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WSSFC 2023

QOL/Ethics Track – Session 4

Leave a Message: Client Communication and Your Ethical Duties

Presented By:
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About the Presenters...

Timothy C. Samuelson is the Director of the Office of Lawyer Regulation. The Wisconsin Supreme Court appointed Samuelson to serve as OLR Director in August 2021. He was formerly the Civil Chief Assistant United States Attorney in the Western District of Wisconsin, an Assistant Attorney General with the Wisconsin Department of Justice, and a Dane County Circuit Court Judge. He graduated from Valparaiso University (B.A., 1995) and Indiana University McKinney School of Law (J.D., 1998).

Francis X. Sullivan is deputy director (litigation) for the Wisconsin Office of Lawyer Regulation. Previously he was an assistant attorney general for 17 years and practiced at the Madison firm of Bell, Moore & Richter.

Leave a Message: Client Communication and Your Ethical Duties

Wisconsin Solo and Small Firm Conference 2023
Kalahari Resort
October 19-21, 2023

1. Agenda
    a. Office of Lawyer Regulation (OLR): who we are and what we do
    b. Grievance statistics
    c. SCR 20:1.4
    d. SCR 20:1.4(a)(1)
    e. SCR 20:1.4(a)(2)
    f. SCR 20:1.4(b)
    g. Available resources

2. OLR: who we are and what we do
    a. "The lawyer regulation system is established to carry out the supreme court's constitutional responsibility to supervise the practice of law and protect the public from misconduct by persons practicing law in Wisconsin." Wis. S. Ct. R., Ch. 21, preamble.
    b. Objectives
        i. Protect the public
        ii. Supervise the practice of law
        iii. Promote ethical conduct by lawyers

3. Grievance statistics
    a. 20,022 active, full dues paying equivalent lawyers [25,669 total]
    b. OLR rec'd 1640 new matters in FY22-23
        i. 1480 new matters FY 21-22
        ii. 1375 new matters FY 20-21
    c. 1152 different lawyers received OLR grievances FY22-23
        i. 5.75% of active practitioners or about 1 in 17
        ii. 246 lawyers received more than one grievance
    d. Two most common types of grievance allegations: diligence & communication
        i. Lack of diligence (SCR 20:1.3)
            1. 20.8% FY22-23
            2. 19.2% FY 21-22
            3. 16.3% FY20-21
        ii. Lack of communication (SCR 20:1.4)
            1. 12.2% FY 22-23
            2. 12.4% FY 21-22
            3. 15% FY 20-21
        iii. Diligence & communication account for about 1/3 of OLR's grievances

e. Two most common practice areas: criminal law & family law
    i. Criminal law
        1. 44.2% FY 22-23
        2. 44.9% FY 21-22
        3. 44.5% FY 20-21
    ii. Family law
        1. 17.1% FY 22-23
        2. 16.1% FY 21-22
        3. 18.5% FY 20-21
    iii. Anecdotally, criminal law family law grievances disproportionately affect small & solo practitioners
f. WILMIC data re malpractice claims (5/10/22): https://wilmic.com/failure-to-communicate/
    i. Failure to obtain consent or to inform the client – 8%
    ii. Procrastination or no follow-up with the client – 7%
    iii. Fee disputes or misunderstandings with the client – 6%
    iv. Failure to follow client instructions – 5%
g. Other WILMIC data (5/10/22): https://wilmic.com/clients-expectations-availability/
    i. "In a Gallup poll conducted several years ago, a whopping 80 percent of respondents said lawyers should do a better job of communicating with their clients."

4. Supreme Court Rule 20:1.4: Communication

(a) A lawyer shall:

(1) Promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in SCR 20:1.0(f), is required by these rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests by the client for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation

5. SCR 20:1.4, generally
    a. Rationale –

"Legal representation is to be conducted to advance the client's objectives, but the lawyer typically has knowledge and skill that the client lacks and often makes or implements decisions in the client's absence. The representation often can attain its end only if client and lawyer share their information and their views about what should be done. Articulate and sophisticated clients typically call for frequent communication with their lawyers when a matter is important to them.

The need to communicate and consult is evident when a decision is entrusted to a client who cannot make it wisely without a lawyer's briefing. That need may also be present even in matters the lawyer is to decide, because the lawyer's decision must seek the objectives of the client as defined by the client. Discussion may cause both participants to change their beliefs about what should be done. In any event, the client may wish to take into account the lawyer's estimate of the probable results of a course of action.

"Sometimes it might be unclear whether a decision relating to the representation is to be made by client or lawyer, and here too consultation with the client is important. Discussion might lead client and lawyer to readjust the allocation of authority between them or to terminate the representation."
See Restatement (3rd) of the Law Governing Lawyers, § 20 (internal citations omitted).

b. General requirements:
"A lawyer must keep a client reasonably informed about the status of a matter entrusted to the lawyer, including the progress, prospects, problems, and costs of the representation. The duty includes both informing the client of important developments in a timely fashion, as well as providing a summary of information to the client at reasonable intervals so the client may be apprised of progress in the matter.

"Important events might affect the objectives of the client, such as the assertion or dismissal of claims against or by the client, or they might significantly affect the client-lawyer relationship, for example issues concerning the scope of the representation, the lawyer's change of address, the dissolution of the lawyer's firm, the lawyer's serious illness, or a conflict of interest….

"The lawyer's duty to consult goes beyond dispatching information to the client. The lawyer must, when appropriate, inquire about the client's knowledge, goals, and concerns about the matter, and must be open to discussion of the appropriate course of action. A lawyer should not necessarily assume that a client wishes to press all the client's rights to the limit, regardless of cost or impact on others. The appropriate extent of consultation is itself a proper subject for consultation… [N]ew and unforeseen circumstances may indicate that a lawyer should ask a client to reconsider a request to be left uninformed.

"To the extent that the parties have not otherwise agreed, a standard of reasonableness under all the circumstances determines the appropriate measure of consultation. Reasonableness depends upon such factors as the importance of the information or decision, the extent to which disclosure or consultation has already occurred, the client's sophistication and interest, and the time and money that reporting or consulting will consume. So far as consultation about specific decisions is concerned, the lawyer should also consider the room for choice, the ability of the client to shape the decision, and the time available."

See Restatement (3rd) of the Law Governing Lawyers, § 20 (internal citations omitted)

6. Informed consent
    a. SCR 20:1.4(a)(1) uses the term "informed consent," which is defined in SCR 20:1.0(f).
        i. Definition: "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."
        ii. Informed consent is the standard that lawyers must meet when requesting a client's permission regarding important decisions.
        iii. Comments 6 & 7 to SCR 20:1.0(f) help clarify what's required for informed consent

7. SCR 20:1.4
    a. 20:1.4(a)(1): informed consent
        i. Case involving John F. Kennedy (not *the* JFK): https://www.dcbar.org/ServeFile/GetDisciplinaryActionFile?fileName=JohnKennedyKathleenDolan16BD042.pdf
        Disciplinary Counsel charged John F. Kennedy and Kathleen A. Dolan with two counts based on misconduct arising out of a litigation and settlement of a collective action and their misappropriation of the entrusted settlement funds. Count I focused on Respondents' representation of over 100 current and former security officers with wage claims against their employer, Inter-Con Security Systems ("Inter-Con"). Respondents settled without informing the clients of the terms and Kennedy misled their clients by telling them that Inter-Con would pay their attorney's fees. Kennedy concealed that the fees were paid out of the lump sum settlement. An Ad Hoc Hearing Committee found both Respondents violated Rules 1.2(a) (failure to abide by clients' decisions), 1.4(a) (failure to keep clients reasonably informed), 1.4(b) (failure to explain a matter to clients), 1.4(c) (failure to inform clients of settlement offer), 1.5(b) (failure to communicate in writing the basis or rate of fee within a reasonable time after commencing representation), and 1.8(f) (failure to obtain informed written consent of an aggregate settlement of claims for two or more clients). The Hearing Committee also found Kennedy was dishonest in violation of Rule 8.4(c).
    b. 20:1.4(a)(2): reasonably consult about client's objectives
        i. Benjamin Jeremy Woolery
        "Respondent 'took advantage of what he perceived to be [Mr.] Hutchens and [Mr.] Watson's overall lack of sophistication in order to pursue what evolved into a personal agenda of maximizing his attorney's fees.' Respondent not only failed to reasonably explain what actions he was taking throughout the litigation, but he also failed to 'consult with [Mr. Watson and Mr. Hutchens] in any meaningful way about his strategy.'

Because he did not meaningfully engage either Mr. Watson or Mr. Hutchens in discussions about strategy, much less the goals of representation, neither client was able to make an informed decision as required by Rule 1.4. Moreover, Respondent concealed information from his client, Mr. Sasser, that Mr. Sasser would need to carry out his fiduciary role. Specifically, Respondent failed to inform Mr. Sasser about the tenant in the Brandywine house, the fact that the tenant was paying rent, and that Respondent had received rent payments from Mr. Hutchens and Mr. Watson who collected them from the tenant. The hearing judge concluded that Respondent violated Rule 1.4 with respect to all three of his clients." https://lawprofessors.typepad.com/legal_profession/2018/12/the-maryland-court-of-appeals-has-disbarred-an-attorney-this-attorney-discipline-case-traces-the-protracted-plight-of-one-ma.html https://www.courts.state.md.us/data/opinions/coa/2018/20a17ag.pdf

c. 20:1.4(a)(3): keep client reasonably informed
    i. Case involving Mark Small: https://www.in.gov/courts/files/order-discipline-2023-19S-DI-647.pdf
d. 20:1.4(a)(4): promptly comply with reasonable requests for information
    i. NOTE: Wisconsin Comment: ¶ 4(a) differs from the model rule in that the words "by the client" are added for the sake of clarity
    ii. *In re Stephen A. Brusch* (S. Ct. V.I.), 2008 WL 901533
    Lawyer failed to pay settlement proceeds of $37,654.98 to blind client, depriving him of funds for approximately four years. By failing to comply with (blind) client's repeated requests for information about the status of settlement proceeds, lawyer violated 1.4(a)(4).
    iii. The Rule requires the lawyer to promptly respond to a client's *reasonable* requests for information about a matter – the Rule does not require that the lawyer meet the client's unreasonable demands, as long as the lawyer otherwise keeps the client reasonably informed about the status of the matter. Therefore, a lawyer who fails to meet a demanding client's expectation of daily telephone contact when there is nothing to discuss [*In re Walker, 647 P.2d 648 (Or. 1982)]* or a three week delay in responding a client's phone call, when the lawyer otherwise kept client reasonably informed about the matter [*In re Schoeneman,777 A.2d 259 (D.C. 2001)*], does not constitute misconduct.
    iv. But … few things are as likely to generate a grievance as a client who feels ignored. If there are likely to be significant periods of time with no news, the client should be so informed. If the lawyer cannot immediately respond to a request for information, the client should be informed when the requested information will be supplied

e. 20:1.4(b): explain to the extent reasonably necessary to permit client to make informed decisions
    i. *In re Johnnie L. Johnson, III* (disbarred for "flagrant dishonesty") https://www.dccourts.gov/sites/default/files/2022-05/In%20re%20Johnson%2C%20III%2019-BG-240.pdf

"The Board's findings of fact concerning Rule 1.4(b) were that Johnson failed to inform his client of rules governing attorney's fees in a workers' compensation claim, notably that the fee cannot exceed twenty percent of the actual award secured …"

ii. Case involving George Harris: https://lawprofessors.typepad.com/legal_profession/2020/01/respondent-donald-r-harris-is-charged-with-violating-rules-14b-failure-to-explain-a-matter-to-a-client-15a-charg.html
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

8. Common questions/issues
Caveat: this is not legal advice
   a. Texts
      i. https://www.2civility.org/ethical-considerations-for-lawyers-when-texting-clients/
      ii. Top Five Considerations for Texting: https://news.bloomberglaw.com/daily-labor-report/insight-texting-while-lawyering-think-twice-before-sending-that-gif
         1. Archiving
         2. Competence (i.e., the casual nature of texting may lead to incomplete or unprofessional responses)
         3. Manage expectations (i.e., client may expect an immediate response; you don't want to be perceived as ghosting)
         4. Privilege
         5. Billing: explain to client basis for billing for texts and how that's done
      iii. E.g., lawyer who misdirected nasty text – went to client, not assistant; younger attorneys who text using emojis
   b. Practical tips: https://www.nhbar.org/tips-for-ethics-and-diligent-client-communications/; https://wilmic.com/client-communications/
      i. Be mindful of work load. Practice saying no.
      ii. Have a system in place to respond to client communication if you are not immediately available. A quick email is often enough (e.g., in court – will call when done; I need to research/review file & will call later).
      iii. Manage expectations. https://wilmic.com/clients-expectations-availability/
Being clear with clients about what communication will look like; this helps the client to know what to expect and what not expect. Being transparent initially about your time goals for responding to client

communication is much easier than apologizing once the client is already frustrated.

iv. Documentation. This is particularly important for communications made out of the office or on mobile devices. Even when in office, document a discussion with the client so the client can review (and you have documentation).

9. State Bar resources
    a. Practice 411
    b. Law firm self-assessment
        i. Module #2: communicating in an effective, timely, professional manner
        ii. Links to free resources, e.g.:
            1. client communications policy
            2. Handling Clients' Text Messages article
            3. Document Everything article
    c. Ethics resources
        i. Ethics Counsel: (608) 229-2017 or (800) 254-9154
        ii. State Bar ethics opinions: EF-09-03: communications concerning attorney's fees and expenses
        iii. Pinnacle publications and CLEs

Attorney Grievance Commission of Maryland v. Benjamin Jeremy Woolery, Misc. Docket AG No. 20, September Term, 2017. Opinion by Greene, J.

ATTORNEY GRIEVANCE — DISCIPLINE — DISBARMENT

The Court of Appeals held that disbarment is the appropriate sanction when an attorney's protracted involvement in an estate case resulted in, among other violations, a conflict of interest, mishandling of funds belonging to the estate, multiple misrepresentations to the court as well as his clients, and frivolous litigation. Respondent Benjamin Jeremy Woolery violated Rules 1.1 (Competence), 1.2(a) (Scope of Representation and Allocation of Authority Between Client and Attorney), 1.4(a) and (b) (Communication), 1.5(a) (Fees), 1.7(a) and (b) (Conflict of Interest), 1.9(a) (Duties to Former Clients), 1.15(a) and (d) (Safekeeping of Property), 1.16(a) and (d) (Declining or Terminating Representation), 3.1 (Meritorious Claims and Contentions), 3.3(a) (Candor Toward the Tribunal), 7.3(a) (Direct Contact with Prospective Clients), and 8.4(a), (c) and (d) (Misconduct).

Circuit Court for Prince George's County
Case No. CAE17-17576
Argued: November 2, 2018

IN THE COURT OF APPEALS

OF MARYLAND

Misc. Docket AG No. 20

September Term, 2017

ATTORNEY GRIEVANCE
COMMISSION OF MARYLAND

v.

BENJAMIN JEREMY WOOLERY

Barbera, C.J.
Greene
McDonald
Watts
Hotten
Getty
Adkins, Sally D. (Senior Judge,
Specially Assigned),

JJ.

Opinion by Greene, J.

Filed: December 20, 2018

This attorney discipline case traces the protracted plight of one man's estate administration. When Freelove Jefferies died in February 2012, he left behind two executed wills. His longtime friend Ronald Hutchens promptly sought the assistance of Respondent Benjamin Jeremy Woolery (Respondent or "Mr. Woolery") to handle opening an estate on behalf of Mr. Jefferies. Mr. Woolery, who was admitted to practice law in Maryland on December 16, 1988, focused his law practice primarily in the area of estates and trusts. Nevertheless, Mr. Woolery's involvement in the administration of Mr. Jefferies's Estate, which spanned several years, led the Attorney Grievance Commission ("Bar Counsel" or "Petitioner") to file a "Petition for Disciplinary or Remedial Action" against Mr. Woolery.

On July 27, 2017, Bar Counsel filed, pursuant to Maryland Rule 19-721, a petition in which it alleged that Mr. Woolery committed violations of the Maryland Lawyers' Rules of Professional Conduct ("MLRPC") based on conduct that occurred before July 1, 2016.[1] Specifically, Bar Counsel alleged that Respondent violated Rules 1.1 (Competence), 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), 1.4 (Communication), 1.5 (Fees), 1.7 (Conflict of Interest), 1.9 (Duties to Former Clients), 1.15 (Safekeeping of Property), 1.16 (Declining or Terminating Representation), 3.1

[1] On July 1, 2016, the Maryland Lawyers' Rules of Professional Conduct ("MLRPC") were renamed the Maryland Attorneys' Rules of Professional Conduct ("MARPC") and codified in Title 19 of the Maryland Rules. Bar Counsel alleged that Respondent's misconduct occurred both prior to July 1, 2016 and after July 1, 2016. At the time of Bar Counsel's filing on July 27, 2017, the Rules were codified as MARPC. Although the majority of Respondent's conduct occurred prior to July 1, 2016, for purposes of consistency, we shall refer to the Rules as they are currently codified as MARPC in the Discussion section of this Opinion.

(Meritorious Claims and Contentions), 3.3 (Candor Toward the Tribunal), 7.3 (Direct Contact with Prospective Clients), and 8.4 (Misconduct). Bar Counsel also alleged that Respondent's acts after July 1, 2016 violated Maryland Attorneys' Rules of Professional Conduct ("MARPC") 19.303.1 (Meritorious Claims and Contentions) as well as MARPC 19.308.4 (Misconduct).

Upon this Court's referral of the matter to the Circuit Court for Prince George's County, the Honorable William A. Snoddy conducted a four-day evidentiary hearing on April 9 – 12, 2018. As a result of that hearing, Judge Snoddy issued Findings of Fact and Conclusions of Law, in which he found by clear and convincing evidence that Respondent's acts violated MLRPC 1.1, 1.2, 1.4, 1.5, 1.7, 1.9, 1.15, 1.16, 3.3, 7.3, and MARPC 3.1 and 8.4. For the reasons explained herein, we conclude that the evidence admitted at trial clearly and convincingly supports the hearing judge's conclusions of law as to violations of the Rules.

FINDINGS OF FACT

The following summary of pertinent facts is derived from Judge Snoddy's thorough Findings of Fact. As a backdrop to the allegations against Respondent, Judge Snoddy found that Respondent is a junior partner in the law firm of McGill and Woolery, where he focuses his practice primarily in the area of estates and trusts. Additionally, Respondent is the chairman of the Prince George's County Bar Association's Estates and Trusts Committee, and he has developed a reputation as an experienced and trustworthy attorney in the area of probate, trusts and estates.

Initial Representation

Ronald Hutchens ("Mr. Hutchens") sought Respondent's assistance in opening and administering the estate of Mr. Hutchens's longtime friend, Freelove Jefferies ("Mr. Jefferies"). At the time of his death, Mr. Jefferies was widowed. Mr. Hutchens had been a caretaker for Mr. Jefferies prior to his death. On February 22, 2012, Mr. Hutchens met with Respondent to discuss Mr. Jefferies's Estate and at that time gave Respondent a check payable to Respondent's law firm in the amount of $1,000.00 as an initial fee. On February 24, 2012, Mr. Hutchens memorialized Respondent's representation in a written Retainer Agreement which included a statement that "Charges will be made to and paid by the Estate." Respondent explained to his client that the legal fees would be paid from the Estate, and he estimated that his charges would be "about $5,000.00." At this time, both Respondent and Mr. Hutchens anticipated that Mr. Hutchens would be appointed as Personal Representative of the Estate because Mr. Hutchens had been nominated as such in one of Mr. Jefferies's wills.

On the same day that Mr. Hutchens signed the retainer agreement, Respondent filed a Regular Estate Petition for Administration on behalf of Mr. Hutchens. Respondent's estimation of the value of real property reflected Respondent's knowledge of two parcels of real property, both unimproved, and a third parcel of real property located at 13201 Old Indian Head Road in Brandywine, Maryland, which contained a house ("Brandywine

property").[2] Respondent knew that a tenant lived in the Brandywine house, and he had copies of the lease agreement for the rental property.

Mr. Jefferies left two signed wills. One of the wills, executed on November 6, 2007 ("the 2007 will"), had been held by the Register of Wills for Prince George's County. Respondent sought to probate Mr. Jefferies's second will, which had been executed on May 1, 2008 ("the 2008 will"), when he filed the Regular Estate Petition for Administration. On February 24, 2012, the same day that Respondent filed the Regular Estate Petition for Administration, Mr. Jefferies's granddaughter, Deidre Jeffries, also filed a petition for administration of Mr. Jefferies's Estate and requested that any wills and codicils be admitted to judicial probate. Ms. Deidre Jefferies was not named as a legatee in the 2008 will and was bequeathed $1.00 under the 2007 will. Mr. Hutchens, on the other hand, had been nominated to serve as the personal representative in the 2007 will and was named in the 2008 will as the alternate personal representative behind an attorney who had predeceased Mr. Jefferies.

The Register of Wills neither named Mr. Hutchens as personal representative, nor appointed him special administrator for the estate. In May 2012, Ms. Deidre Jefferies challenged Mr. Jefferies's competency and asserted that Mr. Hutchens procured the wills by the exercise of undue influence and/or fraud. In her Petition to Caveat and Petition for Appointment of Special Administrator, filed in the Orphans' Court for Prince George's County, Ms. Jefferies sought a declaration that the wills were invalid and that the Court

[2] Respondent placed an approximate value of $950,000.00 on the real property of Mr. Jefferies's Estate.

find that Mr. Jefferies died intestate. She also requested that Mr. Hutchens answer the petition.

On June 14, 2012, the Orphans' Court for Prince George's County appointed Justin Sasser, Esq., as special administrator of the Jefferies Estate.[3] In that role, Mr. Sasser was responsible for, among other duties, marshalling the assets of the estate. Judge Snoddy found that "by virtue of his probate experience, [Respondent] was also aware of Sasser's responsibilities as special administrator."

Respondent knew of and had access to the Estate's assets through Mr. Hutchens. For example, Respondent knew that Mr. Hutchens collected weekly cash rent payments of $150.00 from the tenant of the Brandywine property. Additionally, Respondent knew that at the time of Mr. Jefferies death, he had a savings account at Prince George's Federal Savings Bank ("PGFSB"), which had a balance of $1,590.56 on February 21, 2012. Respondent knew of the existence of the bank account because PGFSB sent the account statements to the Respondent's firm's address. Additionally, Respondent received a $150.00 cash rent payment as well as a tax refund check issued to Mr. Jefferies, and Respondent deposited both amounts in the account for a total of $2,995.00. Respondent's firm continued to receive monthly bank statements at the firm address through May 2013. Despite Respondent's knowledge of these assets of the Jefferies Estate, Respondent did not

[3] Maryland Code Ann., Estates and Trusts Article, § 6-401(a) (1974, 2017 Repl. Vol.) provides that "a special administrator may be appointed by the court whenever it is necessary to protect property prior to the appointment and qualification of a personal representative or upon the termination of appointment of a personal representative and prior to the appointment of a successor personal representative."

promptly notify Mr. Sasser of the existence of the assets or the records in his possession. Judge Snoddy found that the earliest date Respondent sought to disclose information about the bank account's assets was two months after Mr. Sasser's appointment as special administrator on or about August 7, 2012. In addition, despite his knowledge that Mr. Hutchens and/or another individual named William Watson ("Mr. Watson") had been collecting the weekly rent payments from the tenant in the Brandywine property, both prior to and after the death of their friend Mr. Jefferies, Respondent failed to inform Mr. Sasser about the rent collection. Respondent also failed to advise Mr. Sasser that Mr. Hutchens and Mr. Watson performed maintenance at the rental property. As special administrator, Mr. Sasser should have been informed of the existence of Estate assets, and those assets should have been accounted for in an Estate bank account. *See* § 6-403 of the Estates and Trusts Article, Md. Code Ann. (1974, 2017 Repl. Vol.) (stating that a special administrator assumes generally the duties unperformed by a personal representative and has all powers necessary to collect, manage, and preserve property of the Estate).

Respondent's Evolving Representation

Although Respondent's representation of Mr. Hutchens should have been limited to defending the caveat petition filed by Ms. Deidre Jeffries, his involvement in the case during the next year evolved to include matters well beyond defending the caveat petition. For example, when Mr. Sasser missed the deadline for filing an Inventory and an Information Report, Respondent prepared the documents, signed them "Attorney" and "passed them on to Sasser, who reviewed them and signed as special administrator."

Respondent was not Mr. Sasser's attorney at the time of preparation of these documents in April 2013.

In the litigation involving Ms. Deidre Jefferies's caveat petition, Respondent persisted in advancing the position that his client, Mr. Hutchens, was the "de facto Personal Representative" of the Jeffries Estate. For example, Respondent sent a letter to an attorney in November 2012 in which he referred to Mr. Hutchens as "the de facto Personal Representative." Mr. Sasser had been appointed special administrator five months earlier.

In April 2013, Respondent filed a Small Estate Petition for Administration on behalf of Mr. Hutchens for the purpose of opening an estate for Mr. Jefferies's deceased wife. Respondent sought to access the decedent's bank account to pay the property taxes for four properties that were on the verge of being lost to tax sales.[4] Although Respondent sought to have Mr. Hutchens appointed as the Personal Representative of Mrs. Jefferies's Estate, he also filed on the same day a Petition for Appointment as Special Administrator in which he requested that he be appointed special administrator of Mrs. Jefferies's Estate. In his filing, Respondent referred to Mr. Hutchens as the "nominated Personal Representative for this Decedent's surviving spouse Freelove Jefferies." By the date of his filing, though, Respondent knew that Mr. Hutchens had not been appointed personal representative of Mr. Jefferies's Estate, and, in fact, knew that Mr. Sasser had been appointed special

[4] By the time Respondent prepared the Inventory and Information Report, in April of 2013, Respondent knew of four parcels of real property owned by Mr. Jefferies. In contrast to his previous estimations when he filed the Regular Petition for Estate Administration and knew of three properties that he valued at $950,000.00, Respondent changed the estimated value of four properties to only $358,800.00.

administrator of Mr. Jefferies's Estate. He also knew that Mr. Hutchens had not yet been appointed Personal Representative of Mrs. Jefferies's Estate.

In May 2013, Respondent identified himself as "Counsel for the Estate of Freelove Jefferies" in correspondence to counsel for the tax sale purchaser of a previously unknown fifth parcel of land owned by Mr. Jefferies. With respect to this reference of "Counsel for the Estate of Freelove Jefferies," Judge Snoddy found that "[a]t the time the Respondent wrote to [counsel], he did not represent the special administrator nor was he otherwise counsel for the Estate of Freelove Jefferies." The hearing judge also found that Mr. Sasser, the special administrator at the time, had not authorized, nor delegated to, Respondent the task of managing the Estate's assets.

