Issued
July 31, 2018

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
BERNARD A. GRAY, SR.,	:	
	:	Board Docket No. 16-BD-045
Respondent.	:	Bar Docket No. 2015-D349
	:	
A Member of the Bar of the District	:	
of Columbia Court of Appeals	:	
(Bar Registration No. 955013)	:	

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

I. INTRODUCTION

An Ad Hoc Hearing Committee found by clear and convincing evidence that Respondent Bernard A. Gray, Sr. violated Rule 1.15(a) of the District of Columbia Rules of Professional Conduct ("Rules") by commingling personal and client funds in a trust account, failing to maintain adequate records of client funds, and negligently misappropriating funds belonging to two clients. The Committee also concluded that there was insufficient evidence to find a Rule 8.4(d) violation charged by Disciplinary Counsel, finding that Respondent's failure to maintain records required by Rule 1.15(a) does not alone constitute interference with the administration of justice within the meaning of Rule 8.4(d). The Committee recommended a six-month suspension with reinstatement conditioned on successful completion of Disciplinary Counsel-approved ethics-related continuing legal education courses focusing on the care and custody of entrusted funds and the management of a law office.[1]

In his exceptions to the Board, Respondent agrees with the Committee's factual findings (minor exceptions noted below) and conclusions, but asks the Board to recommend a suspension less than six months and without the conditions on reinstatement. Disciplinary Counsel also accepts the Committee's factual findings but takes exception to the negligent misappropriation finding, arguing that Respondent's misconduct was non-negligent misappropriation and urging the Board to recommend disbarment.

The Committee's factual findings are supported by substantial evidence and we adopt them as our own. Board Rule 13.7; *In re Cleaver-Bascombe*, 986 A.2d 1191, 1194 (D.C. 2010) (per curiam) ("'[T]he Board is oblig[ated] 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))). In addition, following our review of the parties' arguments and the record, we agree with the Committee's conclusion that Respondent violated Rule 1.15(a). Because neither party challenged the Committee's conclusion that there was insufficient evidence to prove a Rule 8.4(d) violation, we adopt that conclusion as well.

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[1] The following citation protocols are used: "HC Rpt." refers to the Hearing Committee Report and Recommendation; "FF" refers to the Hearing Committee's proposed Findings of Fact; "Tr." refers to the consecutively paginated transcript of the disciplinary hearing; "DX" and "RX" refer to Disciplinary Counsel's and Respondent's exhibits; "R. Br." refers to Respondent's Brief to the Board; "ODC Br." refers to Disciplinary Counsel's Brief to the Board.

Whether Respondent's misappropriation of client funds was negligent or reckless is a close call. Respondent undeniably was inattentive to his trust account for at least eight years; he commingled personal and client funds, failed to maintain records, and treated the account as a personal account. But the Committee found that his conduct was "simply negligent" because of the nature of his practice and because they found he acted in good faith—believing that the funds belonged to him. We disagree with the Committee and find that the misappropriation was reckless. *See In re Micheel*, 610 A.2d 231, 235 (D.C. 1992) (holding that the finding that the misappropriation was negligent or reckless is an "'ultimate fact'—*i.e.*, a conclusion of law" and the "Board owed no deference to the hearing committee's conclusion that [respondent] was merely negligent").

II. FINDINGS OF FACT

Respondent has been a sole practitioner in the District of Columbia for over 40 years. FF 2. His practice was mainly landlord-tenant matters, and his clients often were low or moderate income tenants or small landlords. FF 2; HC Rpt. 40. He used retainer agreements that required an initial payment ($100 to $1,500) but allowed his clients to pay in installments. FF 3. His hourly rate ranged from $75 to $125; but since 2007, he has not meaningfully tracked his hours or billed his clients. FF 3-4. He believes he has unpaid balances in at least half of his cases. FF 4.

For most clients, Respondent earned the retainer fee before receiving it, or shortly thereafter. FF 7, 8. He nonetheless deposited all retainer fees into his client trust account and did not withdraw earned fees until he needed them for personal or professional expenses. FF 7, 9. Respondent can only recall four instances in his career when he received "pure" client funds, *i.e.*, funds not part of an advance fee but which were the proceeds of a sale of property or a judgment obtained on behalf of a client. FF 8. Two of those instances are part of this disciplinary proceeding. There is no evidence in the record that Respondent treated "pure" client funds differently from the fees he earned but also maintained in the trust account.

Respondent knew that unearned fees or other funds belonging to his clients needed to be in a trust account, and he understood that his funds and client funds were to be maintained separately. FF 6. He nonetheless "did not believe that he was *required* to withdraw retainer fees from the trust account when earned"; but "believed he was *permitted* to withdraw these fees when earned." FF 7 (emphasis in original).

Respondent also knew that he needed to maintain up-to-date records of his trust account, and until 2007, he maintained a computerized record of his account. FF 10. Beginning in 2007, Respondent stopped tracking the funds in his trust account and his record-keeping became "haphazard and incomplete." FF 12, n.5. Respondent did not reconcile his bank statements with the checks he wrote, and indeed he rarely looked at the bank statements. FF 10. He explained that he stopped tracking funds in the trust account "because his practice became too busy and due to some health challenges," FF 57, but he believed that he had "'a reasonably accurate understanding'" of the amount of unearned fees held in trust. FF 11 (quoting Tr. 184-85). The records he maintained, however, were "confused, and provided a limited basis for claiming any specific amount earned." FF 12. The Committee found it was "impossible" to "reconstruct[] an accurate accounting of when Respondent earned fees based on [his] records . . . ." FF 12, n.5. In addition to his trust account, Respondent had an operating account, but he often used the funds from the trust account "to pay client costs (like motions or other filings) from his earned fees, rather than transferring the earnings into his operating account and advancing costs from there as they arose." FF 13.

