THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Issued
December 17, 2020

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

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

I. INTRODUCTION

Respondent, Timothy Guy Smith, was appointed as a co-trustee of a supplemental needs trust established to hold funds paid to T.S. following a personal injury settlement (the "T.S. Trust"). An Ad Hoc Hearing Committee found by clear and convincing evidence that Respondent violated D.C. Rule of Professional Conduct 1.15(a) by recklessly misappropriating entrusted funds, commingling entrusted funds with his own funds, and failing to maintain adequate records of his handling of entrusted funds. The Hearing Committee also concluded that Respondent violated Rule 8.4(d) by engaging in conduct that seriously interfered with the administration of justice because he paid his legal fees from trust funds without permission and because his lack of recordkeeping necessitated a substantial effort and expenditure of time and resources in an Auditor-Master proceeding to account for the use of T.S. Trust funds.

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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.

The Hearing Committee recommended that Respondent be disbarred pursuant to *In re Addams*, 579 A.2d 190, 191 (D.C. 1990) (en banc), and rejected his argument that the eight-year delay between the initiation of the disciplinary investigation and the filing of the Specification of Charges resulted in any unfair prejudice to his defense that might have warranted a lesser sanction.

We agree with the Hearing Committee's conclusions, except that we find that Respondent engaged in intentional as well as reckless misappropriation. We recommend that Respondent be disbarred.[1]

II. STANDARD OF REVIEW

The Board '"must accept the Hearing Committee's evidentiary findings, including credibility findings, if they are supported by substantial evidence in the record."' *See In re Klayman*, 228 A.3d 713, 717 (D.C. 2020) (per curiam) (quoting *In re Bradley*, 70 A.3d 1189, 1193 (D.C. 2013) (per curiam)); *see also In re Thompson*, 583 A.2d 1006, 1008 (D.C. 1990) (per curiam) (defining "substantial evidence" as "enough evidence for a reasonable mind to find sufficient to support the conclusion reached"). We review *de novo* its legal conclusions and its determinations of ultimate fact. *See Klayman*, 228 A.3d at 717; *Bradley*, 70 A.3d at 1194 (Board owes "no deference to the Hearing Committee's determination of 'ultimate facts,' which are really conclusions of law and thus are reviewed *de novo*").

[1] Because we agree with the Hearing Committee that Respondent engaged in misconduct, we deny the request in his Answer that the charges be dismissed.

III. FINDINGS OF FACT

Except where specifically noted below, we conclude that the Hearing Committee's Findings of Fact, summarized below, are supported by substantial evidence in the record on the whole.[2]

In the summer of 2008, Respondent was retained to set up a supplemental needs trust for the benefit of T.S., who was due to receive the proceeds of a confidential settlement of a civil action that had been approved by the Superior Court in a sealed Consent Order. Additional detail regarding the content of the Consent Order is set forth in the attached Confidential Appendix.

Respondent and another lawyer, Kechia R. Adams-Miller, drafted the supplemental needs trust documents to hold the settlement funds, and on September 25, 2008, they petitioned the Probate Division of the Superior Court for the District of Columbia to establish the T.S. Trust. Article 8 of the T.S. Trust identified Ms. Adams-Miller and Respondent as the Trustees, and Section E provided for their compensation:

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

FF 12 (quoting DX 5 at 5-14). Importantly, conservators were required by law to obtain court approval ***before*** taking any fees from estate assets. D.C. Code § 21-2060(a) (2008); *see also* Probate Court Rule 308(a) (providing that any attorney or

[2] As set forth in note 14, we agree with Respondent that his prior business relationship with KH Funding and investments therein is not relevant to this proceeding.

conservator "is entitled to reasonable compensation for services rendered," and that "[c]ompensation paid from the assets of the subject of the proceeding, protected individual or ward . . . must be approved by Order of the Court before being paid"); FF 13. The Superior Court approved the T.S. Trust on December 5, 2008.

