THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Issued
July 19, 2019

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

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

We agree with an Ad Hoc Hearing Committee that Respondent committed intentional misappropriation in violation of D.C. Rule of Professional Conduct ("Rule") 1.15(a) when he kept and spent refunds he received from D.C. Superior Court that belonged to former clients. We also agree that Respondent violated Rule 1.15(a) (commingling), 1.15(c) (failing to promptly notify and deliver entrusted funds), and 8.4(c) (dishonesty), and unlike the Hearing Committee we also find that he violated Rule 1.15(a) (record-keeping). Finally, we agree with the Hearing Committee that Respondent did not prove that he is entitled to mitigation of sanction pursuant to *In re Kersey*, 520 A.2d 321 (D.C. 1987), and we recommend that he be disbarred under *In re Addams*, 579 A.2d 190, 191 (D.C. 1990) (en banc).[1]

[1] We agree with the Hearing Committee's conclusion that Respondent failed to carry his burden of proving that he was entitled to *Kersey* mitigation, but as explained below, we disagree with part of its analysis.

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

I. FINDINGS OF FACT

Having heard oral argument and reviewed the record and briefs of the parties, we concur with the Hearing Committee's factual findings as supported by substantial evidence in the record, with certain exceptions described below. We summarize the relevant facts below and make additional findings of fact based on clear and convincing evidence pursuant to Board Rule 13.7.[2]

Upon becoming a member of the D.C. Bar in 1998, Respondent joined his father's law firm, Schuman & Felts. In 2009, Respondent, his father, and another lawyer, Timothy Cole, were all equal partners of the firm. FF 1-3. When Respondent's father retired in early 2012, and transferred his share of the partnership to Respondent, Mr. Cole left the firm, taking as many as 70 percent of the firm's clients with him. FF 5. Respondent was the sole equity holder in the firm after Mr. Cole's departure. *See* Tr. 352-54.

A large part of Schuman & Felts's practice involved the representation of landlords suing tenants for eviction, a process overseen by the U.S. Marshals Service. FF 2, 8. Landlords would pay $165 to the registry of the D.C. Superior Court for a "Writ of Restitution," which allowed the U.S. Marshals Service to evict. FF 9. Typically, Schuman & Felts's practice was to advance the cost of the writ, and then to bill the client for reimbursement. FF 21. By the time of the events

[2] Clear and convincing evidence 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 Nave*, 197 A.3d 511, 518 (D.C. 2018) (per curiam) (citations and quotation marks omitted).

described below, the clients had reimbursed Schuman & Felts for the cost of the writs. Tr. 44, 69-74.

For various reasons, the writs were not always executed. Beginning in early January 2013, the firm began receiving checks for $165 from D.C. Superior Court—sometimes hundreds of checks at a time—representing refunds of unexecuted writs. FF 13-14, 20, 22. The refunds were for cases dating back to 2009. FF 21. A docket number was printed on each check, along with notice that each had to be cashed within 60 days from the date of issuance. FF 13-15. Although the mailings contained no explanation or guidance, Respondent's staff was able to determine the purpose of the checks by calling the Clerk of the Landlord & Tenant Branch of the Superior Court.[3] FF 26; Tr. 134.

Respondent had frequent discussions with his staff after the checks began arriving and he decided that current clients would receive either a refund or a credit to their outstanding balances (after obtaining client consent), "as a matter of goodwill."[4] FF 24-27, 30. Former clients received nothing, and their refunds remained in the firm's operating account and were used for firm expenses.[5] FF 20, 27, 30. From January 2013 through late February 2014, Respondent's firm

[3] The record includes a communication from the Superior Court in January 2014 (a year after the checks first started arriving) in an email from the Chief of the D.C. Landlord and Tenant Branch, informing landlords and counsel that the restitution checks will be mailed "soon." FF 16-17.

[4] Respondent clarified that by "goodwill," he meant demonstrating his attentiveness to his clients, rather than presenting them with a gift. FF 27 n.8; Tr. 431. Respondent also acknowledged that his clients would have no idea that they were receiving something extra or as a goodwill gesture. Tr. 429-30.

[5] There is evidence that at least one former client was credited with a refund. DX 19A at 15. Respondent testified that this was done without his permission. Tr. 397-99.

deposited 1,920 refund checks, totaling $316,220, into the firm's operating account that also held the firm's own funds during this time.[6] FF 20; Tr. 47-48. Respondent admitted at the hearing that he used the refunds to "float the firm." Had all writ refunds been returned to current and former clients, the firm's operating account balance as of February 14, 2014, would have been *negative* $230,341.40.[7] FF 20, 50.

Respondent never informed his former clients that he received these refunds. Tr. 48. And he admitted that keeping these funds was an error, testifying that he thought at the time that the funds belonged to the firm. Tr. 45, 72.[8]

In early 2014, Mr. Cole—no longer with Schuman & Felts—received and returned writ refunds to clients of his new firm, including those who were former clients of Schuman & Felts. FF 31; Tr. 88, 94-96. One of Mr. Cole's clients, WDC-1 (who was also a former client of Schuman & Felts), asked Mr. Cole about refunds from Schuman & Felts. Tr. 96. Mr. Cole emailed Respondent to ask about WDC-1's refunds for the periods it was represented by Schuman & Felts. FF 31; DX 1 at 6.

