THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY
HEARING COMMITTEE NUMBER ELEVEN

FILED
January 7, 2020
Board on Professional Responsibility

In the Matter of:	:	
	:	
DONALD R. HARRIS,	:	
	:	Board Docket No. 19-BD-004
Respondent.	:	Disciplinary Docket No. 2017-D364
	:	
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 485340)	:	

REPORT AND RECOMMENDATION OF
HEARING COMMITTEE NUMBER ELEVEN

Respondent, Donald R. Harris, is charged with violating Rules 1.4(b) (failure to explain a matter to a client), 1.5(a) (charging an unreasonable fee), 1.15(a) (failure to maintain records; commingling; and intentional or reckless misappropriation), 1.15(e) (relating to treatment of advanced unearned fees), 8.1(a) (knowingly false statement of fact in connection with a disciplinary matter), and 8.4(c) (dishonesty, fraud, deceit, and misrepresentation) of the District of Columbia Rules of Professional Conduct (the "Rules"), arising from his representation of Victoria and Armond Bailey in challenging the actions of Children Services in Lucas County, Ohio, and seeking the returned custody of five children while their appeal was pending before the Ohio Court of Appeals. Disciplinary Counsel contends that Respondent committed all of the charged violations, and should be disbarred as a sanction for his misconduct and ordered to refund the fee paid by his clients as a

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

condition of reinstatement. Respondent admits violating the recordkeeping requirements under Rule 1.15(a), but contends that he did not violate Rules 1.4(b), 1.5(a), 1.15(a) by commingling or misappropriation, 1.15(e), 8.1(a), and 8.4(c).

As set forth below, Hearing Committee Number Eleven finds that Disciplinary Counsel has proven by clear and convincing evidence that Respondent violated Rules 1.4(b) by failing to explain the matter to his client, 1.15(a) and (e) by intentionally misappropriating the clients' advance fees and failing to maintain proper records, and 8.1(a) by knowingly making a false statement of fact during the disciplinary investigation, but did not prove a violations of Rules 1.5(a) (charging an unreasonable fee), 1.15(a) (commingling), or 8.4(c) (dishonesty, fraud, deceit, and misrepresentation). The Hearing Committee recommends that Respondent be disbarred for intentional misappropriation.

One troubling aspect of this matter warrants discussion at the outset. All the conduct in question here transpired in Ohio. The Baileys live in Ohio. Respondent operates his law practice in Ohio. Respondent is not and has never been a member of the Ohio bar. His efforts to gain admission to that Bar have been unsuccessful.[1]

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[1] Although the rulings of the Ohio Supreme Court are not part of the record before us, the Hearing Committee takes judicial notice of the Ohio Supreme Court's decisions regarding Respondent. *See In re Application of Harris*, 101 Ohio St.3d 268, 2004-Ohio-721, 804 N.E.2d 429, ¶ 14, http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2004/2004-Ohio-721.pdf ("In this case, the applicant has failed to establish by clear and convincing evidence that he has the necessary character and moral qualifications to be admitted to the practice of law. As the panel noted in its February 2002 report, 'when questioned about his financial affairs, Mr. Harris answered the questions with irrelevant information and was very evasive.' Because of his complex financial dealings, the relator and the panel requested financial records to support the applicant's assertions. Despite several requests, the applicant never furnished the information requested. Nor did the

Respondent has relied on the federal practice exemption to Ohio's unauthorized practice of law rules to maintain a law practice over many years in Ohio. As the Ohio courts have had occasion to observe, because the Respondent is not a member of the Ohio bar his practice is not regulated in Ohio.[2]

The federal practice exemption is grounded in federalism, which is surely an important part of our system. It creates an accountability gap—or at least a ready accountability gap—in cases like this. If Respondent had actually filed a case in the Ohio federal courts he might have been called to task before those courts, but Respondent did not. Were we to accept Respondent's rendition of the facts he took the Baileys' money, thought about federal law issues, and then the attorney and client parted ways. The Baileys did what surely few clients will have the wherewithal and

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applicant respond in writing to the panel's specific demand in June 2002 for financial documents.").

[2] *See Disciplinary Counsel v. Harris*, 137 Ohio St.3d 1, 2013-Ohio-4026, 996 N.E.2d 921, ¶ 18, http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2013/2013-Ohio-4026.pdf ("Harris has never been admitted to the practice of law in Ohio, does not have active status, and is not certified. By definition, then, Harris did not commit a disciplinary violation because he never became subject to our disciplinary rules by gaining admission to the bar of the state of Ohio. Rather, Harris may have engaged in the unauthorized practice of law when he assisted Roussos in establishing an L.L.C. in accordance with Ohio law and when he participated in transferring properties to that L.L.C. *See Columbus Bar Assn. v. Verne*, 99 Ohio St.3d 50, 2003–Ohio–2463, 788 N.E.2d 1064, ¶ 1–4. In addition, by his silence, he may have further engaged in the unauthorized practice of law by leading Roussos and Martincak to believe that he was a member of the Ohio bar. *See* Gov. Bar R. VII(2)(A)(4), which defines the unauthorized practice of law to include holding out to the public or otherwise representing oneself as authorized to practice law. Thus, since Harris is not admitted to the Ohio bar and because the conduct with which he is charged has been defined by this court to constitute the unauthorized practice of law, we dismiss the disciplinary action and refer this matter to the UPL Board.").

stamina to undertake, which was to contact the home Bar and ultimately travel across the country to press their case.

In contesting this matter Respondent has relied on (inconsistent and inadequate in our view) disclaimers that his practice was limited to federal law. While the implications of such a disclaimer may be apparent to a practitioner, we think it clear from the record that this nuance was never thoroughly explained to the Baileys, and certainly the implications as to what Respondent could and could not do were not understood by the Baileys.

What the Baileys knew was that the State of Ohio was taking their children away, and they needed a lawyer. What they got was, at best, a lawyer who considered but did not file a moonshot federal claim in the quintessentially state-law area of child protection. Adding insult to injury, they then had to travel halfway across the country to seek redress. Where a lawyer is not locally barred we believe it should be made explicit that the onus under Rule 1.4(b) sits squarely on the lawyer to fully explain in writing (not boilerplate or labels) what the lawyer can and cannot do for their potential client.

I. PROCEDURAL HISTORY

On January 7, 2019, Disciplinary Counsel served Respondent with a Specification of Charges ("Specification"). The Specification alleges that Respondent, in connection with the representation of Victoria and Armond Bailey, violated the following rules:

- Rule 1.4(b), by failing to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation;

- Rule 1.5(a), by charging and collecting an unreasonable fee;

- Rule 1.15(a) (Failure to Maintain Records), by failing to keep complete records of the Baileys' entrusted funds;

- Rule 1.15(a) (Commingling), by failing to hold advances of unearned fees and unincurred costs that were in his possession in connection with a representation separate from his own funds;

- Rule 1.15(a) (Misappropriation), by using the Baileys' advanced fees before he earned them and without the clients' authorization, thereby engaging in intentional or reckless misappropriation of client funds;

- Rule 1.15(e), by failing to treat the Baileys' advances of unearned fees as the clients' property and failing to keep his clients' advances of unearned fees in his trust account;

- Rule 8.1(a), by knowingly making false statements of fact to Disciplinary Counsel in connection with a disciplinary matter; and

- Rule 8.4(c), by engaging in conduct involving dishonesty, fraud, deceit, and misrepresentation.

Specification ¶ 30(a)–(h).

Respondent filed an answer on January 28, 2019, generally denying all charges against him, and asserting his disability claim as mitigation to the charges, based on a disability related to his diabetes and depression. DX 2. Respondent filed a supplemental answer responding to the allegations in the Specification of Charges

in response to Disciplinary Counsel's motion to compel.[3] The parties filed a Joint Stipulation as to Stipulated and Disputed Facts on April 10, 2019.

A hearing was held April 23–25, 2019 before this Hearing Committee Number Eleven (the "Hearing Committee"). Disciplinary Counsel was represented at the hearing by Sean P. O'Brien, Esquire. Respondent was present, but was not represented by counsel. The following exhibits were received in evidence: DX 1–DX 14, DX 16–DX 38, and DX 40–DX 48.[4] In addition, DX 15 (November 2017 Text Messages between Mrs. Bailey and Respondent) was admitted as evidence of Mrs. Bailey's messaging with Respondent, but the parties agreed that specific text of the screenshots, where legible, were not offered as evidence and are irrelevant. Tr. 63–65, 80–81. DX 39, a screenshot of the Harris Law Firm website, was not moved into evidence. Tr. 423–24. The Hearing Committee also requested that Disciplinary Counsel produce a copy of Respondent's December 2015 Retainer Agreement, and admitted the document as HCX 1. Tr. 424.

During the hearing, Disciplinary Counsel called as witnesses Victoria Lynn Bailey and Armond A. Bailey (the clients), and Charles Anderson (forensic investigator with the Office of Disciplinary Counsel). Disciplinary Counsel also

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[3] Respondent's Answer filed on March 8, 2019 directly responded to the numbered factual allegations set forth in the Specification of Charges, thus the Hearing Committee did not issue an order addressing Disciplinary Counsel's January 30, 2019 Motion to Compel Supplemental Answer.