On September 30, 2008, Respondent opened an account for the T.S. Trust at Sandy Springs Bank and deposited two T.S. Trust annuity checks (totaling $4,424) into the account.[3] On November 5, 2008, before the court had approved the T.S. Trust Petition, and without seeking or receiving the court's permission, Respondent paid himself at least $4,410 in legal fees from the T.S. Trust funds.[4]

After initially depositing T.S. Trust funds into the T.S. Trust account at Sandy Springs Bank, Respondent deposited two $2,212 T.S. Trust annuity checks into his firm's IOLTA account before the T.S. Trust was approved. Respondent also deposited three $2,212 T.S. Trust annuity checks into his law firm's small business

[3] Although Respondent and Ms. Adams-Miller were co-trustees, Respondent was the only signatory on the T.S. Trust account's signature card. *See* DX 18. For this reason alone, our misappropriation analysis below is unaffected by the Court's recent decision in *In re Harris-Lindsey,* D.C. App. No. 17-BG-859, at 22, 31 (Dec. 10, 2020), addressing entrustment when the respondent was a co-signatory on a bank account.

[4] Jt. Stip. ¶ 10; FF 8, 32; Tr. at 11. There is no dispute that Respondent paid himself a total of $7,080 over the course of his trusteeship, but it is not clear in the record precisely when he took $2,670 in additional fees (bringing the total fees to $7,080). Disciplinary Counsel originally charged, and Respondent originally admitted, that he paid himself $7,080 in fees on November 5, 2008. *See* Specification of Charges ¶ 10; Answer ¶ 10. However, before the Hearing, the parties stipulated that Respondent paid himself "at least" $4,410 on that date. Jt. Stip. ¶ 10. In its brief to the Hearing Committee, Disciplinary Counsel argued that Respondent paid himself $4,410 before the trust was approved, and paid the balance after the trust was approved. Respondent did not challenge that chronology, which the Hearing Committee accepted. As neither party challenges that Respondent paid himself some fees before the trust was approved, and some fees after, we need not determine the exact date(s) on which Respondent took the balance of his fees without court approval.

checking account ("SBCA"), an operating account, in January, February, and March 2009, at times when the account contained Respondent's own funds.

On May 15, 2009, T.S.'s mother (M.P.) petitioned the court to amend the T.S. Trust and replace Respondent and Ms. Adams-Miller as Co-Trustees. The court granted the petition on July 1, 2009 and removed Respondent as Trustee.

Respondent filed his first and final accounting on October 15, 2009, which reflected that he paid himself a total of $7,080 in legal fees, all taken without court approval. On October 28, 2009, the court ordered Respondent to return all of the legal fees taken without court approval. Respondent repaid the T.S. Trust in November 2009.

Following the Successor Trustee's objection to Respondent's accounting, on January 27, 2010, the court ordered the Auditor-Master to state the final account for Respondent as Co-Trustee. The Auditor-Master held an evidentiary hearing on June 21, 2010, and with "substantial assistance" from the Successor Trustee and T.S.'s family, the Auditor-Master was able to account for all but $521.39 of the T.S. Trust funds that had been entrusted to Respondent.[5] The Auditor-Master's task was hampered by Respondent's failure to maintain records of his handling of T.S. Trust funds that tracked the receipt and expenditure of T.S. Trust funds.

[5] Respondent objects to the conclusion that the Successor Trustee and T.S.'s family provided "substantial assistance" to the Auditor-Master. The transcript of the Auditor-Master hearing (DX 12) supports the Hearing Committee's conclusion, and we see no reason to disturb it.

IV. CONCLUSIONS OF LAW

A. Misappropriation

Rule 1.15(a) prohibits misappropriation of funds entrusted to a lawyer. We agree with Respondent that there is no allegation that he engaged in any self-dealing or took fees without first doing work exclusively for the benefit of T.S. However, misappropriation is "any *unauthorized* use of [a] client's funds entrusted to [an attorney] . . . whether or not [the attorney] derives any personal gain or benefit therefrom." *In re Nave*, 197 A.3d 511, 514 (D.C. 2018) (per curiam) (emphasis added) (other alterations in original) (quoting *In re Anderson*, 778 A.2d 330, 335 (D.C. 2001)); *see In re Hewett*, 11 A.3d 279, 285-86 (D.C. 2011). Further, misappropriation is essentially a *per se* offense and does not require proof of improper intent. *In re Anderson*, 778 A.2d 330, 335 (D.C. 2001).

The primary issue before the Board is not whether there was misappropriation, but whether the misappropriation that occurred was intentional, reckless, or merely negligent. This distinction is particularly important because, under *Addams*, the presumptive sanction for intentional or reckless misappropriation is disbarment. 579 A.2d at 191.

