accounting for the Trust in October 2011 and 2012, as required by the Trust and the District of Columbia Uniform Trust Code, FF 24, 43, 151; (2) find safe living accommodations for the Trust Beneficiary, FF 64-65; and (3) pay property taxes for the house in 2011 or the first half of 2012, FF 112. The Board agrees with the Hearing Committee that these actions, or failures to act, by Respondent, constituted a failure to provide competent representation and demonstrated a lack of diligence, zeal, and reasonable promptness in furtherance of the Trust's objectives and thus violated Rules 1.1(a) and 1.3(a) and (c).

We also conclude, however, that Disciplinary Counsel did *not* prove by clear and convincing evidence that Respondent's failure to pursue collection of the loans made to Pastor Tucker violated these Rules. We reach this conclusion even though we recognize that Respondent does not contest a Rules violation on this basis. The record establishes that Respondent made reasonable efforts early on to collect the loans both by speaking with Pastor Tucker, who insisted that the loans had been

forgiven, and by discussing the issue with his law partners, who agreed with him that it would be difficult to collect the loans in the absence of adequate documentation and because of issues concerning the statute of limitations (which would have run absent an acknowledgement from Pastor Tucker). FF 104-108. The Hearing Committee concluded that Respondent's decision not to pursue litigation was "reasonably within his discretion as trustee," but nevertheless faulted Respondent for not "seriously considering" options to pursue the collection by more informal means, such as by having additional conversations with Pastor Tucker or other church leaders, writing a demand letter, seeking to gather more evidence, or asking his own pastor for assistance. FF 108; HC Rpt. at 99; Partial Dissent at 5. The record is not clear, however, that any of these informal strategies would have been worthwhile absent the involvement of the Auditor-Master. Respondent was concerned about depleting the assets of the Trust and may have reasonably concluded that billing for time spent on long-shot efforts to collect the loan would have been unreasonable. *See* FF 62 (Respondent stopped billing for his time after March 2010). Therefore, the Board does not find violations of Rules 1.1(a) or 1.3(a) or (c) on this basis.

B. Rule 1.3(b)(1)

The Hearing Committee concluded that Respondent violated Rule 1.3(b)(1) by intentionally failing to maintain a habitable property and intentionally failing to pay property taxes. *See* HC Rpt. at 104-110. (It is not clear from his separate opinion whether the Chair concurs with the Committee majority's conclusion regarding

Respondent's violations of Rule 1.3(b)(1) on these two grounds, although the Chair does not specifically dissent from these conclusions.) Additionally, the Hearing Committee majority found a violation based on Respondent's intentional failure to pursue sufficiently the collection of the loans made to Pastor Tucker. *See id.* at 98-100. The Chair in his partial dissent found that, on this third basis, Respondent did not act with the requisite intent to violate Rule 1.3(b)(1). *See* Partial Dissent at 2-6.

Respondent adopts the Chair's analysis with respect to his actions to collect on the loans made to Pastor Tucker.[6] R. Br. at 15-17. Disciplinary Counsel supports the majority of the Hearing Committee, arguing that the "lack of sufficient diligence" meets the requisite level of intent to violate Rule 1.3(b)(1). ODC Br. at 18.

Rule 1.3(b)(1) provides that, "A lawyer shall not intentionally . . . fail to seek the lawful objectives of a client through reasonably available means permitted by law and the disciplinary rules." A "[k]nowing abandonment of a client is the classic case of a Rule 1.3(b)(1) violation," *Lewis*, 689 A.2d at 564 (appended Board Report), and "failure to communicate important case developments to a client" has also been found to violate this duty. *In re Starnes*, 829 A.2d 488, 504 (D.C. 2003) (per

[6] As noted, the Hearing Committee also found that Respondent violated Rule 1.3(b)(1) by intentionally failing to maintain a safe and habitable property for Beneficiary and by intentionally failing to pay property taxes. HC Rpt. at 104-110. Because Respondent asserted, mistakenly, that "the debt collection issue was the sole basis for the majority's Rule 1.3(b)(1) conclusion," he did not address the additional violations of Rule 1.3(b)(1) found by the Hearing Committee. R. Br. at 16; *see* R. Br. at 15-17. At oral argument, and in a supplemental statement filed thereafter, Respondent's counsel indicated that Respondent does not concede these violations.

curiam). Even a negligent failure to pursue a client's interest is deemed intentional when "the neglect is so pervasive that the lawyer must be aware of it" or "when a lawyer's inaction coexists with an awareness of his obligations to his client." *In re Ukwu*, 926 A.2d 1106, 1116, 1135 (D.C. 2007) (appended Board Report) (citations and quotation marks omitted). "Neglect of a client's matter, often through procrastination, can 'ripen into . . . intentional' neglect in violation of Rule 1.3(b) 'when the lawyer is aware of his neglect' but nonetheless continues to neglect the client's matter." *In re Vohra*, 68 A.3d 766, 781 (D.C. 2013) (appended Board Report) (quoting *In re Mance*, 869 A.2d 339, 341 n.2 (D.C. 2005) (per curiam)).

For the reasons set forth in Part III.A, *supra*, we do not find that Respondent's failure to make informal efforts to collect the loans from Pastor Tucker violated Rule 1.3(b)(1). However, we agree with the Hearing Committee that Respondent violated Rule 1.3(b)(1) by failing to maintain a habitable property and by failing to pay property taxes.

Under the terms of the Trust, Respondent was obligated to sell the house where the Trust Beneficiary lived and use the funds to ensure safe living conditions for Beneficiary. FF 13. Although Respondent's decision not to sell the house immediately was within his discretion, it was still his responsibility to provide for Beneficiary by other means. FF 64. Respondent knew as early as 2010 that Beneficiary was unable to live by herself and that the house was becoming "uninhabitable," FF 65, yet he still did nothing to find alternative housing. In this

way, Respondent intentionally failed to fulfill the objectives of the Trust, in violation of Rule 1.3(b)(1).