[4] "DX" Refers to Disciplinary Counsel's exhibits. "RX" refers to Respondent's exhibits. "Tr." refers to the transcript of the hearing held on April 23–25, 2019. "Stip." refers to the parties Joint Stipulation as to Stipulated and Disputed Facts.

presented the testimony of Martin Mull by videoconference pursuant to Board Rule 11.4 (remote testimony).

Respondent testified on his own behalf and presented the remote testimony of the following witnesses: Kristen Harris (Respondent's current employee—no relation to Respondent), Jaylyn Williams (Respondent's former employee), and Howard Harris (Respondent's brother). Upon conclusion of the hearing, the Hearing Committee made a preliminary non-binding determination that Disciplinary Counsel had proven at least one of the ethical violations set forth in the specification of charges. Tr. 437; *see* Board Rule 11.11.

In the sanctions phase of the hearing, Disciplinary Counsel submitted DX 40 through DX 48. Respondent testified on his own behalf and called Kristen Harris as a mitigation witness.

II. FINDINGS OF FACT

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

A. Background

1. Respondent, Donald R. Harris, is a member of the Bar of the District of Columbia Court of Appeals, having been admitted on March 1, 2004, and assigned

Bar number 485340. Stip. 1. He is not licensed to practice law in any other state. Stip. 2. Respondent is admitted to the Ohio federal courts where he principally practices bankruptcy law. Stip. 2; Tr. 354:7–12; 355:19–21 (Respondent). This matter, however, involves Respondent's representation of Victoria and Armond Bailey in an Ohio child-custody matter. Stip. 8.

2. Victoria and Armond Bailey are married and live in Lucas County in Toledo, Ohio. Tr. 20 (V. Bailey); *see* DX 5; Tr. 36:6–10 (V. Bailey). They had two children, and Mrs. Bailey had seven children from prior relationships. DX 11 at 2–3. In July 2014, Mrs. Bailey took her youngest child to the hospital, where the baby was diagnosed with multiple rib fractures and failure to gain the appropriate amount of weight. Tr. 26–27 (V. Bailey); DX 11 at 3–4.

3. After an investigation, Lucas County Children Services ("Children Services") determined the Baileys' baby was neglected and abused and that Mrs. Bailey's other minor children were neglected. Tr. 29–31 (V. Bailey); DX 11 at 12. Children Services removed Mrs. Bailey's minor children from her home and placed them with Anthony and Alisa Haynes, a local pastor and his wife. Tr. 29–31 (V. Bailey); DX 11 at 4.

4. In October and November 2015, Children Services removed the children from the Haynes's home due to "unsatisfactory" conditions. Tr. 31–33 (V. Bailey); DX 11 at 4, 7–8. In November 2015, Children Services sought permanent

custody of Mrs. Bailey's minor children in the state juvenile court. Tr. 33 (V. Bailey); DX 11 at 4; Stip. 5. Mrs. Bailey had a court-appointed Ohio attorney for the proceedings, but a therapist who worked with the children suggested Mrs. Bailey might consider also hiring separate "civil" counsel. Tr. 34–35 (V. Bailey). Mrs. Bailey did not know what "civil" counsel meant—only that a "civil attorney" could possibly help her. Tr. 35–36 (V. Bailey). In December 2015, she set out to find an attorney by using internet searches for "civil" attorneys and found Respondent. Tr. 36–37 (V. Bailey).

5. In December 2015, Mrs. Bailey contacted Respondent and his firm about her child-custody case, but she could not afford Respondent's $2,500 advanced fee. Tr. 37–38, 39:22–40:1 (V. Bailey) ("I didn't know how I would come up with that kind of money. . . ."). So, the Baileys proceeded in state-court with court-appointed counsel. *See* DX 11 at 1.

6. On October 17, 2016, the juvenile court ordered the return of Mrs. Bailey's three oldest minor children but terminated her parental rights to her five youngest children. Stip. 6; DX 11 at 4–5. Mrs. Bailey timely appealed with her court-appointed counsel. *See* Tr. 90 (V. Bailey); DX 11 at 1, 4–5; Stip. 8.

B. <u>The Baileys Hired Respondent</u>

7. In December 2016, Mr. and Mrs. Bailey determined they could pay Respondent's $2,500 advance fee by credit card and contacted Respondent's office.

DX 5; Tr. 39–40 (V. Bailey). Respondent sent the Baileys a letter with a "formal retainer document." DX 5. On January 3, 2017, the Baileys met with Respondent at his office in Sandusky, Ohio. Stip. 8; Tr. 41, 44 (V. Bailey); DX 6.

8. The Retainer Letter, HCX 1, is a hash, far short of the standard necessary to reasonably inform a client about the limitations on the ability of an out-of-state-barred attorney such as Respondent to assist the proposed client. First the subject matter is simply "litigation," with no explanation as to what sorts of litigation the Respondent could and could not undertake. Second, the cover letter states: "Please note that we have both Federal and State attorneys at our firm." Nothing in the retainer agreement or related paperwork documents that Respondent and his law firm were offering only limited legal services to the Baileys, and the representation quoted immediately above suggests exactly the opposite.

9. The Baileys discussed their custody case with Respondent and provided him with relevant court documents and correspondence. Stip. 8; Tr. 47 (V. Bailey). As a result, Respondent knew that the appeal of the Ohio juvenile court's custody order was pending before the Ohio Court of Appeals. Stip. 8; DX 7 at 4; Tr. 229:7–19 (Mull); Tr. 372 (Respondent) (he was "waiting to get the results of the appeal").

10. Respondent told the Baileys he could help them get their children back. *See* Tr. 44–45 (V. Bailey); *see also* DX 22 at 1 (Respondent explaining he told them he could attempt to "force [Children Services] to return custody of the children to

the parents."); Tr. 202–03 (Mull). He did not explain that he had never handled any kind of child-custody case, that he was not a member of the Ohio Bar, that child custody is generally a state-law issue, or any issues related to challenging state-court custody orders in federal court. Tr. 47–48, 159 (V. Bailey); *see* Tr. 394–95 (Respondent).

11. In his testimony at the Hearing, in his briefing, and in his responses to Proposed Findings of Fact, Respondent has contended at length that the only actions he could take, because of his not being a member of the Ohio Bar, would be in federal court and premised on a claimed violation of federal Constitutional rights. R. Br. at 2–4 (¶¶ 2, 8), 6 (R. PFF 8). He goes a little further, and perhaps too far, in his reliance on rote licensure disclosures: "As a matter of practice . . . all correspondence for Respondent's office state[s] that he is not licensed in Ohio. [Ms.] Bailey's statement that she was never informed that Respondent was not licensed in Ohio is inaccurate at best." R. Br. at 3 (¶ 6). Having heard the testimony from both the Respondent and his clients we cannot say what words were exchanged between them, but we have no doubt that the import of any such words that were used to qualify the Respondent's ability to be of effective service were lost on the Complainants. A member of the general public cannot be expected to have fluency in what can be subtle distinctions between state and federal practice—or certainly if an attorney intends to rely on such distinctions the onus is on the attorney to make clear and explicit in writing exactly what she can or cannot do for those who have

entrusted their problems to her. This Respondent utterly failed to do. To the contrary, as noted above, the retainer agreement he authored suggests the opposite.

12. At the January 3, 2017 meeting, Mrs. Bailey signed Respondent's "retainer" agreement, which Mr. Bailey witnessed. Stip. 10; DX 6. The agreement provided that Respondent would represent Mrs. Bailey "in the matter of Custody." *Id.*

13. The agreement provided for a $2,500 advanced fee and that Respondent would charge $300 per hour. Stip. 11; DX 6. The $2,500 would be "held for use against time and expenses as incurred." *Id.* Respondent also told the Baileys in a separate letter that the $2,500 would be held "in trust . . . [and] applied . . . against your accounts, as and when they are rendered." DX 5; *see also* HCX 1.

C. Respondent Spent the Baileys' Funds

14. At the January 3, 2017 meeting, Respondent used Mr. Bailey's credit card to transfer $2,500 into his firm's PayPal account. Stip. 13; Tr. 48 (V. Bailey).

15. PayPal immediately collected $67.50 as a fee.[5] The remaining $2,432.50 was deposited into the PayPal account. Stip. 15.

16. Respondent's PayPal account contained only the Baileys' funds and $0.95. Stip. 15; DX 31 at 3; Tr. 303, 305 (Anderson).

[5] Disciplinary Counsel notes that this PayPal credit card fee may have been improper, but does not argue that this is grounds for discipline. ODC Br. at 21 n.3 (citing D.C. Ethics Op. 348 (Accepting Credit Cards for Payment of Legal Fees) (concluding that "there is nothing in the D.C. Rules that prohibits a lawyer from using a credit card for unearned legal fees and expenses (advance fees), provided that the use of a credit card does not jeopardize the security of entrusted funds")).

17. Respondent knew that he needed to place advanced fees in his trust account. Stip. 14; Tr. 387 (Respondent)–90; *see also* DX 5, DX 6. Nevertheless, Respondent immediately began taking the Baileys' funds for his personal use. Tr. 416–19 (Respondent); Stip. 14–16; DX 28 at 2 (Respondent conceded "the funds from PayPal were used directly from PayPal").