[6] Respondent's firm received additional refund checks that were endorsed and forwarded to current clients or were applied to a current client's outstanding balance. FF 27. These funds are not the basis of any Rule violation.

[7] Respondent testified that he would have made firm cuts and taken other action to cover the firm's expenses, Tr. 403, which we take to mean that he would not have allowed the balance of the operating account to be in the red. Nonetheless, the Hearing Committee's finding accurately reflects that as things stood in February 2014, the firm's spending included $230,341.40 of funds that belonged to former clients.

[8] Apparently contradicting himself, Respondent replied "Yes," when asked whether he had "any understanding that those funds were properly that of your clients and not of the firm." Tr. 375. Respondent contends in his brief that the response was either not correctly transcribed or that he misunderstood the question. R. Br. at 25-26. Because it is inconsistent with Respondent's other testimony and his position throughout these proceedings, we will not treat this testimony as a concession that he knew the refunds were property of the clients and not the firm.

Respondent replied that he had "endorsed the backs of the checks and they were forwarded to the clients," but this was not true for WDC-1, a former client. FF 31-32; DX 1 at 5. Mr. Cole followed up explaining that WDC-1 "received nothing from Schuman & Felts." DX 1 at 5. Respondent replied that "[w]e did not keep the checks" which was also untrue because the firm kept copies of checks that were endorsed and mailed to clients. DX 1 at 5; Tr. 144 (Katherine Parker, office manager, explaining "we'd actually make a copy of the check and we had them stashed in the filing cabinet just so we'd have a record of what was sent out"). Again Mr. Cole followed up by email and Respondent replied that "staff checked our records and we did not keep a list of all the case numbers. Anything that came in for WDC-1 should have gone to them." DX 1 at 4-5. Mr. Cole checked with the Court's Financial Operations department and learned that Respondent had deposited into the firm's operating account two refund checks belonging to WDC-1, FF 34, which prompted Mr. Cole to file a complaint with Disciplinary Counsel, FF 35.

Respondent testified that Mr. Cole's inquiry "made [Respondent] second guess [him]self" regarding his handling of the writ refunds. FF 38. He also heard rumors that Mr. Cole filed a disciplinary complaint against him. Tr. 367-69. After consulting with an attorney, Respondent began sending or arranging to send refunds to former clients. FF 38. By late March, he had repaid $257,400 to former clients.[9] FF 42. When Disciplinary Counsel pressed him about the remaining writ refunds,

[9] Respondent received $199,485 from his father to pay former clients the refunds owed to them. FF 37.

Respondent produced records for only $24,429. FF 42. Respondent was unable to account for the disposition of $34,391 in writ refunds that had been received and deposited into the firm's operating account. FF 42-44.

Respondent's Kersey defense. Respondent has suffered from depression at least since college. FF 56. It intensified in early 2012 after his father retired and Mr. Cole left the firm. FF 5, 57-58.

In late 2012, Respondent began treatment with a new psychiatrist, Dr. Lauren R. Hodas. FF 60; RX 2. Her notes in November 2012 outlined Respondent's numerous symptoms, including having a "deer in headlights" feeling, and always wanting to be in bed. FF 61. In addition, Respondent's wife had serious health problems, and their marriage "was a troubled one." FF 61-62.

Based on Dr. Hodas's notes, by January 2013, Respondent's mental condition had begun to improve through the treatment and rebalancing of his medications. FF 63. On January 2, 2013 (before the firm received any refund checks from the Superior Court), Dr. Hodas noted that Respondent was feeling better physically, he was sleeping well, he did not "have deer in headlight feeling," and his concentration had improved. FF 63. During the same day of counseling, Respondent told Dr. Hodas that though he "still feels sadness all the time," "things are going well at [the] firm," and that he was "not obsessing & worrying constantly." FF 63.

On February 1, 2013 (after the firm started to receive refund checks from the Superior Court), Respondent reported that he was feeling better and had more energy, but he also reported anxiety and deep, though not crippling, worry. FF 64.

By the middle of 2013, Respondent had reduced the number of visits with Dr. Hodas, and his symptoms had improved significantly. FF 60. Dr. Hodas observed that Respondent continued to show mental improvement through May 2014, indicating that he had more energy, less worry, and more optimism. FF 64.

Dr. Nuha Abudabbeh was retained solely for purposes of this proceeding and was qualified as an expert in support of Respondent's *Kersey* defense. FF 65. She did not know Respondent during the relevant period of 2012-2014. FF 66. In preparing for this proceeding, Dr. Abudabbeh interviewed Respondent on three occasions during 2018, and she administered various tests and reviewed records, including:

- An opinion letter written by Dr. John R. Lion, a Clinical Professor of Psychiatry at the University of Maryland, in December 2017; and
- An opinion letter written by Denise Perme, a Licensed Clinical Social Worker at the D.C. Bar Lawyer Assistance Program, in June 2017.

FF 66-67. Both documents were admitted into evidence. FF 68-69. Dr. Abudabbeh did not write an expert report. FF 66. Dr. Lion met with Respondent for three hours in late 2017. FF 68. Relying on written materials—including Dr. Hodas's notes as well as the disciplinary complaint and the opinion of Ms. Perme, Dr. Lion opined that within a reasonable degree of medical certainty, Respondent suffered from a Major Depressive Disorder during the time of the alleged misconduct, that the depressive condition caused the misconduct, and that there is significant evidence of rehabilitation. FF 68.