Respondent's neglect of his obligation to pay taxes on the property was intentional as well. As the Hearing Committee wrote, "[a]nyone with the appropriate skill to act as [a] fiduciary to maintain property in the District of Columbia has to know that property taxes are due and should know that they are due in March and September." HC Rpt. at 107. Even though he did not receive the tax statements directly, Respondent received documents from Ms. Walker that should have reminded him of his obligation to pay taxes: a 2011 tax bill and a notice of the pending tax sale of the property in July 2012. FF 113-15; HC Rpt. at 106-07. Despite receiving these documents, Respondent failed to pay property taxes in 2011 or the first half of 2012. FF 112. We find this failure was intentional, in violation of Rule 1.3(b)(1).

C. Rule 1.15(a)

The Hearing Committee concluded that Respondent violated Rule 1.15(a) by negligently misappropriating $1,750 from the Trust. *See* HC Rpt. at 110-120. Respondent concedes there is substantial evidence in the record to support this finding. R. Br. at 15. Disciplinary Counsel argued to the Hearing Committee that

the misappropriation was reckless or intentional, but now concedes that it failed to prove more than negligent misappropriation. ODC Br. at 3, 19-20.[7]

Rule 1.15 provides, in pertinent part, that:

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

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

Misappropriation requires proof of two distinct elements. First, Disciplinary Counsel must establish the unauthorized use of client funds. *See In re Anderson*, 778 A.2d 330, 335 (D.C. 2001); *Harrison*, 461 A.2d at 1036. Misappropriation is essentially a *per se* offense and does not require proof of improper intent. *See Anderson*, 778 A.2d at 335. It occurs where "the balance in [the attorney's] trust

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[7] The Specification of Charges alleged that Respondent also failed to keep complete records of entrusted funds, in violation of Rule 1.15(a), and committed theft, in violation of Rule 8.4(b); however, Disciplinary Counsel did not brief or clearly argue the record-keeping charge and expressly abandoned the theft charge during the hearing. *See* HC Rpt. at 3 nn.1-2. We agree with the Hearing Committee that Disciplinary Counsel failed to prove a violation of the record-keeping component of Rule 1.15(a) and hereby dismiss the Rule 8.4(b) charge.

account falls below the amount due the client [or third party]." *In re Ahaghotu*, 75 A.3d 251, 256 (D.C. 2013) (first alteration in original) (internal quotation marks and citations omitted). Thus, "when the balance in [a] [r]espondent's . . . account dip[s] below the amount owed" to the respondent's client or clients, misappropriation has occurred. *In re Chang*, 694 A.2d 877, 880 (D.C. 1997) (per curiam) (appended Board Report) (citing *In re Pels*, 653 A.2d 388, 394 (D.C. 1995)).

Second, Disciplinary Counsel must establish whether the misappropriation was intentional, reckless, or negligent. *See Anderson*, 778 A.2d at 336-38; *see also 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)); *Ahaghotu*, 75 A.3d at 256 ("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." (alteration in original) (internal citations and quotation marks omitted)). Where Disciplinary Counsel establishes the first element of misappropriation (unauthorized use), but fails to establish that the misappropriation was intentional or reckless, "'then [Disciplinary] Counsel proved no more than simple negligence.'" *Anderson*, 778 A.2d at 338 (quoting *In re Ray*, 675 A.2d 1381, 1388 (D.C. 1996)); *see also In re Abbey*, 169

A.3d 865, 872 (D.C. 2017) ("Negligent misappropriation is an attorney's non-intentional, non-deliberate, non-reckless misuse of entrusted funds or an attorney's nonintentional, non-deliberate, non-reckless failure to retain the proper balance of entrusted funds. Its hallmarks include a good-faith, genuine, or sincere but erroneous belief that entrusted funds have properly been paid; and an honest or inadvertent but mistaken belief that entrusted funds have been properly safeguarded." (citations omitted)).

The record establishes that Respondent withdrew $1,750 from the Trust account and used it for unauthorized personal purposes. FF 129. Although the Hearing Committee did not credit some aspects of Respondent's testimony on this issue, *e.g.*, FF 137, it unanimously agreed that Disciplinary Counsel failed to prove by clear and convincing evidence that the misappropriation was "anything more than a miscommunication or mistake." FF 138. Specifically, the Hearing Committee posited that: (1) when Respondent walked into the bank, he did not know it would be possible to withdraw funds from the Trust account: (2) Respondent could have accomplished an intentional misappropriation easily by other means (*i.e.*, "he could have issued a bill to the Trust for his uncompensated time and paid the money to himself directly, with full justification and documentation"); (3) there is no evidence Respondent had a cash flow problem; and (4) although Respondent was not adequately attentive, he did not actively ignore information that would have alerted him to the misappropriation after it occurred. *See* HC Rpt. at 115-120. In light of these factors, the Board agrees with the Hearing Committee's conclusion that

Respondent committed misappropriation negligently, in violation of Rule 1.15(a), and that Disciplinary Counsel did not prove by clear and convincing evidence that the misappropriation was intentional or reckless.

D. Rule 1.15(c)

The Hearing Committee concluded that Respondent failed to promptly deliver funds that a third person was entitled to receive, in violation of Rule 1.15(c) when he held two of Beneficiary's Social Security payments in the Trust account for over three years. *See* HC Rpt. at 120-24. Respondent concedes that the evidence supports this violation. R. Br. at 15.

Rule 1.15(c) requires that a lawyer "promptly notify the client or third person" "[u]pon receiving funds . . . in which a client or third person has an interest" and to "promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive." *See, e.g.*, *In re Edwards*, 990 A.2d 501, 520-21 (D.C. 2010) (appended Board Report) (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 record shows that Respondent allowed two Social Security checks to sit in the Trust account between late 2009 and May 2013 without providing the money to Beneficiary, using it for her benefit, or trying to resolve his apparent concern that the government might reclaim the funds. FF 72-77. Therefore, the Board agrees

that Respondent failed to promptly deliver funds to Beneficiary, in violation of Rule 1.15(c).