18. Respondent used the funds as follows:

	AMOUNT	**DISBURSEMENT**	**DATE**
	$67.50	2.5% Fee to PayPal	1/3/2017
	$125.00	Transfer to First Tennessee Bank, Acct. 1742	1/3/2017
	$2,100.00	Transfer to Huntington National Bank, Acct. 8701	1/3/2017
	$32.00	Loan Payment to "PayPal Working Capital"	1/3/2017
	$179.00	Loan Payment to "PayPal Working Capital"	1/4/2017
TOTAL:	**$2,503.50**		**1/4/2017**

Stip. 15. The excess $3.50 came from a $3.00 cash-back bonus on January 4, 2017 as well as the account's preexisting $0.95 balance. Stip. 15.

19. Respondent transferred most of the Baileys' funds ($2,100) to his Huntington National Bank 8701 account, an operating account he used for business expenses such as payroll checks, on January 4, 2017. Stip. 15–16; *see generally* DX 40, DX 41. The operating account was overdrawn on January 3, the day before the $2,100 transfer from PayPal occurred. DX 33 at 8; Tr. 306 (Anderson).

20. On January 4 and 5, 2017, Respondent deposited additional funds into the 8701 operating account with the Baileys' funds—two deposits from Intuit Solutions and a check from Lewis Slusher. *See* DX 40-001, DX 41 at 174. Although the 8701 account had a negative balance on January 3, 2017, Disciplinary Counsel's summary chart of the account activity shows the $300 deposit raised the balance to $45.69 before the Baileys' $2,100 was credited to the account. *Compare* DX 33 at 8, *with* DX 40 at 1.

21. Before he had earned any money by performing legal services, Respondent used a portion of the Baileys' $2,100 to pay personal and business expenses, including credit card bills, employees' payroll, rent, and a Sears bill. Stip. 16; DX 40. A total of four transactions and an overdraft fee were debited from the 8701 account on January 4, 2017, leaving a $1,298.89 balance by the close of the day. DX 40 at 1. Thus, the balance in the 8701 account balance fell below the $2,100 Respondent was required to hold in trust for the Baileys on January 4, 2017.

22. Respondent made two deposits on January 5 and three deposits on January 9, 2017 into the 8701 account. Respondent also had numerous expenses and fees deducted from the account between January 5th and 9th. DX 40 at 1. As of

January 9, 2017, the 8701 operating account had a balance of -$53.12. Stip. 16; DX 33 at 8.

23. From January 3, 2017 through January 13, 2017, Respondent overdrew the account ten times. *See* DX 33 at 7; *see also* Tr. 306 (Anderson).

24. Respondent did not tell Mr. and Mrs. Bailey he had taken their funds, nor during his representation of Mrs. Bailey did he provide them with any invoice, billing statement, accounting, or other explanation as to the status of their funds. Tr. 49, 68, 72–73 (V. Bailey).

25. Respondent had not earned the Baileys' funds when he took them without authorization. *Compare* FF 19, 21–22, *with* DX 29 at 2 (even according to Respondent's own questionable invoice, he had earned only $1,025.00 by January 9, 2017); Tr. 49 (V. Bailey).

26. Respondent kept no records of the $2,500 the Baileys paid him. Tr. 299–300 (Anderson); *see also* Stip. 17 ("Respondent stipulates and agrees that he did not keep complete records of his use of clients' funds."); DX 28 at 2.

D. Respondent Assigned Miles Mull to the Bailey Matter

27. Sometime in January 2017, after the 17th, Respondent hired Miles Mull. Tr. 195–99 (Mull). Mr. Mull was not an attorney and had never worked in a law office. Tr. 195, 198 (Mull). He had a computer and technical background and had taken online classes toward a degree in "paralegal studies." Tr. 191, 194, 258–59 (Mull). Mr. Mull had last worked for over ten years as a loader and delivery

driver for UPS. Tr. 192–93 (Mull). Respondent knew about Mr. Mull's background and experience. Tr. 198–200 (Mull).

28. When he interviewed Mr. Mull, Respondent asked him to research a "hypothetical" case involving child custody issues. Tr. 197–98 (Mull); *see* Tr. 202 (Mull). Mr. Mull provided Respondent with the results before he was hired. Tr. 198–99.

29. Mr. Mull began working at Respondent's firm on January 29, 2017. Tr. 201, 208 (Mull); *see* DX 42 at 1–2 (first pay period started January 29, 2017).

30. Mr. Mull initially worked on computer and technical-support issues, including setting up servers and installing and implementing new case-management and time-keeping software called "Amicus Attorney." Tr. 201–202, 241–42, 260 (Mull); Tr. 320 (K. Harris).

31. In mid-February 2017, Respondent tasked Mr. Mull with researching the Bailey child custody matter and preparing a draft complaint. Tr. 201–202, 203, 210 (Mull). Mr. Mull realized that the "hypothetical" Respondent gave him during his interview was, in fact, the Baileys' real case. Tr. 202 (Mull).

32. Mr. Mull worked on the Baileys' case between February 14 and March 14, 2017. Tr. 203, 206–07, 210, 213 (Mull); *see also* DX 29 at 1 (first and last Mull (initials MTM) time entries on February 14 and March 14, 2017).

33. Mr. Mull drafted (1) a chronology, titled a "Calendar of Events," DX 7; (2) a memorandum about Ohio child-custody cases, DX 10; (3) a "Case Brief," DX 8; and (4) a draft Complaint, DX 9. *See* DX 7 (Tr. 203, 208, 227–28 (Mull));

DX 10 (Tr. 210, 233–34 (Mull)); DX 8 (Tr. 209, 230–32 (Mull)); DX 9 (Tr. 210–211, 234–35 (Mull)).

34. Mr. Mull was "the lead person working on the Bailey matter." Tr. 209:16–19 (Mull). Respondent provided some oral suggestions and edits, including identifying the venue for filing and citations to applicable statutes. Tr. 211, 235–37, 283–85 (Mull). But apart from these oral suggestions, no one, other than Mr. Mull, drafted or edited his four documents. Tr. 228, 231–35, 272–73 (Mull).

35. On March 14, 2017, Mr. Mull discussed the draft Complaint with Respondent. DX 29 at 1; Tr. 211–12 (Mull). After that meeting, Respondent assigned Mr. Mull work on immigration matters, and he stopped working on the Bailey matter. Tr. 212–13 (Mull).

36. After March 14, 2017, Mr. Mull performed no other substantive work on the Bailey matter. Tr. 213 (Mull); Tr. 384–86 (Respondent). Mr. Mull left Respondent's firm in May 2017. Tr. 214 (Mull).

E. The Baileys Met Respondent at the Toledo Library

37. Respondent made no edits to Mr. Mull's work, and he performed no additional substantive work on Mrs. Bailey's case. Tr. 213, 228, 231–35, 238:14–16, 272–73 (Mull); Tr. 299 (Anderson); DX 26; Tr. 384–86 (Respondent) (produced client file contained only Mr. Mull's work product). Respondent did not share the draft complaint or other work product with the Baileys. Tr. 87–89 (V. Bailey).

38. On June 23, 2017, the Ohio Court of Appeals affirmed the juvenile court's custody order. DX 11. Respondent played no role in the state-court appeal. Tr. 91 (V. Bailey).

39. By October 2017, the Baileys had grown concerned about the status of their case, and Respondent had not communicated with them since they paid him in January. Stip. 24; Tr. 49, 50:22–51:9, 51:13–22, 52:14–22 (V. Bailey); *accord* DX 29 at 4–5 (Respondent's logs).

40. On October 31, 2017, Respondent met the Baileys at the Toledo library. Stip. 24. Respondent brought with him a box containing all the Baileys' original files. Tr. 53 (V. Bailey); Tr. 372 (Respondent).

41. Respondent told the Baileys he lacked the "manpower" to handle their case. Tr. 54:16–55:1; 109:17–20 (V. Bailey); DX 22 at 1. Mrs. Bailey suggested she herself could help organize her case and put her files in "chronological order" to help the case move forward. Tr. 55:11–17; *see also* Tr. 144 (A. Bailey). Respondent agreed that would help and said he would email her how to proceed. Tr. 55–56 (V. Bailey); Tr. 144–45 (A. Bailey); DX 29 at 4 (Respondent's firm's log noting Mrs. Bailey's call about putting case "in chronological order").

42. Respondent did not provide the Baileys with any billing statement or accounting to show the work he had performed on her case, nor did he discuss anything related to billing, time records, or the status of their funds. Tr. 68:4–10 (V. Bailey); *see* Tr. 67:11–18 (V. Bailey).

43. Respondent did not explain that he was licensed only in federal court, his inability to overturn the existing state-court custody order in federal court, or any problems or difficulties with their case other than his not having enough "manpower." Tr. 55–56 (V. Bailey).

44. After the library meeting, Respondent did not send an email to Mrs. Bailey. Tr. 57 (V. Bailey); *see also* DX 13.

45. On November 6, 2017, Mrs. Bailey sent Respondent a text message asking why he had not emailed her as he said he would. DX 13 at 1. Respondent reported that his mother had died and told Mrs. Bailey he would "be back with [her] to talk soon." DX 13 at 3–4; Tr. 58 (V. Bailey).

46. Mrs. Bailey waited more than a week and then made numerous attempts to contact Respondent by phone and text message between November 14–29, 2017. DX 14, DX 15, DX 29 at 4 (message logs); Tr. 58–59 (V. Bailey). Because Respondent did not reply, Mrs. Bailey began "calling around to try to find another civil attorney." Tr. 59:18–20 (V. Bailey).