Ms. Perme met with Respondent for three hours in June 2017. FF 69. Recounting various sources—including conversations with Dr. Hodas—Ms. Perme concluded that Respondent was seriously depressed in the Fall of 2012, and that by the time of their meeting in 2017, "[h]e reports his mood and concentration are greatly improved since 2012 and the first months of 2013." FF 70. Finally, Ms. Perme concluded that "[b]ut for the Major Depressive Disorder . . . Mr. Schuman would not have allowed the deposit of the subject court refunds to the firm's operating account." FF 72.

Synthesizing all of Respondent's health records at the time, Dr. Abudabbeh concluded that Respondent suffered from a major depressive disorder in January 2013, and that a connection existed between the depression and how Respondent decided to handle the writ refunds. FF 73-74. Dr. Abudabbeh noted Respondent was dealing with major disruptive events, including Mr. Cole leaving the firm, marital issues, and the firm's financial instability. FF 76. But she opined that Respondent may have been in "partial remission" during this period, meaning some symptoms might have abated and some remained.[10] FF 74-75. Dr. Abudabbeh concluded that Respondent's conduct in keeping writ refunds for the firm was not "intentionally wrong." FF 77. Dr. Abudabbeh opined that as of the dates of the Hearing, Respondent was in "full remission." FF 81.

[10] Dr. Abudabbeh could not answer whether, during the period of the alleged misconduct, there were periods of weeks or months that Respondent was not disabled. Tr. 739.

During cross-examination, when asked about Respondent's ability to perform other professional tasks during the time period at issue, Dr. Abudabbeh explained that it was "very possible" that Respondent performed many tasks in his professional life, while his depression only impacted how he handled the writ refunds. FF 79-80.

Dr. Philip Candilis testified on behalf of Disciplinary Counsel, as an expert witness in psychiatry. FF 82-83; Tr. 775; *see also* Tr. 769-93. Dr. Candilis was asked to answer three questions: whether depression had something to do with Respondent's conduct with writ refunds, whether there was rehabilitation to make it safe for Respondent to continue practicing, and whether there "was a direct nexus between the depression and the behavior." FF 84. Dr. Candilis reviewed the same reports reviewed by Dr. Abudabbeh and other exhibits in this matter, and interviewed Respondent, Ms. Parker, Mr. Cole and Dr. Hodas. FF 85. As a result, Dr. Candilis agreed with Dr. Abudabbeh's diagnosis of major depressive disorder. FF 86; Tr. 798.

However, Dr. Candilis stated that a diagnosis of depression does not necessarily mean that a person is disabled. FF 88; Tr. 799 ("Everyone who is depressed is not disabled."). According to Dr. Candilis, Respondent demonstrated that he was not "disabled" in 2013 because he was capable of handling all matters in his personal and professional life, and that the sole matter for which he claimed a disability was his handling of the writ refunds. FF 87, 90. For example, Respondent was able to:

- handle responsibly client matters (other than refunding writ refunds to former clients);

- hire and retain law firm staff, including administrators and new associates; and
- sell a house and buy another.

FF 92.

Respondent told Dr. Candilis that during the period at issue, he was stressed and was like "a deer in the headlights," and that he relied heavily on his staff. FF 94. Yet Dr. Candilis noted Respondent was maintaining his schedules, deadlines, cases, and payroll, in addition to having meetings with staff and overall involvement in the day-to-day activities of his firm. FF 94. In reviewing Dr. Hodas's notes—the only contemporaneous notes during the period at issue—Dr. Candilis concluded that Respondent's depression was not "necessarily affecting him in the way that might affect someone whose decision-making is compromised." FF 95. He reinforced places in Dr. Hodas's notes from 2013 that reported that Respondent's concentration was good and that his mind was not wandering. FF 95-96. Accordingly, Dr. Candilis concluded Respondent's condition was not a disabling one, but that Respondent was nonetheless "rehabilitated." FF 87, 98.

Further mitigation. The record demonstrates Respondent has never previously been the subject of a disciplinary complaint. FF 99.

Speculative Hearing Committee findings. In addition to the findings summarized above, the Hearing Committee made other findings that the Board concludes are primarily speculative and not supported by substantial evidence: (1) the Landlord & Tenant Branch and the U.S. Marshals Service behaved recklessly and may have engaged in misconduct, (2) other attorneys may have mishandled the

refund checks but were not prosecuted, (3) Mr. Cole might have taken steps to resolve Respondent's mishandling of refund checks without resorting to filing a disciplinary complaint, and (4) Disciplinary Counsel might have "work[ed] with Respondent in a constructive fashion" rather than "burden[ing]" him with a long investigation. *See* FF 10-12, 18-19, 35, 100, 103. We do not adopt these findings, and we remind Hearing Committees that all findings of fact must be supported by clear and convincing evidence rather than speculation.