E. Rule 8.4(c)

The Hearing Committee concluded that Respondent was dishonest and made misrepresentations in violation of Rule 8.4(c); however, the Hearing Committee disagreed on the number of violations and on Respondent's intent. The majority found that Respondent was dishonest: (1) in two assertions to the court in response to Ms. Walker's petition for an accounting; (2) in three assertions in his August 2012 opposition to Ms. Walker's petition to remove him as trustee and related statements to the court; and (3) in a statement to the court concerning his April 15, 2013 trust accounting and concerning the $1,750 that Respondent negligently misappropriated from the Trust account. *See* HC Rpt. at 127-32. The Chair, however, found that only one of the statements in Respondent's August 2012 opposition violated Rule 8.4(c) and that the dishonesty was reckless, not intentional. *See* Partial Dissent at 1-2.[8] As explained below, the Board finds that Respondent violated Rule 8.4(c) on two occasions, and that he did so with dishonest intent on both occasions: when he accused Ms. Walker of (1) never requesting an accounting, and (2) refusing to provide property tax statements.

[8] Respondent adopts nearly all the dissenting Chair's analysis and conclusions, but denies he committed any Rule 8.4(c) violations. R. Br. at 18-19. Disciplinary Counsel supports the Hearing Committee majority's conclusions. ODC Br. at 24; *see also id.* at 20-21.

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

Dishonesty is the most general of these categories. It includes "not only fraudulent, deceitful or misrepresentative conduct, but also 'conduct evincing a lack of honesty, probity or integrity in principle; a lack of fairness and straightforwardness.'" *In re Samad*, 51 A.3d 486, 496 (D.C. 2012) (per curiam) (quoting *In re Shorter*, 570 A.2d 760, 767-68 (D.C. 1990) (per curiam)). The Court holds lawyers to a "high standard of honesty, no matter what role the lawyer is filling," *In re Jackson*, 650 A.2d 675, 677 (D.C. 1994) (per curiam) (appended Board Report), because "[l]awyers have a greater duty than ordinary citizens to be scrupulously honest at all times, for honesty is 'basic' to the practice of law." *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc).

If the dishonest conduct is "obviously wrongful and intentionally done, the performing of the act itself is sufficient to show the requisite intent for a violation." *In re Romansky*, 825 A.2d 311, 315 (D.C. 2003). Conversely, "when the act itself is not of a kind that is clearly wrongful, or not intentional, [Disciplinary] Counsel has the additional burden of showing the requisite dishonest intent." *Id.*; *see also In re Uchendu*, 812 A.2d 933, 939 (D.C. 2002) ("some evidence of a dishonest state of mind is necessary to prove an 8.4(c) violation"). Dishonest intent can be established by proof of recklessness. *See Romansky*, 825 A.2d at 315, 317. To prove recklessness, Disciplinary Counsel must establish by clear and convincing evidence

that the respondent "consciously disregarded the risk" created by his actions. *Id.* at 316-17; *see, e.g.*, *In re Boykins*, 999 A.2d 166, 171-72 (D.C. 2010) (finding reckless dishonesty where the respondent falsely represented to Disciplinary Counsel that medical provider bills had been paid, without attempting to verify his memory of events from more than four years prior, and despite the fact that he had recently received notice of non-payment from one of the providers). The entire context of the respondent's actions, including respondent's credibility at the hearing, is relevant to a determination of intent. *See In re Ekekwe-Kauffman*, 210 A.3d 775, 796-97 (D.C. 2019) (per curiam).

Misrepresentation is a "statement . . . that a thing is in fact a particular way, when it is not so." *Shorter*, 570 A.2d at 767 n.12 (citation and quotation marks omitted). Misrepresentation requires active deception or a positive falsehood. *See id*. at 768. The failure to disclose a material fact also constitutes a misrepresentation. *In re Outlaw*, 917 A.2d 684, 688 (D.C. 2007) (per curiam) ("'Concealment or suppression of a material fact is as fraudulent as a positive direct misrepresentation.'") (citations omitted); *see, e.g.*, *In re Lattimer*, 223 A.3d 437, 449-51 (D.C. 2020) (per curiam) (respondent stated as fact a proposition that was contradicted by the only relevant evidence in the record); *In re Scanio*, 919 A.2d 1137, 1139-41, 1142-44 (D.C. 2007) (respondent failed to disclose that he was salaried employee when he made a claim for lost income to insurance company measured by lost hours multiplied by billing rate); *Reback II*, 513 A.2d at 228-29 (respondents neglected a claim, failed to inform client of dismissal of the case,

forged a client's signature onto second complaint, and had the complaint falsely notarized).

As with dishonesty, Disciplinary Counsel does not need to establish that a misrepresentation was deliberate, only that it was made with "reckless disregard for the truth." *In re Brown*, 112 A.3d 913, 916, 918 (D.C. 2015) (per curiam); *see, e.g., In re Jones-Terrell*, 712 A.2d 496, 499 (D.C. 1998) ("Even if they were, at least in part, attributable to Respondent's haste in preparing the petition, the false statement and omissions were of such significance to the issues before the court that we believe her conduct was at least reckless and sufficient to sustain a violation of the rule." (quoting Board Report)).

1. 2010 Petition for Accounting

The Hearing Committee majority found that Respondent violated Rule 8.4(c) by making two deliberately false statements in response to Ms. Walker's January 22, 2010 petition for an accounting of Trust assets.

(i) The Accounting

In his February 17, 2010 opposition to Ms. Walker's petition, Respondent defended his failure to provide Ms. Walker with an accounting of Trust assets by claiming that she "has *never* asked for an accounting of Trust assets and, moreover, is aware – or should have been aware – of the Trust assets." FF 34. He repeated that claim in a February 26, 2010 hearing on Ms. Walker's motion. DX 37 at 6 ("Ms. Walker says she made a request. She did not, Your Honor. She did not ask for any assets, any statements, or anything. That is a false assertion."). The Hearing

Committee majority found that these statements were deliberately false because they were contradicted by a January 12, 2010 email from Ms. Walker in which she asks Respondent to clarify which assets are part of the Trust. *See* HC Rpt. at 127; DX 36 at 9. The Hearing Committee Chair in his dissent found no Rule 8.4(c) violation on this basis, pointing out that it was literally true that Ms. Walker never requested a *formal* accounting and that Respondent was willing to share all the information he had at that time. *See* Partial Dissent at 11. The Chair also took issue with the fact that the majority was finding a violation that Disciplinary Counsel did not allege. *Id.* at 10.[9]

The Board agrees with the Hearing Committee majority that these statements to the court were deliberately false, in violation of Rule 8.4(c). Respondent knew that Ms. Walker had requested information about the trust assets. Although he could have explained to the court that she did not ask him for the *specific* information she was now seeking, his statements that she never asked for an accounting were unqualified and unequivocal. Further, Respondent affirmatively and falsely accused Ms. Walker of making a "false assertion." DX 37 at 6.