F. The Baileys Confronted Respondent at his Office in Sandusky

47. On November 29, 2017, the Baileys visited Respondent's office unannounced and confronted him. Tr. 60 (V. Bailey); Tr. 146–47 (A. Bailey); Stip. 25; *see* DX 15 at 3 (handwritten notation on record of text messages between V. Bailey and Respondent); Tr. 66:4–15 (V. Bailey) (explaining handwritten notation).

48. They asked, "what exactly was going on with the case?" Tr. 61:17–18 (V. Bailey). Respondent said was he was "trying to get over the loss of his mother;" he was "in a rush [and] had to go to another hearing;" and he would email them later. Tr. 66:20–67:4 (V. Bailey). He did not do so. Tr. 67 (V. Bailey).

G. Mrs. Bailey Terminated Respondent

49. Frustrated, and believing Respondent was "leading [her] on," Mrs. Bailey found another attorney. Tr. 68–69 (V. Bailey). On December 7, 2017, Mrs. Bailey fired Respondent by email. DX 16; Tr. 70–71 (V. Bailey).

50. Respondent replied in a letter also dated December 7, 2017, saying he was "deeply sorry that [Mrs. Bailey] ha[d] chosen to retain other counsel," and he noted that he had "previously returned . . . all documents and items pertaining to [the] matter." DX 17; *see* Tr. 70–72 (V. Bailey).

51. Respondent did not offer or provide any refund, nor did he provide any billing statement or accounting to show the work he had performed on her case or anything related to billing, time records, or a justification for keeping the $2,500 retainer fee. Tr. 68, 72–73 (V. Bailey).

52. On December 18, 2017, Disciplinary Counsel received a complaint from Mrs. Bailey. DX 18 at 3–4.

H. Respondent Created *Post-Hoc* Invoices

53. On January 4, 2018, Respondent generated an invoice for the Bailey matter. DX 29 at 1; Tr. 408, 411 (Respondent); Tr. 265 (Mull). He generated the invoice using case management software called Amicus Attorney. Tr. 241–43, 250–

51 (Mull). The January invoice contained ten time entries, for total charges of $3,230.00. DX 29 at 1. The January invoice showed, as of October 31, 2017 (when he met the Baileys at the library), charges amounting to $2,425—less than the Baileys' $2,500 advanced payment. *Id.*; Stip. 11.

54. By letter dated January 12, 2018, Disciplinary Counsel requested Respondent answer Mrs. Bailey's complaint. DX 18 at 1–2.

55. By email on January 24, 2018, Mrs. Bailey asked Respondent to return her $2,500. DX 20; Tr. 72–73 (V. Bailey). He never responded. Tr. 72 (V. Bailey).

56. On February 8, 2018, Respondent generated a "draft" invoice that added five new time entries to the January invoice. DX 29 at 2; Tr. 253–54 (Mull); Tr. 415 (Respondent) (conceding the February invoice was "prepared after [he] received the complaint"). By this time, Respondent knew about the disciplinary investigation and Mrs. Bailey's request for a refund. FF 52, 54–55.

57. On the February draft invoice, Respondent incorrectly input a 3.5-hour charge for Chikela Everett, a former employee, "creat[ing] [a] calendar of events" when, in fact, only Mr. Mull created the calendar of events. Tr. 254:6–256:3 (Mull). Respondent also input a 2.5-hour charge on January 3, 2017 for an "initial interview and client intake" by Mr. Mull even though Mr. Mull did not start working at the firm until January 29, 2017. Tr. 256–57 (Mull); FF 29.

58. Both the January and February 2018 invoice reflected a $350 billing rate, not the $300 billing rate agreed to in the retainer agreement. *Compare* DX 29 at 1–2, *with* DX 6.

59. On February 19, 2018, Respondent answered Mrs. Bailey's complaint and provided Disciplinary Counsel with both the January and February invoices, which he said "detail[ed] the time and research that was conducted." DX 22 at 2.

I. Respondent's Representations About the Invoices

60. On February 26, 2018, Disciplinary Counsel asked Respondent how and when he created the invoices and if he had provided them to the Baileys. DX 23 at 2. Disciplinary Counsel also asked Respondent "to explain the difference between the two invoices" for the same time period (January–November 2017). *Id.*

61. On March 15, 2018, Respondent said he had mistakenly "not realiz[ed] that [his] system had [Mrs. Bailey] listed as two separate cases," but he otherwise ignored Disciplinary Counsel's questions about the invoices. DX 26 at 1; *see generally* DX 26.

62. On March 20, 2018, Disciplinary Counsel again asked Respondent: "Please explain when the invoices and time sheets . . . were created and when (if ever) you sent them to Ms. Bailey." DX 27 at 1.

63. On April 9, 2018, Respondent said he originally created the invoices during the representation "on the date that [he] returned the material to Ms[.] Bailey at the Toledo library," October 31, 2017.[6] DX 28 at 3.

[6] Although Respondent estimated this date was on or about "December 7, 2019" (the date of Mrs. Bailey's termination email and his letter in response), he later stipulated that the library meeting occurred on October 31, 2017. Stip. 24.

64. When he made these representations to Disciplinary Counsel, Respondent knew he did not generate the two invoices until January or February 2018—after he was terminated. FF 49–57.

65. At the hearing, Respondent did not testify that he had two separate invoices because he had "two separate cases" listed in his system. DX 26 at 1. Instead, he said the February "draft" invoice existed because the five entries on the February invoice had not been properly "posted" or "finalized." Tr. 374:11–375:7, 407:10–22 (Respondent).

66. With respect to providing the Baileys with the invoices, Respondent first testified, "I did send them." Tr. 375:14. He then testified, "I did *not* send them a bill at that point because I said we had exceeded what they had provided us with." Tr. 375:16–18 (emphasis added). After the Chair asked Respondent to clarify, Respondent said, "I believe I did [provide a statement or bill]." Tr. 375:19–376:2. But after the Chair pointed out there were no documents to support that assertion, Respondent testified there were no documents because he "*spoke* [to the Baileys] about that bill" (rather than providing a physical invoice). Tr. 376:3–8 (emphasis added). Still later, Respondent said that he did send physical invoices to Mrs. Bailey:

> Public Member: "So I'm to presume that invoices were sent before [Mrs. Bailey] filed the complaint?"
>
> Respondent: "Yes."

Tr. 406:15–18; *see also* Tr. 408:1–13; 410:6–9.

67. Our conclusion is that Respondent gave intentionally false and misleading testimony to the Hearing Committee about the invoices; he knew that he did not provide the January and February invoices to the Baileys.

J. Credibility

68. The witnesses called by Disciplinary Counsel were credible. They testified in a forthright manner about their dealings with Respondent. Their testimony was persuasive and sufficiently detailed. Each witness's testimony was corroborated by the testimony of other witnesses as well as the contemporaneous documents.

69. Respondent's testimony at the hearing was not credible. It was at odds with the contemporaneous documents and his own written statements to Disciplinary Counsel. *See, e.g.*, Tr. 379–81 (testifying he never told the Baileys he could help them get their children back notwithstanding his earlier statement that he had done so). He also contradicted his own testimony and made reckless or intentional false statements during the disciplinary proceeding. *See, e.g.*, FF 63–67; DX 45 at 2 (false statement to Board that he had an attorney monitor, when he did not); Tr. 535–41 (Respondent) (false testimony to Committee that he contacted the monitor before the Board Order, when he did not). *Compare* Tr. 548, 550–53 (Respondent), *with* DX 48 at 1 (Respondent filed several Chapter 13 bankruptcy cases after telling the Board he would handle only Chapter 7 cases).

K. Respondent's Disability Mitigation

70. Respondent asserts that during the Bailey representation he was suffering from uncontrolled diabetes with excessive blood sugar levels which caused memory lapses, stress, and general malaise. R. Br. at 2–3. From January to late March 2017, he suffered several instances of high blood sugar levels, in the 400–500 range, that required emergency room visits. Tr. 509–10 (Respondent). By June 2018 his medical provider, Dr. Franko of the Cleveland Clinic, had gotten Respondent's diabetes under control using two different insulin doses. Tr. 511–12 (Respondent).

71. Respondent asserts that during the Bailey representation he also suffered from depression. R. Br. at 3. Respondent believes that his depression first arose from the loss he suffered at the death of his partner of thirty-plus years in February 2015. *See* Tr. 509 (Respondent). Respondent had been his partner's primary caretaker during her eight-year battle with cancer. Tr. 507 (Respondent). Respondent asserted that his depression was compounded by the loss he suffered due to the death of his mother.. Respondent testified in mitigation that his mother's death occurred in November 2016 (Tr. 509 (Respondent)), but states in in post-hearing briefing that it occurred November 2017 (R. PFF 11). The record evidence supports November 2017. *See* FF 45 (indicating November 2017; citing DX 13 at 2; Tr. 57-58 (V. Bailey)). In late March and April of 2018, Respondent began reporting to Dr. Franko that both his sister and his assistant felt that he was depressed and distracted. Tr. 510–11 (Respondent); *see also* Tr. 512–13 (Respondent)

(supporting that Respondent sought treatment for his depression in 2018). Sometime after June or July of 2018, after Respondent's diabetes was controlled, Dr. Franko prescribed venlafaxine to lighten Respondent's mood. Tr. 513–14 (Respondent); DX 43 at 4. In September 2018, Dr. Franko created an assessment plan that addressed the depression diagnosis. Tr. 511–12; DX 43 at 4.