Just before a hearing on June 20, 2013 in the Orphans' Court, Respondent sought to represent Mr. Watson, who was a legatee under both wills. Mr. Watson was, like Mr. Hutchens, a longtime time friend of Mr. Jefferies, and Mr. Watson helped Mr. Hutchens with the maintenance of the Brandywine property. Respondent's stated goal of representation of Mr. Watson was to present a "unified front at trial." Mr. Watson did not immediately accept Respondent's offer. At the hearing on that day, the Orphans' Court appointed Mr. Sasser as personal representative of the Jeffries Estate on a strictly *pro forma* basis. The appointment "lasted but a few seconds at which time the Court suspended [Mr.] Sasser's duties as P[ersonal] R[epresentative] and restored him to the role of special administrator of the estate." Nevertheless, the very next day, Respondent wrote to Mr. Sasser and addressed him as the "newly-appointed Personal Representative." In that letter, Respondent noted the "'looming' legal costs" but failed to alert Mr. Sasser that Mr.

Hutchens had delivered to Respondent, that same day, rent money from the tenant at the Brandywine property in the amount of $900.00. Respondent deposited the $900.00 into his law firm's attorney trust account.[5] He did not turn over the money to Mr. Sasser.

In September 2013, Mr. Watson formally retained Respondent to represent him in defending Mr. Jefferies's wills and other matters related to the Estate. The retainer agreement provided that Respondent would represent Mr. Watson "to defend both of Freelove Jefferies' 'wills'; use Ron's lot & proceeds therefrom to pay [Mr.] Woolery, and hopefully Mr. Watson c[ould] get his lot(s) from [the] Estate without paying [Mr.] Woolery." The agreement contained a clause that Respondent's representation would be in consideration of "$1.00." The next day, September 10, 2013, Mr. Sasser, as special administrator, notified the other attorneys in the case that he intended to hire Respondent to defend the will in the caveat proceeding brought by Ms. Jefferies. After receiving no opposition from the interested parties, Mr. Sasser formally retained Respondent for representation of the Estate in the caveat proceeding. Mr. Sasser did *not* retain Respondent to represent Mr. Sasser in his capacity as special administrator in the Orphans' Court. At this point, Respondent represented Mr. Hutchens, who was a legatee under the 2008 will, Mr. Watson, who was a legatee under both of Mr. Jefferies's wills, and the Estate for purposes of the caveat proceeding.

On March 27, 2014 during a status hearing for the caveat matter, Mr. Sasser learned that Mr. Watson had been collecting rent payments from the tenant in the Brandywine

[5] The law firm's trust account was in the name of Respondent's law partner.

property. Respondent failed to disclose that he had previously received $900.00 in rent money from Mr. Hutchens on June 21, 2012. At the disciplinary hearing in this matter, "Respondent testified that he did not believe it was on him to tell people what they had to do with property." On the same day as the status hearing in the Circuit Court, Respondent declared in a letter to Mr. Watson that he would need funds for litigation, and that he had already "loaned the estate '$2,000.00 for the Taxes paid in April 2013' and '$1,000.00 last month for our Expert.'" Respondent had not verified with Mr. Sasser that Respondent had advanced any personal funds to the Estate.

In December 2012, the Orphans' Court transferred the caveat matter to the Circuit Court for Prince George's County. At some point prior to March 2014, the Orphans' Court ordered Mr. Sasser to show cause why he should not be removed as special administrator. Respondent acting as Mr. Sasser's "undersigned counsel" filed a Line with Mr. Sasser's response. Respondent had only been retained to represent Mr. Sasser as the special administrator in the caveat matter, not to represent Mr. Sasser with respect to Mr. Jefferies's Estate pending in the Orphans' Court.[6] Shortly thereafter, the Orphans' Court removed Mr. Sasser as special administrator and appointed a successor Special Administrator, namely Nancy L. Miller, Esquire. Upon Mr. Sasser's removal as special

[6] Judge Snoddy found that "In filing the Line on behalf of [Mr.] Sasser, the Respondent acted outside the scope of the representation for which he was retained" because Respondent had only been retained to represent Mr. Sasser, as the special administrator, in the caveat matter. Notwithstanding this finding, Judge Snoddy did not conclude that Respondent's action in filing this Line violated Rule 1.2.

administrator, Respondent's representation of Mr. Sasser terminated. Respondent never provided Mr. Sasser with a bill for legal services.

Although neither Mr. Watson, nor Mr. Hutchens, had a personal interest in who served as special administrator of the Estate, Respondent appealed the Orphans' Court's Order that removed Mr. Sasser as special administrator. Judge Snoddy found that "[d]espite learning of [Mr.] Sasser's desire to no longer act as Special Administrator, the Respondent failed to withdraw his appeal" and that Respondent intended "to protect his own personal interests" in filing the appeal.

After Ms. Miller was appointed successor special administrator, Respondent remitted to her a check in the amount of $116.00, which was drawn on his law firm's attorney trust account. In a letter, Respondent informed Ms. Miller that he had received a $200.00 rent payment but used $84.00 to pay for the homeowner's insurance policy on the Brandywine property. He also explained that he exhausted the balance of cash listed on the Estate's Inventory Report for purposes of deposing Mr. Rankin, the scrivener for the two wills, for the caveat proceeding as well as paying real property taxes for 2012. In this same letter, Respondent claimed that the Estate owed him "$4,410.78 plus another $1,000.00 [that he] advanced personally for the Estate's Medical Expert, Anthony Wolff[.]" On May 5, 2014, three days after his letter to Ms. Miller, Respondent received an additional $400.00 of rent money from Mr. Watson, which he deposited into his law firm's attorney trust account. Yet, as of July 2014, when Ms. Miller filed the Inventory Summary, Respondent had failed to disclose his receipt of the rent money to her. Judge Snoddy found that Respondent "intentionally withheld from Miller: the $900.00 in rent

money he received from [Mr.] Hutchens in June 2013; the $400.00 in rent money he received from [Mr.] Watson on May 5, 2014; and the rent and expense receipts he obtained from [Mr.] Watson."

Ms. Miller made an initial plea in July 2014 for an accounting of the rent money collected. Respondent's reply letter to Ms. Miller offered a vague explanation for an accounting of funds: "Mr. Watson delivered rent to me when Mr. Sasser was exiting, and we knew Allstate needed to be paid so that's why the Escrow checks went to you, etc." Several months later in September 2014, Ms. Miller again urgently requested information on the whereabouts of more than $18,000.00 of rent money owed to the Estate. The letter reflects that the only money Respondent provided to Ms. Miller was the $116.00 that he remitted to her when she was appointed successor special administrator. By this point, Ms. Miller had been appointed Trustee and tasked with the responsibility of selling all of the properties, which were in jeopardy of being sold at tax sale. The hearing judge found that Respondent "intentionally withheld from [Ms.] Miller: the $900.00 in rent money he received from [Mr.] Hutchens in June 2013; the $400.00 in rent money he received from [Mr.] Watson on May 5, 2014; and the rent and expense receipts he obtained from [Mr.] Watson."

On October 31, 2014, all interested parties in the caveat suit engaged in settlement negotiations. By that point, Mr. Hutchens had renounced his bequest in the Estate proceeding and did not participate in the settlement discussions. In fact, "neither the Respondent nor anyone else mentioned [Mr.] Hutchens during the negotiations, advocated a position on his behalf, nor lodged an objection on his behalf to the agreement reached."

The parties reached an agreement, which included Mr. Watson receiving his specific bequest of land as well as Respondent receiving reimbursement for costs he personally advanced, and $5,000.00 from Mr. Watson for legal services. Nevertheless, as the terms of the settlement were placed on the record before the Circuit Court, Respondent

> for the very first time, and in contravention to the wishes of his client [Mr.] Watson, insisted that any agreement between the parties include a stipulation that [Ms.] Miller, as the court-appointed fiduciary of the estate, forgo pursuit of any legal action against [Mr.] Watson or [Mr.] Hutchens for any wrongdoing related to the dissipation of estate assets.

As a result of Respondent's action, the agreement dissolved. In carrying out the purported objections of one of his clients, Respondent's "potential conflict in representing both [Mr.] Hutchens and [Mr.] Watson manifested itself as an actual conflict at th[at] time."

After an unsuccessful settlement conference, Mr. Watson terminated Respondent's legal representation. Respondent failed to withdraw his appearance as counsel for Mr. Watson, indicated in a letter to Ms. Miller that withdrawing his appearance was "not something I'm going to get involved with so close to the trial date," and then filed a pleading as counsel for Mr. Watson in the Circuit Court.

Respondent's Court Filings

Respondent filed, purportedly on behalf of Mr. Hutchens, a pleading in the Orphans' Court to remove Ms. Miller as the special administrator. In the pleading, Respondent "falsely asserted that [Ms.] Miller had undertaken to represent [Mr.] Watson, as his attorney, in the estate proceedings."

In addition, on behalf of Mr. Hutchens, Respondent filed in the District Court of Maryland in Prince George's County suit against Mr. Sasser as "Personal Representative"

of the Estate of Mr. Jefferies. Mr. Sasser had been removed as special administrator nearly eight months prior to the filing of the suit. Moreover, Mr. Sasser was not the Personal Representative of Mr. Jefferies's Estate, a fact which Respondent knew. In addition, Respondent falsely claimed that the plaintiff, Mr. Hutchens, suffered $9,999.00 in damages, inclusive of "post-death Realty Taxes" and expert witness payments. According to Judge Snoddy, "[Mr.] Hutchens had no interest in those amounts, which were in fact payments the Respondent was seeking to recover for the benefit of himself and/or his law firm." Critically, Respondent "failed to notify [Mr.] Sasser of his intent to file the lawsuit nor did he request or obtain [Mr.] Sasser's consent, as a former client, to filing suit against him on behalf of another client (Hutchens)."

Respondent's Efforts to Manipulate His Client

Mr. Hutchens terminated Respondent's legal representation on January 29, 2015. Several days after doing so, Mr. Hutchens delivered to Respondent $1,200.00 in cash, which he had received from the tenant in the Brandywine property. Respondent deposited the funds into his law firm's attorney trust account and failed to notify Ms. Miller of his receipt of the funds. Despite the termination of representation, Respondent thereafter filed pleadings in Mr. Hutchens's name without authorization. Respondent failed to withdraw his appearance entered on behalf of Mr. Hutchens from either the Orphans' Court or the Circuit Court. On one occasion, Respondent appeared in Mr. Hutchens's driveway unannounced and asked Mr. Hutchens to sign a document that promised to settle the matter between them. On another occasion, Respondent sent a letter to Mr. Hutchens in which he stated that "Ms. Miller is planning to go after you following the February 17/18 Jury Trial

in the belief (which I've been sharing with you) that you 'stole' up to $350,000.00 of Freelove's money." He also referred to the receipt of the $1,200.00 cash and indicated to Mr. Hutchens that "those funds are 'being used to cover Litigation Expenses as well as reduce the Estate's debt to me for the Taxes I personally helped pay.'" The hearing judge found that Respondent's letter misrepresented the facts and that his actions were an "apparent effort to manipulate [Mr.] Hutchens to keep [Respondent] on as counsel[.]"

Eventually the parties settled the caveat matter without the involvement of Ms. Miller, Mr. Hutchens, or Respondent. Once the matter was remanded to the Orphans' Court, Respondent filed a pleading entitled "Petition for Section 7-603 'Litigation Expenses'." He attached a billing invoice that reflected a purported 235.24 hours, totaling over $80,000.00, of legal services performed for Mr. Sasser, Mr. Watson, and Mr. Hutchens. The billing invoice failed to indicate for which of the three clients the legal services were rendered. Additionally, Respondent never submitted to Ms. Miller verification of the personal funds that he allegedly advanced to the Estate.

Respondent's Continued Court Filings and Efforts to Coerce Former Clients

Ms. Miller filed a Third and Final Accounting with the Orphans' Court, which was approved by that court on February 24, 2016, subject to exceptions being filed. Had no exceptions been filed, Ms. Miller would have been permitted to make final disbursements twenty-one days after the Orphans' Court Order. Instead, Respondent filed exceptions to the final accounting because the account did not "contemplate disbursement to the Respondent for legal services rendered to the Estate." Although Respondent no longer represented Mr. Watson or Mr. Hutchens, he wrote to each of them and included in his

letter draft exceptions that reflected Respondent's "complicated recalculations of the disbursement." Judge Snoddy found that Respondent's letter was an attempt to "coerce [Messrs. Watson and Hutchens] into filing exceptions to [Ms.] Miller's final accounting." According to Respondent's recalculations, his law firm would receive a disbursement of $57,633.80.

Mr. Hutchens signed and returned the draft exceptions that Respondent had prepared. Mr. Hutchens did not rehire Respondent, or otherwise authorize Respondent to take action, for purposes of legal representation. Nevertheless, Respondent filed a revised copy of the exceptions, representing that he was Mr. Hutchens's counsel. The hearing judge explained that, "by Respondent's own testimony, he knew that [Mr.] Hutchens and [Mr.] Watson were not 'sophisticated.' Th[e] court f[ound] that [Mr.] Hutchens failed to comprehend the substance of the document he signed, and that based on [Mr.] Hutchens's testimony, he had no interest in excepting to [Ms.] Miller's final account."

Thereafter, on March 3, 2016, the Law Offices of McGill and Woolery filed suit in the Circuit Court for Prince George's County against Mr. Watson and Mr. Hutchens. The pleading, styled as a breach of contract, claimed damages in the amount of $75,000.00 and sought to hold Mr. Watson and Mr. Hutchens jointly and severally liable. Respondent never sent Mr. Watson or Mr. Hutchens periodic billing statements or sought payment from them throughout the representation.[7] The hearing judge found that the "Billing Ledger"

[7] Mr. Hutchens had initially paid Respondent $2,500.00 at the inception of Respondent's representation, but the hearing judge found that Respondent did not "seek payment of legal fees from either of them individually beyond what [Mr.] Hutchens paid in the early stages of the representation."

that Respondent filed with the Orphans' Court and that formed the basis for his claim of $75,000.00 of legal fees was "a highly inflated after-the-fact compilation of the Respondent's total time representing three different clients (including [Mr.] Sasser) with a multitude of differing interests in the Jefferies Estate." Additionally, Judge Snoddy found that much of the time billed reflected "Respondent's unilateral efforts to exercise control over the Estate in derogation of the Orphans' Court's orders appointing first [Mr.] Sasser and then [Ms.] Miller as special administrators charged with administering the Estate pending the outcome of the caveat litigation."

Separate from the breach of contract lawsuit, Respondent filed in the Circuit Court a "Request for an Order Directing the Issuance of a Writ of Attachment" with an attachment titled, "Exceptions to 'Account' By Litigation Counsel." Judge Snoddy found that the "'Exceptions' document represented yet another attempt by the Respondent's law firm to have the Orphans' Court award its claim for attorney's fees and expenses." Although the Circuit Court initially granted Respondent's writ of attachment, following oppositions by the parties and a hearing, the Circuit Court, *inter alia*, vacated the writ of attachment. The Circuit Court also declined to assume full jurisdiction over the Jefferies Estate. Respondent filed a Notice for In Banc Review of the Circuit Court's Order. A three-judge panel affirmed the Circuit Court's vacatur of the writ of attachment.

Meanwhile, in the breach of contract suit, Respondent filed a Motion for Summary Judgment as to Mr. Watson on December 16, 2016. Thereafter, he filed a Line for a Hearing on the Motion for Summary Judgment. Mr. Watson, through counsel, filed an opposition to the summary judgment motion. Although the Motion for Summary Judgment

had not been ruled on, the case was closed for inactivity. On October 11, 2017, Mr. Watson suffered a fatal stroke. According to the findings of the hearing judge, Respondent

> believed a legal claim against [Mr.] Watson's estate probably was time-barred as of [] the date the Respondent was testifying. Remarkably, he also testified that but for missing the opportunity to do so legally, he would be pursuing a claim against [Mr.] Watson's estate for the legal fees claimed in the Circuit Court action.

Following unsuccessful In Banc review in the Circuit Court, Respondent again sought to hinder distributions from the Jefferies Estate by filing a "Petition for Writ of Certiorari to the Orphans' Court for Prince George's County" on July 20, 2016. Judge Snoddy found that "Respondent filed this petition because he felt his claim for litigation counsel fees and expenses in connection with the Jefferies Estate had been wrongfully denied, and he was determined to obstruct final distributions from taking place." The Circuit Court eventually denied the petition for certiorari on May 18, 2017; however, the pendency of the petition prevented Ms. Miller from making any distributions of Mr. Jefferies's Estate. Importantly, the hearing judge noted that "Respondent's filing of the Petition for Writ of Certiorari had the effect of delaying final distributions, to the detriment of the Respondent's former client [Mr.] Watson, who would unfortunately pass away before receiving his distribution."

Respondent continued his attempts to block the distributions from Mr. Jefferies's Estate by filing two additional pleadings. On May 26, 2017, upon denial of the petition for certiorari, Respondent filed a Motion for Alteration or Amendment of the Judgment of the Circuit Court. Thereafter, Respondent sought review in this Court by filing a Petition for Writ of Certiorari on July 27, 2017. This Court denied his petition on September 22, 2017.

Attorney Trust Account

Finally, Judge Snoddy found that on several occasions Respondent deposited into his law firm's attorney trust account rent money that he had received from either Mr. Hutchens or Mr. Watson. For example, on or about June 21, 2013, Mr. Hutchens gave Respondent $900.00 of rent money, which Respondent deposited into the McGill attorney trust account without notifying Mr. Sasser of the existence of the funds. On May 5, 2014, Mr. Watson delivered to Respondent $400.00 in rent money, the sum of which was deposited into the law firm's attorney trust account. On February 4, 2015, Mr. Hutchens delivered $1,200.00 of rent money to Respondent. These funds were also deposited into the McGill attorney trust account. Respondent did not notify Ms. Miller that he had received two rent payments in the amount of $400.00 and $1,200.00. The hearing judge found that Respondent "withdrew from the escrow account some of the rent money for his personal use and benefit." A check in the amount of $1,012.69, made payable to Respondent, was drawn from the McGill attorney trust account on February 13, 2015. The deposit slip noted that the amount of $1,012.69 was the "balance of '[Mr.] Hutchens's escrow [and] helps reduce [the] Estate's debt to me." To be sure, Respondent testified at the disciplinary hearing that "he reimbursed himself for funds he had personally advanced to the estate and was still owed, in February 2015, 'about three grand.'"

DICUSSION

Standard of Review

We review a hearing judge's findings of fact for clear error and his or her conclusions of law *de novo*. *Attorney Grievance Comm'n v. Blair*, 440 Md. 387, 400-01,

102 A.3d 786, 793 (2014). As far as what evidence a hearing judge must rely upon to reach his or her conclusions, we have said that the hearing judge "may 'pick and choose' what evidence to believe." *Attorney Grievance Comm'n v. Page*, 430 Md. 602, 627, 62 A.3d 163, 178 (2013). We reiterate this point in light of Respondent's numerous exceptions to findings of facts in which he suggests that the hearing court *should have made* certain findings of fact. Accordingly, we will not disturb the hearing judge's findings of fact unless they are clearly erroneous. *Blair*, 440 Md. at 400, 102 A.3d at 793. We overrule Respondent's generalized exceptions as to what findings of fact the hearing court failed to make. Bar Counsel does not except to any of Judge Snoddy's findings of fact.

Respondent's Exceptions to Findings of Fact

With respect to the hearing judge's finding that Respondent's notice to Mr. Sasser of the existence of an estate bank account within two months of Mr. Sasser's appointment as Special Administrator was not *prompt*, Respondent filed an exception. Arguably, whether Respondent's notice was *prompt* is a matter of subjective calculation given the circumstances. *See, e.g.*, *Commercial Union Ins. Co. v. Porter Hayden Co.*, 116 Md. App. 605, 663, 698 A.2d 1167, 1195 (1997) ("[T]imeliness of notice is an elusive concept as it is variously defined as 'as soon as practicable,' 'within a reasonable time under all the circumstances,' 'not an iron-bound requirement that it be immediate or even prompt,' and 'within a reasonable time in light of the facts and circumstances of the case at hand.'"). Notwithstanding, we overrule Respondent's exception to the fact that he sent a letter to Mr. Sasser on or about July 10, 2012 alerting Mr. Sasser as to the caveat litigation but failed, at that time, to mention the existence of the Estate's assets. In other words, when

Respondent had an opportunity to promptly notify Mr. Sasser about the Estate bank account, he delayed doing so by approximately one month.[8]

Conclusions of Law
&
Respondent's Exceptions to Conclusions of Law

Bar Counsel does not except to any of the hearing judge's conclusions of law. Respondent excepts to all of the conclusions of law. For his part, Judge Snoddy reached detailed conclusions of law, by clear and convincing evidence, with respect to Mr. Woolery's violations of the MLRPC and MARPC based on evidence presented at the evidentiary hearing.

MARPC 19-301.1 Competence (1.1)[9]

MARPC 19-301.1 Competence (1.1) provides: "An attorney shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

[8] Respondent also excepts to the hearing court's finding that he misled the attorney who represented the tax sale purchaser. Respondent asserts that it was not misleading to indicate to this attorney that Respondent had paid the taxes. We overrule Respondent's exception because Respondent mischaracterizes the hearing judge's finding. To be clear, Judge Snoddy found that "at the time the Respondent wrote to [counsel], [Respondent] did not represent the special administrator nor was he otherwise counsel for the Estate of Freelove Jefferies."

[9] Because Respondent's alleged misconduct occurred both before *and* after July 1, 2016, he was charged with violating the MLRPC and the MARPC. To minimize confusion, we refer to the rules as they are currently codified as MARPC.

Once Respondent chose to "insert himself into the estate administration process as counsel for [Mr.] Hutchens, [he] was obligated to do so competently." Among other acts violative of Rule 1.1, the hearing judge found that Respondent acted inappropriately. He

> usurped the fiduciary responsibilities assigned to [Mr.] Sasser and failed to disclose material information in his possession about estate assets to [Mr.] Sasser . . . By withholding information from [Mr.] Sasser, the Respondent hampered [Mr.] Sasser's ability to carry out his fiduciary accounting requirements as special administrator . . . Perhaps most egregiously, the Respondent misappropriated[10] estate funds when, on multiple occasions, he deposited cash rent payments received from [Mr.] Hutchens and [Mr.] Watson into his firm's attorney trust account.

The hearing judge appropriately observed that "[a]lthough he was not officially charged with the responsibility of administering the Jefferies Estate, the Respondent effectively chose to take on such a role without authorization through his actions." Judge Snoddy concluded that Respondent failed to provide competent representation to each of the three clients: Mr. Watson, Mr. Hutchens, and Mr. Sasser.

Respondent excepts to the conclusion that he did not competently represent his three clients in violation of Rule 1.1. He argues that he did not lose the caveat litigation, that Mr. Watson received his real estate parcel, and that the Estate's property was not lost to

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[10] *See* §§ 7-601 to 602 of the Estates and Trusts Article (providing for reasonable compensation for services of an attorney which "shall be fair and reasonable in the light of all the circumstances to be considered in fixing the fee of an attorney."). Respondent's actions with respect to the Estate's funds include depositing money in to Mr. Jefferies's savings account, collecting the rent payments when he was not authorized to do so, withdrawing unauthorized disbursements from his law firm's attorney trust account, holding and failing to disclose money held in trust, failing to give a full accounting of the Estate's money that he held in trust, and as of the filing of this Opinion, continuing to hold money that belongs to the Estate.

tax sale. Because we do not measure an attorney's violation of the Rules of Professional Conduct based on success, or failure to succeed, we overrule Respondent's exception.

MARPC 19-301.2 Scope of Representation and Allocation of Authority Between Client and Attorney (1.2)

MARPC 19-301.2 Scope of Representation and Allocation of Authority Between Client and Attorney (1.2) provides, in pertinent part:

> [A]n attorney shall abide by a client's decisions concerning the objectives of the representation and, when appropriate, shall consult with the client as to the means by which they are to be pursued. An attorney may take such action on behalf of the client as is impliedly authorized to carry out the representation. An attorney shall abide by a client's decision whether to settle a matter.

The hearing judge found that instead of settling the caveat matter on October 31, 2014 according to the wishes of Mr. Watson, Respondent "torpedoed the deal by raising an issue involving another client–[Mr.] Hutchens–after the parties seemingly had agreed to resolve the matter." Thus, Respondent violated the Rule pertaining to scope of representation and allocation of authority between client and lawyer when he failed to abide by his client's decision to settle the matter.

Respondent excepts to the hearing judge's conclusion of law that he violated Rule 1.2 for the same reasons that he excepts to the conclusion that he violated Rule 1.1. We overrule Respondent's exception because Rule 1.2 charges an attorney with the directive to "abide by a client's decisions concerning the objectives of the representation[.]" MARPC 19-301.2; s*ee also Attorney Grievance Comm'n v. Sperling*, 432 Md. 471, 493, 69 A.3d 478, 490-91 (2013) (explaining that it was the client's choice that "was offended

by [the attorney's] failure to inform her of the dismissal."). Respondent failed to abide by Mr. Watson's directive when Respondent caused the breakdown of settlement negotiations due to Respondent's concern for another of his clients, Mr. Hutchens.

MARPC 19-301.4 Communication (1.4)

MARPC 19-301.4 Communication (1.4) provides:

> (a) An attorney shall:
> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(f), is required by these Rules;
> (2) keep the client reasonably informed about the status of the matter;
> (3) promptly comply with reasonable requests for information; and
> (4) consult with the client about any relevant limitation on the attorney's conduct when the attorney knows that the client expects assistance not permitted by the Maryland Attorneys' Rules of Professional Conduct or other law.
>
> (b) An attorney shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Judge Snoddy found that Respondent "took advantage of what he perceived to be [Mr.] Hutchens and [Mr.] Watson's overall lack of sophistication in order to pursue what evolved into a personal agenda of maximizing his attorney's fees." Respondent not only failed to reasonably explain what actions he was taking throughout the litigation, but he also failed to "consult with [Mr. Watson and Mr. Hutchens] in any meaningful way about his strategy." Because he did not meaningfully engage either Mr. Watson or Mr. Hutchens in discussions about strategy, much less the goals of representation, neither client was able to make an informed decision as required by Rule 1.4. Moreover, Respondent concealed information from his client, Mr. Sasser, that Mr. Sasser would need to carry out his fiduciary role. Specifically, Respondent failed to inform Mr. Sasser about the tenant in the

Brandywine house, the fact that the tenant was paying rent, and that Respondent had received rent payments from Mr. Hutchens and Mr. Watson who collected them from the tenant. The hearing judge concluded that Respondent violated Rule 1.4 with respect to all three of his clients.

Respondent excepts to the conclusion that he violated Rule 1.4 on the basis that the evidence does not support the hearing judge's conclusion that "Mr. Woolery engaged in protracted litigation because of 'a personal agenda of maximizing his attorney's fees[.]'" Yet, tellingly, Respondent also admits that "[h]is imaginative and protracted litigation seeking payment was a serious error in judgment on his part." Notwithstanding his own admission, whether Respondent's personal agenda, or the absence of one, influenced his representation of Mr. Hutchens or Mr. Watson does not excuse his conduct with respect to Mr. Sasser. Respondent failed to inform Mr. Sasser of important facts that affected Mr. Sasser's compliance with his duties as special administrator of Mr. Jefferies's Estate. We overrule Respondent's exception.