[9] Due process requirements may be satisfied where the "specification of charges and post-hearing filings fairly put respondent on notice of the . . . charges against him." *In re Austin*, 858 A.2d 969, 976 (D.C. 2004). As the Chair points out in his dissent, that was not the case here. However, Respondent did not raise a due process argument, and in any event, he fully adopted the Chair's analysis on this point, which indicates that he was not prejudiced by lack of notice. *See In re Fay*, 111 A.3d 1025, 1031 (D.C. 2015) (per curiam) (providing that a due process violation requires a finding of "substantial prejudice" (quotation marks and citations omitted)).

(ii) Checks Drawn on the Account

During the February 26, 2010 hearing on Ms. Walker's motion, Mr. Hertz asked Respondent to provide copies of checks drawn on the Trust account along with the updated accounting. Respondent replied, "There are no checks, Your Honor"; but when the judge asked how he made expenditures if not by check, Respondent corrected himself, saying "the number of checks are [sic] less than five." DX 37 at 5-6. Later at the same hearing he stated that the copies of checks were attached to the bank statements he would be providing Mr. Hertz. *Id.* at 7. The majority found that Respondent's claim that there were no checks was "deliberately false," HC Rpt. at 127, whereas the Chair disagreed, again pointing out that Disciplinary Counsel had not alleged this violation (but without further explaining the basis for his disagreement). *See* Partial Dissent at 10-11.

The Board finds that the majority's conclusion is not supported by clear and convincing evidence. Importantly, the majority did not explain the basis for its finding that the false statement was made on purpose, and such a finding is not obvious from the context in which the statement was made. Unlike Respondent's false statement – both in a pleading and at a hearing – that Ms. Walker *never* asked for an accounting, which was central to Ms. Walker's motion to remove Respondent as trustee, the issue of the checks drawn on the account was a minor issue raised by Mr. Hertz in the course of the hearing. It is possible, therefore, that Respondent initially did not remember at this hearing that he had written checks on the account. Further, and significantly to this analysis, he immediately corrected himself on this

point when pressed by the judge. DX 37 at 6. Moreover, copies of the checks in question would have been included with the bank statements Respondent had already agreed to provide. *See* DX 37 at 4, 7. Thus, while Respondent's statement about the checks was not true, the evidence does not establish that it was intentionally or recklessly dishonest.

2. August 2012 Opposition

The Hearing Committee majority found that Respondent violated Rule 8.4(c) by making three deliberately false statements in his August 8, 2012 opposition to Ms. Walker's July 19, 2012 petition to remove Respondent as trustee.

(i) Property Upkeep

In his August 8, 2012 opposition to Ms. Walker's petition – specifically, in responding to her allegation that he "refused to use trust assets to maintain or repair the real property and instead has required [Beneficiary], who lives in the house, to use her own limited assets to pay for negative upkeep" – Respondent asserted that "[Ms. Walker] has ***never*** notified the [Respondent] that [Beneficiary] lived in the Property, much less that the Property required funds for upkeep." DX 42 at 3. The Hearing Committee majority concluded that this response was deliberately dishonest because: Respondent did, in fact, know that Beneficiary lived in the property; and the statement failed to inform the court that Respondent had not made any payments for upkeep since January 2010. HC Rpt. at 128.

The Chair in his dissent contended that Disciplinary Counsel failed to prove Respondent acted with dishonest intent given the context in which he made this

statement, which had more to do with Respondent's focusing on his contentious and noncommunicative relationship with Ms. Walker than on his knowledge of Beneficiary's living situation. *See* Dissent at 6-9. As the Chair wrote in his partial dissent: "[A]s [Respondent] explained [at the Disciplinary Hearing], he was trying to convey that the lack of communication about [Beneficiary] was so extreme that Ms. Walker had not notified him that [Beneficiary] was *even in* the property 'much less that the property required funds for upkeep.'" *Id.* at 7 (emphasis in original), *citing* Tr. 617-19.

Reading the record on this issue, including Respondent's August 2012 pleading, as a whole, the Board agrees with the Chair that Disciplinary Counsel failed to prove dishonest intent in this instance by clear and convincing evidence. It is unlikely that Respondent intended this response to convey that he failed to make payments for upkeep of the property because he believed Beneficiary lived elsewhere. Rather, the record indicates that through this statement Respondent was attempting to stress his position that, for some significant period of time before she filed the petition to have him removed as trustee, Ms. Walker had not communicated with him regarding upkeep of the property. As to the fact that Respondent's August 2012 pleading does not mention his failure to make any payments for upkeep since January 2010, the Board sees this as an implicit concession of the issue, rather than as an attempt to mislead the court. In his response in his August 2012 pleading regarding upkeep of the property, Respondent was neither as clear nor as specific as he should have been. This lack of clarity is a consistent pattern throughout the

pleadings in question, and even if the specific statements were not intentionally or recklessly dishonest, Respondent is responsible for the fact that third parties may have formed an inaccurate impression of the facts. The Board concludes, however, that Disciplinary Counsel did not prove by clear and convincing evidence that this response by Respondent was intentionally or recklessly false on this occasion.