II. CONCLUSIONS OF LAW

A. Respondent's Motions to Dismiss

Respondent has filed two motions to dismiss. The first, filed on April 18, 2018, urged the dismissal of several *paragraphs* of the Specification of Charges for failing to state a claim. The second, filed on August 2, 2018, sought dismissal of several *counts* of the Specification of Charges as a matter of law. We agree with the Hearing Committee's recommendations and deny both Motions. *See In re Ontell*, 593 A.2d 1038, 1040 (D.C. 1991); Board Rule 7.16(a).

The first: Dismissal of paragraphs. Respondent filed a motion to dismiss certain paragraphs of the Specification of Charges, arguing that the allegations in ¶¶ 17-18 were insufficient to state a violation of Rule 8.4(c), that the allegations in ¶¶ 26 and 28 were insufficient to state a violation of any disciplinary Rule, and that the allegations in ¶¶ 25 and 29 were factually incorrect.

The Board Rules do not address dismissal or striking of specific paragraphs or parts of a Specification of Charges. By analogy, the Superior Court's Rules of

Civil Procedure allows the court to "strike from a pleading . . . any redundant, immaterial, impertinent, or scandalous matter." Super. Ct. R. Civ. P. 12(f). Respondent does not address or attempt to meet this standard, but argues only that selected factual allegations in the Specification of Charges, when viewed in isolation, fail to state Rule violations, and that other allegations are simply wrong. Neither is a basis to dismiss, or strike paragraphs of, the Specification of Charges. Respondent's motion to dismiss paragraphs 17,18, 25, 26, 28, and 29 is denied.

The second: Dismissal of counts. Respondent moved to dismiss the charges alleging intentional or reckless misappropriation, commingling, inadequate record-keeping, and failure to promptly notify and promptly deliver entrusted funds under Rules 1.15(a) and (c), arguing that the alleged misconduct instead falls within the scope of Rule 8.4(c). As explained below, Disciplinary Counsel has proven by clear and convincing evidence that Respondent violated each of these Rules. Therefore, Respondent's motion to dismiss Counts A, B, C, and D is denied.

B. The Charged Rule Violations

1. The writ refunds were subject to the protections of Rule 1.15.

Rule 1.15(a) provides that "[a] lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property." Respondent argues that the writ refunds were not subject to Rule 1.15 because the firm advanced the writ fee on behalf of the clients, and thus any writ fee refund belonged to the firm, *even if the client had already reimbursed the firm for the writ fee*. He summarized his legal position in

his brief to the Board: "The client's payment of a bill for legal services and forwarded costs does not fall within [Rule] 1.15 ***at all***." (emphasis in original). R. Br. at 2. Respondent is correct; a client's payment of a fee for services already rendered or for costs already incurred is not "client property;" but his argument misses the point. The writ refunds received from Superior Court were client property because the clients had reimbursed the firm for advancing the writ costs. Because the refund belonged to the client, and not the firm, the refunds were the "property of clients . . . in [Respondent's] possession in connection with a representation," and thus subject to Rule 1.15.

2. Respondent commingled entrusted funds with his own in violation of Rule 1.15(a).

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). Thus, "commingling is established 'when a client's money is intermingled with that of his attorney and its separate identity is lost so that it may be used for the attorney's personal expenses or subjected to the claims of its creditors.'" *In re Malalah*, Board Docket No. 12-BD-038 at 14 (BPR Dec. 31, 2013) (appended HC Rpt.) (quoting *In re Hessler*, 549 A.2d 700, 707 (D.C. 1988)), *recommendation adopted where no exceptions filed*, 102 A.3d 293, 293 (D.C. 2014) (per curiam); *see also 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.").

Between January 2013 and February 2014, Respondent deposited or caused to be deposited $316,220 in refund checks into his operating account at a time when it contained the firm's own funds. FF 20. At least $257,400 of this amount belonged to former clients. FF 27, 42, 49; Tr. 9, 46-47. Therefore, Disciplinary Counsel has proven that Respondent commingled entrusted client funds with firm funds in violation of Rule 1.15(a).

3. Respondent intentionally misappropriated entrusted funds in violation of Rule 1.15(a).

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) (second alteration added) (quoting *In re Harrison*, 461 A.2d 1034, 1036 (D.C. 1983)).

Respondent engaged in misappropriation when he used the entrusted writ refunds to pay the firm's expenses. From January 2013 to February 2014, Respondent received $316,220 in refund checks, at least $257,400 of which belonged to former clients. FF 20, 27, 42, 49; Tr. 9, 46-47. Respondent did not hold these funds in trust as required. FF 20. Nor did he deliver them to his former clients until late March 2014 (*see* discussion of Rule 1.15(c), *infra*). But on February 14, 2014, the balance in his operating account was only $85,878.60. FF 50. *See In re Ahaghotu*, 75 A.3d 251, 256 (D.C. 2013) (misappropriation occurs where "the balance in [the attorney's] trust account falls below the amount due to the client [or third party]" (second alteration added)). Because his account held less than what he

was required to hold, Disciplinary Counsel has proven Respondent misappropriated client funds. *See, e.g.*, *Ahaghotu*, 75 A.3d at 256; *In re Chang*, 694 A.2d 877, 880 (D.C. 1997) (per curiam) (appended Board Report).