MARPC 19-301.5 Fees (1.5)

MARPC 19-301.5 Fees (1.5) provides, in part:

> (a) An attorney shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. 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 of the attorney;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time 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 attorney or attorneys performing the services; and
> (8) whether the fee is fixed or contingent.

The hearing judge reached the conclusion that Respondent violated Rule 1.5 with respect to Mr. Watson and Mr. Hutchens when he sought to recover $75,000.00 in fees. Respondent never sent either client a billing statement throughout the period of representation. The "Billing Ledger" that was submitted as part of Respondent's breach of contract suit against Mr. Watson and Mr. Hutchens had never been provided to either of them, did not identify which services were provided for whom, and contained entries for a three-year period, a period which extended beyond Respondent's representation of Mr. Watson. Despite representing Mr. Watson for a period of just over a year, from September 2013 through November 2014, "Respondent sought to charge [Mr.] Watson for services rendered to his other clients ([Mr.] Hutchens and [Mr.] Sasser) both before, during, and after his representation of [Mr.] Watson and for 'legal services' unrelated to his representation of any of his clients."[11] The hearing judge concluded that when Respondent's efforts to collect legal fees either through his Petition for Section 7-603 Litigation Expenses or through a disbursement from the Third and Final Accounting were

[11] The hearing judge explained that Respondent's intention was to recover fees from Mr. Watson for legal services unrelated to his representation of any of his clients and that this was

> borne out in [Respondent's] threatening letter to [Mr.] Watson of March 4, 2016, wherein he advised that "in a worst-case scenario we've asked the Circuit Court to award all of your $43,923.03 'net distribution' to us if we are unable to have the Orphans' Court award some of our Fees against Ms. Deidre Jefferies and Ms. Baylor."

unsuccessful, he pivoted his "efforts to charge and collect unreasonable legal fees from [Mr.] Hutchens and [Mr.] Watson."

Respondent excepts to the conclusion that he violated Rule 1.5, despite conceding that "his efforts to be paid were unnecessarily aggressive and had the effect of delaying the ultimate disbursement of the estate funds." He insists that he did the legal work and suggests that a sanction of suspension from the practice of law not to exceed 30 days is appropriate for his "serious error in judgment." We overrule Respondent's exception because an attorney may violate Rule 1.5(a) when he fails to provide his client invoices. *See Attorney Grievance Comm'n v. Rand*, 445 Md. 581, 608, 128 A.3d 107, 124 (2015) (concluding that the attorney violated Rule 1.5 when he failed to provide his client with invoices for services and noting that client made repeated requests for invoices). Moreover, it is a plain violation of the Rule for an attorney to collect fees for services he did not render to that client.

MARPC 19-301.7 Conflict of Interest (1.7)

MARPC 19-301.7 Conflict of Interest (1.7) provides:

> (a) Except as provided in section (b) of this Rule, an attorney shall not represent a client if the representation involves a conflict of interest. A conflict of interest exists if:
> (1) the representation of one client will be directly adverse to another client; or
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the attorney's responsibilities to another client, a former client or a third person or by a personal interest of the attorney.
> (b) Notwithstanding the existence of a conflict of interest under section (a) of this Rule, an attorney may represent a client if:
> (1) the attorney reasonably believes that the attorney will be able to provide competent and diligent representation to each affected client;
> (2) the representation is not prohibited by law;

> (3) the representation does not involve the assertion of a claim by one client against another client represented by the attorney in the same litigation or other proceeding before a tribunal; and
> (4) each affected client gives informed consent, confirmed in writing.

Respondent's dual representation of Mr. Hutchens and Mr. Watson "was fraught with the potential for a conflict of interest from the outset," even in spite of the fact that Mr. Hutchens renounced his right to any claim under the 2008 will and, in fact, desired for Mr. Watson to receive his bequest. The hearing judge concluded that although there already was a "significant risk" that Respondent's representation of Mr. Hutchens could be "materially limited" by his representation of Mr. Watson, and vice versa, the potential conflict actually materialized. On October 31, 2014, the day of settlement negotiations with Ms. Miller, "Respondent acted in a manner directly contrary to the wishes of [Mr.] Watson by blocking the settlement deal agreed to by all parties[.]" Additionally, Respondent's efforts to prevent the distribution of the Estate "served to prevent [Mr.] Watson from receiving his distribution before his death." These actions exemplify Respondent's conflict of interest in his representation of Mr. Watson.

With respect to Mr. Sasser, the hearing judge keenly noted that "[c]oncomitant with the rule against conflicts of interest is the duty of loyalty." As Judge Snoddy explained, "[a]s attorney for [Mr.] Hutchens, the designated defendant in the caveat case, the Respondent (and [Mr.] Sasser too for that matter) should have recognized the impropriety of the Respondent also representing the special administrator in any capacity or, for that matter, the special administrator having any active involvement in the litigation."

Respondent also violated Rule 1.7 when he failed to inform Mr. Sasser of the existence of, and his receipt of, Estate funds.

Respondent insists that the interests of two of his clients did not conflict with Mr. Sasser's interests; thus, he excepts to the hearing judge's finding and conclusion of law that he had a conflict of interest with respect to his three clients. Respondent, on the one hand, contends that "Mr. Hutchens and Mr. Watson wanted the exact same thing . . . Mr. Sasser's position was not adverse to that goal." On the other hand, he deflects any responsibility for the conflict because "[t]he Circuit Court declined to remove Mr. Woolery as counsel and thus Mr. Woolery was duty bound to prepare for the jury trial in the caveat litigation." Contrary to Respondent's assertion, the hearing judge found that "[o]utside of the courtroom *prior to* the start of the hearing, the Respondent approached [Mr.] Watson with the idea of presenting a 'unified front at trial.'" (Emphasis added). Importantly, MARPC 19-301.7(a)(2) contemplates a conflict of interest when "there is a significant risk" that the attorney will be handicapped in his representation of one client because of the attorney's duties to another client. Respondent sought out the representation of Mr. Watson without consideration of the potential of a significant risk that representation of Mr. Hutchens would materially limit his ability to represent Mr. Watson. The hearing judge found that the potential conflict "manifested itself as an actual conflict." We see no error in Judge Snoddy's conclusion.

MARPC 19-301.9 Duties to Former Client (1.9)

MARPC 19-301.9 Duties to Former Client (1.9) provides, in pertinent part:

> (a) An attorney who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

Nearly eight months after Mr. Sasser had been removed as special administrator from Mr. Jefferies's Estate, Respondent filed suit against him as "Personal Representative" on behalf of Mr. Hutchens. This pleading, filed in the District Court for Prince George's County, claimed damages of $9,999.00. Respondent's suit against Mr. Sasser violated Rule 1.9 because "Respondent's personal interests in the District Court action were materially adverse to the interests of his former client, [Mr.] Sasser." In violation of the Rule, the lawsuit was "the same or a substantially related matter" to Respondent's previous representation of Mr. Sasser. MARPC 19-301.9. Respondent did not obtain Mr. Sasser's consent, confirmed in writing, prior to filing the suit.

Respondent objects to the finding that the lawsuit filed against Mr. Sasser was a conflict and objects to the conclusion that he violated Rule 19-301.9 as a result. He asserts that the suit was filed "strictly as a place holder to put all parties on notice that certain litigation expenses needed to be reimbursed." We overrule Respondent's exceptions because Rule 1.9 does not carve out any exceptions for suits filed as "place holders." Furthermore, we have previously rejected the use of any type of coercive tactic for purposes of securing damages. *See Attorney Grievance Comm'n v. Gisriel*, 409 Md. 331, 356-57,

974 A.2d 331, 346 (2009) ("The legal process should never be used as . . . merely a device to apply pressure to the other parties[.]").[12]

MARPC 19-301.15 Safekeeping Property (1.15)

MARPC 19-301.15 Safekeeping Property (1.15) provides, in part:

> (a) An attorney shall hold property of clients or third persons that is in an attorney's possession in connection with a representation separate from the attorney's own property. Funds shall be kept in a separate account maintained pursuant to Title 19, Chapter 400 of the Maryland Rules, and records shall be created and maintained in accordance with the Rules in that Chapter. Other property shall be identified specifically as such and appropriately safeguarded, and records of its receipt and distribution shall be created and maintained. Complete records of the account funds and of other property shall be kept by the attorney and shall be preserved for a period of at least five years after the date the record was created.
>
> * * *
>
> (d) Upon receiving funds or other property in which a client or third person has an interest, an attorney shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, an attorney shall deliver promptly to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall render promptly a full accounting regarding such property.

Respondent violated Rule 1.15 in several ways. Respondent caused the amounts of $900.00, $400.00, and $1,200.00 to be deposited into his law firm's attorney trust account, knowing that those funds represented rental income from the Brandywine property and were assets of Mr. Jefferies's Estate. Respondent did not notify the appropriate fiduciary of his receipt of estate funds. Additionally, he failed to safeguard the funds when he

[12] In *Gisriel*, the attorney was not charged with a violation of Rule 1.9 but was charged with violating Rule 3.1 because he sued individuals even though he had no basis for asserting damages against those individuals and his suit was an attempt "to get everyone's 'attention.'" *Attorney Grievance Comm'n v. Gisriel*, 409 Md. 331, 356, 974 A.2d 331, 345 (2009).

disbursed the funds for purposes of litigation expenses related to the caveat proceeding or for reimbursement of fees he claimed he had personally advanced to the Estate without prior approval. *See Attorney Grievance Comm'n v. Owrutsky*, 322 Md. 334, 344, 587 A.2d 511, 516 (1991); *see also* Estates and Trust Article, §§ 7-601 to 602. Finally, Respondent failed to comply with the Rule when he declined to promptly render a full accounting regarding the funds, upon request by Ms. Miller.

Respondent excepts to the hearing court's finding that he misappropriated $900.00 of rent money, and, as a result, that he violated Rule 1.15. At the outset, we note that Respondent does not dispute the finding of fact that he collected $900.00 of rent money from Mr. Hutchens and never turned it over to Mr. Sasser. Instead, Respondent reasons that misappropriation did not occur because the funds he received from Mr. Hutchens or Mr. Watson were never deposited into his law firm's operating account. Respondent deposited the funds into the attorney's trust account. Additionally, Respondent argues that he was entitled to reimbursement pursuant to Estates & Trusts Art., § 7-603.[13]

We have previously defined misappropriation as "any unauthorized use by an attorney of a client's funds entrusted to him or her, whether or not temporary or for personal gain or benefit." *Attorney Grievance Comm'n v. Jones*, 428 Md. 457, 468, 52 A.3d 76, 82 (2012) (quoting *Attorney Grievance Comm'n v. Glenn*, 341 Md. 448, 484, 671 A.2d 463,

[13] Section 7-603 of the Estates and Trusts Article, Md. Code Ann., provides, "When a personal representative or person nominated as personal representative defends or prosecutes a proceeding in good faith and with just cause, he shall be entitled to receive his necessary expenses and disbursements from the estate regardless of the outcome of the proceeding."

481 (1996)). In *Jones*, the hearing court found that Mr. Jones withdrew from his attorney trust account more funds for his own benefit than he had earned as fees and that this act violated Rule 1.15. 428 Md. at 466, 52 A.3d at 81.

In *Owrutsky*, we were asked to consider whether an attorney, acting as a personal representative and trustee in separate estate cases, violated the Rules of Professional Conduct when the attorney took estate funds without the approval of the Orphans' Court and without accounting for the funds, even though those same funds were later approved by the Orphans' Court. 322 Md. at 344, 587 A.2d at 516. We opined that:

> [Estate] funds . . . are those of the estate, and not those of the attorney. The attorney has no right to those funds, either as a commission or as an attorney's fee, unless and until and approval pursuant to § 7-601 or § 7-602 of the Estates and Trusts Article, Maryland Code (1974, 1990 Cum. Supp.) has been obtained from the Orphans' Court.

Id. The obvious difference between *Owrutsky* and the present case–that Respondent was neither a personal representative nor a trustee in Mr. Jefferies's estate–is of no consequence. We heed the observation made in *Owrutsky* as well as the definition of misappropriation described in *Jones* and conclude that an attorney misappropriates funds when he collects and retains funds that he is not authorized to collect or retain and then, without authorization, disburses those funds to himself for reimbursement purposes.

Here, Respondent, by his own admission, explained that he reimbursed himself for "monies I advanced to the Estate out of my own personal pocket because the circumstances left us with little choice." At no point did Respondent have the authority to collect, or disburse, the Estate's assets. In the absence of a personal representative, the special administrator is charged with "any unperformed duties required of a personal

representative . . . [and] shall *collect, manage,* and *preserve* property of the estate[.]" *See* Md. Rule 6-454 (emphasis added); *see also* Md. Code, Estates & Trusts Art., § 6-401 ("(a) Upon the filing of a petition . . . a special administrator may be appointed by the court whenever it is necessary to protect property prior to the appointment and qualification of a personal representative[.]"). Critically, Respondent collected the $900.00 of rent from Mr. Hutchens on June 21, 2012, one week *after* Mr. Sasser was appointed special administrator on June 14, 2012. We overrule Respondent's exceptions.

MARPC 19-301.16 Declining or Terminating Representation (1.16)

MARPC 19-301.16 Declining or Terminating Representation (1.16) provides, in part:

> (a) Except as stated in section (c) of this Rule, an attorney shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
> (1) the representation will result in violation of the Maryland Attorneys' Rules of Professional Conduct or other law;
> (2) the attorney's physical or mental condition materially impairs the attorney's ability to represent the client; or
> (3) the attorney is discharged.
>
> * * *
>
> (d) Upon termination of representation, an attorney shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of another attorney, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The attorney may retain papers relating to the client to the extent permitted by other law.

Respondent violated Rule 1.16 when he purported to continue his representation of Mr. Watson and Mr. Hutchens despite the clients' termination of representation. After Mr. Hutchens terminated representation, Respondent filed pleadings in the Circuit Court and

Orphans' Court without Mr. Hutchens's authorization. Additionally, Respondent filed a line with the Circuit Court wherein he represented that he was Mr. Watson's counsel, despite Mr. Watson terminating representation nearly one month before that filing.

Respondent excepts to the conclusion that he violated Rule 1.16. He asserts that he requested to withdraw from the cases "at the earliest opportunity" after Mr. Hutchens and Mr. Watson requested termination of representation. Testimonial and documentary evidence indicates that Respondent's representation of Mr. Watson was terminated in November 2014 and representation of Mr. Hutchens was terminated in January 2015. Respondent, however, did not file a motion to withdraw. An attorney's failure to withdraw "in a timely fashion" violates Rule 1.16. *Attorney Grievance Comm'n v. Steinberg*, 395 Md. 337, 365, 910 A.2d 429, 445 (2006). We, therefore, overrule Respondent's exception.

MARPC 19-303.1 Meritorious Claims and Contentions (3.1)

MARPC 19-303.1 Meritorious Claims and Contentions (3.1) provides:

> An attorney shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes, for example, a good faith argument for an extension, modification or reversal of existing law. An attorney may nevertheless so defend the proceeding as to require that every element of the moving party's case be established.

The hearing judge concluded

> Respondent violated this rule through his persistent course of filing motions to remove Nancy Miller as special administrator and trustee, exceptions to her accounts and notices of appeal, all with the purpose of delaying the distribution of the Jefferies Estate because the Respondent felt his claim of attorney's fees and expenses as so-called "Litigation Counsel" had not been properly considered in negotiating a resolution.

Respondent's non-meritorious filings continued even after his clients' interest in the matter were non-viable. The hearing judge determined that Respondent filed seven additional frivolous pleadings after the Circuit Court dismissed the "caveat as moot by its Order dated February 18, 2015."[14] Judge Snoddy stopped short of declaring Respondent's breach of contract action in the Circuit Court against his former clients, Mr. Watson and Mr. Hutchens, *per se* frivolous, but nevertheless concluded that Respondent's "use [of] that civil action as a vehicle to have the Circuit Court 'assume full jurisdiction' over the Jefferies Estate was a non-meritorious claim or contention within the context of that case."

Respondent filed two pleadings after July 1, 2016, when the MLRPC were changed to MARPC. Judge Snoddy reviewed both of those pleadings and concluded that the petition for certiorari in the Circuit Court was "a wholly frivolous filing" containing arguments that were "smokescreens used as a mechanism to harass the Orphans' Court because of the Respondent's personal dissatisfaction with that Court's decisions in the

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[14] Specifically, the hearing judge found that Respondent frivolously filed the following pleadings:

> (1) Mr. Hutchens's Petition for Reconsideration of the March 10, 2015, Order, filed April 9, 2015, more than two months after [Mr.] Hutchens fired him;
> (2) Exceptions to "Account" By Litigation Counsel, filed March 3, 2016;
> (3) Litigation Counsel's Amended Exception to the "Final Account," filed March 10, 2016;
> (4) Exception of Ronald Hutchens to the "Final Account," filed March 24, 2016;
> (5) Notice of Appeal to Circuit Court by Mr. Ronald Hutchens, filed March 24, 2016;
> (6) Notice of Appeal to Circuit Court by McGill & Woolery, filed March 24, 2016; and
> (7) Notice of Appeal to Circuit Court, filed April 28, 2016.

Jefferies Estate." For the same reasons, Judge Snoddy concluded that the petition for certiorari filed in this Court was also an abuse of judicial process in violation of Rule 3.1.

Respondent partially excepts to the conclusion that he violated Rule 3.1 for the same reason he objected to a violation of Rule 1.5. Respondent asserts that he "performed extensive legal services for his clients." Providing extensive legal services, however, does not justify pursuing legal action "in an effort to extract legal fees by any means." *Attorney Grievance Comm'n v. Powers*, 454 Md. 79, 105, 164 A.3d 138, 153 (2017) (holding that Respondent violated Rule 3.1 when he sued his former client and third party in a court that lacked jurisdiction "merely in an effort to extract legal fees by any means."). We overrule Respondent's exception.

MARPC 19-303.3 Candor Toward the Tribunal (3.3)

MARPC 19-303.3 Candor Toward the Tribunal (3.3) provides in pertinent part, "(a) An attorney shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the attorney[.]"

Prompted by his "personal animus against [Ms.] Miller following the October 31, 2014, settlement hearing and by [Mr.] Watson's recent termination of his representation[,]" Respondent falsely asserted in a motion to remove Ms. Miller as trustee, which he supported with an affidavit signed by Mr. Hutchens, that Ms. Miller had undertaken representation of Mr. Watson.[15] In contrast, Ms. Miller testified that she never represented

[15] Respondent's motion to remove Ms. Miller as trustee stated, in pertinent part, "Movant [Mr. Hutchens] came to learn from Mr. Watson after the October 31st proceedings that Mr.

Mr. Watson and that he never signed a retainer agreement with her. Furthermore, she testified that Mr. Watson did not give her $1.00 in exchange for her representation, nor did he make a call from her office to Mr. Hutchens in front of her. The hearing judge found that Respondent "knew he had no basis in fact to believe [that Ms. Miller had represented Mr. Watson]" when Respondent raised the issue with the court. On this matter, Judge Snoddy was free to credit Ms. Miller's testimony as to whether she represented Mr. Watson. Additionally, Respondent violated Rule 3.3 when he claimed damages on behalf of Mr. Hutchens in his suit against Mr. Sasser filed in the District Court.[16] As Mr. Hutchens had no claim to those amounts, "Respondent was seeking to recover those payments solely for the benefit of himself and/or his law firm."

Respondent excepts to the conclusion that he violated this Rule because he asserts that Bar Counsel did not prove that he knew the affidavit supplied to him by Mr. Hutchens was false. In arguing this exception, Respondent offers an explanation that is, itself, contradictory: "It was not an affidavit supplied by Mr. Hutchens -- it was not Mr. Woolery's affidavit." We overrule Respondent's exception because there was clear and

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Watson was receiving advice from Ms. Miller independently from that of Mr. Woolery as Mr. Watson's counsel of record herein - Mr. Hutchens' affidavit attached hereto speaks for itself." Mr. Hutchens's affidavit, attached to the motion, stated, "In William's calls, he once told me he was at Ms. Miller's office, and he informed me that he was firing Mr. Woolery and hired Ms. Miller 'with one dollar' (he told me he fired Mr. Woolery after he hired Ms. Miller and he 'knew her a long time' from something in his family[.])"

[16] Among other expenses Respondent sought on behalf of Mr. Hutchens in the District Court filing were "'post-death Realty Taxes advanced' of approximately $3,500.00 and an advanced expert witness payment of $1,000.00)."

convincing evidence before Judge Snoddy that Respondent had no basis to believe that Ms. Miller represented Mr. Watson when he asserted those facts in the motion to remove Ms. Miller as Trustee. Respondent also excepts on the basis that the expenses he sought to recover from the suit filed against Mr. Sasser "were real – they were actually incurred." In overruling this exception, we reiterate our conclusion with respect to Respondent's violations of Rule 1.5 regarding fees. Respondent at no point provided his client a billing invoice for legal services.

MARPC 19-307.3 Direct Contact with Prospective Clients (7.3)

MARPC 19-307.3 Direct Contact with Prospective Clients (7.3) provides in part:

> (a) An attorney shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the attorney's doing so is the attorney's pecuniary gain, unless the person contacted:
> (1) is an attorney; or
> (2) has a family, close personal, or prior professional relationship with the attorney.

Respondent solicited Mr. Watson as a prospective client in June 2013 just before the start of a hearing in the Orphans' Court. At that time, Respondent offered Mr. Watson a retainer agreement to sign, which Mr. Watson later signed. Respondent formalized the attorney-client relationship when he signed the agreement on September 9, 2013. Although he indicated to Mr. Watson that his intention was to present a "unified front," the Respondent was primarily motivated by a pecuniary gain in violation of Rule 7.3. Representing Mr. Watson, who was a legatee under the wills, secured Respondent another client, and thus an opportunity to attempt to recover fees for his services in the Estate matter. The hearing judge observed that Respondent's motive "was borne out in the

Respondent's attempt to take all of Watson's contemplated disbursement, which totaled over $43,000.00, through the breach of contract lawsuit."

Respondent excepts to the conclusion that he violated Rule 7.3 on the basis that an attorney does not violate the Rule when the prospective client has "a family, close personal, or prior professional relationship with the lawyer." Respondent suggests that Mr. Watson qualifies as a "person with a prior professional relationship" because Mr. Watson assisted Respondent and Mr. Hutchens in preparing the caveat case. In previous cases where an attorney is alleged to have violated Rule 7.3, we have acknowledged the distinction between an attorney's efforts to actively seek out clients as opposed to "a situation in which there was no expectation or obligation of representation at the outset." *Attorney Grievance Comm'n v. Merkle*, 440 Md. 609, 632, 103 A.3d 679, 693 (2014) (distinguishing cases where an attorney solicits clients approaching them after they have just left the courtroom from the case at hand where, *inter alia*, the attorney initially refused to represent the prospective client and the attorney, at no time, unduly influenced the client to retain him for legal representation). That Respondent in the case at bar may have formed a relationship—that of attorney and witness—in the context of preparing for litigation does not mitigate Respondent's other disingenuous actions in his attempt to represent Mr. Watson. Respondent approached Mr. Watson in the courthouse, had with him a prepared retainer agreement, and stated that he desired to present a "unified front at trial." Yet, when Respondent was unsuccessful at recovering his attorney's fees through various litigation and appellate mechanisms, he attempted to take Mr. Watson's contemplated disbursement as compensation.

MARPC 19-308.4 Misconduct (8.4)

MARPC 19-308.4 Misconduct (8.4) provides in relevant part:

> It is professional misconduct for an attorney to:
> (a) violate or attempt to violate the Maryland Attorneys' Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
> * * *
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
> (d) engage in conduct that is prejudicial to the administration of justice[.]

Respondent violated Rule 8.4(c) when he violated Rule 3.3(a) by making false statements to a tribunal. Moreover, the entirety of Respondent's conduct was prejudicial to the administration of justice in violation of Rule 8.4(d). Judge Snoddy observed that Respondent "pursu[ed] a personal agenda motivated by his own financial interest . . . intentionally derailed the parties October 31, 2014 settlement agreement . . . and continued to delay the distribution of the estate for over one year." The Respondent's actions toward Mr. Watson and Mr. Hutchens post-representation, *i.e*. "falsely claiming that they owed him $75,000.00 in legal fees . . . and threaten[ing] to take [Mr.] Watson's entire distribution if he did not comply" brought the legal profession into disrepute. Finally, Respondent violated Rule 8.4(a) when he violated other Rules of Professional Conduct.

Respondent excepts to the conclusion that he violated Rule 8.4 and adopts the same explanation he provided for his exception to Rule 3.3(a). As we overruled his exception to Rule 3.3, we likewise overrule his generalized exception to Rule 8.4.

SANCTION

We turn now to the appropriate sanction for Respondent's violations of the MARPC. As mentioned, Respondent recommends that we sanction him with a thirty-day suspension. Bar Counsel, on the other hand, recommends a sanction of disbarment. The sanction we impose is intended to "protect the public and public's confidence in the legal profession." *Attorney Grievance Comm'n v. Moore*, 451 Md. 55, 88, 152 A.3d 639, 658 (2017). Sanctions protect the public when those sanctions are "commensurate with the nature and gravity of the violations and the intent with which they were committed." *Attorney Grievance Comm'n v. Powers*, 454 Md. 79, 107, 164 A.3d 138, 154 (2017). When deciding the proper sanction for an errant attorney's conduct, ". . . we do not simply tote up the number of possible violations and aggravating factors to arrive at an appropriate sanction." *Attorney Grievance Comm'n v. Ndi*, 459 Md. 42, 65, 184 A.3d 25, 38 (2018).

Aggravating Factors

We have oft cited Standard 9.22 of the American Bar Association Standards for Imposing Lawyers Sanctions to guide our consideration of aggravating factors, which include:

> (a) prior disciplinary offenses;
> (b) dishonest or selfish motive;
> (c) a pattern of misconduct;
> (d) multiple offenses;
> (e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;
> (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
> (g) refusal to acknowledge wrongful nature of conduct;
> (h) vulnerability of the victim;
> (i) substantial experience in the practice of law;

(j) indifference to making restitution; and
(k) illegal conduct, including that involving the use of controlled substances.

Attorney Grievance Comm'n v. Woolery, 456 Md. 483, 500, n. 10, 175 A.3d 129, 139, n. 10 (2017) (citing American Bar Ass'n, *ABA 2017 Compendium of Professional Responsibility Rules and Standards* (2017), § 9.22).