(ii) Property Taxes

In his August 2012 opposition, Respondent contended that Ms. Walker's petition was "frivolous and without merit" because, *inter alia*, "[Ms. Walker] refused to provide [Respondent] with the property tax statements for the trust real property . . . , thus resulting in the delinquent payment of taxes." DX 42 at 1. This statement was false, since (1) Ms. Walker had sent Respondent multiple tax notices in March 2011; (2) he did not receive the statements directly because he decided not to retitle the property; and (3) in any event, he was aware of his obligation to regularly pay property taxes. *See* HC Rpt. at 128-30; DX 48 at 24; Tr. 483-84. The full Hearing Committee agreed that this statement was at least recklessly false, in violation of Rule 8.4(c). While the majority went a step further and found it was intentional, the Chair found the statement was similar to the reckless dishonesty at issue in *Boykins*, 999 A.2d at 171-72, in which the respondent "relied solely upon his memory of events more than four years past" when he falsely claimed that certain medical providers had been paid.

This case is distinguishable from *Boykins*, in that here Respondent did not merely attempt to excuse his failure to pay taxes by assuming he had never gotten

the tax statements; rather, Respondent affirmatively attempted to blame Ms. Walker by stating that she had "refused" to provide the statements. *See In re Tun*, 195 A.3d 65, 74 (D.C. 2018) (finding that a false statement in a written motion was intentionally false, in violation of Rule 8.4(c), based on what the respondent "clear[ly] . . . meant to convey"). Therefore, we agree here with the majority of the Hearing Committee that Respondent's statement regarding the property tax statements was intentionally false in violation of Rule 8.4(c).

(iii) Loss of Homestead Exemption

In his 2012 opposition, and in subsequent briefs and appearances before the probate court, Respondent attempted to justify his failure to have the property tax records corrected to reflect the Trust's ownership by stating a concern that this would lead to the loss of the homestead exemption and increase the real property taxes. *See* HC Rpt. at 130-31; DX 42 at 3. As noted above in this Report, Respondent told the Hearing Committee that the homestead exemption would always have applied and that what he intended to convey by these statements was that, if he had notified the District of Columbia government, it might have mistakenly eliminated the homestead exemption, thus requiring him to make efforts to get the mistake resolved. The Hearing Committee majority found that Respondent's attempts "to turn his failure to alert the District to Ms. McCloud's death into a virtue" was intentionally false, in violation of Rule 8.4(c). HC Rpt. at 131. The Chair in his dissent contends that Respondent's statement about the homestead exception amounted to an argument, which, although "poor and uncompelling," Respondent was entitled to

make. Dissent at 11. Again, Disciplinary Counsel did not argue in its post-hearing briefs that these statements formed the basis of a Rule 8.4(c) violation.[10]

The Hearing Committee majority's finding of dishonesty in this instance is undercut substantially by its related statement in its analysis that it was "hard to know, in light of [Respondent's] changing and somewhat conflicting explanations, why he failed to [retitle the property]." HC Rpt. at 130. Without a clear finding as to whether Respondent actually believed he was protecting the Trust against tax increases or whether he was simply offering a *post hoc* rationalization for not retitling the property, the Board finds that there is not clear and convincing evidence to support a Rule 8.4(c) violation in this instance.

3. Labeling the $1,750 Withdrawal

In his April 15, 2013 Trust accounting, Respondent included the $1,750 withdrawal, but instead of disclosing that he had withdrawn it for personal use, he labeled it "To be confirmed." FF 146. The Hearing Committee found that this statement was not an effort to hide his misappropriation, since it in fact flagged a potential problem. HC Rpt. at 131-32. However, the Hearing Committee majority found that his explanation to the court for why he could not confirm the source of

[10] As with the allegation that he dishonestly denied that Ms. Walker ever requested an accounting, Respondent fully adopts the Chair's analysis here and thus does not appear to have suffered prejudice due to his apparent lack of notice. *See* note 9, *supra*.

the withdrawal was a misrepresentation in violation of Rule 8.4(c). Specifically, Respondent stated as follows on this matter:

> And as far as the Schedule J, because I am missing some of those bank statements, I could not confirm those payments. What I recall, though, is that these were debts of Ms. McCloud that were paid after her death, but I want to get those exact payments so I can represent what those payments were for. And it's the same for the 1,750-dollar withdrawal or payment.

DX 48 at 11. The majority found that this statement was false based on Respondent's admission that the bank statements were available online, Tr. 313; however, the Chair in his partial dissent disagreed based on Respondent's testimony that he did not, in fact, access the statements online in advance of the hearing and only brought his paper file (which did not include the statements) to the courthouse. *See* HC Rpt. at 132, *citing* Tr. 313; Dissent at 15, *citing* Tr. 312-13.

The majority found that Respondent's statement that bank statements were "missing" was a falsehood designed to excuse his failure to disclose the $1,750 he misappropriated and delay its repayment. HC Rpt. at 132. This finding is speculative, however, and contradicts the Hearing Committee's apparent further finding that Respondent did not discover the misappropriation until *after* the hearing at which the statement in question was made. FF 154, *citing* Tr. 965-66. Respondent testified at the disciplinary hearing that he made this representation because he was in a rush, and he was trying to convey that he still had to "pull everything together." Tr. 289. Because the Hearing Committee did not make a credibility finding on this portion of Respondent's testimony, and there is no contrary evidence on his intent,

the Board finds that there is not clear and convincing evidence to support a violation of Rule 8.4(c) on this basis.

F. Rule 8.4(d)

The Hearing Committee concluded that Respondent's failure to properly administer the Trust violated Rule 8.4(d) because it resulted in the unnecessary expenditure of judicial resources by the court and the Auditor-Master. *See* HC Rpt. at 132-35. Respondent concedes that there is substantial evidence in the record to support this violation. R. Br. at 15.

Rule 8.4(d) provides that it is professional misconduct for a lawyer to "[e]ngage in conduct that seriously interferes with the administration of justice." To establish a violation of Rule 8.4(d), Disciplinary Counsel must demonstrate by clear and convincing evidence that: (i) Respondent's conduct was improper, *i.e.*, that Respondent either acted or failed to act when he should have; (ii) Respondent's conduct bore directly upon the judicial process with respect to an identifiable case or tribunal; and (iii) Respondent's conduct tainted the judicial process in more than a *de minimis* way, *i.e.*, it must have at least potentially had an impact upon the process to a serious and adverse degree. *In re Hopkins*, 677 A.2d 55, 60-61 (D.C. 1996). Rule 8.4(d) can be violated by conduct that causes otherwise unnecessary judicial proceedings. *See In re Cole*, 967 A.2d 1264, 1266 (D.C. 2009). This includes a court's consideration of a request for appointment of counsel arising from the respondent's misconduct. *See In re Evans*, 187 A.3d 554, 557 (D.C. 2018) (per curiam) (finding a violation of Rule 8.4(d) where the client had to ask the court for

appointment of counsel at the public's expense after the respondent failed to complete the work he was hired to do and the failed to refund the money to the client).