<u>Alice Walker:</u>

Ms. Walker was a personal representative of a family estate; Respondent represented her in the sale of real property belonging to the estate. Respondent deposited the proceeds of the sale, $121,133.99, into his trust account in April 2013. FF 16. Consistent with Ms. Walker's instructions, Respondent disbursed checks to multiple beneficiaries. FF 16. Respondent chose not to withdraw his fees, but kept his own money in the trust account along with the remaining $10,000 of the proceeds, which Ms. Walker asked Respondent to hold in trust, in case a former attorney asserted a claim for fees. FF 18. The $10,000 should have remained in the account from April 2013 through July 2016. *Id.*; Tr. 383-85, 399. In addition, one of the disbursement checks written to Anthony Thomas, for $986.25, was not cashed, so the trust account should have contained an additional $986.25 of Walker funds. FF 19, 21.[2]

[2] Respondent objects to FF 24 as inconsistent with FF 17. R. Br. 19-20. Finding 24 states that Respondent "never independently provided [Ms. Walker] a distribution sheet to show how and where the funds went," and FF 17 states "Respondent prepared a final distribution sheet

From July 2014 through March 2015, Respondent spent almost all of the nearly $11,000 Walker funds. FF 25 ($1,688.85 remained). Respondent forgot that he was holding the Walker funds in trust and did not discover the misappropriation until after the Artis overdraft (explained below). FF 11, 55, 62-63. After the Artis overdraft, and while Disciplinary Counsel was investigating that matter, Respondent

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labeled 'Fin[d] Report' based on his final instructions received from Ms. Walker and sent it to her." *See* FF 17 (citing RX 31). The two findings are not inconsistent. Respondent acknowledged that he did not personally prepare a distribution sheet for Ms. Walker:

> Q And where is that reflected in your distribution sheet? Did you prepare one?
>
> A No, I didn't. I did it at her direction, and her -- and I simply took her word that that's what she wanted me to do.
>
> Q And is there a reason you did not prepare a distribution sheet for your client?
>
> A I did not prepare it. She prepared it. . . .
>
> Q Is there a reason –
>
> A I did not do it at all.
>
> Q Is there a reason that you did not?
>
> A Yes.
>
> Q And what is that?
>
> A Because she was doing it.

Tr. 126. Respondent also testified that he provided Ms. Walker a computer printout of the checks (the "Find Report") that he wrote based on her instructions. Tr. 127-32 (referring to RX 31—the computer printout). Thus, both findings are based on the evidence. Respondent relied on Ms. Walker's calculations to distribute the funds and provided her with a computer printout confirming that the checks were sent, but he did not "independently" prepare a distribution sheet for her. More importantly, these two facts are immaterial to the charges in this matter, as the Committee noted, whether Respondent provided the printout to Ms. Walker, a fact the Committee credited from his testimony, is "trivial and non-essential." FF 17, n.7. We agree and find no reason to disturb the Committee's finding 17 or 24.

reviewed his trust account, learned of the Walker misappropriation, and in July 2016 reported it to the Office of Disciplinary Counsel. FF 55, 62-63. Because the trust account had insufficient funds at that time, Respondent used personal funds to issue a $10,000 check to Ms. Walker. FF 54-55. He also reported in his post-hearing brief that a check for $986.25 was issued from the trust account to Mr. Thomas. FF 55, n.12.

<u>Stephanie Artis</u>:

Ms. Artis was a long-standing client of Respondent, with two matters pending in 2015: a civil action filed by her against her landlord and a landlord-tenant case filed by her landlord against her for rent. FF 26-27. Ms. Artis received an $8,381.49 judgment against the landlord in the civil action, and the landlord issued two checks. The first, dated March 26, 2015, paid $8,000 of the judgment, and the second, dated April 27, 2015, paid the remaining $381.49. FF 28.

On April 30, 2015, Respondent deposited the $8,000 check into his trust account and immediately withdrew $500 and gave it to Ms. Artis. FF 29. Thereafter, the trust account should have contained $7,500 of Ms. Artis's funds. FF 29.

The landlord-tenant matter filed by the landlord ultimately settled, and Ms. Artis owed her landlord $3,848 in back rent that she wanted paid from the funds held in trust by Respondent. FF 32. On October 21, 2015, Respondent wrote a check for the back rent and delivered it to the landlord's attorney. *Id*. When the check was written, there was $9,295.85 in the trust account, which was sufficient to cover the check written to Ms. Artis's landlord but was insufficient to cover all of the entrusted funds held for Ms. Artis's landlord, Ms. Walker, and Mr. Thomas, which totaled $14,834.25. FF 34 ($3,848 + $10,986.25 = $14,834.25).[3]

The second check from the judgment for $381.49 was deposited into the trust account around October 21, 2015, but was not posted to the account until October 26. FF 35. On October 29, 2015, without verifying that the check to the landlord had been paid, Respondent checked the balance of the account, learned it was over $9,000, and withdrew $9,000 for personal reasons. FF 37. The following day, the check to the landlord was presented for payment, but because the trust account did not have sufficient funds, the check was dishonored. FF 38. Respondent learned of the insufficient funds and purchased a cashier's check with personal funds, but the landlord refused to accept it because the settlement deadline had lapsed and the agreement allowed him to possess the property. FF 39. Respondent sought and was granted leave of the court to pay the back rent late. *Id*. Because the court granted Respondent leave to late pay the landlord, Ms. Artis was not harmed. *Id*. Shortly before this disciplinary hearing, Respondent, for the first time, informed Ms. Artis about the bounced check and late payment to her landlord. FF 38-39.

On November 16, 2015, Ms. Artis provided Respondent with the breakdown of her funds, which showed $2,831 for Respondent's fee, and an amount of $1,152

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[3] As of October 21, 2015, the Committee found that the trust account should have contained $3,848 in back rent for Ms. Artis's landlord. That left an additional $3,652 in settlement funds that arguably should have remained in trust as well. *See* FF 34. However, the evidence is unclear as to how Respondent was supposed to handle the remaining funds between the settlement date and November 16, 2015, when Ms. Artis sent Respondent a breakdown of how she wanted them to be distributed. *See* FF 40. Therefore, clear and convincing evidence shows that *at least* $3,848 worth of entrusted funds should have been in the account on behalf of Ms. Artis at that time.

that would be paid to her given Respondent's subsequent agreement to take a reduced fee. FF 32, 40. Because the trust account did not contain sufficient funds, on November 17, 2015, Respondent wrote a check to Ms. Artis for $1,152 from his operating account but wrote "From Trust . . ." on the check. FF 41.