72. Respondent's assistant, Kristen Harris, testified regarding her observations of Respondent during the course of her five years of employment in the Harris Law Firm. When Ms. Harris first began working for Respondent in 2014 "he was very sharp, and his memory was very good." Tr. 480 (K. Harris). But when she returned to his firm in January 2017 she observed "Attorney Harris' memory start to slip," and "multiple times where [she] noticed he was acting very lethargic, very fatigued, confused . . . ." Tr. 478 (K. Harris); *see also* Tr. 482 (K. Harris) ("Attorney Harris was starting to get very bad with his memory as well as just confusion, and his sugar was really out of control at that time."). Ms. Harris is aware of Respondent's medical issues and believes his confused condition was the result of elevated blood sugar levels. Tr. 478–79, 493 (K. Harris). Ms. Harris noticed that Respondent's memory got "a bit sharper" once he began insulin maintenance injections in late 2017 or early 2018. Tr. 486–87 (K. Harris). Ms. Harris now schedules Respondent's doctors' appointments and reminds him to check his blood sugar and take his medications. Tr. 486–88 (K. Harris).

73. Ms. Harris also testified regarding Respondent's depression. Ms. Harris noticed Respondent's "[d]epression, head in the clouds," and failure to deal

with his partner's death in 2015. Tr. 483 (K. Harris). Ms. Harris observed that Respondent's depression worsened with his mother's death and that Respondent was "off in the clouds, not in the moment, not dealing with stuff the way [he] should have dealt with, sad, irritable." Tr. 487 (K. Harris). Ms. Harris and Respondent's sister discussed sending Respondent to a counselor or psychiatrist to help with the depression in December 2018 or the beginning of 2019. Tr. 484, 495–96 (K. Harris). Ms. Harris noticed that after Respondent began taking anxiety medication (sometime after June or July 2018) and attending counseling (December 2018 or the beginning of 2019) he became more focused, "more in the moment, to be able to concentrate and work on stuff." Tr. 489–90 (K. Harris); *see* DX 43 at 4.

III. CONCLUSIONS OF LAW

Disciplinary Counsel argues that Respondent committed all of the charged violations. Respondent admits violating the Rule 1.15(a) recordkeeping requirements, but contends that he did not violate Rules 1.4(b), 1.5(a), 1.15(a) by commingling or misappropriation, 1.15(e), 8.1(a), and 8.4(c). The Hearing Committee finds that Disciplinary Counsel has proven by clear and convincing evidence that Respondent violated Rules 1.4(b) by failing to explain the matter to his client, 1.15(a) and (e) by intentionally misappropriating the clients' advance fees and failing to maintain proper records, and 8.1(a) by knowingly making a false statement of fact during the disciplinary investigation. The Hearing Committee also concludes that Disciplinary Counsel failed establish violations of Rule 1.5(a) (charge

an unreasonable fee), 1.15(a) (commingling), or 8.4(c) (dishonesty, fraud, deceit, or misrepresentation) by clear and convincing evidence.

A. Disciplinary Counsel Proved a Violation of Rule 1.4(b) (Failure to Explain Matter to Client)

Rule 1.4(b) states than an attorney "shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." This Rule provides that the attorney "must be particularly careful to ensure that decisions of the client are made only after the client has been informed of all relevant considerations." Rule 1.4, cmt. [2]. The Rule places the burden on the attorney to "initiate and maintain the consultative and decision-making process if the client does not do so and [to] ensure that the ongoing process is thorough and complete." *Id*.

Disciplinary Counsel argues that Mrs. Bailey engaged Respondent only to help her get her children back. ODC Br. at 26. Knowing this, Respondent failed to explain to Mrs. Bailey that he had no previous child custody experience and was not licensed to practice in Ohio state courts where such custody matters are decided. ODC Br. at 26. Disciplinary Counsel asserts that Respondent knew it was a "legal impossibility" to overturn a state custody order through a federal action, yet he failed to inform his client of his inability to aid her in her custody matter. ODC Br. at 26–27. Disciplinary Counsel further contends that the Hearing Committee should not credit Respondent's claim that he only ever intended to pursue a federal civil rights claim on behalf of the Baileys because it is contradicted by his retainer agreement and prior statements to Disciplinary Counsel; however, even if this was his true

intention, Respondent had an obligation to adequately "explain his approach, including that he could *not* overturn the existing custody order," so that the Baileys could make an informed decision about whether to engage him. ODC Br. at 27.

Respondent admits that he told the Baileys he could "help them get their children back," R. Br. at 2, but asserts that the "Baileys knew . . . from the beginning" that he was "a Federal Attorney not a State Attorney," R. Br. at 5. Respondent states that he "repeatedly explained that he was only a Federal Attorney and did not suggest that there was any way to overturn state actions," and that "[t]he only relief was the federal courts using the civil rights laws." R. PFF 8. Disciplinary Counsel retorts that Respondent's communication with the Baileys "showed Respondent *claimed* he could handle state issues, including child custody cases." ODC Reply Br. at 2. Additionally, Mrs. Bailey's testimony indicates that Respondent never informed her of the differences between the state and federal courts and never explained that a federal court cannot overturn a state custody order. ODC Reply Br. at 2–3.

The Committee finds that there was no meaningful compliance with Rule 1.4(b). Respondent told the Baileys he could help them get their children back without explaining that he had never handled any kind of child-custody case, that he was not a member of the Ohio Bar, and that child custody is generally a state-law issue not a federal issue. Respondent also did not explain any of the issues related to challenging state-court custody orders in federal court. FF 10–11. We find that Disciplinary Counsel proved the violation of Rule 1.4(b) by clear and convincing evidence.

B. Disciplinary Counsel Did Not Prove a Violation of Rule 1.5(a) (Unreasonable Fee)

Rule 1.5(a) provides for the following factors when determining whether an attorney's fee is unreasonable.

> (a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
>
> > (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> >
> > (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> >
> > (3) The fee customarily charged in the locality for similar legal services;
> >
> > (4) The amount involved and the results obtained;
> >
> > (5) The limitations imposed by the client or by the circumstances;
> >
> > (6) The nature and length of the professional relationship with the client;
> >
> > (7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
> >
> > (8) Whether the fee is fixed or contingent.

"The prototypical circumstance of charging an unreasonable fee is undoubtedly one in which an attorney did the work that he or she claimed to have done, but charged the client too much for doing it." *In re Cleaver-Bascombe*, 892 A.2d 396, 403 (D.C. 2006). However, "[i]t cannot be reasonable to demand payment for work that an attorney has not in fact done." *Id.* Even the client's agreement "'to the [amount of the fee] does not relieve the attorney from the burden of showing that

the amount agreed upon was fair and reasonable.'" *In re Martin*, 67 A.3d 1032, 1042 (D.C. 2013) (citation omitted) (alteration in original).

Disciplinary Counsel asserts that "[i]t is unreasonable for a lawyer to charge fees for results he knows he cannot achieve." ODC Br. at 28. Disciplinary Counsel argues that because Respondent knew he could not overturn the state court's custody order in a federal court action the normal Rule 1.5(a) factors do not apply, and it was unreasonable for him to charge and collect the $2,500 fee. *Id.*

Respondent contends that he was not representing Mrs. Bailey in a state-level custody matter. R. Br. at 1. Instead, he undertook and charged Mrs. Bailey to represent her in a federal civil rights case based on the disparate treatment she received as a minority by the Ohio Department of Job and Family Services in taking custody of her children. R. Br. at 1. Disciplinary Counsel argues that this characterization of the case is untrue as evidenced by the retainer agreement and Respondent's admission that he told Mrs. Bailey he could help her get her children back. ODC Reply Br. at 3.

The Committee believes that there is a basis on which it could be fairly concluded that the fee charged here was *per se* unreasonable given the finding that Respondent failed to adequately explain to the Baileys what he could (and more to the point, could not) do to help address the legal problem with which the Baileys presented. However, Disciplinary Counsel failed to establish by clear and convincing evidence that a properly informed client could not properly have been

charged $2,500 for the legal work in question. Thus, we find that Disciplinary Counsel failed to prove a Rule 1.5(a) violation by clear and convincing evidence.

C. Disciplinary Counsel Proved a Violation of Rule 1.15(a) (Intentional or Reckless Misappropriation) and 1.15(e) (Unearned Advance Fees), But Did Not Prove a Violation of Rule 1.15(a) (Commingling)

Disciplinary Counsel alleges that the Baileys' $2,500 retainer was an advance of unearned fees, that Respondent commingled with his own funds, then spent before earning, without the clients' authorization to do so.

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. Funds of clients or third persons that are in the lawyer's possession (trust funds) shall be kept in one or more trust accounts . . . .

Rule 1.15(e) provides that:

> Advances of unearned fees and unincurred costs shall be treated as property of the client pursuant to paragraph (a) until earned or incurred unless the client gives informed consent to a different arrangement.

Rule 1.15(a) prohibits the misappropriation of entrusted funds and the commingling of entrusted funds with a lawyer's own funds. Rule 1.15(e) further requires that advances of unearned fees be treated as entrusted funds until earned unless the client otherwise gives informed consent to a different arrangement. Together, Rules 1.15(a) and 1.15(e) prohibit the misappropriation of unearned advanced fees, and the commingling of unearned advanced fees with a lawyer's own funds.