Here, Respondent's conduct was "improper" in several respects arising from his overall failure to properly administer the Trust. These failures bore on the judicial process, and adversely impacted that process, because the probate court had to hold two hearings in April 2013 and appoint an Auditor-Master in order to correct Respondent's mistakes. *See* HC Rpt. at 134-35. Therefore, the Board agrees with the Hearing Committee that Respondent violated Rule 8.4(d).

IV. SANCTION

A majority of the Hearing Committee recommended that Respondent be suspended for eighteen months with a fitness requirement and nine hours of CLE. The Chair in his partial dissent recommended that Respondent be suspended for one year with reinstatement conditioned upon only the completion of nine hours of CLE. Respondent argues for the imposition of a six-month suspension with the addition of either nine hours of CLE or appropriate supervision and instruction from the D.C. Bar's Practice Management Advisory Service. Disciplinary Counsel supports the sanction recommendation made by the majority of the Hearing Committee.

A. The Period of Suspension

The sanction imposed in an attorney disciplinary matter is one that is necessary to protect the public and the courts, maintain the integrity of the legal profession, and deter the respondent and other attorneys from engaging in similar

misconduct. *See, e.g.*, *Hutchinson*, 534 A.2d at 924; *Martin*, 67 A.3d at 1053; *Cater*, 887 A.2d at 17. "In all cases, [the] purpose in imposing discipline is to serve the public and professional interests . . . rather than to visit punishment upon an attorney." *Reback II*, 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)). We address those factors below.

1. The Seriousness of the Misconduct

As noted by the Hearing Committee majority, Respondent's "violations of the Rules, though serious, do not reach to the most egregious conduct the Court sanctions." HC Rpt. at 138. Respondent misappropriated $1,750 from the Trust account, a serious failure in his duties and responsibilities as a trustee and an attorney; however, this misappropriation was negligent, not done intentionally or recklessly. Respondent's failures in providing a Trust accounting, in paying property taxes, and in finding safe living conditions for Beneficiary constituted clear violations of bedrock obligations of attorneys under the Rules; the latter instance of misconduct harmed Beneficiary in this matter. As the Hearing Committee majority notes, however, certain of these violations "(*e.g.*, withdrawing the money, failing to provide the accounting and failing to pay the property taxes) . . . were at least partially rectified when he agreed to, and did, pay back all funds lost to the Trust as a consequence of his actions." HC Rpt. at 137.

2. Prejudice to the Client

Respondent's misconduct prejudiced the "objectives of the trust, which were the sale of the house (as quickly as practicable) and the provision of a safe living space for the sole beneficiary of the trust . . . ." HC Rpt. at 138. Although Disciplinary Counsel no longer argues that Respondent committed a Rule violation based on failure to promptly sell the house, we have found violations resulting from Respondent's consequent failure to provide safe living accommodations for Beneficiary. We therefore agree with the Hearing Committee that Respondent's

"failure to take responsibility for the condition of the house that led to [Beneficiary's] living in an unsafe environment for the period of time she lived there was prejudice[ial] to the objectives of the Trust." *Id.*

3. Dishonesty

As discussed above, the Board finds that Respondent engaged in two incidents of dishonesty in violation of Rule 8.4(c). We address here in more detail the Hearing Committee majority's determination that Respondent also engaged in dishonesty by testifying falsely at the disciplinary hearing regarding the withdrawal of $1,750 from the Trust account.

The Hearing Committee majority found that Respondent testified falsely to the Hearing Committee in an effort "to excuse his negligent misappropriation and to assign responsibility for it to the teller." HC Rpt. at 140. Specifically, the majority concluded that Respondent testified falsely that he told the teller to take the amount from "the lowest account" and that, without delay, the teller asked him whether he wanted an envelope and then handed him the cash. This testimony appeared to contradict testimony from Mr. Levy (a bank operations analyst), that the transaction required manager approval and Respondent's signature or authorization on a keypad. *Id.*; *see* FF 134-35, 137. The Hearing Committee further found that Respondent's detailed description of the events surrounding the transaction, including the teller's physical appearance, was dishonest, given that before the Auditor Master in June 2013, over six years before the disciplinary hearing, Respondent had been unable to recall details of the transaction. HC Rpt. at 140.

The Chair in his partial dissent found no false testimony, agreeing that Respondent's testimony about events occurring seven years before the hearing was confusing at times but adding that "[i]t is not surprising that someone testifying about it would get details wrong." Partial Dissent at 16. The Chair also disagreed with the majority's finding that Respondent was attempting to blame the teller for his mistake, noting that Respondent never made such a suggestion. *Id.* at 17. Finally, the Chair suggested that if Respondent had completely fabricated a story, it would have been more compelling. *Id.* at 17. The Chair also relied in part on Respondent's demeanor and the testimony of his character witnesses. *See id.* at 31-33. The Board does not rely on this demeanor assessment in making its findings.[11]

The question of whether a respondent gave sanctionable false testimony during a hearing is a matter of law that the Board reviews *de novo. See In re Bradley*, 70 A.3d 1189, 1193-94 (D.C. 2013) (per curiam); *see, e.g.*, *id.* at 1194-95 (overturning a Hearing Committee's finding that the respondent's testimony was not