Several aggravating factors are implicated in this case. This Court issued Respondent a reprimand on December 15, 2017. *Id.* at 502, 175 A.3d at 140. Additionally, Petitioner requests that we take judicial notice of a reprimand that the Attorney Grievance Commission issued against Respondent in a letter dated June 29, 2018. The bases for the reprimand include Respondent's failure to file fiduciary tax returns for a fifteen-year period on behalf of an estate for which he had been appointed special administrator and his deposit of the estate's funds in his law firm's attorney trust account. Additionally, Respondent failed to properly create and maintain client matter records in accordance with the Maryland Rules governing attorney trust accounts.[17]

With respect to aggravating factor (c), a pattern of misconduct, we have concluded that Respondent's conduct reflected a pattern of obstructive attempts to prevent the disbursement of estate funds so that he could secure reimbursement for his legal fees. We have also concluded that Respondent's conduct was primarily spurred by a pecuniary, selfish motive, another aggravating factor. Respondent has refused to acknowledge the

[17] Specifically, the Attorney Grievance Commission reprimanded Mr. Woolery for violations of Rule 1.1 (Competence), Rule 1.3 (Diligence), and Rule 1.15(a) of the MLRPC, in effect prior to July 1, 2016 and Rule 19-301.15(a), which took effect July 1, 2016.

wrongful nature of his actions and testified at the disciplinary hearing that had he not missed the six-month time bar for filing a claim against Mr. Watson's Estate, he would have pursued his claim against his former client. Finally, Mr. Woolery had been a member of the Maryland Bar for more than 25 years at the time of his misconduct.

The hearing judge found no mitigating factors.

We have had numerous occasions to pass upon an appropriate sanction for an attorney who violated the Rules of Professional Conduct related to the mishandling of an estate. *See e.g.*, *Attorney Grievance Comm'n v. Kendrick*, 403 Md. 489, 489, 943 A.2d 1173, 1173 (2008) (indefinite suspension); *Attorney Grievance Comm'n v. Sullivan*, 369 Md. 650, 650, 801 A.2d 1077, 1077 (2002) (disbarment); *Attorney Grievance Comm'n v. Owrutsky*, 322 Md. 334, 334, 587 A.2d 511, 511 (1991) (three-year suspension). The common characteristic in these cases, however, is that the attorney was serving in the capacity of a personal representative when the misconduct occurred. In the case at bar, Mr. Jefferies's Estate suffered several appointments, but a personal representative was not one of them, other than for a few brief moments when Mr. Sasser was appointed *pro forma*. For these reasons, we are not solely guided by the attorney discipline cases in which the attorney engaged in misconduct while serving as a personal representative.

In a case where the attorney sued his former client, without consent, we were troubled by the violation of Rule 1.9 as it reflected poorly on the attorney's integrity. *See Attorney Grievance Comm'n v. Powers*. 454 Md. 79, 112, 164 A.3d 138, 157 (2017) ("Respondent's violations, particularly of Rules 1.6 and 1.9, seriously undermine his integrity as a member of this Bar."). In that case, we indefinitely suspended the attorney.

Id. We are similarly troubled here by Mr. Woolery's suit against Mr. Sasser in the District Court. Mr. Woolery did not secure Mr. Sasser's consent prior to filing the suit. Moreover, Mr. Woolery's allegations in the suit spurred another violation of the MARPC, specifically Rule 3.3(a), because he falsely asserted that Mr. Hutchens was seeking to recover damages that were, in fact, only for the benefit of either Respondent or his law firm.

Mr. Woolery's statement in the District Court filing, along with his false allegation involving Ms. Miller's alleged representation of Mr. Watson, as stated in the petitions to remove Ms. Miller as special administrator, represent repeated acts of misrepresentation to a tribunal. We disbarred an attorney who repeatedly demonstrated a lack of candor and truthfulness and observed that "[c]andor and truthfulness are two of the most important moral character traits of a lawyer." *Attorney Grievance Comm'n v. Myers*, 333 Md. 440, 449, 635 A.2d 1315, 1319 (1994) (attorney had previously been suspended for three years for fabricating a document in order to mislead the Attorney Grievance Commission then later, after reinstatement, lied under oath to a District Court judge about his driving record). Of course, Mr. Woolery's violation of Rule 3.3(a) also resulted in a violation of Rule 8.4(c).

Bar Counsel's suggestion that we disbar Mr. Woolery stems from the commonalties of Respondent's misconduct and that of the attorney in *Attorney Grievance Comm'n v. Framm*. 449 Md. 620, 144 A.3d 827 (2016). At the outset, we note that both the attorney in *Framm* and Mr. Woolery violated the Rule intended to ward against conflict of interests between clients. *Id.* at 629, 144 A.3d at 833. In *Framm*, the attorney noted exceptions to the conclusion that she violated Rule 1.7 on the basis that her clients' "interests in that matter were at all times aligned." 449 Md. at 655, 144 A.3d at 848. Mr. Woolery echoed

this same reasoning in his exceptions. In the *Framm* case, this Court also concluded that the attorney failed to adequately communicate with her client, failed to represent her client competently and diligently, and charged and collected unreasonable fees. *Id*. at 645-54, 144 A.3d at 842-47. One major distinction between the misconduct underlying the disbarment in *Framm* and the case at bar is that in *Framm* the attorney disingenuously used her client's diminished capacity when it worked to her advantage to do so. *Id.* at 658, 144 A.3d at 850. Concluding that this conduct violated Rule 3.3(a)(1), we explained that

> Respondent's misrepresentations were made intentionally, given that Respondent had personal knowledge of the extent of Mr. Wilson's diminished capacity and took a position in the fee case that was directly contrary to the position she advanced before the court in the divorce and guardianship cases. Respondent cherry-picked the information that benefited her and bolstered her position that she was entitled to her fees, to the exclusion of all previous arguments she had made to the contrary. She did so knowing that her adversary was a former client with diminished capacity who was representing himself in that litigation.

Id. at 658-59, 144 A.3d at 850.

Generally, we have endeavored to distinguish the culpability of those attorneys whose actions reflect "deliberation and calculation, fully cognizant of the situation" from those "who, though doing the same act, do[] so unintentionally, negligently or without full appreciation of the consequences." *Attorney Grievance Comm'n v. Calhoun*, 391 Md. 532, 572, 894 A.2d 518, 542 (2006) (quoting *Attorney Grievance Comm'n v. Hayes*, 367 Md. 504, 517, 789 A.2d 119, 127 (2002)). This distinction is particularly important given that disbarment is the usual sanction for intentional misappropriation of funds. *See Attorney Grievance Comm'n v. Sperling*, 380 Md. 180, 192, 844 A.2d 397, 404 (2004). Critically, "[w]here there is no finding of intentional misappropriation [] and where the misconduct

did not result in financial loss to any of the respondent's clients, an indefinite suspension ordinarily is the appropriate sanction." *Id.* We explained that "a finding with respect to the intent with which a violation was committed is relevant to the appropriate sanction and consistent with the purpose of a disciplinary proceeding." *Id.*

Here, Judge Snoddy found that "Respondent intentionally withheld from [Ms.] Miller: the $900.00 in rent money he received from [Mr.] Hutchens in June 2013; the $400.00 in rent money he received from [Mr.] Watson on May 5, 2014; and the rent and expense receipts he obtained from [Mr.] Watson." This finding of intentionality was based on Mr. Woolery's continued avoidance of Ms. Miller's desperate and repeated requests for an accounting of the rent money collected. Mr. Woolery responded to Ms. Miller's requests by explaining that he used Estate funds for litigation purposes, but he did not supply her with an accounting. Upon Ms. Miller's next request, Mr. Woolery responded that "these matters have been fully documented in the discovery provided to folks previously, and of course a formal 'Accounting' will be done for the Orphans' Court by the Personal Representative." We also inquire whether Mr. Woolery's actions caused financial loss to any of his clients. *See id.* In this case, Mr. Woolery's relentless pursuit of getting reimbursed for the funds he claims he advanced on behalf of the Estate as well as legal fees, which he concedes was "unnecessarily aggressive," prevented Mr. Watson from receiving his rightful distribution prior to his death. Finally, the uncontroverted fact remains that Mr. Woolery has failed to remit to the Estate several rent payments he received from either Mr. Hutchens or Mr. Watson.

We also consider that Respondent has previously been disciplined by this Court. *Attorney Grievance Comm'n v. Woolery*, 456 Md. 483, 175 A.3d 129 (2017). In that disciplinary matter, the hearing judge at the Circuit Court observed that Respondent "displayed a contemptuous attitude" toward one of the parties, which resulted in Mr. Woolery's failure to carry out "what he was obligated to do for the estate." *Id*. at 499, 174 A.3d at 139. Here, the hearing judge observed a similar characteristic underlying Respondent's actions in the present matter. Respondent's false assertions in his pleadings before the Orphans' Court, according to Judge Snoddy, "were motivated by his personal animus against [Ms.] Miller following the October 31, 2014, settlement hearing and by [Mr.] Watson's recent termination of his representation." Moreover, Respondent's conduct in the case at bar overlapped in time with his conduct in the case that was previously before us in the 2017 Term. Finally, in the time between his reprimand by this Court and the issuance of the present Opinion, Mr. Woolery received a letter of reprimand from the Attorney Grievance Commission.

Finally, we do not overlook Mr. Woolery's misrepresentations towards a tribunal, in violation of Rules 3.3(a) and 8.4(c), as well as the misrepresentations he made in his attempt to secure legal fees from his former clients. *See Attorney Grievance Comm'n v. Steinberg*, 395 Md. 337, 337, 342-46 910 A.2d 429, 429, 432-34 (2006) (disbarring an attorney who made numerous misrepresentations to the court, his clients as well as opposing counsel)*; see also Attorney Grievance Comm'n v. Mixter*, 441 Md. 416, 416, 523-24, 109 A.3d 1, 1, 66 (2015) (disbarring an attorney whose practice of law consisted of a pattern of misrepresentations to the courts, parties and witnesses).

Where the facts, as in the case at bar, are uncontroverted that an attorney intentionally withheld and disbursed to himself funds, which belong to an Estate, and did so without authorization, the attorney has misappropriated funds. That the attorney did so without prior court approval and without an attorney-client relationship between himself and the Estate further aggravates the misappropriation. We agree with Bar Counsel that among the most egregious of the violations are Mr. Woolery's failure to notify the court-appointed fiduciaries that he was in possession of Estate funds and then his misappropriation of those funds. As we understand Judge Snoddy's factual findings, Mr. Woolery has yet to reimburse Mr. Jefferies's Estate for the funds he retained. For that reason, and the others explained herein, we hold that disbarment is the appropriate sanction in the present case.

IT IS SO ORDERED; RESPONDENT SHALL PAY ALL COSTS AS TAXED BY THE CLERK OF THIS COURT, INCLUDING COSTS OF ALL TRANSCRIPTS PURSUANT TO MARYLAND RULE 19-709(b), FOR WHICH SUM JUDGMENT IS ENTERED IN FAVOR OF THE ATTORNEY GRIEVANCE COMMISSION AGAINST BENJAMIN JEREMY WOOLERY.

THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Issued
November 16, 2020

In the Matter of:	:	
	:	
JOHN F. KENNEDY,	:	Board Docket No. 16-BD-042
	:	Bar Docket No. 2010-D301
Respondent.	:	
	:	
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 413509)	:	
	:	
KATHLEEN A. DOLAN,	:	Board Docket No. 16-BD-042
	:	Bar Docket No. 2010-D302
Respondent.	:	
	:	
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 428925)	:	

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

Disciplinary Counsel charged John F. Kennedy and Kathleen A. Dolan with two counts based on misconduct arising out of a litigation and settlement of a collective action and their misappropriation of the entrusted settlement funds. Count I focused on Respondents' representation of over 100 current and former security officers with wage claims against their employer, Inter-Con Security Systems ("Inter-Con"). Respondents settled without informing the clients of the terms and Kennedy misled their clients by telling them that Inter-Con would pay their attorney's fees. Kennedy concealed that the fees were paid out of the lump-

* 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.

sum settlement. An Ad Hoc Hearing Committee found both Respondents violated Rules 1.2(a) (failure to abide by clients' decisions), 1.4(a) (failure to keep clients reasonably informed), 1.4(b) (failure to explain a matter to clients), 1.4(c) (failure to inform clients of settlement offer), 1.5(b) (failure to communicate in writing the basis or rate of fee within a reasonable time after commencing representation), and 1.8(f) (failure to obtain informed written consent of an aggregate settlement of claims for two or more clients). The Hearing Committee also found Kennedy was dishonest in violation of Rule 8.4(c).

Count II related to the mishandling and misappropriation of the Inter-Con settlement funds and other trust account violations. After unilaterally agreeing to a $310,000 settlement, Respondents paid their firm 67% of the settlement funds as attorney's fees and determined the amount of recovery for each client with the remaining settlement funds. Respondents divided the funds between themselves and their clients without client knowledge or approval. The Hearing Committee found that both Respondents violated Rules 1.5(a) (unreasonable fee), 1.15(a) (failure to maintain records of entrusted funds), and 1.15(c) (failure to notify clients promptly of receipt of funds). And the Hearing Committee found both Respondents misappropriated entrusted funds in violation of Rule 1.15(a), finding Dolan's misappropriation was negligent because the record does not demonstrate direct involvement in the settlement negotiation and client communication or knowledge of Kennedy's dishonesty. But the Hearing Committee found Kennedy's misappropriation was intentional in large part because of his dishonesty.

Respondents took exception, mainly arguing that they had a "good faith belief" that they were "group counsel" representing a "class of plaintiffs" under the Fair Labor Standards Act ("FLSA") and that their communications and fees followed the FLSA. R. Br. 9-20, 25-28.[1] Disciplinary Counsel did not take exception but argued in its brief that the Board should conclude Dolan's misappropriation was intentional or reckless. ODC Br. 1, 33-36.

The Board, having reviewed the record, concurs with the Hearing Committee's factual findings as supported by substantial evidence in the record and adopts and incorporates those findings. Board Rule 13.7; *In re Cleaver-Bascombe*, 986 A.2d 1191, 1194 (D.C. 2010) (per curiam) ("[T]he Board is obligated to accept the hearing committee's factual findings if those findings are supported by substantial evidence in the record, viewed as a whole." (quoting *In re Elgin*, 918 A.2d 362, 373 (D.C. 2007))).[2] We have also made supplemental factual findings, citing directly to the transcripts and exhibits. *See* Board Rule 13.7. In addition, following our review of the parties' arguments and the record, we agree with the Hearing Committee's conclusions of law as supported by clear and convincing evidence and with the recommended sanction of disbarment for Kennedy. But, with respect to Dolan's sanction, we recommend that, rather than a fitness requirement,

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[1] The following citation protocols are used: "Rpt." refers to the Hearing Committee Report and Recommendation; "FF" refers to the Hearing Committee's Findings of Fact; "Tr." refers to the consecutively paginated transcript of the disciplinary hearing; "DX" refers to Disciplinary Counsel's exhibits; "R. Br." refers to Respondents' corrected Brief to the Board, filed on November 20, 2019; and "ODC Br." refers to Disciplinary Counsel's Brief to the Board.

[2] Respondents did not take exception to the factual findings. *See* R. Br. 6-9 (Respondents' summary of the facts).

Dolan be required to take a practice management course, six hours of continuing legal education ("CLE") on trust account management, and serve one year of probation under the supervision of a practice monitor, with her failure to cooperate with the practice monitor resulting in revocation of her probation with a requirement that she demonstrate fitness before reinstatement. The Board briefly summarizes the facts, addresses the arguments raised by the parties, and resolves two dispositive motions.

I. Background

A. Litigation and Settlement of Inter-Con Claims

Between late 2000 and 2002, current or former security officers of Inter-Con hired Respondents to pursue wage claims. FF 6-7. Respondents entered into an agreement that provided a 40% contingency fee with three individuals and the agreement explained that "[n]o settlement of any nature shall be made of any of Client's claims without their [sic] approval." DX L2-2; *see* FF 8.

Kennedy, on behalf of one client, filed suit against Inter-Con under the D.C. Wage Payment Collection Law, D.C. Code §§ 32-1301 to 32-1310, and the litigation eventually made its way to arbitration at JAMS as a collective action and included claims under the FLSA, 29 U.S.C. §§ 201 to 219.[3] FF 10-11. In 2004, Respondents

[3] Both the FLSA and the D.C. Wage Payment Collection Law have a fee-shifting provision. The FLSA provides:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid

pursued these wage claims as a collective action and mailed over 100 notices with opt-in forms to potential clients. FF 11, 15. The notice explained that if the claimants joined the action they would be represented by John F. Kennedy and would "not be required to pay attorney's fees directly. The plaintiffs' attorneys will receive a part of any money judgment entered in favor of the class." FF 15 (quoting DX B41 at 2). Over 100 claimants signed opt-in forms and in doing so accepted Kennedy as their attorney. FF 12-16. Other than through the name of the law firm, Dolan was not identified in the notice. DX B41 at 1, 3. Respondents did not enter

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> minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.
> . . .
> The court in such action shall, *in addition to any judgment awarded to the plaintiff* or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

29 U.S.C. § 216(b) (emphasis added). And the D.C. Wage Payment Collection Law provides:

> [A] person aggrieved by a violation of this chapter . . . may bring a civil action in a court of competent jurisdiction against the employer or other person violating this chapter . . . and, *upon prevailing, shall be awarded reasonable attorneys' fees and costs* and entitled to relief including:
> (i) The payment of any back wages unlawfully withheld;
> (ii) Liquidated damages equal to treble the amount of unpaid wages;
> (iii) Statutory penalties; and
> (iv) Such legal or equitable relief as may be appropriate, including reinstatement of employment, and other injunctive relief.

D.C. Code § 32-1308(a)(1)(A) (emphasis added). For both laws, the plaintiffs need to be prevailing parties and then the court awards attorney's fees. *Saizan v. Delta Concrete Prods. Co.*, 448 F.3d 795, 799 n.7 (5th Cir. 2006) (per curiam) ("Though the attorney's fee provision of the FLSA does not mention 'prevailing party,' we typically cite prevailing party fee-shifting jurisprudence in FLSA cases."). And settlements can result in the award of fees by a court. *See, e.g.*, *Jackson v. Estelle's Place, LLC*, 391 F. App'x 239, 240 (4th Cir. 2010) (per curiam) ("[T]he parties settled the action, leaving to the district court, however, determination of the amount of attorney's fees to be awarded to Appellants as prevailing parties."); *Saizan*, 448 F.3d at 798; *Small v. Richard Wolf Med. Instruments Corp.*, 264 F.3d 702, 707 (7th Cir. 2001).

into an attorney-client agreement with their new clients, but Kennedy told the arbitrator in 2005 that the "claimants . . . hired me to represent them and they have signed individual attorney-client agreements." FF 20 (quoting DX C86 at 2).

In 2007 a new arbitrator was assigned to the matter and new notices and opt-in forms were mailed to the claimants. FF 21-23. The notice informed the claimants: "If you prevail in your claim against Inter-Con, Inter-Con will be required to pay your reasonable attorney's fees. If you do not prevail, you may or may not be required to pay your attorney's fees and costs depending on the terms under which he or she agreed to represent you." FF 23 (quoting DX H19 at 9). The opt-in forms provided three options for representation: "1) pro se representation; 2) Respondent Kennedy; or 3) another attorney of their choice." FF 24. Most of the 100 claimants elected to have Kennedy represent them. FF 24. Respondents did not have written fee agreements with these clients. FF 24-25.

The arbitrator issued a summary judgment ruling that reduced the number of claimants with valid claims against Inter-Con. FF 27. Shortly thereafter in January 2008, Respondents, without authority from or notice to their clients, initiated settlement discussions with Inter-Con, demanding $700,000. At that time, Respondents estimated their fees at over $1 million. FF 28-29. Kennedy continued to negotiate a settlement with Inter-Con's attorney. FF 33, 35, 37.

In late January 2008, Kennedy contacted his clients—not to inform them of the settlement negotiations—but to obtain signed attorney-client agreements. He did not tell his clients about his offer to settle for $700,000 or that his fees were over $1

million. FF 31, 33. The attorney-client agreements he provided his clients stated: "Attorney will be paid at 40% of the recovery or at an hourly rate pursuant to the applicable Adjustable [sic] Laffey Matrix in Washington, DC at his choosing upon recovery or upon application to the arbitrator for payment of attorney[']s fees and costs pursuant to applicable statutes." FF 32 (quoting DX E37 at 4). Attorney is defined in the agreement as "Kennedy & Dolan." DX E47 at 3 ("Client hires Kennedy & Dolan (hereinafter 'Attorney') to represent Client in the arbitration claim against from [sic] Inter-Con . . . .").

In February 2008, at a client meeting, Kennedy told his clients that he was engaged in settlement discussions, FF 38, and asked them to sign authorizations to allow him to settle for "as much as he believes is reasonable for any and all claims I may have had with Inter-Con arising from this action and give him the power to sign any and all papers, releases (sic) for me." FF 39 (quoting DX E47 at 2). But he provided no details of the settlement discussions, to include that he offered to settle for $330,000 just three days before the meeting. FF 37-38. Kennedy sent letters to clients who did not attend the meeting, seeking authorization to settle and explaining that if the client does not sign the form they "risk being excluded from the case and/or not getting anything from it." FF 40 (quoting DX E48 at 1).

Kennedy entered into an agreement with Inter-Con to settle for $320,000 and he agreed to provide Inter-Con the amount to be paid to each claimant. FF 42. Kennedy told his clients the matter was settled but did not share the settlement. FF 44-47. He misled his clients by telling them that they had no obligation to pay

attorney's fees and that Inter-Con would pay Respondents' fees. FF 46; *see, e.g.*, DX E63 ("you will pay me nothing . . . all fees & costs are paid by Inter-Con *by statute*" (emphasis added)). The statement that Inter-Con was paying fees by statute was simply untrue. Kennedy concealed from his clients that he planned to take his fees from the settlement and that he would determine the amount of those fees. FF 46. In fact, the settlement agreement stated: "each side agrees to separately bear all of its own costs and attorney's fees." FF 46. The Hearing Committee found that Kennedy "deliberately concealed the settlement details" because he believed disclosing the details to his clients would put the settlement at risk. FF 49. Each client learned only the amount they received. FF 50.

Kennedy and Inter-Con moved to have the arbitration dismissed, explaining in the motion that they entered a "private settlement" and that each party would bear their own attorney's fees and costs. FF 62 (citing DX F63 at 2). Some clients were unresponsive to Kennedy's demands for signed authorizations and releases. Kennedy dismissed those clients' claims with prejudice. FF 54.

In the end 90 clients settled and the total settlement was reduced to $310,000. FF 63. Kennedy signed the releases for all 90 clients. FF 63. Neither the arbitrator nor the Superior Court saw the private settlement. FF 64, 65-67. Kennedy did not apply "to the arbitrator for payment of attorney[']s fees and costs pursuant to applicable statutes" as outlined in his attorney-client agreement. *See* FF 32; DX E37 at 4.

Kennedy applied a formula of his own making to determine the amount of settlement funds for each client. This formula was not based on the FLSA, the D.C. Wage Payment Collection Law, or the clients' hourly wages. Instead, for each month of employment, the client received $80, and if the client testified in a deposition, they received an additional $500 of settlement funds. FF 69. In total, the clients received less than a third of the total settlement: $100,086.68. And Respondents took $209,913.32 as fees. FF 70-73. Respondents did not give their clients an accounting of the settlement funds. FF 70-71.

Throughout the litigation, Kennedy was the lead attorney who communicated with the clients and opposing counsel. Disciplinary Counsel questioned Kennedy extensively about the litigation, communication with clients, and settlement. And his testimony described his actions, decisions, and communications. *See, e.g.*, Tr. 272-73. Kennedy also explained Dolan's more limited involvement. Tr. 1116, 1170-71. In addition, Disciplinary Counsel called three former clients who testified that Kennedy was the lead attorney or the only attorney on the case based on their experience. Tr. 655 (Jermaine Fitzgerald: "Mainly, I was speaking to Mr. Kennedy . . . . I may have spoken to Ms. Dolan, I'm not a hundred percent sure. I don't recall."); 768 (Michel Ashton testifying that he only spoke to Kennedy); 844 (Daniel Quagliarello: "I only had contact with Mr. Kennedy").

Dolan's testimony was more limited to the firm's trust account and tax issues. But Dolan testified that she "knew the full terms of the settlement agreement." Tr. 1556. And Kennedy testified that Dolan was involved in the litigation during

negotiations and involved in drafting a demand letter. Tr. 1182; DX E14; Rpt. 9 n.4 (discussing Dolan's more limited involvement in the litigation).

B. Trust Account

Respondents maintained trust and operating accounts. FF 76. Dolan was mainly responsible for the oversight of the trust account. FF 77. During the relevant period, Respondents' practice was to deposit client funds into the trust account and withdraw the earned fees anytime during the same tax year that the fees were earned. FF 78-79. Respondents did not maintain complete records of the client or third-party funds in the trust account. FF 81. The only records maintained were disbursement or cost sheets maintained in the individual client files—this means that at any given time Respondents were unable to identify whose funds were in trust or the purpose of any disbursement. FF 82-84.

In January 2008, Respondents deposited $15,000 into their trust account from a settlement for a client, Louanne Anderson, whom they represented in a matter unrelated to the Inter-Con litigation. FF 88. In March and April 2008 Respondents withdrew funds totaling $15,000 for "Partnership Distribution" and "Referral Fee Income." FF 88. Dolan had "no idea" what the reference to "Referral Fee Income" meant.[4] FF 88. Dolan was unable to identify the client matters/source of the $15,000 withdrawal. FF 88.

In December 2008, another $15,000 was withdrawn from the trust account through two checks signed by Dolan and made payable to Respondents that noted

[4] The phrase "referral fee income" appears on another $5,000 check in May 2008. FF 88.

"Fees Inter-Con" and "Inter-Con Fee" in the memo lines. FF 85. But at the time of the withdrawal, Respondents had no funds from the Inter-Con litigation. FF 86. Dolan testified incredibly that the memos incorrectly identified Inter-Con and that the funds were from the Anderson settlement almost a year earlier—even though $15,000 had already been withdrawn from the account in March and April. FF 88-90. The Hearing Committee found, and the Board agrees, that Dolan's testimony about these two checks is "inconsistent, speculative, reliant on a partial (if not selective) memory, and therefore not credible." FF 88; *see* FF 89-90. The evidence demonstrates that Dolan withdrew funds from the trust account in December 2008 without knowing the source of the funds and misidentified the funds as from the Inter-Con litigation. *See* FF 88. The $15,000 was deposited in the firm's operating account, which had a low balance and was used to pay various expenses, including rent and parking. FF 87. At the hearing, Dolan tried to shift blame for the reference to Inter-Con on the memo of these two checks onto her assistant but also admitted that she reviewed and approved each check. FF 88-90.

In January 2009, $209,913.32 of the Inter-Con settlement funds were received and deposited into the trust account. FF 91. This was the amount that Respondents determined to pay themselves from their clients' $310,000 lump-sum settlement. FF 73, 91. Over the next ten months Respondents withdrew their fees. FF 92-93. Respondents never provided their clients an accounting of the settlement, and none of the clients nor any court or arbitrator approved the fees taken by Respondents. FF 74-75.

II. Dispositive Motions

A. February 24, 2017 Motion to Dismiss

Respondents moved to dismiss "all charges that are dependent upon or supported by the cooperation and/or anticipated testimony of [Respondents'] clients in the Inter-Con matter," arguing that the Office of Disciplinary Counsel violated Board Rule 2.9(b):

> Disciplinary Counsel shall not contact a client of respondent when that client is not the complainant without first obtaining the consent of respondent or, failing that, the consent upon a written showing of good cause of a member of the Board designated by the Chair for that purpose. The preceding requirement for consent prior to contacting a respondent's client who is not a complainant shall not apply when Disciplinary Counsel believes the client has knowledge of a matter under investigation in a docketed case. Disclosures necessary to Disciplinary Counsel's investigation shall not constitute a violation of the confidentiality rules.