1. Pre-Trust Misappropriation

It is undisputed that Respondent misappropriated client funds when, on November 5, 2008 — before the court had approved and thereby created the T.S. Trust — he paid himself at least $4,410 in legal fees from funds belonging to T.S. and did not seek or receive the court's permission to do so. The evidence of pre-

trust misappropriation is clear and convincing. *See In re Bach*, 966 A.2d 350, 350-52 (D.C. 2009) (unauthorized use element satisfied where the respondent took estate funds to pay his fee without prior court approval, even though the probate court later approved the amounts).

The Hearing Committee found that Respondent's pre-trust misappropriation was reckless. Respondent argues that the misappropriation was negligent because it resulted from his good faith belief that the court would approve the fees retroactively, and his "misunderstanding of the prevailing regulations and requirements." Resp. Br. at 14. Disciplinary Counsel argues that Respondent's misappropriation was intentional. *See* ODC Br. at 19 n.5. We consider Respondent's state of mind *de novo*. *See In re Abbey*, 169 A.3d 865, 872 (D.C. 2017) (whether misappropriation resulted from more than simple negligence is a question of law that the Board and the Court review *de novo*).

Respondent testified that he understood at the time that he lacked authority to spend any of the trust assets. Tr. at 194, 199. Prior to making the unauthorized self-payment, Respondent filed with the court a Petition to establish the T.S. Trust. *See* DX 4. Not only did that Petition summarize terms of the settlement agreement and quote the Consent Order approving (and setting forth in its entirety) the settlement agreement, but Respondent himself verified the truth of the facts stated in the Petition. *Compare* DX 2 at 2-6, *with* DX 4 ¶ 6; Tr. at 217 (Respondent authenticating his signature on the verification in DX 4). Respondent's verification, combined with

his testimony, is clear and convincing evidence that he was aware of the court-approved settlement agreement. *See In re Pleshaw*, 2 A.3d 169, 173-74 (D.C. 2010).

The facts of this case are materially indistinguishable from those presented in *Bach* and *Pierson*, where the Court held that knowingly taking entrusted funds without the required prior approval, and in hopes of a retroactive approval, constituted intentional misappropriation. *See Bach*, 966 A.2d at 350-52 (respondent took entrusted funds as fee without requisite advance court approval); *In re Pierson*, 690 A.2d 941, 947 n.18, 949 (D.C. 1997) (respondent took settlement funds without advance client approval). Accordingly, we disagree with the Hearing Committee that Respondent's misappropriation was only reckless, and we instead find that it was intentional.

Even if we were to credit Respondent's explanation that this was a good faith mistake, which we do not, his conduct was reckless at best. The Court has found negligent misappropriation where the unauthorized use resulted from a lawyer's good faith mistake, but such a mistake must be "objectively reasonable." *In re Gray*, 224 A.3d 1222, 1232 (D.C. 2020); *Pierson*, 690 A.3d at 949 (citing *In re Evans*, 578 A.2d 1141, 1142 (D.C. 1990) (per curiam)). As set forth in the Confidential Appendix, he knew that he could not take settlement funds before the trust had been approved, and he knew that the trust had not been approved, yet he concluded that the court "would have to" retroactively approve his use of the funds. Tr. 200. Respondent's unsupported belief that his conduct would be approved retroactively

is not objectively reasonable. *See, e.g.*, *Pierson*, 690 A.2d at 949[6]; *In re Soininen*, Bar Docket No. 121-03 (BPR May 12, 2005), appended HC Report at 27, 30 (finding that the respondent's misappropriation was not simply negligent, in part because of the "vagueness of [the] [r]espondent's testimony regarding the consultations critical to [respondent's] mistake of law defense"), *recommendation adopted where no exceptions were filed*, 889 A.2d 294 (D.C. 2005) (per curiam); *cf. In re Fair*, 780 A.2d 1106, 1111-13 (D.C. 2001) (finding only negligent misappropriation, based in part on expert testimony which noted the "prevalence in actual probate practice at the time of payment of fees in probate matters without prior court approval"). Even assuming that Respondent actually believed that he was entitled to take the settlement funds before the trust had been approved, reliance on such an objectively unreasonable belief was reckless.

2. Post-Trust Misappropriation

After the T.S. Trust was created on December 5, 2008, Respondent did not deposit trust checks into the T.S. Trust Account that he had opened at Sandy Springs Bank. Instead, Respondent deposited annuity checks for the T.S. Trust directly into his firm's SBCA, the law firm's operating account. FF 20-22. As of March 24, 2009, Respondent had deposited at least $6,636 in trust checks into his firm's SBCA.