The Committee found that Respondent did not "take meaningful steps to fix how he handled entrusted funds" after the Artis overdraft.[4] FF 42. He was also unable to "meaningfully comply with either the subpoenas or request for an accounting" of the trust account for 2015 from Disciplinary Counsel. FF 48-49. But, after retaining counsel and an accountant, Respondent reviewed the account and records and provided supplemental responses to Disciplinary Counsel. FF 53. He also reviewed the trust account bank records for 2013 and 2014 and discovered the Walker misappropriation, reported it to Disciplinary Counsel, and did not withdraw any additional funds from the trust account. FF 54-55.

<u>Other funds</u>

In May 2015, Respondent's son deposited $5,500 into Respondent's trust account. FF 31. Respondent did not know that the funds were deposited into that account. *Id*. Respondent explained that the funds were a loan or gift from his son

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[4] Respondent objects to FF 42, which states that he did not "take meaningful steps to fix how he handled entrusted funds." R. Br. 18. He concedes that the finding is accurate because he did not develop a new and better system for tracking client funds, but argues that it does not credit that he reviewed the account and records, found the Walker misappropriation, self-reported the Walker misappropriation to Disciplinary Counsel, stopped using the trust account, and plans to retire. *Id*. at 18-19. We find no reason to disagree with FF 42. The finding is based on the evidence—Respondent did not implement a system to fix how he handled entrusted funds. The other facts offered by Respondent in his objection are reflected in the Committee's findings elsewhere. *See* FF 54-55, 65, 68.

and that the funds should have been deposited into his personal account held by the same bank.[5] *Id.*; Tr. 241, 248. This deposit is material because from May 2015 forward, the trust account should have contained the funds belonging to Walker, Artis, and the $5,500 that Respondent did not know was in the account.

Beginning in June 2015, Respondent's trust account was also holding $195 for his client, Frank Chambers. FF 43. And in October 2015, the trust account was holding $100 as an unearned fee from his client, Thelma Cofer. *Id*.

For each month from January through November 2015, the closing balance on Respondent's trust account did not contain sufficient funds to cover *all* of the funds belonging to his clients (Walker, Artis, Chambers, and Cofer), even with an extra $5,500 from his son.

<u>Respondent's Testimony</u>

The Committee "credit[ed] Respondent's testimony that he had a reasonable and factually based sense of how much of the money in his IOLTA constituted earned fees, that is, we believe that Respondent had a good faith belief that the funds

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[5] Respondent objects to the Committee's reference to his son's funds as a "loan" in FF 31, arguing that the evidence does not support that the funds were a loan and that the Committee also called the funds a "gift." R. Br. 20. We find no reason to disagree with the Committee's finding for two reasons. First, it is immaterial if the funds were a loan or a gift; they were personal funds that did not belong in the trust account. Second, Respondent never fully explained if the funds were a loan or a gift:

> Q: You still owe [your son and his wife] $5,500[?]
>
> A: If they did not give it to me as a gift, yes.

Tr. 246.

he withdrew from his IOLTA were funds he had earned." HC Rpt. 41. But the Committee tempered its finding. The Committee "credit[ed] Respondent's testimony that he believed he had earned any funds he withdrew for his own use," FF 45, n.11, but it also found that this belief was not accurate: "Respondent's beliefs notwithstanding, his failure to maintain records and follow appropriate practices rendered his IOLTA account into something of a Ponzi scheme where funds deposited in one case supported funds earned in an earlier case." *Id*.

Indeed, Respondent's testimony demonstrates that he did not connect his personal withdrawals from the trust account to a specific client or matter—stating more generally that he withdrew funds when he needed them and that he had earned the funds based on his work. *See, e.g.*, Tr. 102-03 (Respondent explaining that for a specific withdrawal in September 2015 he had "no idea whose money I was withdrawing out of the account, except that I know that I had done more work that would entitle me to be able to take that as fees"); Tr. 165-66 (Respondent, answering a hypothetical where a client paid $500 but the work on the case was worth $3,500, explained: "I only take what I figured that would be due me for the work that I've done for these clients"); Tr. 167-68 (explaining that when he made a $500 withdrawal he was unable to connect it to a particular client: "Basically, I either needed the $500 for something, so I went to my trust account and transferred it into my law account to use."); Tr. 416 (admitting that he took funds as needed, instead of transferring fees upon being earned).

Respondent gave a similar response when asked specifically about his understanding of the funds in the account when the Artis overdraft occurred:

> Q. If you look at the last sentence in that paragraph, "I believed mistakenly, as it turns out now, that even in the absence of proper records, I had a reasonably accurate understanding of what was in my trust account, and did not intend to draw Ms. Artis's funds out of the account." [quoting from DX O, Respondent's response to ODC] Would you tell the Hearing Committee on what basis you believed you had a reasonably accurate understanding of what was going on in your trust account?
>
> A. I believe that the work that I had done for Ms. Artis far exceeded the fees that were in her account.

Tr. 184-85; *see also* FF 45. Based on this record, the Committee's finding that Respondent believed he withdrew funds that belonged to him is supported by substantial evidence, but its finding that Respondent's belief was objectively reasonable is not. *See* Section III.B.

III. DISCUSSION

The Committee concluded that Respondent violated Rule 1.15(a) by commingling funds, failing to keep complete records of entrusted funds, and misappropriating entrusted funds. Rule 1.15(a) provides:

> 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.

The Committee did not address in detail the finding of commingling and failure to maintain records. HC Rpt. 40 (stating that Respondent admitted to the violations and the Committee finds adequate basis in the record). Neither party challenges the finding, and we agree that the evidence is more than sufficient to show both violations. But we address commingling, because Respondent argues that his conduct demonstrated "some degree of commingling," R. Br. 36, yet implies the scope of his commingling was limited because of a lack of clarity on whether he was required to remove his earned fees from the trust account containing client funds. R. Br. 37-39.