Misappropriation is "any unauthorized use of client's funds entrusted to [an attorney], including not only stealing but also unauthorized temporary use for the lawyer's own purpose, whether or not [the attorney] derives any personal gain or benefit therefrom." *In re Cloud*, 939 A.2d 653, 659 (D.C. 2007) (quoting *In re Harrison*, 461 A.2d 1034, 1036 (D.C. 1983)) (first alteration in original); *see also In re Micheel*, 610 A.2d 231, 233 (D.C. 1992) ("Depositing client funds into an attorney's operating account constitutes commingling; misappropriation occurs when the balance in that account falls below the amount due to the client."); *In re Edwards*, 808 A.2d 476, 482 (D.C. 2002) (commingling client money with the lawyer's money in the operating account is not misappropriation; however, the respondent "engaged in misappropriation the instant she allowed the balance in her operating account to fall below the amount given to her by" the client).

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). Misappropriation is essentially a *per se* offense and does not require proof of improper intent. *See id.* It occurs where "the balance in [the attorney's] trust account falls below the amount due to the client [or third party]." *In re Ahaghotu*, 75 A.3d 251, 256 (D.C. 2013) (internal quotation marks and citations omitted). Thus, "when the balance in [a] [r]espondent's . . . account dip[s] below the amount owed" to the respondent's client or clients, misappropriation has occurred. *In re Chang*, 694 A.2d 877, 880 (D.C. 1997) (per curiam) (appended Board Report) (citing *In re Pels*, 653 A.2d 388, 394 (D.C. 1995)).

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

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

Finally, 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)). "Negligent misappropriation is an attorney's non-intentional, non-deliberate, non-reckless misuse of entrusted funds or an attorney's non-intentional, non-deliberate, non-reckless failure to retain the proper balance of entrusted funds. 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." *In re Abbey*, 169 A.3d 865, 872 (D.C. 2017) (citations omitted); *see also Anderson*, 778 A.2d at 339 (providing that negligent misappropriation occurs where "the unauthorized use was inadvertent or the result of simple negligence" (citations omitted)).

Commingling occurs when an attorney fails to hold entrusted funds in an account separate from his own funds. *In re Moore*, 704 A.2d 1187, 1192 (D.C. 1997). Thus, "commingling is established 'when a client's money is intermingled with that of his attorney and its separate identity is lost so that it may be used for the attorney's personal expenses or subjected to the claims of its creditors.'" *In re Malalah*, Board Docket No. 12-BD-038 at 12 (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."). To establish commingling, the entrusted and non-entrusted funds must be in the same account at the same time. "The rule against commingling has three principal objectives: to preserve the identity of client funds, to eliminate the risk that client funds might be taken by the attorney's creditors, and most importantly, to prevent lawyers from misusing/misappropriating client funds, whether intentionally or inadvertently." *In re Rivlin*, 856 A.2d 1086, 1095 (D.C. 2004) (per curiam).

Disciplinary Counsel argues that Respondent (1) commingled his own funds with the Baileys' advance fee; and (2) intentionally misappropriated the fee by using it without authorization before it was earned. *See* ODC Br. at 19, 22.

Upon receiving the Baileys' fee via PayPal, Respondent transferred the bulk of the payment to his operating account and shortly thereafter deposited additional non-entrusted funds in that same account, thereby, Disciplinary Counsel asserts, commingling the entrusted Bailey funds with Respondent's own funds. ODC Br. at 21–22. The Bailey funds were used to pay Respondent's personal and business expenses, and Disciplinary Counsel points out that by January 9, 2017, at least $2,311 of the Bailey funds had been spent. Even if we were to rely upon Respondent's *post hoc* inflated invoices, Respondent spent at least $1,286 more than was earned by that date. ODC Br. at 21. Because Respondent spent this money without authorization from his client, Disciplinary Counsel contends it amounts to misappropriation. ODC Br. at 21.

Additionally, Disciplinary Counsel maintains that this misappropriation was intentional. ODC Br. at 22. Disciplinary Counsel argues that Respondent knew he had an obligation to keep the Bailey funds in a trust account until they were earned and even told them he would do so in the retainer agreement. ODC Br. at 23. Instead, Respondent placed the funds into his operating account, which had a negative balance on the date of the deposit, and he proceeded to spend the funds before they were earned, overdrawing the account ten times over the next several days. ODC Br. at 23. Disciplinary Counsel asserts that Respondent's "entire course of conduct shows he was interested only in taking and spending his clients' advanced fee" before he had earned it, and this was "the *only* reason Respondent took the Baileys' case." ODC Br. at 24 (emphasis added).

Respondent contends that he did not commingle or intentionally misappropriate the funds because PayPal "automatically placed the funds in the working capital account, R. PFF 4, he did not know the "proper procedure in handling the funds," and he "negligently allowed the funds to not be placed in the Trust Account," R. Br. at 2. Respondent represents "that the bulk of [his] prior use of the trust account had been to hold filing fees for bankruptcy filings which was . . . the majority of the Respondent[']s cases." R. PFF 4. He also emphasizes that he "had earned a portion of the Baileys' funds when they were withdrawn, and it was negligence not fraud that caused them to be used without notice." R. PFF 5. In response, Disciplinary Counsel states that "PayPal did not automatically transfer money into his operating account," that "Respondent *did* know he was required to

hold client advances of fees or costs in his trust account," and that he "intentionally and calculatingly disbursed Mrs. Bailey's funds—to the penny—to pay various personal debts and expenses." ODC Reply Br. at 5–6.

This is not a close case, and Respondent would have been well served by an admission of the unavoidable facts rather than prevarication. Disciplinary Counsel is unquestionably correct that Respondent knew his obligations to hold the funds in trust—his own letter to the Baileys recites as much. HCX 1. Just the same it was not PayPal, but Respondent that, as Disciplinary Counsel aptly describes, "calculatingly disbursed" his clients' funds to satisfy unrelated personal obligations before the funds were earned. FF 18, 21–22, 24. Based on our judgment as to the factual record as a whole and Respondent's credibility before the Committee, we find that Respondent commingled his clients' funds with other unentrusted funds before misappropriating the funds by using them to pay his own expenses before the funds were earned. We believe that Respondent's misappropriation was intentional.

In the alternative, Respondent's conduct in transferring his clients' funds from the PayPal account into his operating account (FF 19), and then using the funds to pay his expenses, resulting in a negative balance (FF 21–22), all while completely failing to track the use of the funds (FF 25), was reckless in the extreme. Respondent's handling of the Baileys' funds bears the hallmarks of reckless misappropriation, which includes: " . . . a complete failure to track [client funds]; 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 the disregard of inquiries concerning the status of funds[,]" and "reveal an intent by the attorney 'to deal with and use funds escrowed for clients as his own' or an unacceptable disregard for the security of client funds." *Anderson*, 778 A.2d at 338 (citations omitted).

Disciplinary Counsel argues that Respondent commingled the Baileys' advanced funds in his 8701 operating account when he transferred the funds from his PayPal account and deposited additional funds into the account on January 4 and January 5, 2017. ODC Br. at 22. Disciplinary Counsel proved that two deposits from Intuit Solutions and a check from Lewis Slusher were deposited into the 8701 account which held the Baileys' advance funds. But, Disciplinary Counsel did not prove that those funds were unentrusted. Because Disciplinary Counsel did not establish that the Baileys' entrusted funds were intermingled with other unentrusted funds in the Respondent's operating account, we find that Disciplinary Counsel failed to prove, by clear and convincing evidence, that Respondent violated Rule 1.15(a) by commingling.

D. Disciplinary Counsel Proved a Violation of Rule 1.15(a) (Maintain Records)

Rule 1.15(a) requires lawyers to keep "[c]omplete records of . . . account funds and other property" and preserve them "for a period of five years after termination of the representation." *See In re Edwards* (*Edwards II*), 990 A.2d 501, 522 (D.C. 2010) (appended Board Report). The *Edwards* decision explained that "[f]inancial records are complete only when an attorney's documents are 'sufficient to demonstrate [the attorney's] compliance with his ethical duties.'" 990 A.2d at 522

(quoting *In re Clower*, 831 A.2d 1030, 1034 (D.C. 2003) (finding Rule 1.15(a) and § 19(f) violations)). The purpose of the requirement of "complete records is so that 'the documentary record itself tells the full story of how the attorney handled client or third-party funds' and whether, for example, the attorney misappropriated or commingled a client's funds." *Edwards II*, 990 A.2d at 522 (citation omitted); *see also Pels*, 653 A.2d at 396 (finding Rule 1.15(a) violation when attorney showed a "pervasive failure" to maintain contemporaneous records accounting for the flow of client funds within various bank accounts). Thus, "[t]he records themselves should allow for a complete audit even if the attorney or client is not available." *Edwards II*, 990 A.2d at 522.

Disciplinary Counsel asserts that "Respondent kept no records of what he did with the Baileys' funds" and was "unable to find even the initial transactions for the deposit of funds when Disciplinary Counsel asked him what he did with the funds." ODC Br. at 25. This, Disciplinary Counsel alleges, is a clear violation of Rule 1.15(a). *See* ODC Br. at 24–25.