[6] Respondent seeks to distinguish *Pierson* because there are no allegations here that the legal fees had not been incurred in providing services to the T.S. Trust. As set forth above, however, misappropriation is the unauthorized use of entrusted funds whether or not the attorney derives any personal benefit from it. *See Nave*, 197 A.3d at 514. Thus, the question presented is whether the respondent was authorized to take the entrusted funds at the time they were taken. Notably, the *Pierson* court recognized that "[u]nder *Addams* and its progeny, the authority to divert the settlement funds could not be granted retroactively." 690 A.2d at 947 n.18.

HC Conf. Appx. FF 20-25. Respondent used the T.S. Trust funds to pay for expenses incurred on behalf of the T.S. Trust and as payment for his legal services to the T.S. Trust ($2,670). The former expenditures were permitted without prior court approval. However, the latter were not.[7]

After the court created the T.S. Trust, court approval for payment of Respondent's legal fees from trust assets was required by the Trust instrument that Respondent himself had drafted and filed. FF 13. Article 8 Section E of the T.S. Trust document specifically and clearly provided that Trustee "compensation" was to be handled "in accordance with the manner of awarding compensation to Conservators in the District of Columbia." DX 5 at 5-14. Conservator compensation was governed by the D.C. Code and the associated Probate Court Rules, which provided that, for services rendered by an attorney or conservator, "[c]ompensation paid from the assets or the subject of the proceeding, protected individual or ward . . . must be approved by Order of the Court before being paid." FF 13 (emphasis added) (quoting Probate Court Rule 308(a)); *see In re Utley*, 698 A.2d 446, 449 (D.C. 1997) (noting that "[o]ur regulations plainly require the [court] to approve a conservator's fee and commissions"). Accordingly, the $2,670 Respondent claimed

[7] Respondent had argued to the Hearing Committee that it was appropriate to deposit T.S. Trust funds into his firm's operating account to cover legal fees because T.S.'s mother did not dispute his fees. The Hearing Committee gave no weight to T.S.'s mother's failure to dispute the fees, citing Respondent's own testimony that he told T.S.'s mother that she should not worry about the fees because they would be paid out of the trust. Respondent argues that the Hearing Committee's conclusion was speculative absent direct testimony from T.S.'s mother. Respondent misunderstands the issue. The Hearing Committee simply rejected Respondent's argument that he could have relied on T.S.'s mother's silence, given his testimony. It did not speculate.

as legal fees should have remained in the SBCA because he never received court approval to withdraw that amount.[8]

Respondent does not dispute that the balance in his firm's SBCA fell below the amount that he should have held in trust. *See* FF 20-22, 24-25. This constitutes an "unauthorized use." *See, e.g.*, *In re Edwards*, 990 A.2d 501, 518 (D.C. 2010) (appended Board report) (unauthorized use occurs where "the balance in the attorney's . . . account falls below the amount due to the client, regardless of whether the attorney acted with an improper intent"); *Bach*, 966 A.2d at 350-52 (unauthorized use element satisfied where the respondent took estate funds to pay his fee without prior court approval, even though the probate court later approved the amounts); *In re Berryman*, 764 A.2d 760, 773-74 (D.C. 2000) (unauthorized use element satisfied even though the probate court ruled that the respondent had earned the fee she had taken without prior court approval). Respondent tries to avoid this line of cases by arguing that the combined balance of his firm's IOLTA account and multiple operating accounts did not fall below the amount of entrusted funds. However, the *Pels* court "reject[ed] respondent's argument that because he simultaneously held thousands of dollars in the companion savings account, misappropriation did not occur when the operating account fell below the required

[8] Disciplinary Counsel argues that the Hearing Committee also found that Respondent's failure to account for $521.39 in T.S. Trust funds was an additional instance of misappropriation. *See* ODC Br. at 13. We do not agree. Instead, the Hearing Committee's discussion of Respondent's inability to account for all of the entrusted funds is among the evidence considered in determining that the post-trust misappropriation was reckless. Moreover, in footnote six of its post-hearing reply brief to the Hearing Committee, Disciplinary Counsel represented that it had "not charged Respondent with the unauthorized use of the $521.39." Given this concession, we are reluctant to find an unauthorized use that Disciplinary Counsel did not charge, and we make no such finding.