[11] With respect to demeanor, the Chair provided a fairly detailed and specific discussion of Respondent's non-"evasive" manner of testifying during the four days of the disciplinary hearing. *Id.* The Board has rightly encouraged Hearing Committees to make findings about credibility based on witness demeanor and other aspects of live testimony that only they can assess from the hearing. When such assessments are shared by all members of a Hearing Committee, they can be persuasive and reliable. The demeanor assessment of a single individual (here the dissenting Chair) is significantly less so. A presentation at The National Council of Lawyer Disciplinary Boards 2021 Annual Conference, *Cognitive, Implicit Biases, and Decision-making for Adjudicators* (written and presented by Destiny Peery, JD, PhD), for example, opened a window to the dangerous implications of reliance on and deference to subjective assessments as a basis for credibility findings. In this matter, where we have the assessment of only one member of the Hearing Committee, and consideration of demeanor is unnecessary in light of the objectively reviewable record evidence, we do not rely on the dissenting member's discussion of demeanor.

intentionally false because there was "no factual support in the record for the Committee's conclusion that [the respondent] simply misremembered what had occurred," which was undermined by her detailed testimony and contradicted by other witnesses, and because no evidence in the record supported a finding that she was "merely confused"). On *de novo* review, the Board concludes that the findings of false testimony are not supported by clear and convincing evidence.

First, the Hearing Committee unanimously found that Respondent's testimony was too confusing to establish what he told the teller, *i.e.*, whether he did, in fact, instruct her to withdraw the $1,750 from the "lowest account." FF 137. Thus, while his testimony was not credible, there is no factual basis for finding that it was false, let alone intentionally false. *See Tun*, 195 A.3d at 75 (finding no false testimony where it was "not so precise[] that it suggests a carefully fabricated explanation rather than the truth" and was "at least weakly corroborated by [the respondent's] uncontradicted testimony"). Further undercutting the Hearing Committee majority's conclusion that Respondent testified falsely as to the withdrawal of the $1,750 is the fact that the Hearing Committee relied on Respondent's testimony in finding that Disciplinary Counsel failed to prove reckless or intentional misappropriation. It appears inconsistent to find – in reliance, at least in part, on Respondent's testimony about the transaction – that the misappropriation was not intentional or reckless, while simultaneously concluding that Respondent intentionally lied about the circumstances surrounding the transaction. Accordingly, this finding of false testimony is not supported by clear and convincing evidence.

Second, Respondent contradicted Mr. Levy's testimony and bank record evidence showing manager approval for the transaction, FF 135-36, when he testified as follows:

> As I said, I gave my debit card, I input my pin and told her that I wanted it taken from my – "the account with the lowest balance," and then she gave me cash. There was no delay, because like I said, I entered my pin number, and she gave me cash. She asked me if I wanted an envelope, and that was it. . . . When [Mr. Levy] talks about the teller override, I knew nothing about that because my withdrawal was not delayed. She looked at the screen and then she gave me the $1,750 and asked if I wanted an envelope. That was it.

Tr. 990-91, 997.

The Hearing Committee's unanimous finding that Mr. Levy's testimony and the electronic record of the transaction are more reliable evidence, and thus that Respondent's contrary testimony was not credible, is supported by substantial evidence. FF 136. Accordingly, the question is whether Respondent's testimony was intentionally false. We conclude that it was not. Respondent did not rule out the possibility that an override took place, but rather based his testimony on his recollection of the speed of the transaction and the absence of any discussion or appearance of a manager. Furthermore, he was not asked to address Mr. Levy's uncorroborated testimony that a signature or keypad approval was required. *See* Tr. 267-68. Accordingly, there is insufficient evidence to establish by clear and convincing evidence that Respondent's testimony was intentionally false.

Finally, the Hearing Committee majority does not specify what aspects of Respondent's "highly detailed account of events" were false. HC Rpt. at 140. The

passage of time may have led Respondent to remember certain details and forget others. Without a factual basis to find specific false statements, the Board cannot find by clear and convincing evidence that this testimony as a whole was intentionally false.

4. Violations of Other Disciplinary Rules

All violations of relevant Disciplinary Rules have been addressed above.

5. Previous Disciplinary History

Respondent has no disciplinary history. Further, as the Hearing Committee noted, based on the testimony of multiple character witnesses, Respondent "appears to be an extremely well-respected member of the legal community. HC Rpt. at 144, citing *In re Kline*, 11 A.3d 261, 266 & n.6 (D.C. 2011) (citing as a mitigating factor character witness testimony establishing that "misconduct was an aberration in an otherwise unblemished 27-year practice as a lawyer").

6. Acknowledgement of Wrongful Conduct

As set forth in this report, and as noted by the Hearing Committee, Respondent has acknowledged that he failed to pay property taxes on time and that he took $1,750 from the Trust Account. Respondent did not acknowledge in proceedings before the Hearing Committee, however, his failure to provide competent representation or his lack of diligence, zeal, and reasonable promptness in furtherance of the objectives of the Trust, nor did Respondent acknowledge his failure to promptly deliver the Social Security payments, any instance of dishonesty, or that his conduct in the underlying matter seriously interfered with the

administration of justice. Before the Board, Respondent concedes every violation aside from intentional neglect and dishonesty.

7. Other Circumstances in Aggravation and Mitigation

In mitigation of sanction, the Board considers that Respondent took steps to rectify the harm caused by his misconduct by repaying the Trust, with interest, the amount he misappropriated, refunding attorney's fees, and paying the interest and penalties on the overdue property taxes. He did not seek or obtain personal profit from his misconduct. Further, as Disciplinary Counsel does not dispute, Respondent cooperated in the investigation in this matter. Finally, as the Hearing Committee observed regarding the four character witnesses called by Respondent and "who collectively have decades of experience working with [Respondent] personally or professionally": "[A]ll of them attested to many ways in which he has acted with kindness and decency over the years. Their testimony suggests that he is respected not just in the legal community, but in his religious and social community." HC Rpt. at 146.