A. Commingling

Respondent argues that the law is unclear as to when an attorney must remove earned fees from an entrusted account. R. Br. 37-39. He asserts that Rule 1.15 "requires advance fees to be placed in a lawyer's trust account 'until earned,' but it does not by its terms require that they be removed as soon as they are earned." R. Br. 38 (citing *In re Mance*, 980 A.2d 1196 (D.C. 2009) and D.C. Bar Ethics Op. 355 (June 2010)).

Respondent's reliance on *Mance* and Ethics Opinion 355 is misplaced. In *Mance*, the attorney failed to deposit a flat fee (unearned funds) into a trust account, and the Court held that "the default rule is that an attorney must hold flat fees in a client trust or escrow account until earned." *Mance*, 980 A.2d at 1206. Here Respondent deposited into his trust account three types of funds: (1) fees he earned before receipt (*i.e.*, funds that belonged to him); (2) advanced fees that were not yet earned, in whole or in part; and (3) entrusted funds that belonged to his clients (*e.g.*, Walker and Artis).[6] Respondent treated the first type of funds—the fees earned prior to receipt—as his own funds because they were already earned. However, he deposited them into the trust account and left them there until he needed them. Based on these facts, those funds did not belong in the trust account, and Respondent's act of commingling occurred when he deposited them into the trust account.[7] Rule 1.15(a) speaks directly to this issue, requiring the attorney to "hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property." Respondent testified that the earned funds were his. As such, they were required to be kept separate from his clients' funds.

We are also not persuaded that the Rule and case law is unclear about the second type of funds, the fees that were not yet earned in total when deposited into the trust account. We agree with Respondent that he did not need to withdraw the funds immediately upon earning them—a requirement that would impose a nearly impossible burden on attorneys who charge hourly rates—but the attorney needs a system to remove his earned fee. D.C. Bar Ethics Opinion 355 provides that the

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6 There is a fourth type of funds in the trust account, the funds Respondent's son deposited into the account in error, but Respondent admits that the inclusion of those funds in the trust account resulted in commingling, so they do not warrant further discussion. R. Br. 28 n.12.

7 An attorney may deposit the already-earned fee into a trust account and leave it there until he provides an accounting/bill to the client. In such a situation, the attorney is not yet treating the funds as his own, and the ethics opinion would support that such an act would not be charged as commingling. *See* D.C. Bar Ethics Op. 355. But, that is not the situation here; Respondent deposited the funds and then withdrew them as needed.

system can be based on milestones, passage of time, or completion of certain tasks. But, the Ethics Opinion also acknowledges that a flat fee may remain in the trust account until the end of the representation: “a lawyer has the option of simply keeping the entire flat fee in a trust account and transferring such fee to an operating account in one lump sum at the conclusion of the representation.” *Id*. The language of the Ethics Opinion does not provide protection to Respondent because he had *no* system for removing his earned fee from the trust account. Instead, he made withdrawals when he needed the money—treating the account as an operating or personal account. Neither *Mance* nor the Ethics Opinion can be read to support that conduct. Accordingly, the Board finds that the record fully supports a finding of commingling.

B. Misappropriation

1. Legal Overview

Misappropriation is “any unauthorized use of client’s funds entrusted to [the lawyer], including not only stealing but also unauthorized temporary use for the lawyer’s own purpose, whether or not he derives any personal gain or benefit therefrom.” *In re Harrison*, 461 A.2d 1034, 1036 (D.C. 1983) (citation and quotation marks omitted). Disciplinary Counsel bears the burden to prove misappropriation by clear and convincing evidence. *See, e.g., In re Anderson*, 778 A.2d 330, 335 (D.C. 2001). “[The] proof requirement is not a demanding one, because misappropriation occurs whenever ‘the balance in [the attorney’s operating] account falls below the amount due to the client. Misappropriation in such situations is essentially a per se offense; proof of improper intent is not required.'" *Id*. (quoting *Micheel*, 610 A.2d at 233).

To prove reckless misappropriation, Disciplinary Counsel has the burden of proving that Respondent's "misappropriation reveal[ed] an unacceptable disregard for the safety and welfare of entrusted funds." *In re Ahaghotu*, 75 A.3d 251, 256 (D.C. 2013) (quotation marks and citation omitted). Recklessness is shown when Respondent "handled entrusted funds in a way that reveals either an intent to treat the funds as the attorney's own or a conscious indifference to the consequences of his behavior for the security of the funds." *In re Pleshaw*, 2 A.3d 169, 173 (D.C. 2010) (quotation marks omitted).

Reckless misappropriation "does not require proof that the attorney acted intentionally or deliberately." *Anderson*, 778 A.2d at 338; *Pleshaw*, 2 A.3d at 174 ("proof of improper intent is not required"). In *Anderson*, the Court provided five "hallmarks" that "reveal an intent by the attorney 'to deal with and use funds escrowed for clients as his own' or an unacceptable disregard for the security of client funds." 778 A.2d at 338 (quoting *In re Hines*, 482 A.2d 378, 380 (D.C. 1984)). The hallmarks include:

> the indiscriminate commingling of entrusted and personal funds; a complete failure to track settlement proceeds; total disregard of the status of accounts into which entrusted funds were placed, resulting in a repeated overdraft condition; the indiscriminate movement of monies between accounts; and the disregard of inquiries concerning the status of funds.

Id.