balance." *In re Pels*, 653 A.2d 388, 394 (D.C. 1995). Here, as in *Pels*, "'even if [R]espondent did have sufficient cash on hand to cover the shortages, it would not excuse his breach of the trust or his unauthorized use of trust funds.'" *Id*. (quoting *In re Burton*, 472 A.2d 831, 831 (D.C. 1984), *cert. denied*, 469 U.S. 1071 (1984)).[9]

Respondent argues that the Hearing Committee erred in finding that this post-Trust unauthorized use was reckless; however, none of Respondent's arguments have any merit. Respondent claims he had a good faith belief that numerous provisions in the Trust document allowed him to pay his legal fees from the trust assets, such that the checks he deposited in his SBCA represented a payment for legal fees and were not entrusted funds. However, we agree with the Hearing Committee's thorough analysis and findings that the provisions now cited by Respondent are general provisions related to reimbursement of expenses and administrative costs, and not to trustee compensation. FF 16-18.[10] The only

[9] Respondent attempts to distinguish *Pels* because Respondent deposited the trust checks into a firm operating account and claims to have maintained an adequate balance in the firm's combined accounts, whereas in *Pels* the attorney deposited entrusted funds into an account used for both business and personal matters, and he arguably maintained adequate funds in his personal savings account. Resp. Br. at 17. This is a distinction without a difference. Again, misappropriation turns on the unauthorized use of entrusted funds, regardless of whether or not the attorney derives any personal gain or benefit from it. *See Nave*, 197 A.3d at 514.

[10] In rejecting Respondent's arguments that he reasonably relied on either Article 8 Section F of the trust document or D.C. Code § 19-1308.15(a)(2) to justify taking fees without court approval, the Hearing Committee found that such reliance would not be objectively reasonable, and it also noted that there is no contemporaneous evidence that Respondent relied on either the provision or the statute. FF 18, 19. Respondent argues that noting the lack of contemporaneous evidence shifted the burden to Respondent to disprove Disciplinary Counsel's allegations. We disagree. Disciplinary Counsel always bears the burden of proving Rule violations by clear and convincing evidence. Disciplinary Counsel argued to the Hearing Committee that, prior to the hearing, Respondent had not offered either of these explanations to justify taking his fees without court approval. The Hearing Committee can certainly determine the weight to give evidence presented

provision specific to trustee compensation is Article 8 Section E, which incorporates by reference the D.C. conservator compensation rules. FF 12, 17-19. Respondent agrees that under the applicable conservator compensation scheme, he should not have paid himself without court approval but asserts that did not know that at the time. Despite having drafted the trust instrument, and despite never having previously set up or managed a conservatorship, Resp. Br. at 16, Respondent testified that he did nothing to apprise himself of the requirements for compensating conservators. FF 5, 15 (Tr. 166-67).[11] Absent any effort to understand conservator compensation, it was not objectively reasonable for Respondent to assume that it was the same as trustee compensation, and thus Respondent's belief was not sufficient to support the conclusion that his conduct was only negligent.[12] *See Gray*, 224 A.3d at 1232; *Pierson*, 690 A.3d at 949. As the Hearing Committee correctly concluded, these actions evidence recklessness "because [Respondent] undertook to

during the hearing, and we see no reason to disturb the conclusion that Respondent's failure to raise this explanation previously with Disciplinary Counsel further supports the finding that Respondent did not reasonably rely on either Article 8 Section F or D.C. Code § 19-1308.15(a)(2) when he prematurely withdrew his fee.

[11] The Hearing Committee notes that Respondent identified an ambiguity in the rules regarding conservator compensation, as D.C. Code § 21-2060(a) and Probate Court Rule 308(a) require prior court approval, while D.C. Code § 21-2070 may not require such approval. However, as the Hearing Committee noted, any perceived ambiguity is irrelevant because Respondent was not aware of either provision before he took his fees without court approval, and thus this ambiguity could not have contributed to his understanding of the approvals required for payment.

[12] Respondent objects to the Hearing Committee's conclusion that his testimony regarding his failure to understand the differences between the two payment mechanisms was "not credible." Read in context, we do not understand the Hearing Committee to have disbelieved Respondent's testimony on this issue. Instead, the Hearing Committee accepted Respondent's testimony that he was ignorant of the statutes governing conservator compensation and cited that as a factor in concluding that he engaged in reckless misappropriation. *See* HC Report at 38.

manage a vulnerable person's limited resources without apprising himself of his duties and responsibilities as a conservator under the T.S. Trust." HC Report at 38.