Respondent's misappropriation was intentional. He made a conscious choice to use the entrusted funds belonging to former clients not only to pay his salary, but to "float" his firm, which would have otherwise operated at a loss. FF 27, 50-51. Crucially, he did so while disbursing refunds to *current* clients. He stated he did so solely as a matter of "goodwill"—as in showing his "attentiveness" to these clients. FF 27, FF 27 n.8. We agree with the Hearing Committee that "[r]eimbursing the current clients proves that Respondent was fully aware that the refunds were owed [to his] clients." HC Rpt. at 48. Indeed, Respondent's "attentiveness" to his current clients included making sure that they received the writ refunds that they were due. He deliberately chose to deny the same benefit to his former clients, and when asked about the refunds owed to his former clients, he falsely claimed the funds were returned. FF 31-32. These facts prove by clear and convincing evidence that Respondent intentionally misappropriated entrusted funds. *See In re Mabry*, 11 A.3d 1292, 1294 (D.C. 2011) (per curiam) ("[A]lthough much of the evidence is circumstantial, it demonstrates that respondent intentionally misappropriated.").[11]

[11] Respondent argues in his brief that the record shows that he made a mistake but had no intent to deceive. Resp. Br at 22. However, he does not cite any evidence to support this proposition, and our review of the record shows that he testified that "[i]t was wrong" for him to believe that the funds belonged to the firm, Tr. 45; *see also* Tr. 48 (agreeing that it was "improper" to keep the money). But he did not explain, beyond "goodwill" towards current clients, why he believed that it was proper to for him to use the former clients' refunds, but not the current clients' refunds. *See, e.g.*, Tr. 65-66, 72-73, 362.

Respondent argued in his brief and during oral argument that retaining and spending the refunds that belonged to his former clients was not misappropriation because the funds were not "entrusted," instead, he explains that the funds were refunded from the Superior Court and not given to him to hold in trust by the clients. *See* R. Br. 2-3. But Respondent's argument is based on a misunderstanding of the requirements to hold in trust any funds that belong to his clients or third parties that are in his "possession in connection with a representation." Rule 1.15(a). The refunds from the Superior Court belonged to his current and former clients because the refunds were expenses that his clients previously paid through the firm's billings. The fact that his clients' funds were given to him by someone other than the client is of no moment. *See, e.g.*, *In re Haar*, 698 A.2d 412, 414-15 (D.C. 1997) (misappropriation of settlement funds received from a non-client but owed to the client).

4. Disciplinary Counsel has proven Respondent failed to keep complete records in violation of Rule 1.15(a).

Rule 1.15(a) provides that "[c]omplete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation." The purpose of the requirement "is so that 'the documentary record itself tells the full story of how the attorney handled client or third-party funds' and whether, for example, the attorney misappropriated or commingled a client's funds." *In re Edwards*, 990 A.2d 501, 522 (D.C. 2010) (citation omitted). "Financial records are complete only when an attorney's documents are 'sufficient to demonstrate [the attorney's] compliance with his ethical

duties.'" *Id.* The reason for requiring complete records is so that any audit of the attorney's handling of client funds by Disciplinary Counsel can be completed even if the attorney or the client, or both, are not available. *In re Clower*, 831 A.2d 1030, 1034 (D.C. 2003) (quoting Board Report). We find that Respondent failed to keep adequate records because he could not account for $34,391 of the writ refunds he received.

The Committee found no violation because Respondent's records could account for the "bulk" of the money, and further because these refunds came as a surprise, such that Respondent had no notice he would need to account for them. HC Rpt. at 43-44. We disagree on both grounds. Rule 1.15(a) mandates *complete* records and contains no exception for entrusted funds that are received unexpectedly. Once Respondent understood that these refunds belonged to clients and former clients, he was obligated to accurately account for them. We accordingly find Respondent violated 1.15(a) in failing to keep complete records of his handling of entrusted funds.

5. Respondent failed to promptly notify clients upon receiving funds belonging to them and failed to promptly deliver these funds, both in violation of Rule 1.15(c).

Rule 1.15(c) requires a lawyer to "promptly notify the client or third person" "upon 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 also, e.g.*, *Edwards*, 990 A.2d at 520-21 (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).

As to the refunds belonging to former clients, Respondent did neither; instead he kept and used them to float the firm. FF 20, 27, 50-51; Tr. 44-45, 48. Some of these funds were kept for over a year; indeed, only in late March 2014 did Respondent forward most of these funds to former clients. FF 37, 42. Such a long period of time is clearly not "prompt." *See, e.g.*, *In re Graham*, Bar Docket No. 422-97, at 9 (BPR Nov. 16, 2001) (four-month delay "falls short of any reasonable definition of 'prompt'"), *recommendation adopted where no exceptions filed*, 795 A.2d 51 (D.C. 2002) (per curiam); *In re Ross*, 658 A.2d 209, 211 (D.C. 1995) (eleven-month delay is not "prompt"); *In re Pye*, 57 A.3d 960, 972 (D.C. 2012) (per curiam) (appended Board Report) ("over a year" delay is not "prompt"). Therefore, we find that Disciplinary Counsel has proven by clear and convincing evidence that Respondent violated Rule 1.15(c).

6. Respondent engaged in dishonest conduct in violation of Rule 8.4(c).

Disciplinary Counsel contends Respondent was dishonest in two separate instances: when he withheld the refunds from his former clients and when he made false statements in emails to Mr. Cole about refunds due to a former client. The Hearing Committee found Respondent was dishonest in the former, but not in the latter instance, reasoning that any potential dishonesty to Mr. Cole was "*de minimis*."