As background, in June 2010, Disciplinary Counsel received notice from Wachovia Bank of an overdraft from Respondents' trust account and Disciplinary Counsel docketed the matter for investigation. FF 80. During the investigation, Disciplinary Counsel contacted Respondents' clients from the Inter-Con litigation. Respondents argue Disciplinary Counsel needed their consent to contact those clients because they were not the complainants in the 2010 overdraft investigation and the Inter-Con settlement funds were transferred from the IOLTA account to the firm's operating account in 2009 and thus were not involved in the 2010 overdraft. Mot. Feb. 24, 2017; R. Br. 28-31. The Hearing Committee recommended denying this motion. Rpt. 55.

Respondents' argument relies on the first sentence of Board Rule 2.9(b), which prohibits Disciplinary Counsel from contacting clients without first obtaining the consent of a respondent, or if unable to obtain that consent, the consent of a Board member. But the second sentence explains that the consent requirement "shall *not* apply when Disciplinary Counsel believes the client has knowledge of a matter under investigation in a docketed case." Bd. R. 2.9(b) (emphasis added). Disciplinary Counsel had a docketed case when they contacted Respondents' clients in the Inter-Con litigation. Disciplinary Counsel docketed an investigation of a 2010 IOLTA overdraft. It is reasonable that this 2010 IOLTA investigation would include 2009 IOLTA transactions. The Inter-Con settlement funds were in the IOLTA account as late as October 15, 2009. FF 93. Given this factual background, the record supports that Disciplinary Counsel was reasonable in acting on a belief that Respondents' Inter-Con clients had "knowledge of a matter under investigation in a docketed case." *See* Bd. R. 2.9(b). We thus disagree that Rule 2.9 prohibited Disciplinary Counsel's contact with Respondents' clients.[5]

The February 24, 2017 motion to dismiss is denied.

B. July 24, 2017 Motion to Dismiss

On July 24, 2017, Respondents moved to dismiss the dishonesty and misappropriation charges that are based on two checks from their IOLTA account in

[5] Because of this conclusion we need not reach Disciplinary Counsel's alternative arguments that Rule 2.9(b) does not require consent before Disciplinary Counsel contacts former clients or whether D.C. Bar Rule XI, § 6(a)(2) provides additional authority to contact clients without a respondent's consent. *See* Rpt. 54.

December 2008, that were designated "Fees Inter-Con" and "Inter-Con Fee" and totaled $15,000. Respondents sought to preclude testimony about these two checks. Mot. July 24, 2017. The checks were drawn on the IOLTA account before Respondents received the Inter-Con settlement funds. FF 85. Respondents argued that Disciplinary Counsel learned during the investigation that the trust account had $15,000 related to another case (the Anderson settlement) and thus Disciplinary Counsel's assertions that Respondents were unable to identify the source of the $15,000 was inaccurate. Disciplinary Counsel opposed, explaining that this evidence needed to be presented in the hearing because it was relevant and material to the charged misappropriation and recordkeeping violations. The Hearing Committee recommended denying the motion. Rpt. 56-57.

The Board agrees with the Hearing Committee's recommendation. Respondents' motion did not present justification for dismissing charges or excluding evidence. It instead presented a disagreement about interpreting evidence—evidence that included the withdrawal of $15,000 identified as Inter-Con fees even though this $15,000 transaction occurred before Respondents had deposited any Inter-Con funds into their IOLTA account. Respondents' argument that there was exculpatory evidence showing that these funds were unrelated to the Inter-Con settlement funds misses the point. That these were not Inter-Con funds is the precise evidence a Hearing Committee needs to consider when assessing whether Respondents complied with their professional obligations related to IOLTA funds and recordkeeping. Based on this record, rather than being exculpatory, the Hearing

Committee found this evidence was material to Respondents' misconduct—failure to maintain complete trust account records. And the Hearing Committee found that Dolan's testimony about the two checks was not credible. FF 88 (describing Dolan's testimony to be "inconsistent, speculative, reliant on a partial (if not selective) memory, and therefore not credible").

For these reasons, the motion to dismiss the dishonesty and misappropriation charges based on the December 2008 checks is denied.

III. Respondents' Exceptions

The Board agrees with the Hearing Committee's conclusions of law for each rule violation. Respondents took exception to most of those conclusions, and we address each of their arguments below.

A. Count I

1. Violations of Rules 1.2(a) and 1.4(a), (b), and (c)

Respondents did not keep their clients reasonably informed about the settlement negotiations, did not communicate any of the settlement offers to their clients, and did not seek client approval before settling the clients' claims in violation of Rules 1.2(a) and 1.4(a), (b) and (c).[6] The Hearing Committee found that Dolan's

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[6] Rule 1.2(a):

> A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d), and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the

failures to communicate with the clients was passive, but Kennedy engaged in deliberate concealment when he withheld settlement information because he believed disclosure would put the settlement at risk. Rpt. 65. The Board agrees.

Respondents do not challenge the factual underpinnings of the Hearing Committee's conclusions; instead they argue that as a legal matter they did not have to communicate the settlement information or seek client approval because of the nature of a collective action and because of the fee-shifting provisions in the FLSA. R. Br. 9-17. We are unpersuaded by their arguments.

First, Respondents rely on Civil Procedure Rule 23, governing class actions, to argue that a collective action, like a class action, requires an attorney to act in the interests of the group rather than an individual client. R. Br. 10-12. Their argument is that they met their obligations of Rules 1.2 and 1.4 with class action procedures. R. Br. 16 (citing Rule 1.8, cmt. [12]: "Lawyers representing a class of plaintiffs or defendants . . . must comply with applicable rules regulating notification of class members, compensation of class counsel, and other procedural requirements designed to ensure adequate protection of the entire class.").

> client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

Rule 1.4:

> (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
> (c) A lawyer who receives an offer of settlement in a civil case or proffered plea bargain in a criminal case shall inform the client promptly of the substance of the communication.

But Respondents did not follow class action procedures and no court ruled that the plaintiffs were a class. Had Respondents followed the class action requirements this may have been a compelling argument because those requirements include elaborate settlement procedures to provide notice to class members, a mechanism for class members to object, a fairness hearing, and ultimately approval by the court. *See* Super. Ct. Civ. R. 23(e) ("The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised *only with the court's approval*." (emphasis added)). And those procedures make good sense: they protect the interests of the class and prevent class counsel from acting without oversight. In their brief, Respondents acknowledge that counsel in a class action cannot act independently, noting that where there is a conflict the attorneys need to apply to the court to take appropriate steps. R. Br. 12-13 (citing *In re Agent Orange Prod. Liab. Litig.*, 800 F.2d 14, 18 (2d Cir. 1986)); *see* R. Br. 24 (acknowledging their "conflicting roles").

But Respondents did not comply with any of the Rule 23 procedural protections. They did not treat the litigation as a class action. They did not apply to the court or arbitrator to provide oversight over the settlement. They acted independently and without client involvement or authorization required by Rules 1.2 and 1.4.

Second, Respondents argue that their entitlement to fees under the FLSA's fee-shifting provision is mandatory and they conducted the settlement discussions

under the FLSA's fee-shifting scheme and under the "auspices of two arbitrators and a D.C. Superior Court judge." R. Br. 13-17. The Hearing Committee correctly found the FLSA's fee-shifting provision does not apply. Rpt. 86-87.

The FLSA does not authorize an attorney to determine his own attorney's fees. Instead, the fee-shifting provision applies when there is a judgment for the claimants. *See supra* note 3. And then the court awards the attorney's fees. Here, there was no judgment. And Respondents did not present the settlement to the arbitrators or Superior Court judge for approval. Instead, they dismissed the litigation as a "private settlement" with each party bearing their own attorney's fees and costs. FF 62 (citing DX F63 at 2).

2. Violation of Rule 1.5(b)

The Hearing Committee found Respondents failed to provide their clients with the basis or rate of the fee in writing within a reasonable time after commencing representation in violation of Rule 1.5(b).[7] Rpt. 59. The Hearing Committee explained that other than the three original clients, FF 16, 29, the clients did not receive an agreement until January 26, 2008, almost four years after the clients first selected Kennedy as their attorney, and months after they opted-in a second time and again selected Kennedy as their attorney, FF 26, 31. *See* Rpt. 59-60. The second opt-in forms specifically refer to a separate agreement with their attorney,

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[7] Rule 1.5(b):

> When the lawyer has not regularly represented the client, the basis or rate of the fee, the scope of the lawyer's representation, and the expenses for which the client will be responsible shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation.

explaining: "If you prevail in your claim against Inter-Con, Inter-Con will be required to pay your reasonable attorney's fees. If you do not prevail, you may or may not be required to pay your attorney's fees and costs depending on the terms under which he or she agreed to represent you." FF 23 (quoting DX H19 at 9). Respondents did not provide a separate agreement until three days *after* Kennedy offered to settle and under the false statement that Inter-Con would pay the attorney's fees. Rpt. 60. Under these facts, we agree with the Hearing Committee that the agreements eventually entered were "neither prompt nor reasonable as required by the Rule." Rpt. 60.

Respondents again do not dispute the factual basis of this conclusion but argue that the opt-in forms satisfied the requirements of Rule 1.5 because the form advised that "Mr. Kennedy as group counsel was[] by statute to be paid by the defendant." R. Br. 18. As explained above, there is a mechanism for payment of fees under the FLSA, but that mechanism is triggered with a judgment or award of damages. The opt-in form did not address payment of fees when, as here, there was no judgment or award. Instead, the opt-in form referred to a separate agreement with counsel that would govern such a situation. Thus, the opt-in form did not satisfy the rule because it did not provide the basis or rate of the fee when there was a settlement.

3. Violation of Rule 1.8(f)

The Hearing Committee found that Respondents violated Rule 1.8(f) because they did not have informed written consent from their clients before they negotiated

and entered an aggregate settlement.[8] Rpt. 66. The factual findings fully support this conclusion. Respondents did not obtain consent—written or otherwise—from their clients about the nature and terms of the aggregate settlement. Instead, Respondents acted independently to negotiate, approve, and divide the settlement among the clients and themselves. The terms of the settlement were in fact "deliberately concealed" by Kennedy out of fear that informed clients would put the settlement at risk. FF 49.

Respondents argue that Comment 12 to Rule 1.8 provides for an exception to informed written consent for class actions. R. Br. 19-20 (citing Rule 1.8, cmt. [12]). But Respondents misunderstand the purpose of Comment 12. Comment 12 provides that there are a different set of procedures for class counsel before entering an aggregate settlement, and those procedures are designed to protect class members. "Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, must comply with applicable rules regulating notification of class members, compensation of class counsel, and other procedural requirements designed to ensure adequate protection of the entire class." Rule 1.8, cmt. [12]. And as already explained, Respondents did not follow the "procedural requirements

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[8] Rule 1.8(f):

> A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims for or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent in a writing signed by the client after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

designed to ensure adequate protection of the entire class" when they settled the Inter-Con litigation. Rule 1.8, cmt. [12]; *see* Super. Ct. Civ. R. 23.

The Board agrees with the Hearing Committee that Rule 1.8(f) applies to Respondents and they violated the rule when they entered an aggregate settlement without first obtaining informed written consent from their clients.

4. Violation of Rule 8.4(c) by Kennedy

The Hearing Committee found two violations of Rule 8.4(c) by Kennedy.[9] First, the Hearing Committee found Kennedy's conduct involved dishonesty, deceit, and misrepresentation in violation of Rule 8.4(c) when he intentionally concealed the terms of the Inter-Con settlement from his clients out of fear that it would put the settlement at risk. Rpt. 67-68.

Kennedy does not dispute that he intentionally concealed the settlement terms from his clients but argues it was not a violation because "[n]one of the clients objected" to the settlement process or amount of recovery. R. Br. 20. The Board is unpersuaded. A lack of objection from clients who have been intentionally uninformed is not an endorsement of Kennedy's actions. The Board agrees with the

[9] Rule 8.4(c) provides: "It is professional misconduct for a lawyer to . . . [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation." The Specification of Charges only alleges that Respondents "engaged in conduct involving dishonesty." However, Disciplinary Counsel's brief to the Hearing Committee referenced the "fraud, deceit, [and] misrepresentation" aspects of Rule 8.4(c), and Respondents did not object to the Hearing Committee's consideration of those aspects in their briefs to the Hearing Committee or the Board. Accordingly, we do not limit our consideration of the Rule 8.4(c) charge to "dishonesty" alone, which, in any event, is broad enough to encompass the other three terms. *See In re Samad*, 51 A.3d 486, 496 (D.C. 2012) ("The term 'dishonesty' includes not only fraudulent, deceitful or misrepresentative conduct, but also 'conduct evincing a lack of honesty, probity or integrity in principle; a lack of fairness and straightforwardness.'" (quoting *In re Shorter*, 570 A.2d 760, 767-68 (D.C. 1990))).

Hearing Committee that Kennedy's actions involved dishonesty, deceit, and misrepresentation when he deliberately withheld information from clients—information that clients have a right to know—in order to ensure that the settlement would be entered without client objection.

Second, the Hearing Committee found that Kennedy fraudulently and deceitfully obtained signed client authorizations when he falsely told his clients that if they did not sign the authorizations, they risked being excluded from the case. As the Hearing Committee explained, the clients had a right to reject the settlement and have a hearing on their claims. Rpt. 69. But Kennedy argues that his statement to clients was true: "In order to avoid being excluded from the case, a client who rejected the settlement would have to take steps to litigate his or her claim, including possibly retaining counsel, which, if they [sic] failed to do, could result in their [sic] losing their [sic] individual case." R. Br. 21. Kennedy's argument depends on defining the term "case," as used in the notice to the clients, to be only the collective action he was litigating and not the client's individual case. Kennedy's vague statement to the clients does not fully explain that clients who did not sign the authorizations were still allowed to litigate their claims and if successful would recover damages. Instead, Kennedy's notice to the clients appears to be intentionally vague to get the unresponsive clients to sign the authorizations. The Board agrees with the Hearing Committee that Kennedy's statement violated Rule 8.4(c).[10]

[10] The Hearing Committee found insufficient evidence that Dolan was "an active participant during this time." Rpt. 69; *see also* Rpt. 68. Disciplinary Counsel did not take exceptions to this

B. Count II

1. Violation of Rule 1.15(a) (misappropriation)

The Hearing Committee found that Respondents misappropriated client entrusted funds when they paid themselves a fee out of the Inter-Con settlement funds without client authorization.[11] Rpt. 69-79. The Board agrees with this finding. Misappropriation is an unauthorized use of client funds entrusted to the attorney. *In re Anderson*, 778 A.2d 330, 335 (D.C. 2001). Here, the Inter-Con settlement funds were client entrusted funds in which Respondents claimed an interest. The settlement was between the clients and Inter-Con with each party to bear his or her own attorney's fees and costs. FF 46. When asked about this provision of the settlement agreement, Mr. Kennedy conceded that his fees and costs would be paid by the plaintiffs—his clients—not by Inter-Con:

> Q. When he writes, Mr. Kennedy, that each side is to bear its own attorney's fees and costs, "each side" is the claimants that have to bear the attorney's fees and costs, correct?
> A. No. I think each side means -- again, I don't know what it means, but I think it means both sides.
> Q. So the plaintiffs have to pay their attorney fees and costs, correct?

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finding. We have reviewed the record and agree that the evidence does not support that Dolan was dishonest with the clients. Rpt. 9 n.4.

[11] Rule 1.15(a):

> A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds of clients or third persons that are in the lawyer's possession (trust funds) shall be kept in one or more trust accounts maintained in accordance with paragraph (b). Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

A. Yes.
Q. And InterCon will take care of its attorney's fees and costs?
A. Correct.

Tr. 1269-70. As the Hearing Committee explained, settlements of this nature are treated as client property, and the attorney cannot take his fee without client authorization. Rpt. 74. While the Hearing Committee and parties were unable to identify a case exactly on point, the Hearing Committee concluded that because the settlement agreement with Inter-Con did not divide the settlement between the clients and the attorneys, the "economic substance" of that agreement was the "equivalent of a settlement check jointly payable to a lawyer and client." Rpt. 74. Those settlement "funds must be treated as client property until there has been an accounting and a severance of interest in the funds." Rpt. 74 (citing *In re Lee*, 95 A.3d 66, 75 (D.C. 2014) (per curiam)).

The *Haar* cases support the Hearing Committee's conclusion. In *Haar I*, the Court held that an attorney may not withdraw settlement funds to pay his fees—even if those fees were "rightfully earned"—if there is a fee dispute. *In re Haar* (*Haar I*), 667 A.2d 1350, 1353 (D.C. 1995). And in *Haar II*, the Court explained that settlement funds belong to the client where "there was no agreement that [the attorney] was entitled to take his fee from the trust account holding the settlement proceeds," and, that if the attorney takes those funds, it "would be a clear case of misappropriation, because [the attorney] would have taken client funds over which he had no claim greater than that of a general creditor." *In re Haar* (*Haar II*), 698 A.2d 412, 416 (D.C. 1997).

Here, there was no agreement from the clients for Respondents to take 67% of their settlement proceeds. Respondents point to the opt-in form to fulfill their obligation to provide an agreement with their clients, *supra* 18-19, but that document only addresses fees if the clients prevail, explaining that Inter-Con would be "required to pay your reasonable attorney's fees." FF 23; DX H19 at 9. The opt-in form did not allow Respondents to recover fees in a settlement. *See* FF 23; DX H19 at 9. And the agreement that Respondents eventually entered did not allow 67% recovery of settlement proceeds with no accounting. FF 32; DX E37 at 4 ("Attorney will be paid at 40% of the recovery or at an hourly rate pursuant to the applicable Adjustable [sic] Laffey Matrix in Washington, DC at his choosing upon recovery or upon application to the arbitrator for payment of attorney[']s fees and costs pursuant to applicable statutes.").

The Hearing Committee's conclusion also tracks with the requirements of Rule 1.15, which requires an attorney to hold client funds separate from his own funds in a trust account. Rule 1.15(a). The attorney also must notify the client that he receives such funds. Rule 1.15(c). If the attorney believes he is entitled to some amount of those funds, as his fee, the funds must remain in trust until his fee is resolved. *Accord In re Midlen*, 885 A.2d 1280, 1286-88 (D.C. 2005) (finding misappropriation where the attorney withdrew funds for his fee before the client acknowledged he had earned and was entitled to those fees).

To be sure, there was no dispute here about the fees to be paid. R. Br. 24-25 (noting that no client objected). But silence from the clients does not amount to

consent or approval, especially where Respondents not only failed to inform their clients how those fees are to be calculated but Kennedy actively deceived the clients about the source of the attorney's fees. *Cf. In re Pierson*, 690 A.2d 941, 949 (D.C. 1997) (noting that the attorney "knowingly took away [the client's] ability to refuse" when she took funds "without prior consent" from the client).

Respondents disagree and argue that there was no misappropriation because the FLSA "mandates that attorney[']s fees . . . be paid" by Inter-Con. R. Br. 22. And they claim that "Kennedy operated on a good faith belief that pursuant to the fee-shifting provision of the FLSA, he was entitled to attorney[']s fees." R. Br. 24.

This argument is unavailing. As explained, the FLSA does not mandate attorney's fees from a settlement. To the contrary, the FLSA allows a court to award an attorney fees. 29 U.S.C. § 216(b). And Respondents have not pointed and cannot point to anything in the FLSA that permits attorneys to award themselves fees from a settlement with no oversight.[12] In short, Respondents knew that they were taking funds from a settlement without approval—"a clear case of misappropriation." *Haar II*, 698 A.2d at 416. Based on this record, the Board agrees with the Hearing Committee's conclusions that Respondents misappropriated their clients' funds when they paid themselves fees out of their clients' settlement funds without notice to or approval from those clients.

[12] Both Respondents are found to have misappropriated because Dolan admitted that she was fully aware of the settlement terms. Tr. 1556.

Having found misappropriation, the Hearing Committee also determined the level of culpability for Kennedy and for Dolan. The Court has delineated three types of misappropriation: intentional, reckless, and negligent. *See Anderson*, 778 A.2d at 336. Disciplinary Counsel bears the burden of establishing the level of culpability by clear and convincing evidence but where Disciplinary Counsel fails to establish deliberate or reckless conduct then "[Disciplinary] Counsel proved no more than simple negligence." *Anderson*, 778 A.2d at 338.

Here, the Board agrees with the Hearing Committee that Kennedy's misappropriation was intentional based on his dishonest conduct. Rpt. 76. Intentional misappropriation occurs where an attorney takes a client's funds for the attorney's personal use. *See Anderson*, 778 A.2d at 339 (citations omitted) (attorney handles entrusted funds in a way "that reveals . . . an intent to treat the funds as the attorney's own"). Kennedy's misappropriation flows directly from his false statements and misrepresentation to the clients. He deliberately did not share settlement details with clients to ensure that the settlement would be finalized. He misrepresented to the clients that Inter-Con would pay his fees. He then calculated his own fee from the clients' settlement proceeds and paid his firm with no authorization or oversight. These are intentional acts.

Kennedy's pattern of dishonesty contradicts his argument that he acted on a "good faith belief" that the FLSA permitted his unilateral withdrawal of fees. R. Br. 20-21 (arguing for prospective application of the ruling here). So does his reference in the attorney-client agreement that he could apply to "the arbitrator for payment of

attorney[']s fees and costs pursuant to applicable statutes." FF 32 (quoting DX E37 at 4). This statement reflects that Kennedy knew he could not unilaterally award himself fees. And as explained, Kennedy's actions of paying himself fees with no oversight conflicted with the FLSA. Based on this record, we see no justification to apply this ruling prospectively. *Cf. In re Mance*, 980 A.2d 1196, 1206 (D.C. 2009) (explaining the need for prospective rulings to avoid disciplining attorneys for "inadvertent violations based on *reasonable*, but mistaken interpretations" of the law (emphasis added)).

Dolan's level of culpability is a closer case. The Hearing Committee found that her misappropriation was negligent—or more specifically it found that Disciplinary Counsel did not establish reckless or intentional misappropriation. Rpt. 78-79. Disciplinary Counsel did not take exception to this determination but explained that the Board's review of legal conclusions is de novo and argued that the Board should find that Dolan's conduct was at least reckless. ODC Br. 33-36. In support, Disciplinary Counsel cites generic statements that Respondents (in the plural) litigated the Inter-Con matters and were involved in the settlement of the case. ODC Br. 34-36 (noting that Dolan reviewed some of the correspondence from Kennedy to the clients). But those statements do not establish, by clear and convincing proof, that Dolan was involved or fully aware of Kennedy's dishonest communications with the clients. And there is no proof that she was dishonest with the clients.

After reviewing the record, the Board agrees with the Hearing Committee that there is insufficient evidence to establish Dolan's conduct was reckless or intentional.[13] The record shows Dolan had general knowledge of the litigation and negotiations but did not communicate directly with the clients. *See* Rpt. 9 n.4; *see also supra* 9-10, 15-16, 22 n.10.

It is worth repeating that Disciplinary Counsel bears the burden to prove the level of culpability for *each* respondent. Here, there was a materially different approach to the evidence presented against Kennedy compared to Dolan. Disciplinary Counsel questioned Kennedy extensively about the litigation, communication with clients, and settlement. And his testimony described *his* actions, decisions, and communications. *See, e.g.*, Tr. 272-73. Kennedy also explained Dolan's more limited involvement. Tr. 1116, 1170-71.

In addition, Disciplinary Counsel called three former clients who testified that Kennedy was the lead attorney or the only attorney on the case based on their experience. Tr. 655 (Jermaine Fitzgerald: "Mainly, I was speaking to Mr. Kennedy . . . . I may have spoken to Ms. Dolan, I'm not a hundred percent sure. I don't recall."); 768 (Michel Ashton testifying that he only spoke to Kennedy); 844 (Daniel Quagliarello: "I only had contact with Mr. Kennedy").

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[13] In determining whether a respondent's unauthorized use of funds was reckless, one must determine whether the act "reveal[s] an unacceptable disregard for the safety and welfare of entrusted funds." *See Anderson*, 778 A.2d at 338. And "'[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.'" *Id.* at 339 (quoting 57 Am. Jur. 2d *Negligence* § 302 (1989)).

And significantly, Disciplinary Counsel's examination of Dolan was almost exclusively about the financial practice of the firm and tax issues. Disciplinary Counsel asked a couple of questions about Dolan's involvement in the litigation, received a generic statement that Dolan was "completely involved," and moved on. Tr. 1555-56. There were no follow up questions to explore what was meant by "completely involved." There was no development of her communications with clients or questions about her specific knowledge of Kennedy's communications with the clients. These omissions are significant when the record shows less overall involvement by Dolan in the litigation, the clients had already testified that they did not communicate with her, and Kennedy's testimony limited her involvement.

Based on this record, we agree with the Hearing Committee that Dolan's misappropriation was negligent because there was insufficient proof that it was reckless or intentional.

2. Violations of Rule 1.5(a), 1.15(a) (record-keeping), and 1.15(c)

The remaining violations in Count II can be addressed summarily.

Rule 1.5(a) (unreasonable fee):[14] Respondents repeatedly told their clients they would not be responsible for paying fees and then they paid themselves fees

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[14] Rule 1.5(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;

directly from the clients' settlement funds. The Board agrees with the Hearing Committee's conclusions that "[u]nder the circumstances proven in this matter, Respondents' collection of 67% of their clients' settlement in attorneys' fees [*without authorization*] crossed the border from unethical to unconscionable behavior." Rpt. 86; *see In re Martin*, 67 A.3d 1032, 1041-42 (D.C. 2013) ("[A]n attorney should not acquire 'a greater interest in the outcome of the litigation than his clients.'" (quoting *Attorney Grievance Comm'n of Maryland v. Korotki*, 569 A.2d 1224, 1233 (Md. 1990))); *Martin*, 67 A.3d at 1041-42 (citing cases holding that fees over fifty percent were unreasonable).[15] Respondents argue that the fee was reasonable because it was "governed by the fee shifting provision of the FLSA."

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(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.

[15] Respondents are not wrong that an attorney may be able to recover a significant fee even if the damages recovery is small under the FLSA's fee shifting provisions. *See, e.g.*, *Barfield v. New York City Health & Hosps. Corp.*, 537 F.3d 132, 152-53 (2d Cir. 2008) (FLSA damages' award less than $2,000 but court awarded almost $50,000 is attorney's fees); *Jackson*, 391 F. App'x at 239 (settled FLSA damages for just under $20,000 but court awarded $36,000 in attorney's fees). *But see Loughner v. Univ. of Pittsburgh*, 260 F.3d 173, 178 (3d Cir. 2001) (remanding for factual findings but noting that a consideration is that the fees awarded by the trial court was "more than triple the amount of both the overtime claimed in the complaint, and the amount for which the plaintiff settled"). The important fact is that damages and fees were determined separately, and a court reviewed the fees and determined they were reasonable. *Cf. Barbee v. Big River Steel*, *LLC*, 927 F.3d 1024, 1027 n.1 (8th Cir. 2019) ("We note that if FLSA settlements are subject to judicial review, the court would retain the authority to ensure the attorney fees were in fact negotiated separately and without regard to the plaintiff's FLSA claim, and there was no conflict of interest between the attorney and his or her client."). Respondents did not present the settlement and fees to a court for approval and did not negotiate the damages and fees separately.