Misappropriation is found to be negligent when the attorney's error was inadvertent or based on a mistaken belief. *See, e.g.*, *In re Reed*, 679 A.2d 506, 507-08 (D.C. 1996) (per curiam) (failure of attorney to pay a client's doctor's bill was "inadvertent" because the attorney believed she had paid the bill and immediately corrected the error upon discovery); *In re Choroszej*, 624 A.2d 434, 435-36 (D.C. 1992) (per curiam) (misappropriation was "inadvertent and negligent" where attorney "genuinely believed that he had paid [a doctor]," and corrected the error upon discovery). The Court recently defined negligent misappropriation as:

> an attorney's non-intentional, non-deliberate, non-reckless misuse of entrusted funds or an attorney's non-intentional, non-deliberate, non-reckless failure to retain the proper balance of entrusted funds. Its hallmarks include a good-faith, genuine, or sincere but erroneous belief that entrusted funds have properly been paid; and an honest or inadvertent but mistaken belief that entrusted funds have been properly safeguarded.

In re Abbey, 169 A.3d 865, 872 (D.C. 2017).

2. Board's Recommendation

Respondent admits that he misappropriated client funds. His trust account was below the amount owed to his clients in 2015.[8] The parties' dispute is over Respondent's culpability; Respondent agrees with the Committee that his misappropriation was negligent, and Disciplinary Counsel argues that it was at least reckless. R. Br. 24-44; ODC Br. 8-19.

[8] The account balance at the end of most months in 2015 held sufficient funds to cover the amount belonging to Walker *or* Artis but not both.

As explained by the Committee, Respondent is a sympathetic subject. HC Rpt. 40-42. He provided legal services to persons who would not otherwise be able to afford an attorney. He developed a flexible billing practice that allowed for payment by installments, and he frequently accepted less than he earned. He is also at the end of his career and seeks to retire as a full member of the Bar.[9] The Board is sympathetic to his situation. But, as the Committee noted, these facts are generally considered in mitigation—not in assessing the level of culpability. As such, they are not the basis of the Board's conclusion on culpability but are considered in the sanction recommendation, to determine whether they are extraordinary under *Addams*.

Level of culpability is determined based on "how [Respondent] handle[d] entrusted funds" and whether he "engaged in a pattern or course of conduct demonstrating an unacceptable disregard for the welfare of entrusted funds." *Anderson*, 778 A.2d at 339. To that end, Disciplinary Counsel correctly argues that many of the *Anderson* hallmarks were established. ODC Br. 9-13. Respondent indiscriminately wrote checks from the trust account for personal reasons, failed to keep records, failed to track client funds, commingled personal and client funds, and overdrew the trust account. These facts establish the first two *Anderson* hallmarks—

[9] The Committee "found compelling Respondent's limited request to simply avoid disbarment at the end of his career." HC Rpt. 42 (noting that the Committee is unanimous in their hope that the Board will respect Respondent's wish). We, however, disagree with the Committee that Respondent's request for lenity is *legally* "compelling." We examine whether Disciplinary Counsel proved the Respondent's conduct constituted reckless misappropriation, without regard to Respondent's desire to avoid disbarment.

"the indiscriminate commingling of entrusted and personal funds [and] a complete failure to track settlement proceeds." *Anderson*, 778 A.2d at 338. In addition, the third hallmark is largely established—"total disregard of the status of accounts into which entrusted funds were placed"—but without the "resulting . . . *repeated* overdraft condition." *Id*. (emphasis added). Arguably, Respondent's maintenance of his personal funds in the entrusted account hid the problems with his record-keeping and prevented repeat overdrafts. *See* HC Rpt. 25 n.11 (referring to Respondent's practice of failing "to maintain records and follow appropriate practices rendered his IOLTA account into something of a Ponzi scheme where funds deposited in one case supported funds earned in an earlier case"). The Court has not limited reckless misappropriation to cases that meet all five hallmarks. *See, e.g.*, *Ahaghotu*, 75 A.3d at 255 (three of five hallmarks); *Pleshaw*, 2 A.3d at 174-75 (no discussion of the hallmarks in probate matter); *In re Pels*, 653 A.2d 388, 396-97 (D.C. 1995) (three of five hallmarks). And other factors exist here that demonstrate recklessness including Respondent's knowledge and prior history of fulfilling his obligations to safeguard client funds, but nonetheless in 2007 completely discontinuing his practice of fulfilling those obligations and consequently putting client funds at risk.

Respondent argues that to find that an attorney acted with "conscious indifference" requires evidence that the attorney was "on notice" of a problem with his trust account and that he failed to take "steps to correct the problem." R. Br. 25-29. Respondent emphasized that he had no prior overdrafts before the Artis check and, thus, did not have notice of a problem with his trust account. But the Court in *Abbey* appears critical of the "'never had an overdraft'" defense because it "lifts up only *one* of the hallmarks of reckless misappropriation identified by *In re Anderson*." *Abbey*, 169 A.3d at 874 (emphasis added).

We agree that Respondent has a point. Actual notice of a problem with the trust account and failure to correct the problem is a recurring finding in reckless misappropriation cases. *See, e.g.*, *Micheel*, 610 A.2d at 236 (finding reckless disregard where attorney "made no attempt to keep track of his client's funds, but indiscriminately wrote checks on the account at a time when he knew or should have known that the account was overdrawn" because one check had already bounced due to insufficient funds by the time he wrote the check in question); *Ahaghotu*, 75 A.3d at 255 ("'Respondent was clearly on notice of problems with his accounting practices and his escrow account, which he failed to address . . . .'" (quoting Board Report)). Respondent did not receive such a warning that would have put him on actual notice that he was at risk of misappropriating client funds. The first overdraft was the check to Artis's landlord,[10] and there is no record of failure to respond to client's or third-party's inquiries.

[10] Disciplinary Counsel refers to the Artis overdraft as the *second* overdraft of the trust account. ODC Br. 4. The first overdraft, Disciplinary Counsel asserts, occurred when Respondent closed his trust account with SunTrust and opened a trust account at PNC in June/July 2014. FF 5, 22-23. A check in the amount of $500 written on the SunTrust account was presented for payment after Respondent transferred the funds to PNC; the $500 check resulted in an overdraft. The $500 check was written to Respondent, DX U, which implies that he should have received notice of the overdraft, but such notice was not established, and Disciplinary Counsel acknowledges that "Respondent was not contemporaneously aware" of the overdraft. ODC Br. 4.