Respondent acknowledged violating the recordkeeping requirements of Rule 1.15(a) (Stip. 17) and makes no attempt to argue the matter in his post-hearing filings. In light of this stipulation and Respondent's inability to provide records to allow Mr. Anderson to track the clients' funds, we find that Disciplinary Counsel has proved the violation of Rule 1.15(a) (maintain records) by clear and convincing evidence. FF 26.

E. Disciplinary Counsel Proved a Violation of Rule 8.1(a) (Knowingly make False Statement of Fact in Disciplinary Matter)

Rule 8.1(a) provides that "a lawyer . . . in connection with a disciplinary matter, shall not . . . knowingly make a false statement of fact[.]" The Rule requires Disciplinary Counsel to prove by clear and convincing evidence that Respondent "knowingly" made a false statement. The Terminology section of the Rules defines "knowingly" as "actual knowledge of the fact in question" which "may be inferred from circumstances." Rule 1.0(f). Note that Comment [1] to Rule 8.1 provides that "it is a separate professional offense for a lawyer knowingly to make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct." Moreover, the "[l]ack of materiality does not excuse a knowingly false statement of fact." Rule 8.1 cmt. [1].

Disciplinary Counsel alleges that Respondent violated Rule 8.1(a) by making false statements about his invoices for the Bailey case, which he submitted in response to Mrs. Bailey's disciplinary complaint against him. ODC Br. at 32–33. When Disciplinary Counsel noticed the discrepancies between two invoices that Respondent submitted in the course of the investigation, they asked Respondent when the invoices were created and whether they had been provided to the Baileys. *Id.* Respondent answered that both invoices had been created in October 2017, and, Disciplinary Counsel argues, he "clear[ly] impli[ed]" that the invoices were given to the Baileys when he met with them at the Toledo library. ODC Br. at 33. Indeed, Respondent confirmed as much at the hearing in his testimony recited above.

Contrary to Respondent's representations, the Committee finds that the invoices were created in January and February of 2018, contained an inflated billing rate, and were never given to the Baileys, who had terminated Respondent in December of 2017. FF 52, 55–58. Respondent submitted the false billing statements in his response to the disciplinary complaint. FF 59. We find that Disciplinary Counsel proved the violation of Rule 8.1(a) by clear and convincing evidence.

F. Disciplinary Counsel Did Not Prove a Violation of Rule 8.4(c) (Dishonesty, Fraud, Deceit or Misrepresentation)

Disciplinary Counsel charges Respondent with a violation of Rule 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation). The Court has held that each of these terms encompassed within Rule 8.4(c) "should be understood as separate categories, denoting differences in meaning or degree." *In re Shorter*, 570 A.2d 760, 767 (D.C. 1990) (per curiam). Each category requires proof of different elements. *See In re Romansky*, 825 A.2d 311, 315 (D.C. 2003).

Dishonesty is the most general category in Rule 8.4(c), defined as:

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

Shorter, 570 A.2d at 767–68 (internal quotation marks and citation omitted); *see also In re Scanio*, 919 A.2d 1137, 1142–43 (D.C. 2007). Dishonesty in violation of Rule 8.4(c) does not require proof of deceptive or fraudulent intent. *See Romansky*, 825 A.2d at 315. Thus, when the dishonest conduct is "obviously wrongful and

intentionally done, the performing of the act itself is sufficient to show the requisite intent for a violation." *Id.* Conversely, "when the act itself is not of a kind that is clearly wrongful, or not intentional, [Disciplinary] Counsel has the additional burden of showing the requisite dishonest intent." *Id.* A violation of Rule 8.4(c) may also be established by sufficient proof of recklessness. *See id*. at 317. To prove recklessness, Disciplinary Counsel must prove by clear and convincing evidence that the respondent "consciously disregarded the risk" created by his actions. *Id.*

Fraud is defined under Rule 1.0 as "conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive." Rule 1.0(d). The Court has held that fraud "embraces all the multifarious means . . . resorted to by one individual to gain an advantage over another by false suggestions or by suppression of the truth." *Shorter*, 570 A.2d at 767 n.12 (citation omitted). Fraud requires a showing of intent to deceive or to defraud. *See Romansky*, 825 A.2d at 315; *In re Hutchinson*, 534 A.2d 919, 923 (D.C. 1987) (en banc) (finding no violation of Rule 8.4(c) where the respondent committed misdemeanor violation of Securities Exchange Act of 1934 and crime did not require proof of specific intent to defraud or deceive).

Deceit is the "suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead . . . ." *Shorter*, 570 A.2d at 767 n.12 (citation omitted). To establish deceit, the respondent must have knowledge of the falsity, but it is not necessary that the respondent have intent to deceive or defraud. *In re Schneider*, 553 A.2d 206, 209 (D.C. 1989) (finding deceit

where attorney submitted false travel expense forms but did not intend to deceive the client or law firm and there was no personal gain); *see also Shorter*, 570 A.2d at 767 n.12.

Misrepresentation is a "statement . . . that a thing is in fact a particular way, when it is not so." *Shorter*, 570 A.2d at 767 n.12 (citation omitted); *see also Schneider*, 553 A.2d at 209 n.8 (misrepresentation is element of deceit). Misrepresentation requires active deception or a positive falsehood. *See Shorter*, 570 A.2d at 768. The failure to disclose a material fact also constitutes a misrepresentation. *See In re Outlaw*, 917 A.2d 684, 688 (D.C. 2007) (per curiam) ("Concealment or suppression of a material fact is as fraudulent as a positive direct misrepresentation.") (citations omitted); *Scanio*, 919 A.2d at 1139–44 (respondent failed to disclose that he was salaried employee when he made a claim for lost income to insurance company measured by lost hours multiplied by billing rate); *In re Reback*, 513 A.2d 226, 228–29 (D.C. 1986) (en banc) (finding deceit and misrepresentation where respondents neglected claim, failed to inform client of dismissal of case, forged client's signature onto second complaint, and had complaint falsely notarized).

The Court has held that Disciplinary Counsel does not need to establish that a respondent acted with "deliberateness" in making a misrepresentation in order to prove a violation of Rule 8.4(c). *In re Rosen*, 570 A.2d 728, 728–30 (D.C. 1989) (per curiam). Rather, establishing a violation of Rule 8.4(c) based on a misrepresentation only requires proof that the respondent "acted in reckless

disregard of the truth." *Id.* at 729 (finding material misrepresentation in bar application where the respondent acted in reckless disregard of the truth).

Disciplinary Counsel asserts three justifications for finding an 8.4(c) violation. First, they argue that "Respondent engaged in dishonesty, fraud, and misrepresentation by taking funds from the Baileys and misleading them to believe he could help Mrs. Bailey regain custody of her children." ODC Br. at 29. Second, they state "Respondent also engaged in dishonesty and deceit by omission by withholding critical information from [the clients], which prevented his client[s] from discovering that he had spent their funds." *Id.* Finally, they claim Respondent engaged in dishonesty by making false statements regarding invoices for the Bailey case to Disciplinary Counsel during the course of their investigation. ODC Br. at 32–33.

Disciplinary Counsel points to "a pattern of dishonesty" in Respondent's actions. Respondent "concealed that he was not properly licensed to handle an Ohio child-custody matter" and spent the Baileys' fee without providing them with an invoice or receiving authorization to do so. Respondent failed to perform "any actual legal services," and he merely "assigned an entry level employee, with virtually no legal training, to [Mrs. Bailey's] case" to conduct "make-work, which served only to eat up time to justify keeping the Bailey's initial $2,500 payment." ODC Br. at 31. According to Disciplinary Counsel, Respondent made no contribution to his employee's work, never shared that work with the Baileys, and only produced it in response to Disciplinary Counsel's investigation. ODC Br. at 31–32. Further,

Respondent provided Disciplinary Counsel with two invoices that were created in 2018 after Mrs. Bailey terminated him, but he represented that they had been created and given to the Baileys in October 2017. ODC Br. at 32–33. Taking and keeping the Baileys' fee "under false pretenses, knowing he could not achieve their desired result," and dishonestly representing when the invoices were created amounts to an 8.4(c) violation. *Id.*

Respondent maintains that he was open and honest about not being licensed to practice in Ohio state courts and about his strategy to pursue a federal civil rights claim on behalf of the Baileys. R. Br. at 3–4; R. PFF 7. He further contends that he contributed ample work to the Bailey case, including that he "wrote the bulk of the draft complaint." R. PFF 6. Respondent argues that his work and the work of his employee "provided the basis for the invoice that was prepared for the Baileys. This demonstrated conclusively that no fraud was intended as all this work was . . . to force a reconsideration of the removal of her children." R. PFF 6. Further, "Respondent had earned a portion of the Baileys' funds when they were withdrawn, and it was negligence not fraud that caused them to be used without notice." R. PFF 5.

Disciplinary Counsel has made a compelling case; however, on balance, the Committee does not find that Respondent committed acts violative of Rule 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation) which have not otherwise been addressed in the disposition of other violations alleged in this proceeding.

IV. RECOMMENDED SANCTION

In this case, Disciplinary Counsel has asked the Hearing Committee to recommend the sanction of disbarment and direct Respondent to repay $2,500 to the Baileys. ODC Br. at 39–40. Respondent has requested that the Hearing Committee recommend additional training on entrusted fund management, use of a practice monitor, and repayment of $2,500 to the Baileys. R. Br. at 7. For the reasons described below, we recommend the sanction of disbarment. Because we find that Disciplinary Counsel has not proven, by clear and convincing evidence, that Respondent was not entitled to keep the fees he received, there is no basis to order that restitution be paid to the Baileys.