R. Br. 26. But as already explained, the fees Respondents paid themselves were inconsistent with the FLSA.

Rule 1.15(a) (failure to maintain records of entrusted funds): Respondents admit to this violation. R. Br. 31. There is clear and convincing evidence that Respondents failed to maintain records of the entrusted funds and were unable to identify the source of the funds in trust. FF 78-84.

Rule 1.15(c) (failure to notify clients promptly of receipt of funds):[16] Respondents do not address this Rule violation in their brief to the Board, though they implicitly take exception to it by conceding only the record-keeping violation. The Hearing Committee's findings sufficiently establish that Respondents did not notify their clients of the settlement funds and the distribution of those funds. FF 63-73.

3. No violations of Rules 1.15(a) (commingling) or 8.4(c)[17]

The Hearing Committee found there was insufficient evidence to establish a violation of Rule 1.15(a) for commingling because Disciplinary Counsel did not establish that the trust account had both client funds and Respondents' funds at the same time. Rpt. 80. And Disciplinary Counsel did not establish a violation of Rule

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[16] Rule 1.15(c) provides in part:

> Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person.

[17] Disciplinary Counsel also charged that Respondent violated Rule 1.5(c) by failing to provide a written statement explaining the outcome and fee calculation in a contingent fee matter; however, it did not brief that violation before the Hearing Committee. Rpt. 87. We agree with the Hearing Committee's conclusion that no violation of Rule 1.5(c) has been proven.

8.4(c) for dishonesty because insufficient evidence showed that Respondents used their trust account to prevent the funds from being subject to an IRS lien for owed taxes. Rpt. 87-88. Disciplinary Counsel did not take exception, and after review of the record, we concur with the Hearing Committee.

IV. Sanctions

There is a presumptive sanction of disbarment, absent "extraordinary circumstances," for intentional or reckless misappropriation. *In re Addams*, 579 A.2d 190, 191 (D.C. 1990) (en banc) ("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."); *see In re Hewett*, 11 A.3d 279, 286-87 (D.C. 2011) (extraordinary circumstances include *Kersey* disability mitigation and actions designed to benefit the client). Kennedy has not argued extraordinary circumstances and we see none on this record. Thus, we recommend the presumptive sanction of disbarment for Kennedy's misappropriation.

For Dolan, the analysis is more complicated. A six-month suspension is common for negligent misappropriation cases. *See, e.g.*, *In re Kline*, 11 A.3d 261, 265 (D.C. 2011) ("[T]he ordinary sanction for negligent misappropriation would not exceed suspension for six months"); *Anderson*, 778 A.2d at 332; *In re Chang*, 694 A.2d 877, 880 (D.C. 1997) (per curiam) (appended Board report) (citing cases); *In re Choroszej*, 624 A.2d 434, 436 (D.C. 1992) (per curiam). But longer suspensions are imposed based on aggravating factors, including if there were prior negligent

misappropriations, or if there are other serious violations. *See, e.g.*, *In re Bailey*, 883 A.2d 106, 112, 123 (D.C. 2005); *In re Fair*, 780 A.2d 1106, 1115-16 (D.C. 2001) (imposing suspension of one year and sixty days for two negligent misappropriations—each warranting a six-month suspension—with additional neglect).

Dolan has factors in support of a six-month suspension: she does not have a history of misconduct and she did not engage in dishonesty. Along with the misappropriation, however, she violated numerous serious rules to include failure to communicate with clients and failure to maintain trust records.

The Hearing Committee found that *In re Herbst*, 931 A.2d 1016 (D.C. 2007) (per curiam), was the most comparable to Dolan's misconduct. There the Court imposed a nine-month suspension, with three months stayed and two years of probation with conditions because along with the negligent misappropriation, the respondent allowed a nonlawyer employee to negotiate the settlement without consulting the clients. *Id.* at 1016-17. In addition, like Dolan, the respondent in *Herbst* violated Rules 1.2(a) (failure to abide by client's decision/consult clients) and 1.4(a)-(b) (failure to communicate adequately with client). *Id.* *In re Wright*, 885 A.2d 315 (D.C. 2005) (per curiam), another case with similar violations, to include settling a case without client consent, failing to keep clients properly informed or abide by their decisions, and failing to keep adequate records of the source and disposition of funds in his client trust account, resulted in a one-year suspension with a fitness requirement. *Id.* at 315-16. We agree with the Hearing

Committee's analysis of the nine-month suspension based on the total Rule violations as consistent with sanctions imposed in comparable cases.

The Hearing Committee also recommended that before reinstatement Dolan must show fitness, in particular because of her failure to maintain sufficient trust records and the inability to identify the funds in trust or the distributions from the trust account, which demonstrate a need for Dolan to show competency in maintaining trust records and management of a law firm. Rpt. 102.

"[T]o justify requiring a suspended attorney to prove fitness as a condition of reinstatement, the record in the disciplinary proceeding must contain clear and convincing evidence that casts a serious doubt upon the attorney's continuing fitness to practice law." *In re Lattimer*, 223 A.3d 437, 453 (D.C. 2020) (per curiam) (quoting *In re Cater*, 887 A.2d 1, 6 (D.C. 2005)). The Court explained in *Cater* that it is

> useful to consider the same factors that guide us in determining whether to reinstate attorneys who have been suspended (or disbarred):
> (1) the nature and circumstances of the misconduct for which the attorney was disciplined;
> (2) whether the attorney recognizes the seriousness of the misconduct;
> (3) the attorney's conduct since discipline was imposed, including the steps taken to remedy past wrongs and prevent future ones;
> (4) the attorney's present character; and
> (5) the attorney's present qualifications and competence to practice law.

Cater, 887 A.2d at 21 (citing *In re Roundtree*, 503 A.2d 1215, 1217 (D.C. 1985)).

The Court recently reiterated that "imposing a proof-of-fitness requirement is 'conceptually different from the reason for suspending a respondent for a period of time.'" *In re Askew*, 225 A.3d 388, 400 (D.C. 2020) (quoting *Cater*, 887 A.2d at 22).

A suspension "is 'intended to serve as the commensurate response to the attorney's past ethical misconduct, . . . [an] open-ended fitness requirement is intended to be an appropriate response to serious concerns about whether the attorney will act ethically and competently in the future, after the period of suspension has run.'" *Id.* (quoting *Cater*, 887 A.2d at 22). The Court rejected a fitness requirement in *Askew* explaining that the proof was largely a "contemporaneous . . . failure by respondent to understand her duties as court-appointed counsel" and noting that the record did not provide "'real skepticism' about respondent's fitness to practice law" in the future. *Id.* at 401.

Here, the Hearing Committee relied on several factors to determine that Dolan's fitness to practice is questionable. First, the Hearing Committee relied on Dolan's complete failure to maintain the trust account in compliance with the rules and her failure to correct that system even after Disciplinary Counsel's investigation and *up through the hearing*. Rpt. 102. Dolan displayed a dismissive attitude toward the obligation to track deposits and withdrawals from the trust account, claiming that it is unnecessary because she does not have clients that pay each month. Tr. 1589 (admitting she has not changed her practice of maintaining client ledgers and still does not maintain a record of deposits and disbursements from the IOLTA account). Second, Dolan did not supervise her non-attorney staff over the trust account. And she tried to shift the blame to that staff for the errors in issuing checks from the trust account with "Inter-Con" in the memo line before receipt of such funds. FF 88-90. In this regard, the Hearing Committee found that Dolan did not acknowledge the

seriousness of her misconduct and her testimony "reflects a failure to appreciate her fiduciary responsibilities for clients' entrusted funds." Rpt. 102; *see Lattimer*, 223 A.3d at 453 (imposing fitness because of, in part, the respondent's "adamant refusal to accept responsibility and his corresponding willingness to blame any deficiencies in his representation on his clients").

Based on this record, the Board concludes that Disciplinary Counsel did not establish a "'real skepticism' about [Dolan's] fitness to practice law" in the future. *Askew*, 225 A.3d at 401. Though Dolan's continuing failures to recognize her ethical obligations in safeguarding client funds and to take remedial action are concerning, and we see the requirement of fitness as a close question, we conclude that these problems may be remedied with CLE, a practice management course, and practice monitoring. *See, e.g.*, *In re Edwards*, 870 A.2d 90, 92-93, 98-99 (D.C. 2005) (six-month suspension with CLE and six months of probation with practice monitoring for, *inter alia*, negligent misappropriation, commingling, and improper record-keeping, where the respondent was still "'confused' about her obligations," reasoning that practice monitoring, rather than fitness, was "the most practical and effective method of protecting the public and advancing the goals of attorney discipline," unless the respondent failed to cooperate with the practice monitor); *see also, e.g.*, *In re Bailey*, Bar Docket Nos. 442-92 & 483-92, at 37-39 (BPR Feb. 27, 2003) (recommending a nine-month suspension with CLE for negligent misappropriation, commingling, and improper record-keeping, but no fitness requirement, where the misconduct persisted "over a significant period of time"

despite experience handling client funds), *recommendation adopted*, 883 A.2d 106, 123 (D.C. 2005).

V. Conclusion

For the reasons set forth above, we recommend that Respondent Kennedy be disbarred for intentional misappropriation and that Respondent Dolan be suspended for nine months. In lieu of requiring her to demonstrate fitness as a condition of reinstatement, we recommend reinstatement conditioned on completion of six hours of CLE courses on trust account management and a practice management course approved by Disciplinary Counsel. The Board also recommends that, following her suspension, Respondent Dolan be required to serve one year of probation under the supervision of a practice monitor, with her failure to cooperate with the practice monitor resulting in revocation of her probation with a requirement that she demonstrate fitness before reinstatement.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: 

Lucy E. Pittman

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

THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Issued
May 10, 2021

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

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

All of the conduct at issue in this matter took place in Ohio. Respondent, who is only licensed to practice in the District of Columbia, practiced bankruptcy law in the federal court in Ohio under the federal practice exemption in the state's unauthorized practice of law rules. The Baileys, a husband and wife, retained Respondent to assist them with the return of their minor children who were in the custody of a local child services agency. While the Baileys already had a court-appointed attorney to assist them with the state court custody matter, they were told to retain a separate "civil attorney" which led them to Respondent. Custody proceedings are typically state law matters that are resolved in state court. Respondent did not adequately disclose that he was not barred in the state of Ohio

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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.

** Respondent was suspended from the practice of law in the District of Columbia pursuant to D.C. Bar R. XI § 13(c) pending final resolution of these disciplinary proceedings. *In re Harris*, 241 A.3d 243 (D.C. 2020) (per curiam).

or that he was a federal bankruptcy attorney with no experience in child custody cases. Because Respondent was only admitted to practice in federal court in Ohio, his single option was to file a federal court action based on federal constitutional grounds. Constricted by this limitation, Respondent crafted a strategy that required a showing that the child services agency in Lucas County, Ohio treated Black parents differently in comparison to White parents. Even if what the Hearing Committee termed Respondent's "moonshot" tactic prevailed, it would not have resulted in the return of the Baileys' children because a federal court does not have jurisdiction over child custody matters. Hearing Committee Report ("HC Report") at 4 (referring to "moonshot federal claim"). Respondent's intended strategy, its low likelihood of success and the outcome (if attained) was never explained to the Baileys. What the Baileys understood after meeting with Respondent was his assurance that he would get their children back.

Hearing Committee Number Eleven (hereinafter, the "Hearing Committee") determined that Respondent violated District of Columbia Rules of Professional Conduct (the "Rules") 1.4(b) (failure to explain a matter to a client), 1.15(a) (failure to maintain records and intentional, or at least reckless misappropriation), 1.15(e) (treatment of advanced unearned fees), and 8.1(a) (knowingly false statement of fact in connection with a disciplinary matter), but not 1.15(a) (commingling), 1.5(a) (unreasonable fee), or 8.4(c) (dishonesty, fraud, deceit, or misrepresentation). The Hearing Committee recommended that Respondent be disbarred for intentional misappropriation and determined that Respondent failed to establish his *Kersey*

mitigation claim because he failed to prove by clear and convincing evidence that he suffered from a disability during the relevant time period.

Respondent admitted to violating Rule 1.15(a)'s recordkeeping requirements before the Hearing Committee but takes exception to the Hearing Committee's Report and Recommendation, arguing before the Board that in relevant part that he did not engage in any misconduct because he used disclaimers to inform clients that his practice was limited to federal law, that he fully informed the Baileys of his strategy and that they specifically retained him because of his strategy and federal court experience. Respondent asks that he not be sanctioned and that the Board consider that he was under extreme health and mental duress at the time of the events at issue. Disciplinary Counsel supports the Hearing Committee's Report and Recommendation, except for its failure to find violations of Rules 1.5(a) (unreasonable fee) and 8.4(c) (dishonesty, fraud, deceit, or misrepresentation), and its failure to recommend restitution as a condition of reinstatement.

We agree with the Hearing Committee's conclusion that Respondent violated Rules 1.4(b), 1.15(a) (recordkeeping and misappropriation), 1.15(e) and 8.1(a). We also agree with the Hearing Committee's conclusion that Disciplinary Counsel failed to prove a Rule 1.15(a) commingling violation because there was no clear and convincing evidence establishing that the clients' entrusted funds were intermingled with other unentrusted funds in Respondent's operating account. We disagree with the Hearing Committee's determination that Disciplinary Counsel did not prove by clear and convincing evidence that Respondent violated 1.5(a) or 8.4(c), and

conclude that Respondent violated these Rules for the reasons discussed below. We agree with the sanction recommendation that Respondent be disbarred for intentional misappropriation, and that Respondent failed to establish his *Kersey* mitigation claim. Finally, we recommend that Respondent be required to make full restitution to Mrs. Bailey as a condition of reinstatement.

I. STANDARD OF REVIEW

Disciplinary Counsel bears the burden of proving the alleged Rule violations by clear and convincing evidence, which is "'evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established.'" *In re Cater*, 887 A.2d 1, 24 (D.C. 2005) (quoting *In re Dortch*, 860 A.2d 346, 358 (D.C. 2004)). In deciding whether Disciplinary Counsel has carried this burden, we are required to accept the Hearing Committee's factual findings that are supported by substantial evidence in the record as a whole, even where the evidence may support a contrary view as well. *In re Robbins*, 192 A.3d 558, 564 (D.C. 2018) (per curiam); *In re Martin*, 67 A.3d 1032, 1039 (D.C. 2013); *In re Godette*, 919 A.2d 1157, 1163 (D.C. 2007). "Substantial evidence means enough evidence for a reasonable mind to find sufficient to support the conclusion reached." *In re Thompson*, 583 A.2d 1006, 1008 (D.C. 1990) (per curiam). The Board reviews *de novo* the Hearing Committee's legal conclusions and its determinations of ultimate fact. *In re Bradley*, 70 A.3d 1189, 1194 (D.C. 2013) (per curiam).

II. PROCEDURAL BACKGROUND

Respondent was charged with failing to explain a matter to the extent reasonably necessary to permit the client to make an informed decision regarding the representation in violation of Rule 1.4(b); charging and collecting an unreasonable fee in violation of Rule 1.5(a); failing to keep complete records of entrusted funds, commingling advanced unearned fees with his own funds and intentional or reckless misappropriation by using the Baileys' advanced fee before it was earned and without the clients' authorization, all in violation of Rule 1.15(a); failing to treat the Baileys' advanced fee as their property by placing these funds into a trust account in violation of Rule 1.15(e); knowingly making false statements of fact to Disciplinary Counsel in violation of Rule 8.1(a); and, engaging in conduct involving dishonesty, fraud, deceit and misrepresentation in violation of Rule 8.4(c). Respondent filed an answer on January 28, 2019 denying the charges against him, and asserting a claim under *In re Kersey*, 520 A.2d 321 (D.C. 1987), specifically that his disability of depression and diabetes, should be considered as mitigation of any sanction.

A hearing was held on April 23-25, 2019 before the Hearing Committee. The Hearing Committee recommended that Respondent be disbarred for intentional misappropriation, as Respondent failed to meet his burden for *Kersey* mitigation. As to the other charges, the Committee recommended that the Board find violations of Rules 1.4(b), 1.15(a) (recordkeeping), 1.15(e) and 8.1(a) and also recommended that the Board find that Disciplinary counsel did not prove by clear and convincing

evidence that Respondent violated 1.5(a) (unreasonable fee) and 1.15(a) (commingling). The Hearing Committee also concluded that Disciplinary Counsel had not proven that Respondent engaged in conduct that violated Rule 8.4(c) (dishonesty, fraud, deceit, or misrepresentation), that had not already been addressed in the finding of other Rule violations.

Respondent filed exceptions to both the Hearing Committee's factual findings and the sanction recommendation. Disciplinary Counsel does not object to the Hearing Committee's factual findings or the sanction recommendation of disbarment but objects to the legal conclusions that Respondent's misconduct did not violate Rules 1.15(a) (commingling), 1.5(a) (unreasonable fee) or 8.4(c) (dishonesty, fraud, deceit, or misrepresentation).

III. FINDINGS OF FACT

We fully adopt the Hearing Committee's factual findings. Respondent was admitted to the Bar of the District of Columbia on March 1, 2004. He is not licensed to practice law in any other state but is admitted to practice before Ohio federal courts where he principally practices bankruptcy law. FF 1.

By the time that Victoria and Armond Bailey consulted with Respondent regarding their child custody issue, their children had been removed from their home after a finding of abuse by the Lucas County Children Services ("Children Services") with respect to their youngest daughter. FF 2-3. Their minor children were placed in foster care and, after approximately a year and a half, the children were removed from foster care by Children Services because the foster parents kept the children in

‘“unsatisfactory”’ conditions and subjected them to abuse. FF 4 (quoting, in part, DX 11 at 4). Thereafter, Children Services sought permanent custody of Mrs. Bailey’s minor children in state juvenile court. *Id.* Approximately a year later in October 2016, the juvenile court ordered the return of the Mrs. Bailey’s three oldest minors but terminated her parental rights to her five youngest children. Mrs. Bailey timely appealed this decision. FF 6.

During the entirety of the state court proceedings, including the appeal, the Baileys were represented by court-appointed counsel. They sought Respondent’s services because they were advised by the children’s therapist to seek separate “civil” counsel to supplement their court-appointed attorney’s representation. The Baileys did not know what a “civil” attorney meant, but an internet search led them to Respondent. FF 4.

Mrs. Bailey initially contacted Respondent and his firm in December 2015, but she could not afford Respondent’s $2,500 advance fee. FF 5. A little over a year later she was able to pay Respondent’s fee via credit card. On January 3, 2017, three months after the state juvenile court order, the Baileys met with Respondent in order to retain him to assist them in the return of their children. FF 6-7. During this meeting, Respondent learned that the appeal of the Ohio juvenile court’s custody order was pending before the Ohio Court of Appeals. Respondent told the Baileys that he could help them get their children back by ‘“forc[ing] [Children Services] to return custody of the children to [them].”’ He did not explain how he would accomplish this goal including the nature of the claim(s) that he would raise.

Respondent never revealed the scope of his experience or expertise, specifically that he had never handled a child custody matter, that he was principally a bankruptcy attorney and that his practice was limited to the federal courts in Ohio. He also did not explain to the Baileys that child custody matters are state matters and that federal courts do not have jurisdiction. *See* FF 9-10 (second alteration in original) (quoting DX 22 at 1).

Respondent asserts that the Baileys came to him because Children Services was treating Black parents unfavorably in comparison to White parents with respect to custody issues. In other words, Black parents were having their children removed, and their parental rights terminated, at a much higher rate in comparison to White parents. Respondent readily acknowledges that the only action he could take to effectuate the return of the Baileys' children was a federal court action premised on a constitutional violation. He believed that the Baileys hired him because he was best suited to handle this case because he was a Black attorney and that they specifically agreed with his federal court strategy because they already had a court-appointed attorney handling the state court action. Respondent also claims that they knew the limitations of his practice because he included licensure disclaimers in his correspondence and on his website. *See* HCX 1 n.1 ("Licensed in Washington DC and Northern District of Ohio Federal Courts, not admitted in Ohio or New York.").

During their meeting, the Baileys executed a "Retainer Letter." Respondent's Retainer Letter itself makes no mention of the fact that Respondent's practice was confined to the federal courts in Ohio or that he was not barred in the state. The

cover letter that accompanied the agreement confusingly provided, '"Please note that we have both Federal [sic] and State attorneys at our firm."' FF 8 (quoting HCX 1 at 1).

The agreement called for a $2,500 advanced fee and specified a $300 hourly rate for Respondent's services. Both the agreement and the cover letter indicated that the advanced fee would be held in trust and applied towards time and expenses incurred during the course of the representation. FF 13. Instead of depositing the Baileys' payment into a trust account, the funds were deposited into Respondent's PayPal account, minus the $67.50 PayPal fee. FF 14-15. Most of the Baileys' money, $2,100, was immediately transferred to Respondent's firm's operating account where he used it for personal and business expenses including employee payroll, rent and a Sears bill. FF 19, 21. As detailed in the Hearing Committee's Report, Respondent failed to maintain any of the Baileys' money in trust and in fact, overdrew his operating account ten times. FF 23. He had not earned the Baileys' funds at the time that he disbursed them for his personal use; he did not obtain their authorization or otherwise keep them informed of the status of their entrusted funds and he did not keep any records of the $2,500 paid to him. FF 24-26.

Towards the latter half of January 2017, Respondent hired Miles Mull. Even though Mr. Mull lacked any legal experience (except for taking online classes towards a degree in paralegal studies), as part of his interview process, Respondent asked Mr. Mull to research a "hypothetical" child-custody case. Mr. Mull provided his results prior to being hired. FF 27-28. Approximately two weeks after he started

working at Respondent's firm, Respondent assigned Mr. Mull the task of researching the Bailey child custody matter and preparing a draft complaint. It was at this point that Mr. Mull learned that the "hypothetical" he researched during the interview process was actually the Baileys' case. FF 31.

During the one-month period that Mr. Mull worked on the Baileys' case, he drafted a chronology, a memorandum regarding Ohio child custody cases, a "Case Brief" and a draft complaint (collectively, the "work product"). According to Mr. Mull, he was the '"lead"' person working on the Bailey matter; Respondent provided limited input regarding edits, identifying the venue for filing and citations to applicable statutes. FF 32-34 (quoting Tr. 209). Respondent claims that he was the one who created the work product and that Mr. Mull was simply a "scriber." Board Oral Argument Tr. 15. The Hearing Committee found that Respondent made no edits to Mr. Mull's work, however, Mr. Mull testified that he did not know if Respondent or anyone else worked on the Baileys' file after he left the firm in May 2017. Tr. 288. Mr. Mull acknowledged that Respondent provided input into the complaint and that he required assistance in order to complete it. Tr. 287. While we cannot discern who did what or to what extent, what is evident is that the work product is irregular and deficient in most respects but adequate in other respects. For example, the chronology appears to be a sufficiently detailed timeline while the case summary is riddled with misspellings and syntax errors. DX 7 ("Calendar of Events"); DX 8 (Case Brief).

The draft complaint recites specific events related to the Baileys' child custody matter and attempts to connect these facts to a denial of due process claim. The complaint does not, however, bear out the theory of the case that Respondent described at the hearing or during oral argument before the Board. Specifically, Respondent asserted that he planned to pursue a federal civil rights claim akin to a class action based on how Children Services treated White families more favorably in comparison to Black families. HC Report at 46; Board Oral Argument Tr. 10-13. However, the complaint lacks any allegations regarding this issue or any other "facts" that would otherwise support a disparate treatment claim. A review of the complaint reveals a document that is inadequate for filing with a court. For example: (1) asserts venue under 28 U.S.C. § 1331 (federal question) without citation to 28 U.S.C. § 1391 (venue generally) or statement explaining why the District Court for the Northern District of Ohio, Western Division was the proper forum (DX 9 ¶ 2); (2) includes citation to 28 U.S.C. § 1331 (federal question) but fails to reference 28 U.S.C. § 1343 (civil rights) (DX 9 ¶¶ 1-2); (3) asserts a claim under 42 U.S.C. § 1983 without explanation regarding "under color of state law" (DX 9 ¶¶ 1, 27); (4) the statement of facts fails to identify and explain how the specific action or policy was applied in a disparate manner based on race (DX 9 at 2-4); (5) and the prayer for relief requests dismissal and remand, despite the fact that there was no appeal pending before the court (DX 9 ¶ 32). Additionally, it is unclear what, if any, work Respondent or any employee of the firm performed on the Baileys' case after Mr.

Mull separated from the firm in May of 2017. *See* FF 34-37; Tr. 288; *see also* DX 29 (invoice).

On June 23, 2017, the Ohio Court of Appeals affirmed the juvenile court's custody order. FF 38. Respondent claims that he was waiting for the conclusion of the state case (FF 9) (quoting Tr. 372) before proceeding with the federal action, however, there is no evidence in the record that he took any action after the appellate decision was issued. Several months after the appellate court decision, on October 31, 2017, Respondent met with the Baileys at the Toledo library wherein he informed them that he lacked the '"manpower"' to handle their case. Mrs. Bailey suggested that she could help by putting the case files in chronological order. Respondent accepted her offer of assistance and promised to email her on how to proceed. FF 40-41 (quoting Tr. 54). Respondent never followed up with Mrs. Bailey as he had promised, and when she and her husband confronted Respondent at his office a month later, he had no explanation other than that he was still grieving over the loss of his mother but at the same time, appeared to be continuing to practice law as he was '"in a rush . . . to go to another hearing."' FF 44, 47-48 (quoting Tr. 66-67).

Shortly thereafter, Mrs. Bailey terminated Respondent and filed a complaint with the Office of Disciplinary Counsel on December 18, 2017. FF 49-52. On January 4, 2018, Respondent generated, for the first time, an invoice containing time entries concerning his legal work on the Baileys' case. FF 53. On February 8, 2018, Respondent generated a second "draft" invoice that included "new" time entries in

comparison to the January invoice. By this time, Respondent was aware that Disciplinary Counsel was investigating Mrs. Bailey's complaint and that Mrs. Bailey had requested a refund of her fee advance. FF 56. The February invoice had erroneous entries to include, for example, attributing the creation of a "calendar of events" to another employee when Mr. Mull created this document and a time charge on January 3, 2017 for Mr. Mull even though Mr. Mull did not start working at the firm until January 29, 2017. FF 57. Both the January and February 2018 invoices reflected a billing rate of $350 and not the $300 rate agreed to in the Retainer Letter. FF 58. Disciplinary Counsel asked Respondent twice during its investigation to explain the creation of the two invoices, and whether he had sent the invoices to the Baileys. FF 60 (DX 23); FF 62 (DX 27). Respondent made representations to Disciplinary Counsel, during the investigation and at the hearing during his testimony, that the invoices were created and delivered to the Baileys before the representation was terminated. FF 63-64, 66.