But, actual notice of a problem with the trust account is not a requirement for reckless misappropriation, which *Anderson* defined as "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." 778 A.2d at 339 (quoting 57 Am. Jur. 2d Negligence § 302 (1989)). And based on his own testimony and his history of fulfilling those obligations until 2007, Respondent was on notice of the risks of not keeping records of client funds long before the misconduct at issue. *See, e.g.*, *Micheel*, 610 A.2d at 232 n.5, 235 (noting that the respondent "previously maintained a separate bank account for client funds, but had closed it when he reorganized his practice" prior to the misappropriation, and he thus "knew that to [commingle] was improper"). Respondent explained that he stopped tracking the entrusted funds because "his practice became too busy and due to some health challenges at that time." FF 57. *See, e.g.*, *Pleshaw*, 2 A.3d at 173-74 (Respondent "demonstrated that he was aware of and understood [the rules], but he nonetheless disregarded them for his own convenience. This alone constitutes 'conscious indifference.'" (quoting *In re Fair*, 780 A.2d 1106, 1110 (D.C. 2001))).

A difference between this case and other reckless misappropriation cases is the Committee's finding that Respondent had a good faith belief that the funds he withdrew from the trust account were his own. *See, e.g.*, *In re Smith*, 70 A.3d 1213,

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Disciplinary Counsel asks the Board to admit DX U, which was submitted to the Committee through a consent motion to supplement the record. ODC Br. 4 n.2. This request is unnecessary; the Committee granted Disciplinary Counsel's motion on May 5, 2017 and admitted DX U into evidence. HC Order (May 5, 2017); *see also* HC Rpt. 5 (referencing the May 5 order).

1216 (D.C. 2013) (finding reckless misappropriation where the attorney did "not claim[] a good-faith belief that he was entitled to the funds"; instead the Committee found that when he spent the funds he was "well aware of the possibility that he was appropriating client funds for personal use."); *Abbey*, 169 A.3d at 873 ("findings . . . do not reveal a good-faith, genuine, or sincere but erroneous belief that entrusted funds were properly safeguarded and paid, or that [the attorney's] failure to pay [client's] medical bills in a timely manner was inadvertent or due to an honest mistake").

But, as Disciplinary Counsel argues, the factual record does not support Respondent's good faith belief. ODC Br. 15-16; HC Rpt. 41 ("the accuracy of his belief is open to debate"). The Court's decisions set forth an objectively reasonable standard for a good faith, but erroneous belief, in misappropriation cases. *See, e.g.*, *In re Chang*, 694 A.2d 877, 880-82 (D.C. 1997) (per curiam) (appended Board Report) (finding negligent misappropriation where attorney mistakenly, but not unreasonably, believed he had enough earned fees in the account to cover the check); *In re Pierson*, 690 A.2d 941, 949 (D.C. 1997) ("attorney's misappropriation was merely negligent when he acted with the 'objectively reasonable, albeit erroneous, belief that he was authorized to do so'") (quoting *In re Evans*, 578 A.2d 1141, 1142 (D.C. 1990)).

Respondent's belief is based on violations of the Rules. Because he commingled funds, he believed that the funds in the trust account belonged to him, even though he did not maintain records and did not have a system for tracking the funds. His testimony demonstrates the lack of foundation for his belief. He explained that he was unable to connect his personal withdrawals from the trust account to any particular client or work performed. In short, he had "no idea whose money [he] was withdrawing." Tr. 102-03.

The Court explained the risk of commingling: "[t]he rule against commingling was adopted to provide against the probability in some cases, the possibility in many cases, and *the danger in all cases* that such commingling will result in the loss of the clients' money." *In re Hessler*, 549 A.2d 700, 702 (D.C. 1988) (emphasis added). Respondent *knew* he was commingling funds and not meeting his obligations to track the status of funds for eight years. Perhaps it was reasonable *at times* for Respondent to believe that the funds in the account belonged to him, but there is no evidence of any efforts to protect the "pure" client funds received in the Walker and Artis matters and, thus, no reason for him not to appreciate the danger to those funds when he continued to commingle and treat the account as his personal account.

In addition, for the Artis misappropriation, the Committee did not address whether it was reasonable to withdraw $9,000 from the trust account after determining that the balance was a little more than $9,000, only eight days after writing a check to Artis's landlord and without verifying that the check had cleared. We do not find that this evidence meets the "objectively reasonable" standard referred to in the Court's decisions. Instead, Respondent knew he had a commingled account and no records to guide his withdrawals. And he should have known that he was holding Artis's funds at the time of the withdrawal. His failure to ensure that his client's funds were safe before making a withdrawal was not objectively reasonable.

We also reject Respondent's argument, relying on *Anderson*, that the evidence here is limited to poor record-keeping and commingling of funds, which is insufficient for a reckless misappropriation finding. R. Br. 31-32; *Anderson*, 778 A.2d at 340 (citing cases) ("our decisions, by clear implication, have rejected the proposition that recklessness can be shown by inadequate record-keeping alone combined with commingling and misappropriation."). As explained, the evidence here supports a finding that the misappropriation was based on more. Respondent knew or should have known the risk to his clients' funds when he failed maintain records of the trust account, his fees, or his billable hours. He also did not review bank statements and treated the funds in the trust account as his own. Respondent did not take steps to protect client funds, other than depositing them into a trust account, but any protection from such an account is negated by Respondent's treatment of the account as his own.

To be sure, this is a close case. Both sides presented compelling and thoughtful arguments that the Committee and the Board carefully considered. The Board emphasizes that in finding reckless misappropriation, it does not find that Respondent did not care about his clients. The Committee's findings about his dedication to his clients are well-supported by the record, and the Board finds no reason to disagree with them. But, the standard is not whether the attorney *cared* about his clients, but it is based on *how he handled entrusted funds*. Here, the Board does not believe that Respondent's lack of care and attention to the trust account for eight years, when he had knowledge of his obligations, can be called simply negligent.