A. Standard of Review

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

B. Presumptive Sanction of Disbarment

The law regarding misappropriation is clear and consistent: absent "extraordinary circumstances," disbarment is the presumptive sanction for intentional or reckless misappropriation. *In re Addams*, 579 A.2d 190, 191 (D.C. 1990) (en banc); *In re Hewett*, 11 A.3d 279, 286 (D.C. 2011); *see also In re Mayers*, 114 A.3d 1274, 1279 (D.C. 2015) ("'In virtually all cases of misappropriation, disbarment will be the only appropriate sanction unless it appears that the misconduct resulted from nothing more than simple negligence.'" (quoting *Addams*, 579 A.2d at 191)). The Court further held that "it is appropriate . . . to consider the surrounding circumstances regarding the misconduct and to evaluate whether the mitigating factors are highly significant and [whether] they substantially outweigh

any aggravating factors such that the presumption of disbarment is rebutted." *Addams*, 579 A.2d at 195. The Court recognized that extraordinary circumstances are present when a respondent is entitled to mitigation under *In re Kersey*, 520 A.2d 321, 326 (D.C. 1987), but the Court warned that "mitigating factors of the usual sort" are not sufficient to rebut the presumptive sanction of disbarment, and "[o]nly the most stringent of extenuating circumstances would justify a lesser disciplinary sanction." *Addams*, 579 A.2d at 191, 193. Accordingly, once misappropriation involving more than simple negligence has been established, the inquiry turns to whether sufficient mitigating factors rebut the presumption of disbarment. *Anderson*, 778 A.2d at 337–38 (citing *Addams*, 579 A.2d at 191).

In mitigation of his misconduct, Respondent states that he lost both his partner of thirty-plus years and his mother within a relatively short timeframe. *See* R. Br. at 3; R. PFF 11. His mother passed away in early November 2017, during the course of his representation of the Baileys, and this death "increased the state of depression that was already present after the death of his companion of 30 plus years." R. PFF 11. Disciplinary Counsel asserts that the death of Respondent's mother in November 2017 was "in no way connected to his misappropriation of client funds or his taking a case under false pretenses—which occurred nearly a year earlier." ODC Br. at 36; *see also* ODC Reply Br. at 6–7 (noting Respondent's partner died approximately two years before the misconduct at issue).

No extraordinary circumstances exist that remove this case from the heartland of the disbarment presumption. Indeed, the Committee finds it difficult to imagine

that such circumstances could be found to exist where, as here, the Respondent has not in any meaningful manner accepted the fact, seriousness or impact of his misconduct. Indeed, at the hearing, Respondent equivocated about whether or not he told the Baileys he could help them regain custody of their children, minimized his responsibility for misappropriating the Baileys' fee, and falsely represented that he had an attorney monitoring his practice and was limiting his practice to Chapter 7 bankruptcy proceedings. ODC Br. at 35.

C. Disability Mitigation

Respondent asserts any misconduct is subject to *Kersey* mitigation. *See Kersey*, 520 A.2d 321. The respondent in *Kersey* successfully proved alcoholism was a significant factor in his disciplinary rule violations, resulting in mitigation of his sanction for intentional misappropriation. *Id.* at 327–28. Other illnesses have qualified for *Kersey* mitigation, including depression and bipolar disorder. *See, e.g.*, *In re Peek*, 565 A.2d 627 (D.C. 1989); *In re Appler*, 669 A.2d 731 (D.C. 1995) (bipolar disorder); *In re Cappell*, 866 A.2d 784 (D.C. 2004) (per curiam) ("major depression at the time of the misconduct").

To find *Kersey* mitigation, Respondent must demonstrate,

(1) by clear and convincing evidence that he had a disability;

(2) by a preponderance of the evidence that the disability substantially affected his misconduct; and

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

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

A respondent who establishes all three Kersey factors may be entitled to have the sanction stayed in favor of probation. *See, e.g., Kersey*, 520 A.2d at 328 (disbarment stayed in favor of probation); *In re Temple* (*Temple II*), 629 A.2d 1203, 1209–10 (D.C. 1993) (disbarment stayed in favor of probation); *In re Verra*, 932 A.2d 503, 505 (D.C. 2007) (per curiam) (disbarment for reckless misappropriation stayed in favor of three years' probation). D.C. Bar R. XI, § 3(a)(7) provides that any period of probation shall be no more than three years.

As the Court emphasized in *Lopes*, "it was incumbent upon [respondent] to show that his illnesses, however labeled, deprived him of the meaningful ability to comport himself in his professional conduct in accordance with the basic norms of professional responsibility." 770 A.2d at 567 (internal quotations and citation omitted). To satisfy the first *Kersey* factor, the respondent must prove by clear and convincing evidence that he was suffering from a disability or addiction "that has been held to warrant *Kersey* mitigation." *Id*. at 568.

To satisfy the second *Kersey* factor, Respondent must prove by a preponderance of the evidence that his misconduct was "substantially caused" by the qualifying disability or addiction. *In re Zakroff*, 934 A.2d 409, 418 (D.C. 2007) (citations omitted). "Substantial cause" requires Respondent to show that "but for [the disabling condition], his misconduct would not have occurred." *Kersey*, 520 A.2d at 327. "[T]he 'but for' test does not require proof that the attorney's disability

was the 'sole cause' of the attorney's misconduct"; instead it requires that Respondent establish a "sufficient nexus" between the misconduct and his disability or addiction. *See Zakroff*, 934 A.2d at 423 (citations omitted). As a result, Respondent does not need to prove that his disabling condition caused each and every disciplinary violation to satisfy the "but for" test. *Id*.

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

Finally, to satisfy the third *Kersey* factor, Respondent must show that he is "substantially rehabilitated." A respondent is substantially rehabilitated when he "no longer poses a threat to the public welfare" or where "that threat is manageable and may be controlled by a period of probation . . . ." *Appler*, 669 A.2d at 740; *see also In re Robinson*, 736 A.2d 983, 989–90 (D.C. 1999).

Respondent Did Not Prove That He Had a Disability.

Respondent asserts that at the time of the alleged misconduct he was "operating under acute depression" resulting from the loss of his partner, which was being exacerbated by his mother's failing health and eventual death. FF 71. He additionally asserts that he was suffering from uncontrolled diabetes and periods of hypoglycemia that caused lapses in judgment, disorientation, memory loss, and

insomnia. FF 70; DX 2 at 1. At the time of the alleged misconduct, Respondent reports that his blood sugar levels were reading at five times the normal range for adults, which caused memory lapses and contributed to his overall "stress and general mala[i]se." R. Br. at 2–3.

Disciplinary Counsel contends that Respondent did not prove the existence of a disability because he failed to produce any testimony, affidavit, letter, or other statement from any treating physician or mental health professional establishing that he suffered from a disability during the relevant period of the misconduct. ODC Br. at 37. The medical records he submitted show that he was first assessed for depression in September 2018, long after the period when the misconduct occurred. ODC Br. at 37–38. Therefore, Disciplinary Counsel argues, Respondent has not met his burden of proving by clear and convincing evidence that he had a disability at the primary time of the misconduct. ODC Reply Br. at 6–7.

Here the burden rests with Respondent. While Ms. Harris' testimony tends to corroborate Respondent's timeline regarding the onset of the symptoms of his asserted disabilities, the thin record Respondent assembled does not carry the burden of proof by clear and convincing evidence, especially given that the only objective medical evidence he submitted postdates the conduct in question by many months. *See* Motion to Consider Medical Disability in Mitigation, Attachment at 1 (Sept. 21, 2018 Cleveland Clinic medical notes). Given the failure to establish a disability, consideration of the remaining *Kersey* factors is not necessary. But, we note that Respondent's only mitigation witness was unable to confirm that Respondent's

disabilities were a substantial cause of his misconduct or that Respondent was substantially rehabilitated. Tr. 495 (Ms. Harris unfamiliar with Respondent's handling of client funds); Tr. 494–95 (Ms. Harris must remind Respondent to check his blood sugar and take his medication due to his failure to "realize" his symptoms). In addition, we note that absence of any acceptance of responsibility, or of simply the facts of what transpired, is something close to a bar to mitigation under any theory.

V. CONCLUSION

For the foregoing reasons, the Hearing Committee finds that Respondent violated Rules 1.4(b) by failing to explain the matter to his client, 1.15(a) and (e) by intentionally misappropriating the clients' advance fees and failing to maintain proper records, and 8.1(a) by knowingly making a false statement of fact during the disciplinary investigation. The Hearing Committee finds that Disciplinary Counsel did not prove violations of Rule 1.5(a) (charge an unreasonable fee), 1.15(a) (commingling), or 8.4(c) (dishonesty, fraud, deceit, or misrepresentation) by clear and convincing evidence. The Hearing Committee concludes that Respondent failed to establish *Kersey* mitigation and recommends that Respondent be disbarred for intentional misappropriation. 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).

HEARING COMMITTEE NUMBER ELEVEN

Matthew J. Herrington, Chair

Trevor Mitchell, Public Member

Patricia B. Millerioux, Attorney Member