IV. CONCLUSIONS OF LAW

Respondent filed objections to both the findings and sanction recommendation. In his five-page brief to the Board containing his exceptions, Respondent expended a considerable portion of his brief on the issue of whether it was inappropriate for the Hearing Committee to have cited findings by the Ohio Supreme Court in two unrelated cases.[1] The Hearing Committee's citations to the

[1] Specifically, in *Disciplinary Counsel v. Harris*, 996 N.E.2d 921, 923 (Ohio 2013), the court found that Respondent was not subject to the disciplinary authority of the court because he was not a

Ohio Supreme Court's decisions were used to clarify threshold issues including that Respondent was not admitted to practice in Ohio and why the District of Columbia Rules of Professional Conduct were being applied to events that occurred entirely in another state. The findings in the Ohio state cases are not the subject of this disciplinary proceeding, are not part of the record here and have no bearing on the charged violations of the rules of this jurisdiction or the recommended sanction of disbarment.

A. Rule 1.15(a) and (e)

Respondent is charged with three violations of Rule 1.15(a): (1) failing to keep complete records of entrusted funds, (2) commingling advanced unearned fees with his own funds and (3) intentional or reckless misappropriation by using the Baileys' advanced fee before earned and without the clients' authorization. Respondent acknowledged that he violated the recordkeeping requirements of Rule 1.15(a) by failing to maintain complete records of his client's entrusted funds[2], but contests the remaining violations.[3]

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member of the Ohio bar. *See* HC Report at 3, n.2. In *In re Application of Harris*, 804 N.E.2d 429, 431-32 (Ohio 2004) (per curiam), the court discussed Respondent's character and moral qualifications in denying his application to become a member of the Ohio bar. *See* HC Report at 2, n.1.

[2] The Hearing Committee found that Disciplinary Counsel proved the Rule 1.15(a) recordkeeping violation by clear and convincing evidence based in part on Respondent's admission that he did not keep complete records. HC Report at 40 (citing Parties' Joint Stipulation, ¶ 17). Respondent did not address this determination in his brief to the Board.

[3] The Hearing Committee concluded that Disciplinary Counsel failed to prove the Rule 1.15(a) commingling violation because it could not establish by clear and convincing evidence that the Baileys' entrusted funds were intermingled with other unentrusted funds in the Respondent's

1. Rule 1.15(a) Misappropriation

Rule 1.15(a) prohibits the misappropriation of entrusted funds. The Hearing Committee found that the clients paid Respondent an advanced fee, and thus, he was required to hold the funds in trust until he had earned those funds by performing legal services. The Hearing Committee found that Disciplinary Counsel proved that Respondent misappropriated the clients' advanced fee when he withdrew the fee from his account before it had been earned. The Hearing Committee also found that Respondent's misappropriation was intentional because he '"calculatingly disbursed' his clients' funds to satisfy unrelated personal obligations before the funds were earned." HC Report at 38 (quoting ODC Reply Br. to the Hearing Committee at 5-6). In the alternative, the Hearing Committee found that Respondent's misappropriation was "reckless in the extreme" because he transferred entrusted funds into his operating account, and failed to track his use of those funds. *Id.* We agree with the Hearing Committee's findings.

Respondent did not address the misappropriation issue in his brief to the Board and did not meaningfully contest it at oral argument. At oral argument, Respondent contended that there was no intent to fraudulently misappropriate the clients' funds, but he did not identify any factual or legal errors in the Hearing Committee's analysis. *See* Board Oral Argument Tr. 13-15. Disciplinary Counsel supports the

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operating account. HC Report at 39. Disciplinary Counsel did not challenge this determination in its brief to the Board, and Respondent did not address the issue in his brief to the Board. We agree with the Hearing Committee's commingling findings for the reasons stated in the Report and Recommendation. *See id.*

Hearing Committee's analysis, but did not separately address this Rule violation in its brief.

Misappropriation is defined as "any unauthorized use of client's funds entrusted to [a lawyer], including not only stealing but also unauthorized temporary use for the lawyer's own purpose, whether or not [the lawyer] derives any personal gain or benefit therefrom." *In re Edwards*, 808 A.2d 476, 482 (D.C. 2002) (first alteration in original, citation and quotation marks omitted). Advances of unearned fees are client funds that must be held as entrusted funds "until they are earned by the lawyer's performance of legal services." *In re Mance*, 980 A.2d 1196, 1203 (D.C. 2009); Rule 1.15(e). To prove misappropriation here, Disciplinary Counsel must establish that the balance in Respondent's account fell below the amount of fees that he had not yet earned through the performance of legal services, and thus, the amount that he was required to hold in trust for his clients. *In re Ekekwe-Kauffman*, 210 A.3d 775, 794 (D.C. 2019) (per curiam).

It is easy to find that Respondent engaged in misappropriation. After receiving the Baileys' advance fee via PayPal, Respondent transferred the bulk of the payment to his operating account where he promptly used the funds for personal and business expenses. By January 9, 2017, Respondent had spent at least $2,311 of the Baileys' funds. Even if the Board were to accept, *arguendo*, the validity of the time entries contained in Respondent's two *post hoc* invoices, Respondent had spent at least $1,286 more than what he had allegedly earned by this date. Accordingly, Disciplinary Counsel has established by clear and convincing evidence

that Respondent engaged in misappropriation by using the Baileys' entrusted funds without authorization.

We must next consider Respondent's state of mind, whether his conduct was intentional, reckless, or negligent. *See In re Anderson*, 778 A.2d 330, 336-37 (D.C. 2001). 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)). The Court has found intentional misappropriation where the respondent used entrusted funds to pay personal and business expenses. *In re Cappell*, 866 A.2d 784 (D.C. 2004) (per curiam). The level of intent may be established by circumstantial evidence. *See In re Mabry*, 11 A.3d 1292 (D.C. 2011) (per curiam).

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

2. Rule 1.15(e) Advanced Fee Held in Trust

Both the Retainer Letter (agreement) and cover letter indicated that the Baileys' advanced fee would be held in a trust account. Respondent knew that he was required to hold the Baileys' funds in trust, but their funds never even touched a trust account as required by Rule 1.15(e). The funds went from Respondent's PayPal account immediately into the firm's operating account where they were disbursed for personal and business expenses, including credit card bills, employee payroll, rent and a Sears bill. On January 4, 2017, the balance in the operating account fell to $1,298.89, which was well below what he was required to hold in trust. Less than one week after receiving the advanced fee, Respondent used all of the $2,100 that he had transferred, leaving the operating account with a negative balance.

At no point did Respondent inform the Baileys that he had used their funds or requested their consent to use their funds. He never provided them with an invoice, billing statement or any other indication as to how their funds were used.

3. Respondent's Intentional or Reckless Misappropriation of Advanced Fees

Based on these circumstances, we agree with the Hearing Committee's findings that the immediate transfer of the advanced fee to the firm account to pay personal and business expenses before the work had even begun, establishes that Respondent's conduct was intentional. *See, e.g.*, *In re Grigsby*, Board Docket No. 14-BD-103, *et al.* at 2-3 (BPR Nov. 14, 2016) (finding intentional misappropriation where the respondent transferred advanced fees from his trust account to his operating account before performing services to earn the fees), *recommendation approved where no exceptions filed*, 167 A.3d 551 (D.C. 2017) (per curiam). We also agree with their finding that, in the alternative, Respondent's conduct was reckless "in the extreme" because he failed to track his client's funds in any manner, and had a total disregard for the status of his account in which he placed these entrusted funds, which resulted in the repeated overdraft of his firm's operating account, coupled with the indiscriminate movement of money from his PayPal account to his operating account where it was disbursed for his personal needs. Finally, we agree with the Hearing Committee that Respondent's failure to treat the Baileys' advanced fee as their property by placing these funds into a trust account violated 1.15(e).

B. Rule 1.4(b)

The Hearing Committee found that Respondent violated Rule 1.4(b) because he failed to explain to the clients that he had never handled a child custody case, that he was not licensed to practice in Ohio, and that child custody matters are typically

matters of state law that are resolved in state courts. Disciplinary Counsel supports the Hearing Committee recommendation.

Mrs. Bailey testified that she contacted Respondent after she reviewed a "complaint" and learned that Children Services sought to terminate Mrs. Bailey's parental rights over her oldest daughter and other of her children. According to Mrs. Bailey, her daughter "had nothing to do with it. She was not a part of the '14 case. But the way that this paper had read is if she was part of it. And so they had took my daughter." Tr. 35. It was the children's therapist who suggested that Mrs. Bailey seek out a "civil attorney." Mrs. Bailey performed an internet search which led her to Respondent. A week after contacting his firm, Mrs. Bailey spoke to Respondent and explained that the agency had "stolen [her] daughter and [her daughter] had nothing to do with this case. And I asked if he – if there was any way that he could help me. And he said, yes, that he wanted me to call back . . . tomorrow and he would have his secretary explain the process, and then we would go from there." Tr. 37-38. When Mrs. Bailey called the next day, Respondent's secretary informed her that she would need to pay $2,500 in order for Respondent to begin working on her matter. Tr. 38.

Approximately a year later, after Mrs. Bailey was able to pay Respondent's fee via a credit card, she and her husband met with Respondent on January 3, 2017. During this meeting, she reiterated to Respondent what had happened with their first seven children and "now our eighth child has been taken." Tr. 44. Respondent told her that all they needed to do was pay the $2,500 and that "the agency had been

asking questions," "but now they would be having to ask him questions, and all we needed to do was give the money and sign the agreement." Tr. 44-45. Mrs. Bailey understood that this meant that Respondent would now deal directly with the agency on her behalf. She further explained, "first, he had to get our children back for us, *then* we would deal with the agency itself." Tr. 45 (emphasis added).

Rule 1.4(b) requires that an attorney "shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." 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" and "must 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." Rule 1.4, cmt. [2]; *see also In re Askew*, 225 A.3d 388, 396 (D.C. 2020) (per curiam) (to satisfy Rule 1.4(b), '"a lawyer not only must respond to client inquiries but also must initiate communications to provide information when needed"' (quoting *In re Hallmark*, 831 A.2d 366, 374 (D.C. 2003))).

Respondent argues that the clients wanted a "federal attorney," as they already had an attorney licensed to practice in the Ohio courts. He also argues that the clients were sufficiently sophisticated to understand his role as a "federal attorney," as demonstrated by the fact that were able to make a disciplinary complaint against Respondent in the District of Columbia and not in Ohio, where the representation occurred. Disciplinary Counsel asserts that Respondent knew it was a legal

impossibility to overturn a state custody order through federal action, yet he failed to inform his client of his inability to assist her due to the limitations of his practice. Respondent acknowledged before the Hearing Committee that he was '"well aware that we couldn't have forced the overturn [of the custody order] because this was a state issue."' ODC Br. to the Hearing Committee at 6-7 (alteration in original) (quoting Harris Closing Argument, Tr. 434).

Regardless of his 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." HC Report at 29 (emphasis in original) (quoting ODC Br. to the Hearing Committee at 27). As the Hearing Committee noted, "A member of the general public cannot be expected to have fluency in what can be subtle distinctions between state and federal practice . . . [and] if an attorney intends to rely on such distinctions, the onus is on the attorney to make clear and explicit in writing exactly what [he] can or cannot do for those who have entrusted their problems to [him]." FF 11.

On the record before us, it is evident that Respondent failed to provide Mrs. Bailey with information sufficient for her to make an informed decision regarding his representation. FF 43; *see also* Tr. 48, 106 (Bailey). Respondent's Retainer Letter also falls short of providing the required disclosures. The cover letter that accompanied the agreement was also confusing if not outright misleading regarding the limitations of his practice. It stated, '"Please note that we have both Federal [sic] and State attorneys at our firm."' FF 8 (quoting HCX 1). Conflating the bar

admissions of the attorneys that periodically worked at his firm in this manner is the exact opposite of Respondent's obligation to reasonably inform the Baileys about his status as an out-of-state attorney and the attendant limitations on his practice.

Mrs. Bailey had extremely limited resources. She initially could not afford the $2,500 fee that Respondent required in order to represent her. While she was clearly desperate, she likely would not have retained him if he had explained to her that child custody matters are typically within the exclusive purview of the state courts, that Respondent was only admitted in federal court and, therefore, he could only file an action on her behalf in federal court using an approach that had an extremely low likelihood of success.

Moreover, what Respondent told Mrs. Bailey he *would* do for her if she retained him is inconsistent with what he *could* do for her. He told her that his first priority would be to obtain the return of her children and after this goal was achieved, he would "deal with the agency." The limitations inherent in a federal suit on a child custody matter would actually result in the reverse. First, Respondent would have to "deal with the agency" by asserting a federal claim based on due process and/or disparate treatment grounds, that Mrs. Bailey was treated unfairly by Children Services. Second, by Respondent's own testimony, the goal of the federal suit was to force Children Services to reevaluate the decision regarding the custody of the Baileys' children using the same standard that applied to White families. Tr. 380. And if Mrs. Bailey was successful in the "reevaluation," her children would have been returned to her. This true sequence of events, as opposed to the snake oil that

Respondent peddled to Mrs. Bailey to induce her to retain him, further supports our conclusion that Respondent violated 8.4(c), as discussed below.

C. Rule 8.1(a)

The Hearing Committee found that Respondent violated Rule 8.1(a) by submitting false billing statements to Disciplinary Counsel in response to Disciplinary Counsel's request for information about Mrs. Bailey's complaint. Respondent did not address this issue in his brief. Disciplinary Counsel supports the Hearing Committee's recommendation.

Rule 8.1(a) provides that "a lawyer . . . in connection with a disciplinary matter, shall not . . . [k]nowingly make a false statement of fact[.]" "Knowingly" is defined as "actual knowledge of the fact in question[,]" which "may be inferred from circumstances." Rule 1.0(f).

When Disciplinary Counsel asked about the discrepancies between the January and February invoices, Respondent answered that both invoices were created in October 2017, presumably in advance of his meeting at the Toledo Library with the Baileys on October 31, 2017. Respondent confirmed this during his testimony at the hearing. However, contrary to Respondent's representations, the invoices were created in January and February of 2018 and also utilized an inflated billing rate. There is no evidence that these invoices were provided to the Baileys either before or after they terminated Respondent in December 2017. We therefore agree with the Hearing Committee's finding that Disciplinary Counsel proved a violation of Rule 8.1(a) by clear and convincing evidence.

D. Rule 8.4(c)

Before the Board, Disciplinary Counsel argues that Respondent violated Rule 8.4(c), in that he engaged in dishonesty, fraud, deceit and/or misrepresentation because he knowingly mislead the Baileys to believe that he would be able to reunite them with their children, even though he knew that that relief could not be obtained in federal court, that he had no intention of actually working on the case, instead instructing a non-lawyer assistant to perform needless "make-work" in order to create an ostensible basis for taking the fees, and finally that he engaged in fraud by intentionally taking the fee advanced under false pretenses and spending the funds. Disciplinary Counsel also argues that Respondent lied to Disciplinary Counsel during its investigation with respect to the post-hoc invoices, as discussed above. Respondent argues that the Baileys knew that he intended to file a civil rights claim requesting that the federal court order the local child services agency to hold a fair hearing, which would have resulted in a new hearing in state court, which presumably would have led to an opportunity for family reunification.

Despite finding that Disciplinary Counsel had made "a compelling case" on the Rule 8.4(c) charge, the Hearing Committee did not find a violation because it did not find that Respondent committed acts violative of Rule 8.4(c) "which have not otherwise been addressed in the disposition of other violations alleged in this proceeding." HC Report at 46. However, it is not unusual that the same misconduct violates numerous Rules. *See In re Drew*, 693 A.2d 1127, 1132 (D.C. 1997) (per curiam) (appended Board report); *see also Cater*, 887 A.2d at 16 n.14 ("There is no

preemption, however, where . . . the lawyer is found to have violated the more specific Rule. In that case it remains appropriate to determine whether the lawyer also transgressed the more general Rule."). We therefore disagree with the Hearing Committee's declination to consider the charged Rule 8.4(c) violation because the facts that Disciplinary Counsel argued supporting such a violation were already covered by other Rule violations. We agree with Disciplinary Counsel that Respondent's actions and statements about his ability to reunite Mrs. Bailey with her children involved dishonesty, deceit, fraud, and misrepresentation. ODC Br. to the Board at 19.

Dishonesty may be any "conduct evincing a lack of honesty, probity or integrity in principle; [a] lack of fairness and straightforwardness. . . ." *In re Shorter*, 570 A.2d 760, 767–68 (D.C. 1990) (per curiam) (alteration in original, citation and quotation marks omitted).

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 for want of communication of that fact." *Shorter*, 570 A.2d at 767 n.12 (citation and quotation marks 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, 207, 209 (D.C. 1989) (finding deceit where attorney intentionally 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 and quotation marks omitted); *see also Schneider*, 553 A.2d at 209 n.8 (misrepresentation is element of deceit). Misrepresentation requires active deception or a positive falsehood. *Ekekwe-Kauffman*, 210 A.3d at 796; *see also 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 and quotation marks omitted). The misrepresentation need not be intentional, statements made in reckless disregard of the truth violate Rule 8.4(c).

By the time that Mrs. Bailey met with Respondent, he knew that her children had been taken away by Children Services and that she was unable to retain him a year earlier because she could not afford the $2,500 fee advance he required. Tr. 38 (Bailey). Mrs. Bailey was that much more desperate a year later when she met with Respondent while facing the removal of her eighth child, and paid his fee using a credit card. Tr. 39-40, 44. Respondent represented to Mrs. Bailey that all she had to do was pay his fee and he would get her children back. This is further supported by Respondent's own words, because he admitted that he told Mrs. Bailey that "he could attempt to 'force [Children Services] to return custody of [her] children.'" FF 10 (first alteration in original) (quoting DX 22 at 1). This was an untrue statement because, as a federal bankruptcy attorney, without an Ohio law license, he did not have the ability to challenge an Ohio state custody order in federal court let alone

have a federal court return her children. Respondent never explained this substantial limitation, instead relying on confusing disclaimers that would be lost on a lay person. He also never explained the type of claim that would be asserted in federal court, or that even if his federal court action was somehow successful it still would not result in the immediate return of her children. At best, under Respondent's theory of the case, the federal court could order Children Services to reevaluate the Bailey custody decision using the standard allegedly applicable to White families. *See* Tr. 380, 434 (Harris Closing Argument explaining that he was "well aware that we couldn't have forced the overturn [of the custody order] because this was a state issue."). Respondent's statements to Mrs. Bailey that he could return her children under these facts were dishonest and deceitful.

We find that Respondent was also dishonest in his communications with the Baileys that he intended to pursue their case. Respondent assured the Baileys that he was waiting for the conclusion of the state court action before filing the federal court complaint. However, after the state appeal was decided, instead of filing the federal action, Respondent sought to withdraw entirely from the case stating that the reason the federal complaint could not be filed was due to his lack of "'manpower"' despite the fact the complaint had already been drafted. FF 41 (quoting Tr. 54). When Mrs. Bailey offered to assist him with the manpower issue by organizing the case files, Respondent agreed, but then did not email her as promised and did not return her calls or texts. FF 44-46. When the Baileys ultimately appeared in person at Respondent's office in November 2017, Respondent again reassured them he

would email but did not do so. FF 47-48. Mrs. Bailey finally terminated Respondent when she became frustrated with him leading her on about filing the complaint. FF 49. We find that Respondent was dishonest in misrepresenting to the Baileys why their already drafted and paid for federal complaint could not be filed.

As Disciplinary Counsel noted in its brief before the Board, even if Respondent "believed there were some one-in-a-million chance to pursue a federal claim that could affect child custody, it was incumbent on him to explain that to Mrs. Bailey." ODC Br. to the Board at 17. Moreover, Respondent "could not satisfy his ethical obligation to be honest, fair, and straightforward without explaining the dire, if not non-existent, odds of challenging child custody in federal court." *Id.* The failure to disclose to Mrs. Bailey that even if the federal suit were successful, the state custody order would not be overturned was a significant and material fact that Respondent failed to disclose to Mrs. Bailey.

Disciplinary Counsel also argues that Respondent violated Rule 8.4(c) by fraudulently inducing Mrs. Bailey to pay the $2,500 under the false pretense of returning her children and then intentionally spending the funds before they were earned. ODC Br. to the Board at 18-19. 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 and quotation marks omitted). Unlike dishonesty, however, fraud requires a showing of intent to deceive or to defraud. *See In re Romansky*, 825 A.2d 311, 315 (D.C. 2003). Evidence of intent will almost always be circumstantial and can be

inferred by a respondent's behavior. *See In re Ukwu*, 926 A.2d 1106, 1116 (D.C. 2007) ("Intent must ordinarily be established by circumstantial evidence, and in assessing intent, the court must consider the entire context . . . . [I]t is generally in the interests of justice that the trier of fact consider the entire mosaic." (internal citation and quotation marks omitted)).

Respondent accepted the Baileys' fee on January 3, 2017 after misrepresenting his ability to return custody of their children. FF 10, 12, 14. Respondent immediately began transferring the Baileys' funds to his other accounts to pay for his own expenses before the fees were earned. FF 18-21 (detailing transactions occurring January 3-5, 2017), 25. Later in January 2017, Respondent hired an inexperienced paralegal student to research a complex custody issue and draft a federal complaint. FF 27-28, 31. The Hearing Committee found that although Respondent provided some suggestions, edits, and guidance on citation to applicable statutes, Mr. Mull was the lead person drafting the four relevant documents in the clients' file. FF 33-34. After the Baileys filed a disciplinary complaint, Respondent created invoice entries for work that was not performed and used an inflated billing rate to justify keeping the funds for himself. *See* FF 56-57. Compounding this conduct, Respondent thereafter did not refund the $2,500, even after receiving an email from Mrs. Bailey requesting that he return this sum. FF 51, 55. We find that this mosaic shows a clear and convincing picture that Respondent engaged in fraud when he intentionally took advantage of Mrs. Bailey by falsely convincing her that he could handle the custody case although he had no intent of

actually performing services on the matter or pursuing the representation in federal court, and that he did this so that he could improperly use the clients' funds for his own use.

For these reasons, the Board concludes that Disciplinary Counsel has proven, by clear and convincing evidence, that Respondent violated Rule 8.4(c) by engaging in dishonesty, fraud, deceit, and misrepresentation when convincing the Baileys to retain him to pursue a federal case for child custody then using the funds for his own use before abandoning the case. We also find a violation of Rule 8.4(c) based on Respondent's misrepresentations regarding the creation and content of his post-representation invoices (FF 56-58), and whether he had provided the invoices to the Baileys (FF 62-63).

E. Rule 1.5(a)

The Hearing Committee found that while there is some basis to conclude that the charged fee was *per se* unreasonable because Respondent failed to adequately explain the limitations of his practice, the approach he planned to take in a federal court action – and the result even if he was successful, there was no Rule 1.5(a) violation. HC Report at 31-32. The Hearing Committee concluded that "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" that was performed. *Id.*

Disciplinary Counsel argues that Respondent's fee was unreasonable *ab initio* because his proposed approach had no chance of success.[4] Even if Respondent believed that his "moonshot" federal claim might obtain the requested relief, it was unreasonable to charge the clients without first explaining that his plan had little, if any, chance of success. Disciplinary Counsel's argument is premised on the argument that Respondent deprived the Baileys of making an informed choice and thus charging any amount was unreasonable. Respondent does not specifically address this issue in his brief, but maintains that the clients wanted a "federal" lawyer to pursue civil rights claims.

We disagree with the Hearing Committee's analysis and conclusion, and find that Disciplinary Counsel proved a violation of Rule 1.5(a). We have concluded that Respondent failed to provide Mrs. Bailey with information sufficient for her to make an informed decision regarding his representation. *Supra* at pgs. 20-24 (Rule 1.4

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[4] Because Disciplinary Counsel's argument is that Respondent charged an unreasonable fee *ab initio* it does not address the factors generally used to analyze the reasonableness of a legal fee. Rule 1.5(a) provides that "[t]he 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.'"

violation). Respondent gave dishonest and deceitful assurances to Mrs. Bailey that he could return her children in order to induce her to pay his fees, although he had no intention of pursuing their case. *Supra* at pgs. 27-28 (Rule 8.4(c) violation). After obtaining the retainer, Respondent handed the matter over to a newly-hired, inexperienced legal assistant, who drafted a deficient complaint. In reviewing Respondent's lack of effort on behalf of the Baileys and his attempt to hide that fact with dishonest billing statements, it is clear that the fee he alleges was earned was inaccurately calculated. But the mosaic further shows that Respondent fraudulently charged a legal fee when he falsely convinced the client that he could handle the custody case although he had no intent of actually performing services. The purpose of his fraud was to improperly use the clients' funds for his own use. *Supra* at pgs. 29-31 (Rule 8.4(c) violation). In sum, Respondent dishonestly and fraudulently convinced the Baileys to enter into a retainer agreement and pay a $2,500 advanced fee for services that Respondent never intended to provide. Respondent did not provide any benefit to the Baileys in their quest for custody because the draft complaint was never completed or filed. We agree with Disciplinary Counsel that these facts establish that Respondent's fee was unreasonable *ab initio*, and violates Rule 1.5(a).

V. SANCTION

The Hearing Committee recommended that Respondent be disbarred for intentional misappropriation. Respondent argues that he was under "severe health and mental duress during" the relevant time period, which warrants consideration.

Respondent further objects to any immediate suspension, citing "due process consideration[s]" until "the Court makes its final rul[ing]." Resp. Br. to the Board at 4-5. Disciplinary Counsel supports the Hearing Committee's recommendation, but asks that Respondent's reinstatement be conditioned upon proof of restitution of the $2,500 legal fee, plus interest, to the clients. ODC Br. to the Board at 23-24.

A. Disbarment for Intentional Misappropriation

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) (per curiam) ("'[I]n 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.'" (alteration in original) (quoting *Addams*, 579 A.2d at 191)). A lesser sanction may be imposed if the respondent is entitled to mitigation of sanction pursuant to *In re Kersey*, 520 A.2d 321 (D.C. 1987). *See In re Merritt-Bagwell*, 122 A.3d 874, 875-76 (D.C. 2015) (per curiam) (disbarment stayed in favor of three years of probation). We agree with the Hearing Committee's sanction analysis and recommend that the Court disbar Respondent for intentional misappropriation.

B. *Kersey* Mitigation

Before the Hearing Committee Respondent sought *Kersey* mitigation, which means that he was required to prove

(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).

Respondent asserted that at the time of the misconduct, he was "operating under acute depression," and that uncontrolled diabetes and periods of hypoglycemia caused lapses in judgment, disorientation, memory loss and insomnia. HC Report at 52-53 (quoting FF 71). The Hearing Committee found that Respondent did not sustain his *Kersey* burden because he did not establish by clear and convincing evidence that he suffered from a disability at the time of the misconduct. While his employee's testimony tended to corroborate Respondent's timeline regarding the onset of the symptoms of his asserted disabilities, the only objective medical evidence he submitted postdated the conduct in question by many months. *Id.* at 53. The Hearing Committee did not consider the other *Kersey* factors, but noted that his mitigation witness was unable to confirm that Respondent's alleged disabilities were a substantial cause of his misconduct or that Respondent was substantially rehabilitated. *Id.* at 53-54.