C. Sanction

Whether misappropriation was negligent or reckless will determine if the attorney is disbarred because "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." *In re Addams*, 579 A.2d 190, 191 (D.C. 1990) (en banc). And "'only in extraordinary circumstances'" will a lesser sanction than disbarment be considered in "non-negligent misappropriation." *Anderson*, 778 A.2d at 335 (quoting *Addams*, 579 A.2d at 191). The Court has emphasized that "disbarment 'is not reserved for the most egregious and dishonest' misappropriations." *Pleshew*, 2 A.3d at 173 (quoting *In re Bach*, 966 A.2d 350, 352 (D.C. 2009)).

The application of the presumptive rule of disbarment, where the Committee found a respondent to be sympathetic, has been discussed in many Board reports and Court decisions. *See, e.g.*, *In re Berryman*, 764 A.2d 760, 774 (D.C. 2000) ("disbarment may appear to be quite harsh in this case where [respondent] previously enjoyed a twenty-four year career as an attorney without a single blemish, rendered extraordinary service to [her client]"); *Pels*, 653 A.2d at 398 (noting that members of the Court "believe the result *Addams* dictates in this case is a harsh one"); *Micheel*, 610 A.2d at 236 ("[D]isbarment in a case such as this may seem to be a harsh sanction when compared with sanctions for other violations involving arguably more egregious conduct.”).

Respondent argued that there are factors in mitigation. R. Br. 43-44. The Committee considered those factors in assessing culpability, but acknowledged that they would normally be considered in mitigation. HC Rpt. 42-43. As described by the Committee, “Respondent’s clients are persons of low or moderate income who have not the resources to make a significant payment to Respondent” and that Respondent “accommodate[d] his clients’ financial limitations [with] retainers [that] provided that the clients would make regular payments to Respondent against an agreed upon total fee until that fee was paid in full.” HC Rpt. 40. This flexible arrangement meant that Respondent assumed a “financial risk” that his clients would not pay in full. HC Rpt. 40 n.13. “Indeed, he was left with unpaid balances at the end of the day in 50%-75% of his cases.” FF 4. The Committee found compelling Respondent’s “daily” service to an “underserved” part of our community “throughout his career before the Bar.” HC Rpt. 42.

We have considered these mitigation factors, but we do not believe, nor does Respondent suggest, that they justify a finding of extraordinary circumstances needed to depart from the *Addams* rule. *See In re Thomas-Pinkney*, 840 A.2d 700, 701 (D.C. 2004) (per curiam) (imposing disbarment for reckless misappropriation despite the respondent’s “very considerable service to her community, for which she was praised both by the Hearing Committee and by the Board”); *Pels*, 653 A.2d at 397-98 (“[T]he mitigating factors cited to us (his relative inexperience in client representation of this kind, the lack of ultimate disadvantage to the client, and the comparatively small dollar amounts involved) are not of the extraordinary kind that can overcome 'the strong presumption of disbarment' that pertains after *Addams*.") (footnotes omitted).

The Court departed from the *Addams* rule once "where [the] respondent engaged in intentional misappropriation for the purpose of benefitting the client, and in fact did benefit the client." *In re Hewett*, 11 A.3d 279, 286 (D.C. 2011) (finding intentional misappropriation where the respondent, in a probate matter, withdrew his earned legal fee before receiving court approval because he needed to "spend-down" his client's account to maintain his client's Medicaid eligibility). The Court found that these facts were "truly unique," noting that the Board was unaware of any "'prior cases in which the intentional misappropriation was intended for and, in fact, benefitted the client.'" *Id.* at 287 (quoting the Board Report). The Court explained that

> where the Hearing Committee found that *but for* the impending Medicaid review, respondent would not have filed the petition for legal fees and withdrawn the funds when he did, we are persuaded that this is the exceptional case envisioned in *Addams* where, notwithstanding intentional misappropriation, "giving effect to mitigating circumstances is consistent with protection of the public and preservation of public confidence in the legal profession."

Hewett, 11 A.3d at 287-88 (emphasis added) (quoting *Addams*, 579 A.2d at 195).

The Board cannot conclude that the facts here are "truly unique" or that Respondent's misappropriation was for the benefit of his clients. Unlike the respondent in *Hewett*, the funds Respondent withdrew belonged to his clients, who received no benefit from the withdrawals. While the Committee stated that Respondent's "misappropriations . . . resulted from [his] accommodations to the financial restrictions of the majority of his clientele," HC Rpt. 43, the Board does not find support in *Hewett* or other cases that this is the type of extraordinary circumstance that would warrant departure from the *Addams* rule.

The Board recognizes that its departure from the Committee's conclusion on culpability has the effect of not fulfilling the Committee's recommendation to allow Respondent to avoid disbarment. HC Rpt. 42 ("We also found compelling Respondent's limited request to simply avoid disbarment at the end of his career in the law. We are unanimous in our hope that the Board will respect his wish."). But, the Board is compelled to follow the rule in *Addams* when the facts show reckless misappropriation and do not show an extraordinary circumstance warranting departure. And we were mindful of the Court's discussion in *Pels*, a case that involved a sympathetic respondent where the Board struggled with application of the *Addams* rule. We are in a similar position here:

> [I]n *Addams* the court weighed the concern of seemingly unjust application of a categorical sanction to particular cases against "our concern . . . that there not be an erosion of public confidence in the integrity of the bar. Simply put, where client funds are involved, a more stringent rule is appropriate."

Pels, 653 A.2d at 398 (alteration in original) (quoting *Addams*, 579 A.2d at 198). "'The Board does not do the Court a service by trying to mitigate this result. . . . [Its] job is to follow the Court's decisions.'" *Id*. (quoting Board Report at 3-4 (opinion by Mr. Fox)).

Based on the foregoing, we find that Respondent violated Rule 1.15(a) by commingling personal and client funds in a trust account, failing to maintain adequate records of client funds, and recklessly misappropriating funds belonging to clients, and we recommend that Respondent be disbarred.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: Lucy E. Pittman
Lucy E. Pittman

All members of the Board concur in this Report and Recommendation. Messrs. Bernstein, Carter, and Kaiser and Ms. Smith submit a Separate Statement as to sanction.