Rule 8.4(c) provides that it is professional misconduct for a lawyer to "[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

Dishonesty "encompasses fraudulent, deceitful, or misrepresentative behavior," and "includes conduct evincing a lack of honesty, probity or integrity in principle; a lack of fairness and straightforwardness." *In re Shorter*, 570 A.2d 760, 767-68 (D.C. 1990); *In re Scanio*, 919 A.2d 1137, 1143 (D.C. 2007) (citation and quotation marks omitted).

(i) False Statements to Mr. Cole

Mr. Cole asked about the status of a writ refund to WDC-1—Mr. Cole's current client and Respondent's former client. Respondent represented that the refund had been sent to WDC-1, even though he knew that WDC-1 was a former client and he knew that refunds were not being sent to former clients.[12] Respondent has admitted that his statement was false, but testified that he relied on information from his assistant. However, his assistant testified that Respondent never asked her about WDC-1's refund. The Hearing Committee credited her testimony over Respondent's and we see no reason to disturb that conclusion. R. Br. at 24; FF 32. Given these circumstances, we find clear and convincing evidence of at least reckless dishonesty. *See In re Romansky*, 825 A.2d 311, 316-17 (D.C. 2003) (dishonesty can be established by recklessness—consciously disregarding the risk created by a respondent's actions).

[12] The decision to keep the refunds from former clients was significant, as evident by Respondent's reaction during the hearing when asked about evidence that refunds for one former client were applied to an outstanding balance. He explained that he had discussed the process with staff "a hundred times" and that applying the refunds to an outstanding balance for a former client was "illogical" and done "against my orders." Tr. 398.

The Committee declined to find a violation of 8.4(c) on this basis because—in its view—the statement was *de minimis* and Respondent may have been simply trying to "brush off" the inquiry. FF 32-33; HC Rpt. at 56. We disagree. The dishonesty directly related to the practice of law and client-funds. And "[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) (internal quotation marks omitted). The Hearing Committee seems to imply that Mr. Cole did not have a good reason to inquire about the funds. But the obligation to be honest in response to a question is not dependent on whether the questioner has pure motives. Moreover, Mr. Cole, as counsel for WDC-1, asked a legitimate question on behalf of his client. The record shows that WDC-1 was owed over $12,000 from Respondent's firm. DX 3 (showing that Respondent repaid WDC-1 on March 21, 2014, after Mr. Cole's inquiry).

(ii) Respondent's withholding and spending of refunds belonging to former clients.

The Committee found that Respondent was dishonest in violation of Rule 8.4(c) by knowingly and intentionally keeping and spending funds belonging to former clients. HC Rpt. at 55-56. We agree with the Hearing Committee that Respondent's conduct was dishonest. After prolonged discussions with his staff, Respondent decided to return the refunds to current clients, but to keep and spend the refunds belonging to former ones. HC Rpt. at 55. As explained above, we found that this conduct was intentional misappropriation and it was also dishonest, and therefore was a violation of Rule 8.4(c). *See In re Mooers*, Bar Docket No. 177-04,

at 17-18 (BPR May 22, 2006) (explaining that intentional misappropriation includes an element of dishonesty, for it cuts against the "continuing representation to [the] client that those [entrusted] funds are being preserved for the client's use alone," but observing that when intentional misappropriation is found, finding other violations for the same misconduct would not alter the sanction), *recommendation adopted where no exceptions filed*, 910 A.2d 1046 (D.C. 2006) (per curiam).[13]

III. SANCTION

When an attorney has intentionally misappropriated funds, absent "extraordinary circumstances," disbarment is the presumptive sanction for intentional or reckless misappropriation. *Addams*, 579 A.2d at 191; *In re Hewett*, 11 A.3d 279, 286 (D.C. 2011). Disbarment may be stayed if a respondent is entitled to mitigation pursuant to *Kersey*, 520 A.2d at 326, which requires the respondent to prove:

> (1) by clear and convincing evidence that he suffered from a disability or addiction at the time of the misconduct;
>
> (2) by a preponderance of the evidence that the disability substantially caused him to engage in that misconduct; and
>
> (3) by clear and convincing evidence that he is substantially rehabilitated.

In re Stanback, 681 A.2d 1109, 1114-15 (D.C. 1996); *see also In re Rohde*, 191 A.3d 1124, 1136-37 (D.C. 2018); *In re Silva*, 29 A.3d 924, 934 (D.C. 2011) (appended Board Report).

[13] As noted in *Mooers*, the additional finding of dishonesty on the same facts as intentional misappropriation has no effect on the sanction.

Respondent seeks to mitigate any sanction because he suffered from major depression at the time of his misconduct. The Hearing Committee found that Respondent met his burden of proof as to the first and third prongs of the *Kersey* analysis but failed to prove the second prong. Respondent contends that Disciplinary Counsel's expert witness, Dr. Candilis, should not have been qualified as an expert witness, and that he met his burden as to all aspects of the *Kersey* analysis. We agree with the Hearing Committee's conclusion that Respondent failed to prove *Kersey*'*s* second prong, but find that Respondent also failed to meet his burden under *Kersey*'s first prong.