Finally, we note that in November 2009 Respondent returned to the T.S. Trust the legal fees he had previously withdrawn without court approval, and in August of 2010 he reimbursed the T.S. Trust for the unaccounted expenses plus interest. That Respondent appropriately acknowledged and took responsibility for his actions does not negate the recklessness that led to the unauthorized use of entrusted finds. That said, we do not agree with, and therefore do not adopt, the Hearing Committee's factual findings or legal conclusion that Respondent's admission to the Court, the Auditor-Master and to Disciplinary Counsel that he made a mistake in taking the fees demonstrates that he did not hold a contemporaneous belief that he was permitted to pay his legal fees from the trust without court approval and, therefore, itself demonstrates recklessness. *See* FF 17, 28; HC Report at 24. One can have a belief and later come to understand that the belief was erroneous, but that subsequent realization does not mean that one did not have the earlier-held belief. Indeed, one of the factors in determining a disciplinary sanction is whether the attorney has acknowledged his or her wrongful conduct. If such an acknowledgement were to be construed as evidence that the Rule violation had been knowing or intentional, respondents would be dissuaded from acknowledging their errors, thereby undermining the policy reasons for encouraging them to do so and for favorably taking those acknowledgements into account in the sanction analysis. *See, e.g.*, *In re Fay*, 111 A.3d 1025, 1031 (D.C. 2015) (per curiam) ("In determining the

appropriate sanction, both the Board and this court consider . . . (6) whether or not the attorney acknowledged his or her wrongful conduct . . . ." (citations omitted)); *In re Bernstein*, 707 A.2d 371, 377 (D.C. 1998) ("[R]espondent has not demonstrated . . . other mitigating factors . . . such as expressing remorse, voluntarily compensating the client, or merely acknowledging that one has committed misconduct.").

We have concluded that Respondent's post-trust misappropriation was reckless not because he later acknowledged that he should have sought court approval before using trust assets to pay his compensation; rather, we find recklessness because prior to withdrawing trust assets, he had taken no steps to determine the rule governing conservator compensation.

B. Commingling

Respondent does not contest the Hearing Committee's finding that his own funds were present in the SBCA account when he deposited the T.S. Trust checks. Instead, he argues that because all funds from those T.S. Trust checks belonged to him in that they paid his legal fees and covered expenses he incurred, he did not commingle entrusted funds with his own funds. As discussed above, we find that the record clearly and convincingly establishes that Disciplinary Counsel proved that at least $2,670 of the Trust deposits were entrusted funds (that should have been held pending court approval to pay Respondent's fees), and thus Respondent engaged in commingling in violation of Rule 1.15(a).

C. Recordkeeping

The Hearing Committee found that Respondent violated Rule 1.15(a) based on his failure to provide complete records to the Auditor-Master. Respondent does not contest that he failed to keep complete records of his handling of the T.S. Trust funds, but argues that had he known that the failure to produce those records would have resulted in adverse disciplinary action, he would have located and produced them to the Auditor-Master. We agree with the Hearing Committee.

Rule 1.15(a) puts all D.C. Bar members on notice that "[c]omplete records of [entrusted] 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." No further notice was required to inform Respondent of the necessity of such records.

The purpose of the Rule "is so that the documentary record itself tells the full story of how the attorney handled client or third-party funds and whether, for example, the attorney misappropriated or commingled a client's funds." *Edwards*, 990 A.2d at 522 (internal quotations omitted). Respondent's records did not tell the story of his handling of the T.S. Trust funds for the Auditor-Master and, even after an audit, Respondent could not support roughly $521 of his expenditures. As such, he violated Rule 1.15(a)'s recordkeeping requirement.[13]

[13] There is no merit to Respondent's argument that the delay between the underlying events and the disciplinary hearing prejudiced Respondent's ability to obtain proof to support the roughly $521 in expenses that the Auditor-Master could not identify. The recordkeeping violation occurred in 2009-2010, when Respondent's records were insufficient for the Auditor-Master to determine the disposition of all T.S. Trust funds.