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
BERNARD A. GRAY, SR.,	:	
	:	Board Docket No. 16-BD-045
Respondent.	:	Bar Docket No. 2015-D349
	:	
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 955013)	:	

SEPARATE STATEMENT OF MESSRS. BERNSTEIN, CARTER, AND KAISER AND MS. SMITH AS TO SANCTION

We join the well-reasoned Board report in finding that Respondent engaged in reckless misappropriation, but write separately on the issue of sanction to underscore a point about this case, and similar cases, under the Court of Appeals' precedent in *Addams*.

The majority report is an accurate statement of the law. We agree that Respondent's misappropriation was reckless. And, under *Addams*, we agree that the recklessness determination requires a sanction of disbarment, absent extraordinary mitigation of the kind found in *In re Hewett*, 11 A.3d 279 (D.C. 2011).

On this record, we stress the extraordinary circumstances that point to suspension rather than disbarment. Respondent is one of a number of lawyers we have seen who are in solo or small firm practice, engaged in otherwise laudable service to his clients, and yet would be disbarred under *Addams*. Although we agree that this is the result called for by *Addams*, we disagree that should be the outcome in this case.

First, though we disagree with Respondent that notice of a problem with his trust accounting is necessary to make a finding of recklessness, we do think that the absence of notice is significant. We think the majority report is right that the misappropriation was reckless, and – like the majority – we think that this is a close case. The line between what constitutes reckless misappropriation and negligent misappropriation is not always finely drawn. Yet the difference in sanction is so dramatic, and the consequences of the slight difference between recklessness and negligence in some cases is so slight, that this application of *Addams* appears, to us, at times, unjust.

Second, we are troubled by much of what is laudable about Respondent, and how little that matters in determining his sanction. The Hearing Committee discussion is persuasive. HC Rpt. at 40-41. Respondent has worked for little money serving a population that desperately needs his help. In a city where some lawyers routinely charge well over $1,000 per hour, during this period, Respondent's hourly rate generally ranged from $75 to $125. And, in some cases, he did not attempt to collect all that he was owed. In light of the well-documented and often-discussed gap in legal services for those of limited means, Respondent was willing to forgo greater financial means to serve those who otherwise may be unable to afford counsel. While perhaps not "extraordinary" in the way the term is used in *Addams*, we find this extraordinary in a different sense.

Third, and finally, we note that we have seen a number of cases where an otherwise deserving solo or small firm lawyer has been disbarred because of

Addams. Lawyers in larger firms serving clients with greater and easier access to legal counsel simply do not face these problems. It is lawyers who represent individuals – often of limited means – who have much greater difficulty setting up accounting and control practices that larger and more sophisticated firms easily can. Hiring a person who can handle trust accounting may, for someone like Respondent, be a significant cost. The rigid application of *Addams* in this context is not good. On balance, disbarment would be detrimental to the public, even when the risk created by Respondent's trust accounting practices is considered. As the Court of Appeals noted in *Hewett*, quoting the Board report in that case, '"[i]n all events, it must be clear that giving effect to mitigating circumstances is consistent with protection of the public and preservation of public confidence in the legal profession."' 11 A.3d at 290 (alteration in original) (quoting *Addams*, 579 A.2d at 195). Here, protection of the public and preservation of the public's confidence would, in our opinion, not be served by disbarring Respondent.

This is not to say that people of limited means are owed fewer duties to have their funds protected. Every client should have confidence that his or her funds are safe when in an attorney's IOLTA account. We are emphatically not advocating that these attorneys receive no sanction. We merely believe that an inflexible rule that requires a sanction of disbarment in every instance of reckless misappropriation, without any room for mitigation, is excessive. And we further note that the respondent in *Hewett*, who acted in a misguided way to help his client, engaged in *intentional* misappropriation and yet managed to avoid disbarment.

If the application of *Addams* allowed greater consideration of mitigation in cases of reckless misappropriation – perhaps calibrated to the degree of recklessness to avoid particularly unsavory results in very close cases where a number of *Anderson* factors were not present – we believe that would result in more proportionate outcomes. An expansion of circumstances that could be considered in mitigation would better address situations like the instant case, in which disbarment may hurt the public more than protect it.

On the facts presented here, disbarment is not necessary to "'protect the public and the courts, maintain the integrity of the profession, and deter others from engaging in similar misconduct.'" *See In re Murdter*, 131 A.3d 355, 357 (D.C. 2016) (per curiam) (quoting *In re Askew*, 96 A.3d 52, 58 (D.C. 2014) (per curiam) (discussing the purpose of disciplinary sanctions)). Instead, were the Court to expand consideration of what sanction is appropriate in a case like this, we recommend that Respondent be suspended for three years, with reinstatement conditioned upon Respondent completing a CLE course (approved by Disciplinary Counsel) concerning the handling of payments for legal services and funds subject to D.C. Rule of Professional Conduct 1.15, and that following reinstatement, Respondent be placed on one year of probation with the following terms:

1. Respondent shall be supervised by a Financial Monitor;

2. At least every sixty days, the Financial Monitor shall review Respondent's records of his handling of (a) payments made by or on behalf of clients, and (b) funds subject to D.C. Rule of Professional Conduct 1.15;

3. Upon the Financial Monitor's request, Respondent shall allow the Financial Monitor immediate access to Respondent's records of his handling of (a) payments made by or on behalf of clients, and (b) funds subject to D.C. Rule of Professional Conduct 1.15;

4. Respondent shall comply with the Financial Monitor's recommendations concerning Respondent's handling of (a) payments made by or on behalf of clients, and (b) funds subject to D.C. Rule of Professional Conduct 1.15; and

5. Respondent shall execute a waiver to permit the Financial Monitor to file quarterly reports with the Office of Disciplinary Counsel and the Board on Professional Responsibility.

By: David Bernstein

David Bernstein

Jason E. Carter

Jason E. Carter

Matt Kaiser

Matthew G. Kaiser

Billie LaVerne Smith

Billie LaVerne Smith