Respondent asks that the Board consider his health, but does not specifically identify any errors in the Hearing Committee's *Kersey* mitigation analysis, or otherwise argue that there is clear and convincing evidence that he was suffering from a disability at the time of the misconduct. Disciplinary Counsel supports the

Hearing Committee's analysis, arguing that Respondent offered no supporting medical records or testimony from any treating physician or other health care professional to establish by clear and convincing evidence that he suffered from any disability during the relevant period. Respondent's misconduct with respect to the Baileys' representation occurred January through December 2017, and his misconduct during the disciplinary investigation occurred January through April 2018. The only medical records Respondent submitted were dated September 2018.

We agree with the Hearing Committee's findings as well as its conclusion that Respondent's lack of acceptance of any responsibility or recognition of the facts that transpired further undercuts his failure to meet his burden to establish that he is entitled to *Kersey* mitigation.

C. Restitution

Disciplinary Counsel argues that the Board should also recommend that Respondent be ordered to pay restitution to Mrs. Bailey in the amount of $2,500, plus interest at the statutory rate. There appear to be three grounds asserted for this request. First, that restitution should be ordered based on fact that the $2,500 was an unreasonable fee *ab initio* and/or Respondent failed to perform the work contracted for, either of which violates Rule 1.5(a). Second, that the taking of the $2,500 was a result of at least reckless dishonesty in violation of Rule 8.4(c). Third, that the failure to explain the limitations of the representation to the Baileys violates Rule 1.4(b). Respondent did not file a response to the restitution argument.

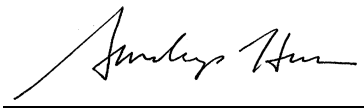
Under D.C. Bar R. XI, § 3(b), "the Court or the Board may require an attorney to make restitution . . . to persons financially injured by the attorney's conduct . . . as a condition of probation or of reinstatement . . . ." Restitution is designed to restore to the client any unearned benefit that the client has conferred on the attorney. *In re Robertson*, 612 A.2d 1236, 1240-41 (D.C. 1992) (Restitution is "a payment by the respondent attorney reimbursing a former client for the money, interest, or thing of value that the client has paid or entrusted to the lawyer in the course of the representation."); *see also In re Hager*, 812 A.2d 904, 923 (D.C. 2002) (restitution prevents unjust enrichment). Where restitution is ordered, the respondent is required to pay six percent interest per annum. *See In re Edwards*, 990 A.2d 501, 508 (D.C. 2010).

We agree with Disciplinary Counsel that the $2,500 advanced fee the Baileys paid was an unreasonable fee *ab initio*. Respondent obtained the funds through dishonest and fraudulent means with the intent of using the funds for his own purposes, violating Rules 1.15(a) and 8.4(c). The $2,500 he collected for his services was far more than appropriate in light of the work he performed, the lack of value he provided to Mrs. Bailey, and the incompetent legal services he provided to her. Under these circumstances, we recommend that the Court require Respondent to pay restitution to Mrs. Bailey in the amount of $2,500 with interest at the statutory rate of 6% per annum, accruing from January 3, 2017, as a condition of reinstatement.

VI. CONCLUSION

For the foregoing reasons, the Board recommends that the Court conclude that Disciplinary Counsel has proven by clear and convincing evidence that Respondent violated Rules 1.4(b), 1.5(a), 1.15(a), 1.15(e), 8.1(a) and 8.4(c), and should be disbarred for intentional misappropriation. We also recommend that the Court require that as a condition of reinstatement Respondent be required to pay $2,500 in restitution to Mrs. Bailey (or the Client Security Trust Fund) at the 6% legal rate of interest calculated from the date of payment, January 3, 2017. 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: 

Sundeep Hora

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

In the Indiana Supreme Court

In the Matter of: Mark Small,
Respondent

Supreme Court Case No.
19S-DI-647

Published Order Revoking Probation and Imposing Suspension

On May 20, 2021, this Court entered an order suspending Respondent from the practice of law for a period of one year, all stayed subject to completion of at least three years of probation. Our order required as a condition of probation that Respondent not violate the Rules of Professional Conduct during his probation. Our order further provided that if Respondent violated the terms of his probation, his stayed suspension shall be actively served without automatic reinstatement.

On January 13, 2023, the Commission filed a verified motion to revoke Respondent's probation, asserting Respondent violated Professional Conduct Rules 1.3 and 1.4 in connection with his representation of an incarcerated client whose mother ("Mother") retained Respondent to file a petition for certiorari on her son's behalf. Respondent, by counsel, has filed a verified response.

The material facts are not in dispute. The petition for certiorari was due on March 3, 2022. Pursuant to United States Supreme Court Rule 13(5), an application for extension of this deadline could be granted for good cause and "must be filed . . . at least 10 days before the date the petition is due, except in extraordinary circumstances." Despite timely reminders from Mother, including one in which Mother specifically identified for Respondent the 10-day deadline for the extension request, Respondent failed to file an extension request by that deadline. Respondent did not file an extension request until March 3, the date the certiorari petition was due and the last date an extension request could be made based on "extraordinary circumstances." The extension request was denied, and no certiorari petition was filed on the client's behalf.

Mother texted Respondent on February 18 and February 24 asking for a copy of the extension request Respondent had indicated he would file. Respondent did not respond to either of these inquiries. Mother twice texted Respondent on March 8, once in the morning and once in the evening, asking that Respondent call her and expressing concern that she had not heard from Respondent. Respondent likewise did not respond to either of these inquiries. Respondent asserts he finally contacted Mother on March 10 to advise her the extension request was denied and no certiorari petition was filed. Respondent claims he offered to refund the $7,500 retainer

Mother had paid once he could obtain the funds, but Respondent makes no claim that he has actually refunded that money.

Respondent's characterization of this as a "single calendar error" ignores the litany of similar appellate errors and pattern of misconduct giving rise to his suspension and probation. *See Matter of Small*, 167 N.E.3d 1160 (Ind. 2021). Simply put, Respondent was placed on probation for the precise purpose of ensuring that his neglect of appellate matters would not continue. Respondent's attempted diminution of Mother's requests for information is similarly unavailing. The requests were reasonable under the circumstances, even if made by text message (a medium of communication Respondent apparently invited), and Respondent's failure to respond in any manner whatsoever during this critical three-week window—even simply to acknowledge receipt of the requests and advise when a response would be forthcoming—fell short of what our professional conduct rules require. Accordingly, the Court finds Respondent violated Professional Conduct Rules 1.3 and 1.4 and, hence, has violated the terms of his probation.

Being duly advised, the Court GRANTS the Commission's motion and revokes Respondent's probation. **Respondent shall be suspended from the practice of law for a period of not less than one year, without automatic reinstatement, beginning April 20, 2023.** Respondent shall not undertake any new legal matters between service of this order and the effective date of the suspension, and Respondent shall fulfill all the duties of a suspended attorney under Admission and Discipline Rule 23(26). At the conclusion of the minimum period of suspension, Respondent may petition this Court for reinstatement to the practice of law in this state, provided Respondent pays the costs of this proceeding, fulfills the duties of a suspended attorney, and satisfies the requirements for reinstatement of Admission and Discipline Rule 23(18). Reinstatement is discretionary and requires clear and convincing evidence of the attorney's remorse, rehabilitation, and fitness to practice law.

The costs of this proceeding are assessed against Respondent.

Done at Indianapolis, Indiana, on 3/16/2023.

Loretta H. Rush
Chief Justice of Indiana

All Justices concur.

Wisconsin Ethics Opinion E-09-03: Communications Concerning Attorneys' Fees and Expenses

Revised April 17, 2020

Synopsis:

In every representation, a lawyer must inform the client of the scope of the representation, the basis or rate of the lawyer's fee and any expenses for which the client will be responsible. This communication should be sufficient to enable the client to readily determine the matter, or nature of an on-going lawyer-client relationship, the method by which the lawyer's fee will be calculated and the types of costs and expenses for which the client will be responsible. This communication must be in writing whenever it is reasonably foreseeable that the total cost to the client will exceed $1000 and agreements to limit the scope of the representation must usually be in writing. Contingent fee agreements, however, must always be in writing and signed by the client. The initial communication with the client should also inform the client if the lawyer intends to charge a reasonable rate of interest on delinquent balances and whether the lawyer anticipates that the lawyer's rates may increase during the course of the representation. This opinion supersedes E-91-2, which is hereby withdrawn.

OPINION

The initial correspondence sent to a client after consultation about representation is an important communication about the lawyer and the lawyer's services. In addition to fulfilling the lawyer's obligations under the Rules of Professional Conduct (the "Rules"), the communication can be used to establish a successful working relationship between the lawyer and the client. Accordingly, careful consideration should be given to the content of the initial communication.

This opinion discusses the parts SCR 20:1.5 which set forth a lawyer's obligations in communicating with a client concerning fees and expenses.[1] The Rule sets forth the information that must be communicated to a client with respect to a lawyer's fees and describes the circumstances in which information may be conveyed orally or must be conveyed in writing or in

[1] The provisions of SCR 20:1.5 that govern how a lawyer handles fee payments, such as SCR 20:1.5(f), which requires lawyers to place advanced fees in trust, and SCR 20:1.5(g), which permits a lawyer to place advanced fees in an operating account if the lawyer complies with the alternative protection provisions, are beyond the scope of this opinion.

a writing signed by the client. Other rules, such as SCR 20:1.0 and SCR 20:1.2, which contain important definitions, are relevant and will be discussed herein.

I. Information that Must be Communicated to the Client.

SCR 20:1.5(b)(1) requires that: (1) the scope of the representation; (2) the basis or rate of the fee; and (3) the expenses for which the client will be responsible be communicated to the client before or within a reasonable time after commencing the representation. The only exception to this requirement **in SCR 20:1.5** is when the lawyer will charge a regularly represented client on the same basis or rate as in the past. Each of the required elements of the communication the lawyer must convey to the client merits further discussion.

A. Scope of the Representation.

The communication to the client concerning the scope of the representation should be a clear description of the services and matter for which the lawyer has been retained. The Rule does not explicitly require a particular degree of specificity. The Committee believes, however, that the Rule requires a lawyer to provide enough detail to enable the client to identify the particular matter involved. In many cases, the description of the scope of a representation may fulfill this requirement while being brief. Accordingly, a description such as, "Legal representation in connection with contract dispute with party X concerning delivery of widgets " or, "Legal representation in connection with automobile accident in X county on or about date Y" should be sufficient for straight forward matters. An estate planning matter could be described as, "Preparation of Will" or more generally as, "Preparation of estate plan."

Such a brief description, however, may not be possible when a lawyer's relationship with a client is not limited to a single discrete matter. If there is not a particular matter or case which can be easily identified, the lawyer should focus on providing as clear a description of the lawyer-client relationship as possible. Again, this description may be fairly brief and meet the requirements of the Rule. So, for example, if the lawyer is retained to handle general representation of a business client, the description could state, for example, "Business-related matters as may arise from time to time and as requested by you." Or a description of may consist of "Legal advice and services in connection with business matters as requested by you."

While the Committee believes that fairly brief descriptions may usually suffice to fulfill a lawyer's obligations under SCR 20:1.5(b)(1), lawyers may wish to provide greater detail, particularly with respect to services not within the scope of the representation. Engagement letters are contracts with clients, and ambiguities will be construed against the lawyer/drafter, and thus lawyers should carefully consider whether the language reflects the actual intent of the parties. If, for example, a lawyer intends to provide general transactional, but not litigation, services to a business client, or a lawyer may wish to agree to represent a client on a criminal charge at trial, but not on any possible appeal, such exclusions should be included in the description of the engagement. Care should also be taken to avoid descriptions that might imply

a future obligation to monitor the client's estate plan, for example, "General Estate Planning", unless that is what is intended.

SCR 20:1.2(c) permits a lawyer to limit the scope of representation if the limitation is "reasonable under the circumstances and the client gives informed consent. The client's informed consent must be in writing except as set forth in SCR 20:1.2(c)(1)."[2] When undertaking a limited scope representation, it is particularly important for the lawyer to clearly communicate to the client the limits of the representation. In most circumstances, in a limited scope representation it will be necessary for the lawyer to inform the client what services the lawyer will not provide to the client. This is because the representation is often limited in a manner that varies from what a client might typically expect, and this information must be communicated to the client. For example, "legal representation through negotiation and sentencing (but not including trial) in connection with pending OWI charge." Even when an oral communication concerning fees and costs is permitted, a lawyer should be careful to observe the requirements of SCR 20:1.2(c) that client informed consent to limited scope representation be in writing in most circumstances.

B. The Basis or Rate of the Fee.

SCR 20:1.5 provides no explanation as to the detail that must be included in a description of the basis or rate of the lawyer's fee. The Committee believes that the Rule requires the information to be sufficient to enable the client to understand how the fee will be calculated, and that it should be communicated in a clear and easily-understood manner. The basis or rate of the fee might be a specified hourly charge, a flat fee, a percentage of the amount recovered or a description of a set of factors on which the fee will be based. *See Restatement (Third) of The Law Governing Lawyers*, § 38, comment b (2001).

In setting the basis or rate of the fee, a lawyer must comply with SCR 20:1.5(a), which prohibits a lawyer from making an agreement for, charging, or collecting an unreasonable fee or an unreasonable amount for expenses. SCR 20:1.5(a) provides that the factors to be considered in determining the reasonableness of the 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 exceptions to the requirement that the clients informed consent be in writing are set forth in SCR 20:1.2(c)(1) as follows: "The client's informed consent need not be given in writing if: a. the representation of the client consists solely of telephone consultation; b. the representation is provided by a lawyer employed by or participating in a program sponsored by a nonprofit organization, a bar association, an accredited law school, or a court and the lawyer's representation consists solely of providing information and advice or the preparation of court-approved legal forms; c. the court appoints the lawyer for a limited purpose that is set forth in the appointment order; d. the representation is provided by the state public defender pursuant to Ch. 977, stats., including representation provided by a private attorney pursuant to an appointment by the state public defender; or e. the representation is provided to an existing client pursuant to an existing lawyer-client relationship.

(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 the similar legal services;

(4) the amount involved and the results obtained;

(5) the time 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."[3]

The ABA Comments[4] caution that, "[a] lawyer should not exploit the fee arrangement based primarily on hourly charges by using wasteful procedures." SCR 20:1.5, ABA Comment [5]. Fees that the Wisconsin Supreme Court has ruled to be unreasonable include fees that exceed a statutorily permitted fee (*In re Estate of Konopka*, 175 Wis. 2d 100, 498 N.W.2d 853 (Ct. App. 1993)), fees that were inflated to make up for fees lost when the client successfully challenged a previous billing (*In re Glesner*, 2000 WI 18, 233 Wis. 2d 35, 606 N.W.2d 173), and fees charged for retrieving the clients' file to answer inquiries when they filed a grievance against the lawyer (*In re Kitchen*, 2004 WI 83, 273 Wis. 2d 279, 682 N.W.2d 780).

1. Anticipated changes in the basis or rate of the fee.

The Wisconsin Committee Comment accompanying SCR 20:1.5 states that "[a] lawyer should advise the client at the time of commencement of representation of the likelihood of a periodic change in the basis or rate of the fee or expenses that will be charged to the client." Not disclosing, for example, that hourly rates may be adjusted annually may run afoul of SCR 20:1.5(b)(1)'s requirement that the client be informed of the basis of the rate or fee.

As discussed below, changes in the basis or rate of the fee also must be communicated to the client when they actually occur (*see* Section VI.A, *infra).*

2. Interest charges.

The rules do not prohibit a lawyer from charging a reasonable rate of interest on outstanding balances for fees or costs. If the lawyer intends to charge interest on unpaid balances, that information must be part of the written communication to the client regarding fees or must be clearly communicated to the client at the beginning of the representation if a written communication is not required. A lawyer who imposes interest charges absent prior notification to the client runs the risk of being found to have violated SCR 20:1.5(b)(1), concerning

[3] If the representation contemplates a division of a fee between lawyers who are not in the same firm, SCR 20:1.5(e) comes into play. The requirements of that section are beyond the scope of this Opinion.

[4] SCR 20:1.5 has both a Wisconsin Committee Comment and an ABA Comment,

communication as to the basis or rate of the fee, and to have charged an unreasonable fee in violation of SCR 20:1.5(a).[5] *See* Wisconsin Ethics Op. E-90-4.

C. Expenses for which the Client will be Responsible.

If the client will be charged for photocopying costs, court reporter fees, filing fees and the like, the communication at the outset of the representation must inform the client of that fact. The rule does not require that the specific amount of the costs that will be charged to the client (i.e., X¢/page for photocopying) be identified in advance, but that information should be provided if known.[6]

SCR 20:1.5(a) prohibits a lawyer from charging or collecting an unreasonable amount for expenses. The ABA Comment accompanying SCR 20:1.5 states that a lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges. According to the comment, this may be done "either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer." SCR 20:1.5, ABA Comment [1]. Marking up expenses, such as fees for photocopying, with the intention to use such expenses as a source of profit for the lawyer, is not permitted. See ABA Formal Ethics Op. 93-379 (1993).

II. Requirement of a Written Communication.

Whether the information the lawyer must provide the client regarding the scope of the representation, fees and expenses may be communicated orally or whether it must be communicated in writing depends on the amount of the fee and expenses that are involved and whether or not the fee is contingent on the outcome of the matter.[7]

[5] It is also unlikely that the lawyer would be able to collect interest charges unless such charges were part of the original engagement agreement. See *Ziolkowski v. Great Lakes Dart Manufacturing, Inc.*, 2011 WI App. 11, 794 N.W.2d 253.

[6] The absence of a requirement that the specific amount for various expenses be disclosed in advance reflects the fact that many types of expenses, such as expert witness fees, cannot be known in advance.

[7] Lawyers must also remain aware of the requirement for written confirmation of agreements to limit the scope of representation pursuant to SCR 20:1.2(c).

A. Representation not Involving a Contingent Fee.

1. Matters for which it is reasonably foreseeable that the total cost of the representation will be greater than $1,000.

A written communication to the client *is* required if it is "reasonably foreseeable" that the total cost of representation to the client, including attorney's fees, will be more than $1,000. SCR 20:1.5(b)(1).[8]

2. Matters for which it is reasonably foreseeable that the total cost of the representation to the client will be $1,000 or less.

If it is reasonably foreseeable that the total cost of the representation will be $1,000 or less, the communication to the client regarding the scope of the representation, fees and expenses need not be in writing. Thus, a lawyer who intends to charge $500 for a simple matter still must inform the client of the scope of the representation, the basis or rate of the fee, and any expenses for which the client will be responsible, but may do so orally. A written communication conveying the same information would, of course, also comply with the Rule.[9]

What if the total cost of the representation was anticipated to be $1,000 or less at the outset of the representation, but then exceeds $1,000 during the course of representation? SCR 20:1.5 does not explicitly address that scenario. The Rule's reference to what is "reasonably foreseeable," arguably implies that the appropriate reference point is the commencement of the representation. On the other hand, once the cost exceeds $1,000, it is certainly foreseeable that the total cost will be even higher than that by the time the representation is concluded. Further, the clear intent of the Rule is to encourage, and in most cases require, lawyers to provide information with respect to fees and costs to clients in writing. Accordingly, in the opinion of the Committee, compliance with the Rule would require a written communication concerning fees and expenses at such time that the lawyer anticipates the total cost to exceed $1,000, regardless of whether this occurred at the commencement of the representation or while the representation is in progress.

[8] The term "total cost" refers to fees charged by the lawyer or firm, costs billed by the lawyer or firm to the client and costs for which the client will be directly responsible.

[9] As the ABA Comment points out: "A written statement concerning the terms of the engagement reduces the possibility of misunderstanding." SCR 20:1.5, ABA Comment [2].

B. Representation Involving a Contingent Fee.

Pursuant to SCR 20:1.5(c), a contingent fee agreement must be in a writing signed by the client and must state:

(1) "[T]he method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal;"
(2) "litigation and other expenses to be deducted from the recovery;" and
(3) "whether such expenses are to be deducted before or after the contingent fee is calculated."
(4) The agreement also "must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party." SCR 20:1.5(c).

In accordance with SCR 20:1.5(b)(1), the contingent fee agreement must also explain the scope of the representation. This is particularly important if the lawyer's representation is limited, for example, to handling the matter through settlement or trial, but not on appeal.

When the contingent fee matter is concluded, SCR 20:1.5(c) requires the lawyer to provide the client with a written statement:

(1) "[S]tating the outcome of the matter;" and
(2) "if there is a recovery, showing the remittance to the client and the method of its determination."

Note that SCR 20:1.5(d) prohibits a lawyer from entering into a contingent fee agreement in certain types of actions affecting the family or when representing a defendant in a criminal case or any proceeding that could result in deprivation of liberty.

III. Communication with Regularly Represented Clients.

SCR 20:1.5(b)(1) does not require a communication with the client about the scope of the representation or the basis or rate of the fee and the expenses for which the client is responsible if the lawyer will be charging "a regularly represented client on the same basis or rate as in the past." Neither the rule nor the comments define "regularly represented client." The ABA Comment, however, states that "[w]hen the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible." SCR 20:1.5, ABA Comment [2]. This suggests that sporadic or infrequent representation that is unlikely to have produced such an understanding will not constitute "regular representation." It further suggests that the question does not necessarily turn on the number of matters or contacts within a certain time period, but rather on the nature of the relationship between the lawyer and the client.

The question the lawyer should consider is whether it is reasonable for the lawyer to conclude that the client understands that the client will be billed on the same basis as in the past. The answer to this question depends on the context. Clients with differing levels of sophistication in dealing with lawyers, for example, may have differing conclusions regarding the concept of "regular" representation. The lawyer should be sensitive to this when deciding whether the basis or rate of the fee should be communicated to the client when additional representation is undertaken.

IV. Timing of the Communication.

SCR 20:1.5(b)(1) requires that the communication concerning the scope of the representation, the basis or rate of the fee, and the expenses for which the client will be responsible be communicated to the client "before or within a reasonable time after commencing the representation." A lawyer accordingly may start working for the client and may provide the client with the written communication concerning fees within a reasonable time thereafter. What constitutes a "reasonable time" after the representation has begun will depend on the circumstance. SCR 20:1.5 contemplates, however, that the client be advised of important information concerning the representation before the matter proceeds very far and therefore should be done as soon as reasonably practical. In this way, the client will not be inconvenienced unnecessarily if the client decides to hire a different lawyer after considering the information. *See Restatement (Third) of The Law Governing Lawyers*, § 38, comment b (2001).

V. What Constitutes a Writing?

When information concerning fees and expenses must be communicated "in writing," how may this be accomplished? SCR 20:1.0(q) defines a "writing" as "a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, Photostating, photography, audio or video recording and email." Thus, a writing required by SCR 20:1.5 need not be in the form of a "fee agreement" (indeed, the rule does not use that term), but could be something as simple as an email, a letter or memorandum, or as suggested by the ABA Comment, "a copy of the lawyer's customary fee arrangements." SCR 20:1.5, ABA Comment [2]. Arguably, a voicemail message falls within the definition of a "writing," although using a voicemail message as a "writing" undercuts the benefits of documentation and retention contemplated by the rule.

VI. Other Information that Must be Communicated in Writing.

A. Changes in the Basis or Rate of the Fee.

Regardless of whether the initial communication concerning fees was required to be in writing, SCR 20:1.5(b)(1) requires that any changes in the basis or rate of the fee or expenses be communicated to the client in writing. There are no exceptions to this requirement. Thus, even in the case of a regularly represented client as to whom no communication regarding fees and expenses was required upon the commencement of additional representation, information

concerning a change in the basis or rate of the fee (for example, an increase in hourly rates) must be communicated to the client in writing. The Wisconsin Committee Comment to SCR 20:1.5 explains this requirement as it relates to a regularly represented client:

> In instances when a lawyer has regularly represented a client, any changes in the basis or rate of the fee or expenses may be communicated in writing to the client by a proper reference on the periodic billing statement provided to the client within a reasonable time after the basis or rate of the fee or expenses has been changed. The communication to the client through the billing statement should clearly indicate that the change in the basis or rate of the fee or expenses has occurred along with an indication of the new basis or rate of the fee or expenses.

The Wisconsin Committee Comment thus makes it clear that a change in rates does not necessarily require a separate written notification to the client, but it does require at least a clear statement on a bill sent to the client notifying the client of the change and indicating the new basis or rate of the fee or expenses.

B. Purpose and Effect of any Retainer or Advance Fee.

SCR 20:1.5(b)(2) states that if the total cost of representation to the client, including attorney's fees, is more than $1,000, the "purpose and effect" of any retainer or advance fee that is paid to the lawyer shall be communicated to the client in writing. According to the Wisconsin Committee Comment accompanying SCR 20:1.5, "the lawyer should identify whether any portion, and if so what portion, of the fee is a retainer." A "retainer" is defined in SCR 20:1.0(mm) as:

> [A]n amount paid specifically and solely to secure the availability of a lawyer to perform services on behalf of the client, whether designated a "retainer," "general retainer," "engagement retainer," "reservation fee," "availability fee," or any other characterization. This amount does not constitute payment for any specific legal services, whether past, present or future and may not be billed against for fees or costs at any point. A retainer becomes the property of the lawyer upon receipt, but is subject to the requirements of SCR 20:1.5 and SCR 20:1.16(d).

"Advanced fee" is defined in SCR 20:1.0(ag) as:

> [A]n amount paid to a lawyer in contemplation of future services, which will be earned at an agreed-upon basis, whether hourly, flat, or other basis. Any amount paid to a lawyer in contemplation of future services whether on an hourly, flat or other basis, is an

advanced fee regardless of whether that fee is characterized as an "advanced fee," "minimum fee," "nonrefundable fee," or any other characterization. Advanced fees are subject to the requirements of SCR 20:1.5, SCR 20:1.15(b)(4) or (4m), SCR 20:1.15(e)(4)h, SCR 20:1.15(g), and SCR 20:1.16(d).

VII. When Must the Writing be Signed by the Client?

SCR 20:1.5 does not require the client's signature on a writing which communicates the information required by SCR 20:1.5(b)(1) (the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible). Contingent fee agreements, however, must be signed by the client. A writing signed by the client is also required in certain situations involving a division of fees between lawyers who are not in the same firm. *See* SCR 20:1.5(e). Pursuant to SCR 20:1.0(q), a "signed" writing includes "an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing."

VIII. Responding to a Client's Request for Information Concerning Fees and Expenses.

SCR 20:1.5(b)(3) states that "[a] lawyer shall promptly respond to a client's request for information concerning fees and expenses."

In summary, a good working relationship with a client requires proper communication concerning the fees and expenses for which the client will be responsible. SCR 20:1.5 is designed to ensure that this communication occurs.

Wisconsin Formal Ethics Opinion E-91-2 is hereby withdrawn.