1. Was Dr. Candilis properly qualified as an expert witness?

Respondent concedes that Disciplinary Counsel's expert, Dr. Philip Candilis, has "impressive credentials," but should not have been allowed to testify as an expert because he misstated the first two *Kersey* prongs by "intentionally ignoring" caselaw and statutory definitions. R. Br. at 6-8. We disagree.

Respondent argues that Dr. Candilis should not have been qualified as an expert under Federal Rule of Evidence 702, which was adopted by the Court in *Motorola Inc. v. Murray*, and which states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;

> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

147 A.3d 751, 756 (D.C. 2016).

Respondent's argument confuses a witness's competence to give expert opinion testimony with the weight to be afforded that testimony. Respondent does not contend that Dr. Candilis is not qualified to give an opinion, that his opinion would not help the trier of fact to understand the evidence or determine a fact in issue, that his testimony is not based on sufficient facts or data, or is the product of reliable principles and methods, or that Dr. Candilis did not reliably apply those principles and methods to the facts of the case. Based on our independent review of the record, we see no reason to disturb the Hearing Committee's ruling that Dr. Candilis was qualified as an expert in general and forensic psychiatry.

Qualifications aside, Respondent seems to argue that Dr. Candilis's testimony is entitled to no weight, because he did not sufficiently address the *Kersey* elements in offering his opinion that, based on the information available to him, and to a reasonable degree of medical certainty, Respondent's "mental condition did not interfere with his capacity to make appropriate decisions with the writ refund checks," and "is not disabling." R. Br. at 7-8. Again we disagree. These opinions relate directly to whether Respondent suffered from a disability at the time of the misconduct, and if so, whether the disability was a substantial cause of the

misconduct. That the opinions did not precisely track *Kersey*'s phraseology is of no moment.

2. *Kersey*'s first prong: Did Respondent suffer from a disability at the time of his misconduct?

To satisfy his burden on the first prong, Respondent must prove by clear and convincing evidence that he suffered from a disability at the time of his misconduct.

The Committee found that because Respondent suffered from depression during the period at issue, Respondent satisfied *Kersey*'s first prong. HC Rpt. at 64. Disciplinary Counsel appears to agree that Respondent had depression throughout his life—including during the period at issue—but contends this is not enough. ODC Br. at 20; HC Rpt. at 64. Focusing on *Stanback*, it argues that Respondent must prove his depression was "disabling" during the time of the misconduct.[14] And because he has not, his *Kersey* claim must fail on prong one. ODC Br. at 20-22. The Hearing Committee found that whether the depression was "disabling" is really a question of causation under prong two.

We agree with Disciplinary Counsel that a diagnosis alone is insufficient to meet Respondent's burden under prong one; Respondent must have been suffering the ill-effects of the disability at the time of the misconduct. *See In re Lopes*, 770 A.2d 561, 568 (D.C. 2001) (the respondent "was suffering from depression"); *In re*

[14] *Stanback* is not exactly on point. There, the respondent failed to prove he suffered from alcoholism at any point prior to the time of the misconduct. 681 A.2d at 1116. Here, the parties agree that Respondent was diagnosed with severe depressive disorder before the time of the misconduct; the question is whether Respondent continued to suffer from it during the relevant period.

Robinson, 736 A.2d 983, 985 (D.C. 1999) (the respondent "suffered from dysthymia"); *Stanback*, 681 A.2d at 1114-15 (respondent must show that "he suffered from an alcoholism-induced impairment" at the time of the misconduct); *see also* FF 89 (quoting DX 25 a cautionary statement from the American Psychiatric Association's fifth edition of the Diagnostic and Statistical Manual of Mental Disorders ("DSM-5") and its application to forensic psychology: "it is important to note that the definition of mental disorder included in DSM-5 was developed to meet the needs of clinicians, public health professionals and research investigators rather than all of the technical needs of the courts and legal professionals").

To hold that a diagnosis alone establishes a disability without establishing by clear and convincing evidence that the condition is disabling is also inconsistent with Respondent's own history. He has been diagnosed and treated for depression most of his adult life. But he has not been disabled his entire career because his condition was managed through treatment and he was not suffering from the ill-effects of the condition. Similarly, a person diagnosed with alcoholism does not suffer the ill-effects or disabling-effects of alcoholism when he is in recovery and is sober—yet his diagnosis remains alcoholism.

The Hearing Committee applied the question of whether Respondent was disabled at the time of the misconduct to the second *Kersey* prong—causation. HC Rpt. at 64. Understandably, the two prongs relate—an attorney cannot establish

causation if he cannot first establish that the condition was a disability.[15] And as explained below, even if we assume proof of disability, Respondent's evidence falls short in establishing that his depression caused his misconduct.