D. Serious Interference with the Administration of Justice

Applying the three-part test set forth in *In re Hopkins*, 677 A.2d 55 (D.C. 1996), the Hearing Committee found that Respondent violated Rule 8.4(d) because he "violated a court order" (*see* Confidential Appendix), "and also contravened applicable law governing conservator compensation as well as ethical rules obligating Respondent to maintain adequate records for the estate." HC Report at 45. Respondent does not directly address the Hearing Committee's analysis of the *Hopkins* factors. Rather, he challenges two of the Hearing Committee's Findings of Fact (33 and 35)[14] and argues that a Rule 8.4(d) violation requires that he intentionally obstructed, misled, or submitted falsified evidence before the Auditor-Master. Disciplinary Counsel argues that Respondent's unauthorized disbursement of settlement funds and his failure to maintain adequate trust account records prompted the court to order an audit, and the Auditor-Master to expend significant time and effort to account for the entrusted funds that Respondent mishandled. We agree with the Hearing Committee, but on different grounds.

To establish a Rule 8.4(d) violation, Disciplinary Counsel must demonstrate by clear and convincing evidence that Respondent's conduct: (i) was improper, *i.e.*,

[14] We agree with Respondent's objection to Finding of Fact 33, regarding Respondent's prior business relationship with KH Funding and his investments therein. Those facts are not relevant to the charges in this proceeding, as the Hearing Committee itself expressly recognized. HC Report at 17 n.5. As discussed above in note 5 we disagree with Respondent's objection to Finding of Fact 35, as the record supports the Hearing Committee's finding that the Auditor-Master required "substantial assistance" from the Successor Trustee and T.S.'s family.

that Respondent either acted or failed to act when he should have; (ii) bore directly upon the judicial process with respect to an identifiable case or tribunal; and (iii) tainted the judicial process in more than a *de minimis* way, *i.e.*, it must have potentially had an impact upon the process to a serious and adverse degree. *See Hopkins*, 677 A.2d at 60-61. Rule 8.4(d) is violated if the attorney's conduct causes the unnecessary expenditure of time and resources in a judicial proceeding. *See In re Cole*, 967 A.2d 1264, 1266 (D.C. 2009).

The first two prongs of the *Hopkins* test are easily met here: Respondent engaged in improper conduct (taking fees without court approval and failing to maintain records of entrusted funds) that bore directly on an identifiable case (the T.S. Trust probate matter).

Regarding the third prong, we disagree with the Hearing Committee and Disciplinary Counsel that there is clear and convincing evidence that Respondent's failure to obtain court approval before taking his fees, while improper, tainted the T.S. Trust probate proceedings in more than a *de minimis* way, or even had the potential to do so.[15] We note that the Petition to remove Respondent as Trustee did

[15] This is not to say that misappropriation of the type discussed here would *never* have the potential to interfere with the administration of justice, only that the record here does not establish more than *de minimis* interference. We note that Disciplinary Counsel does not argue how the misconduct seriously interfered with the administration of justice; it simply notes the Hearing Committee's finding to that effect. *See* ODC Br. at 16.

not mention the unauthorized attorney fee payments among the litany of complaints regarding Respondent. *See* FF 29; DX 7.

Disciplinary Counsel cites *In re L.R.*, 640 A.2d 697 (D.C. 1994), to support its argument that accepting fees in violation of the rules governing conservator compensation is itself a serious interference with the administration of justice. *L.R.* is inapposite because the respondent there accepted payment from a client whom he had already been appointed to represent under the Criminal Justice Act. The Court found the misconduct "presumptively prejudicial to the administration of the CJA system, if for no other reason than because of the belief it likely will instill in the defendant that the quality of his representation may yet depend upon gather[ing] together funds to compensate the attorney whom he has not selected. . . ." *L.R.*, 640 A.2d at 701 (internal quotations omitted). Those are not the facts here.[16]

However, we agree with the Hearing Committee and Disciplinary Counsel that Respondent's failure to maintain adequate records seriously interfered with the administration of justice. The Hearing Committee accurately recounts the

[16] The Hearing Committee's reliance on *In re Confidential*, 664 A.2d 364, 367 (D.C. 1995) is similarly inapposite. *Confidential* did not find a serious interference with the administration of justice. Further, only one of the two cases *Confidential* cited to support the language quoted by the Hearing Committee involved the serious interference with the administration of justice, but not due to the unauthorized taking of fees without court permission. *See In re Burka*, 423 A.2d 181 (D.C. 1980) (en banc). Instead, the Court held that the respondent "engaged in conduct prejudicial to the administration of justice in failing to turn over assets of the client account promptly to the court or to the successor conservator, and in failing to submit bank statements to the Auditor upon request." *Id.*, at 187.