8. Sanctions Imposed for Comparable Misconduct

As the Hearing Committee recognized, negligent misappropriation carries a presumptive sanction of a six-month suspension, and comparable misappropriation cases also involving dishonesty have resulted in suspensions of up to two years. *See, e.g.*, *Boykins*, 999 A.2d at 171-74 (two-year suspension with fitness for negligent misappropriation, dishonesty, failure to keep records, failure to promptly notify and pay medical providers, and serious interference with the administration of justice,

aggravated by prior discipline); *In re Midlen*, 885 A.2d 1280, 1288-1292 (D.C. 2005) (eighteen-month suspension for negligent misappropriation, dishonesty, failure to communicate, failure to timely render an accounting, and failure to deliver the client's file upon termination of the representation, where the respondent paid fees to himself despite a dispute with his client and executed a document despite his client's instructions to the contrary); *see also In re Fair*, 780 A.2d 1106, 1113, 1115-16 (D.C. 2001) (fourteen-month suspension with fitness for two instances of negligent misappropriation, a pattern of neglect, charging an unreasonable fee, and serious interference with the administration of justice, mitigated by the fact that some of the misconduct represented a common practice).

The Hearing Committee majority found that the misconduct in this case is most comparable to that in *Midlen*, recommending the same eighteen-month suspension. The Chair in his partial dissent recommended a one-year suspension due to the absence of a finding of intentional dishonesty or false testimony, concluded that the misconduct in *Midlen* was "significantly more serious than Mr. Marks's violations." HC Rpt. at 148-49; Dissent at 26.

We agree with the Partial Dissent that the misconduct here is less serious than that in *Midlen*, which involved a more serious disregard of a client's interests. We also agree that *Fair*, which did not involve dishonesty, nevertheless serves as a useful guide for sanction; but for a separate instance of negligent misappropriation, the Court likely would have imposed an eight-month suspension. *See Fair*, 780 A.2d at 1115-16 (suspending the respondent for six months for each of two instances of

negligent misappropriation and two additional months for the remaining misconduct, totaling fourteen months). Dishonesty to a court is a serious violation, and while the two instances of dishonesty in this case warrant an upward departure from that eight-month baseline, it is not so serious as to justify more than a one-year suspension. *See, e.g.*, *In re Soininen*, 853 A.2d 712, 715 & n.4 (D.C. 2004) (six-month suspension for false statements to immigration tribunals, unauthorized practice of law, and serious interference with the administration of justice).

B. Fitness

The Hearing Committee recommended that Respondent be required to prove his fitness to practice law prior to reinstatement. The majority concluded that Disciplinary Counsel established a serious doubt as to Respondent's continuing fitness to practice law based on his "serious misapprehension" of his responsibilities under the Trust and duty of honesty. *See* HC Rpt. at 150-51. The Chair opposes the imposition of a fitness requirement, reasoning that the suspension and CLE will remedy the Committee's concerns, and noting that much of the misconduct, including dishonesty, arose from Respondent's acrimonious relationship with Ms. Walker and his inability to focus on working through problems that arose, neither of which establish a serious doubt as to his continuing fitness to practice law. *See* Dissent at 28-34. Respondent adopts the Chair's analysis on fitness. *See* R. Br. at 23.

"[T]o justify requiring a suspended attorney to prove fitness as a condition of reinstatement, the record in the disciplinary proceeding must contain clear and

convincing evidence that casts a serious doubt upon the attorney's continuing fitness to practice law." *Cater*, 887 A.2d at 6. Proof of a "serious doubt" involves "more than 'no confidence that [a] Respondent will not engage in similar conduct in the future.'" *In re Guberman*, 978 A.2d 200, 213 (D.C. 2009) (alteration in original). It connotes '"real skepticism, not just a lack of certainty."' *Id.* (quoting *Cater*, 887 A.2d at 24).

The reason for conditioning reinstatement on proof of fitness is "conceptually different" from the basis for imposing a suspension. As the Court explained:

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

Cater, 887 A.2d at 22. *Cater* observed that the five factors for reinstatement set forth in *In re Roundtree*, 503 A.2d 1215, 1217 (D.C. 1985), can be useful in determining whether there is clear and convincing evidence of a "serious doubt":

> (a) the nature and circumstances of the misconduct for which the attorney was disciplined;
>
> (b) whether the attorney recognizes the seriousness of the misconduct;
>
> (c) the attorney's conduct since discipline was imposed, including the steps taken to remedy past wrongs and prevent future ones;
>
> (d) the attorney's present character; and

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

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

The Board may consider a respondent's conduct during the disciplinary proceeding in deciding whether there is clear and convincing evidence that raises a "serious doubt" as to whether Respondent will act ethically and competently in the future. *See, e.g.*, *In re Yelverton*, 105 A.3d 413, 431 (D.C. 2014) (the respondent's "subsequent conduct during the disciplinary proceedings shows that his many filings in the criminal assault case, the basis for our findings of professional misconduct, are not isolated events relegated to the past"); *In re Lea*, 969 A.2d 881, 893 (D.C. 2009) (the respondent's "testimony, tone, and behavior [during the disciplinary proceedings] demonstrated a lack of contrition or appreciation for the seriousness of her conduct")), *recommendation adopted*, 105 A.3d 413, 430-31 (D.C. 2014).

Based in large part on the Board's disagreement with most of the Hearing Committee majority's findings of dishonesty, which it considered the "[m]ost serious of all" factor weighing in favor of a fitness requirement, the Board finds that a fitness requirement is not warranted. Instead, the Board agrees with the Hearing Committee Chair that Respondent's "serious misapprehensions of his responsibility as a Trustee, and to some extent as a member of the Bar" are sufficiently addressed by a one-year suspension with CLE. Partial Dissent at 28.

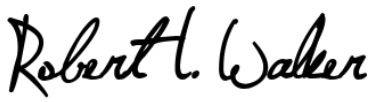
VI. CONCLUSION

For the foregoing reasons, the Board recommends that the Court conclude that Disciplinary Counsel has proven by clear and convincing evidence that Respondent

violated Rules 1.1(a), 1.3(a), 1.3(b)(1), 1.3(c), 1.15(a), 1.15(c), 8.4(c), and 8.4(d), and should be suspended for one year with reinstatement conditioned on the completion of nine hours of CLE: six hours on the topic of trust account management and three hours on the topic of legal ethics.

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).

BOARD ON PROFESSIONAL RESPONSIBILITY



Robert L. Walker

All Members of the Board concur in this Report and Recommendation.