Here, we find that Respondent established that he was diagnosed with depression, but that he failed to prove by clear and convincing evidence that its ill-effects disabled him when he mishandled writ refunds—January 2013 through February 24, 2014. Dr. Hodas's notes—the only contemporaneous record during this period—reflect that Respondent was suffering from depression not long before he first received the writ refund checks, but by January 2013, Respondent was improved. Notably, Respondent's own words to Dr. Hodas were that despite feeling sad, "things [were] going well at [the] firm," and that he was "not obsessing & worrying constantly." FF 63. Shortly thereafter his visits with Dr. Hodas were reduced as his symptoms improved greatly and Respondent "continued to show mental improvement—citing more energy, less worry, and more optimism." FF 64. The opinions of Dr. Lion, Ms. Perme, and Dr. Abudabbeh suggesting that Respondent was suffering from depression in 2013 are based on after-the-fact assessments, and none account for his improvement on new medications as early as

[15] The cases cited by the Hearing Committee, *In re Verra* and *In re Mardis*, HC Rpt. at 64, are not to the contrary because there was no challenge by Disciplinary Counsel as to the first prong under *Kersey*. *See, e.g.*, *In re Verra*, Bar Docket No. 166-02, at 32 (BPR July 20, 2006) ("Bar Counsel concedes that Respondent had met her burden of proof on the first element of Kersey"), *recommendation adopted where no exceptions filed*, 932 A.2d 503, 505 (D.C. 2007) (per curiam); *In re Mardis*, Board Docket No. 14-BD-085 (July 13, 2017), appended HC Rpt. at 112 ("Disciplinary Counsel does not dispute that . . . Respondent was significantly disabled by alcoholism and psychotic thinking" (alterations and quotation marks omitted)), *recommendation adopted where no exceptions filed*, 174 A.3d 868, 869 (D.C. 2017) (per curiam).

January 2013. Indeed, Dr. Abudabbeh's assessment was largely a conclusion that his diagnosis alone established a disability. Tr. 716, 731. This conclusion is not supported by the diagnostic manual, as explained by Dr. Candilis, or by our case law. Tr. 799-802 (citing DX 25); *Lopes*, 770 A.2d at 568 (noting that respondent's depression along with the evidence of his symptoms "amounted to a disability cognizable under *Kersey*").

Accordingly, we find that Respondent failed to prove by clear and convincing evidence that he was suffering from a disability when he mishandled the writ refunds.[16]

3. *Kersey*'s second prong: Did Respondent's disability substantially affect his misconduct?

Because Respondent has not shown that he was suffering from depression during the time of misconduct, Respondent cannot meet his burden on the causation prong. Alternatively, if the Court finds Respondent met his burden under prong one, we would recommend Respondent did not meet his burden here, for the reasons substantially set forth in the Committee Report.

To satisfy the second prong, Respondent must prove by a preponderance of the evidence[17] that his disability substantially affected his misconduct.

[16] Our conclusion does not minimize that Respondent has a diagnosis of depression and that the depression was affecting him in late 2012, but the record does not support that he continued to experience those effects into January 2013 when the refund checks first arrived in his office, let alone all of 2013 and early 2014 when he continued to receive and spend his former clients' funds.

[17] This "requires proof that something more likely than not exists or occurred." *V.K. v. Child and Family Services Agency*, 14 A.3d 628, 633 n.10 (D.C. 2011) (citation and quotation marks omitted).

"Substantially affected" entails "but for causation"—meaning Respondent must show that "the misconduct would not have occurred but for his depression." *In re Cappell*, 866 A.2d 784, 785 (D.C. 2004) (per curiam); *see also Kersey*, 520 A.2d at 327. But Respondent's disability need not be the "sole cause;" instead Respondent must show a "sufficient nexus" between the misconduct and his disability. *See In re Kakroff*, 934 A.2d 409, 423 (D.C. 2007). And nested within, as the Committee noted, is proof that the disability was disabling at the time of the violation. *See* HC Rpt. at 65 (citing *In re Verra*, 932 A.2d 503, 505 (D.C. 2007) (per curiam)).

Even if he was suffering from depression, as the Committee explained, "Respondent has not identified any area of his life in which his depression disabled his conduct, except for purposes of defending this action." HC Rpt. at 65; *see also Lopes*, 770 A.2d at 568-69 (agreeing with and quoting the Board's conclusion that there was insufficient evidence of causation absent evidence that the impairments "'rendered Respondent unable to understand that he was being dishonest or unable to behave otherwise'"). This included maintaining a practice satisfactory to his clients, creating computer programs to better track client matter activity, hiring staff, and selling a house and buying a new one. HC Rpt. at 65-66. These events, combined with his own reported improvement to Dr. Hodas in early 2013, and continued improvement without significant interruption into May 2014, significantly cut against any causation argument. *Id.* at 67. We would recommend the Court so find if the Court finds Respondent met his burden under prong one.

4. *Kersey*'s third prong: Is Respondent substantially rehabilitated?

This element is not contested—both parties and the Hearing Committee agree Respondent does not need rehabilitation. We agree.

IV. CONCLUSION

For the foregoing reasons, we recommend Respondent be disbarred as mandated by *Addams*, and that he be required to properly dispose of the unaccounted-for $34,391 or disgorge that amount to the D.C. Bar's Clients' Security Fund. We further recommend that the period of disbarment run for purposes of reinstatement from the filing of the affidavit required by D.C. Bar R. XI, § 14(g). *See In re Slosberg*, 650 A.2d 1329, 1331-33 (D.C. 1994).

BOARD ON PROFESSIONAL RESPONSIBILITY

By: 

Lucy E. Pittman

All members of the Board concur in this Report and Recommendation except Ms. Smith, who did not participate.