"laborious process" necessary for the Auditor-Master to verify Respondent's expenditures of T.S. Trust funds because Respondent kept incomplete records. FF 34-35, 37. Even that process, which should have been unnecessary had Respondent complied with Rule 1.15(a), could not identify all of the expenses. Thus, there is clear and convincing evidence that Respondent's failure to maintain records resulted in the otherwise unnecessary expenditure of time and resources in a judicial proceeding.[17] *See Cole*, 967 A.2d at 1266; *see also Burka*, 423 A.2d at 187 (respondent engaged in conduct prejudicial to the administration of justice in *inter alia* failing to "submit bank statements to the Auditor upon request").

In reaching this conclusion, we disagree with Respondent's contention that only intentionally obstructive conduct violates Rule 8.4(d). *In re Hopkins* held that the conduct at issue is improper if "considering all the circumstances in a given situation, the attorney should know that he or she would reasonably be expected to act in such a way as to avert any serious interference with the administration of justice." 677 A.2d at 61. There can be little dispute that Respondent would be reasonably expected to act in such a way as to avoid the unnecessary expenditure of resources during the Auditor-Master proceeding.

[17] To be clear, we do not conclude that Respondent violated Rule 8.4(d) simply because the Superior Court referred the case to the Auditor-Master. Rather, on these facts, the 8.4(d) violation arises from the substantial, otherwise unnecessary, effort required of the Auditor-Master because Respondent failed to maintain records as required by Rule 1.15(a).

V. SANCTION

The sanction imposed in an attorney disciplinary matter must protect the public and the courts, maintain the integrity of the legal profession, and deter the respondent and other attorneys from engaging in similar misconduct. *See, e.g.*, *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc); *In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013); *In re Cater*, 887 A.2d 1, 17 (D.C. 2005). "In all cases, [the] purpose in imposing discipline is to serve the public and professional interests . . . rather than to visit punishment upon an attorney." *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (en banc) (citations omitted); *see also In re Goffe*, 641 A.2d 458, 464 (D.C. 1994) (per curiam). The sanction also must not "foster a tendency toward inconsistent dispositions for comparable conduct or . . . otherwise be unwarranted." D.C. Bar R. XI, § 9(h)(1); *see, e.g.*, *Hutchinson*, 534 A.2d at 923-24; *Martin*, 67 A.3d at 1053; *Berryman*, 764 A.2d at 766.

We have concluded that Respondent's pre-trust misappropriation was intentional (or at least reckless), and his post-trust misappropriation was reckless. Disbarment is the presumptive sanction for intentional or reckless misappropriation absent "extraordinary circumstances." *Addams*, 579 A.2d at 191; *Hewett*, 11 A.3d at 286; *see also In re Mayers*, 114 A.3d 1274, 1279 (D.C. 2015) (per curiam) ("'In virtually all cases of misappropriation, disbarment will be the only appropriate sanction unless it appears that the misconduct resulted from nothing more than

simple negligence.'") (quoting *Addams*, 579 A.2d at 191)).[18] There are no extraordinary circumstances here.

VI. CONCLUSION

For the foregoing reasons, we recommend that the Court find that Respondent engaged in intentional and reckless misappropriation, commingled entrusted funds, and failed to maintain adequate records of his handling of entrusted funds, in violation of Rule 1.15(a); and that he engaged in conduct that seriously interfered with the administration of justice, in violation of Rule 8.4(d); and that the Court conclude that Respondent should be disbarred for his misconduct. 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

By: Elissa J. Preheim
Elissa J. Preheim

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

[18] Respondent objected to the Hearing Committee's characterization of a prior Informal Admonition in Maryland "in a matter that involved client authorizations for disbursements." FF 42. We find that the Hearing Committee's characterization was consistent with Respondent's own testimony on the issue ("I needed to obtain client signatures on all disbursement sheets," Tr. 211) and did not "insinuate[] there was some financial impropriety," as Respondent argues. Resp. Br. at 10. In any event, the prior discipline is irrelevant to the sanction analysis in light of our conclusion that Respondent engaged in at least reckless misappropriation.