DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY
AD HOC HEARING COMMITTEE

In the Matter of:	:	
	:	
EDWARD N. MATISIK,	:	
	:	Board Docket No. 13-BD-091
Respondent.	:	Bar Docket No. 2011-D193
	:	
A Suspended Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 463786)	:	

REPORT AND RECOMMENDATION OF THE AD HOC HEARING COMMITTEE

This matter arises out of Respondent Edward N. Matisik's representation of the American Society for Cell Biology (ASCB), in connection with its annual registration in a number of states where it planned to seek charitable contributions. This matter is before the Ad Hoc Hearing Committee (the "Hearing Committee") pursuant to the default procedure of D.C. Bar R. XI, § 8(f) and Board Rule 7.8, arising from Respondent's failure to answer the Specification of Charges or to respond to Disciplinary Counsel's[1] motion for default.

PROCEDURAL OBSERVATIONS

Default proceedings, as their name suggests, occur only where, after substantial notice and outreach procedures have been carried through, a disciplinary

[1] The petition was filed by the Office of Bar Counsel. The District of Columbia Court of Appeals changed the title of Bar Counsel to Disciplinary Counsel, effective December 19, 2015. We use the current title herein.

action goes forward as to a Bar member who has failed to appear. By our Rule, once default has occurred, the facts alleged by Disciplinary Counsel are admitted. This Rule should afford substantial efficiencies; however, that has not proved the case. An informal practice has emerged, in the absence of definitive guidance and for the generally laudable reason of erring on the side of more rather than less process, of conducting essentially a full (one-sided) hearing and preparing a Report and Recommendation of the same character as is prepared in contested proceedings. Given the volume of important work before the Board, the Board's limited staff resources, the Board's reliance on the volunteer efforts of members of the Bar and the public, and the value of maintaining an orderly and efficient docket, we respectfully suggest that this practice should be revisited.

We do not question here that where the proposed penalty is disbarment a hearing should be held. However, where, as in the case at hand, a hearing allows the Hearing Committee to confirm the findings of fact proposed by Disciplinary Counsel, we see little value in the transformation of Disciplinary Counsel's submission into a written opinion. Just the same where, as in the case at hand, the conclusions of law proposed by Disciplinary Counsel present no novel issues and reflect nothing more than the application of settled law, we likewise see little value in the transformation of Disciplinary Counsel's submission into a written opinion. So, given our druthers, we would have resolved this matter several months ago with a one-paragraph Report and Recommendation. The foregoing notwithstanding, we are aware that our suggestions are just that and we have observed that there is great

(perhaps appropriate) reluctance to procedural innovation coming from the ground up. Accordingly, we submit herewith a traditional Report and Recommendation. We respectfully seek the guidance of those who review this Report and Recommendation as to whether the above observations are well taken and believe the disciplinary system as a whole would benefit from clarification on this point and a more streamlined process.

REPORT AND RECOMMENDATION

Based upon the undisputed evidence submitted in support of Disciplinary Counsel's motion, the Hearing Committee finds clear and convincing evidence of each of the violations charged by Disciplinary Counsel. The Hearing Committee recommends that Respondent be disbarred.

I. PROCEDURAL HISTORY

Disciplinary Counsel charged that Respondent violated D.C. Rules of Professional Conduct 1.1(a), 1.1(b), 1.3(a), 1.3(b)(1)[2], 1.3(c), 1.4(a), 1.4(b), 1.15(a), 1.15(e), 1.16(d), 5.5(a), and 8.4(c). DX B.[3] Respondent was personally served with the Specification of Charges on October 10, 2013. DX C. Respondent did not file an Answer to the Specification of Charges, and did not appear at any point in the proceedings before this Hearing Committee.

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[2] Although Specification of Charges charged only that Respondent violated "Rule 1.3(b)," the language describing the violation made clear that Disciplinary Counsel charged a violation of Rule 1.3(b)(1).

[3] "DX" refers to Disciplinary Counsel's Exhibits. "Tr." Refers to the transcript of the April 19, 2017 hearing.

On September 17, 2015, Disciplinary Counsel filed a motion for default, supported by sworn proof of the charges in the Specification of Charges. That motion was granted on October 15, 2015. Disciplinary Counsel served Respondent with the order granting the default motion by mailing it to the address at which Respondent had been personally served and Respondent's address on file with the D.C. Bar. This matter proceeded under the "default" procedures found in Board Rule 7.8. A hearing was held on April 19, 2017, before Matthew Herrington, Esquire, Chair; Octave Ellis; and Esther Yong McGraw, Esquire. Assistant Disciplinary Counsel Caroll G. Donarye, Esquire and Assistant Disciplinary Counsel Joseph H. Bowman, Esquire appeared on behalf of Disciplinary Counsel. Respondent did not appear, nor did any counsel appear on his behalf, despite notice of the hearing sent to the addresses discussed above and additional staff efforts to engage with the Respondent. The Hearing Committee admitted into evidence Disciplinary Counsel Exhibits A through C, and 1 through 10, previously filed with the Committee. Tr. 8; *see also* DX A-C, 1-10.

II. FINDINGS OF FACT

Board Rule 7.8(b) provides that an Order of Default is "limited to the allegations set forth in the petition . . . which shall be deemed admitted," where, as here, Respondent fails to answer the petition, Respondent is personally served, and Disciplinary Counsel's default motion is supported by sworn proof of the charges in the petition. On the basis of the admitted allegations set forth in the Petition and Specification of Charges, and uncontested sworn statements supporting Disciplinary

Counsel's default motion, the Hearing Committee makes the following findings of fact by clear and convincing evidence:

1. Respondent is a member of the Bar of the District of Columbia Court of Appeals, having been admitted by examination on July 9, 1999, and assigned Bar Number 463786. DX A.

2. On December 31, 2005, Respondent was administratively suspended from the D.C. Bar for failure to pay his annual dues. DX 1.

3. On June 30, 2010, the American Society for Cell Biology (ASCB) retained Respondent to provide legal representation, advice, and assistance with regard to its annual registration in thirty-four states where ASCB intended to engage in charitable solicitation. DX 5 at 41. Cynthia Godes, Director of Finance and Administration for the ASCB, sent Respondent check number 32858, in the amount of $4,000, as an advance payment for his services. DX 4 at 71; DX 5 at 41. Respondent did not advise ASCB that he was administratively suspended and not a member in good standing of the D.C. Bar at the time he was retained. DX 5 at 47.

4. In order for ASCB to solicit charitable contributions, it was required to prepare and file a form entitled "Unified Registration Statement for Charitable Organizations" ("URS"), and pay the required fee. DX 5 at 42. The URS forms are filed with the Office of the Attorney General in each state, and require the filing organization to provide detailed information pertaining to, among other things, the organization's identity, sources of funding, non-profit status, total annual

contributions to the organization, and operating and administrative expenses. DX 5 at 42. *See* DX 2 at 28-30 for an example of a URS.

5. When ASCB paid the $4,000 advance fee payment to Respondent, it intended for the money to be treated as ASCB's property until earned; it did not consent to Respondent depositing the money into an account other than an IOLTA account. DX 5 at 42.

6. On July 6, 2010, Respondent deposited $3,750 of ASCB's retainer fee into a joint savings account at Northwest Savings Bank with an account number ending in #8952[4], and he took the balance of $250 in cash. DX 4 at 70-71. According to the Northwest Savings Bank signature card for account #8952, the two signatories on the account were Holly A. Matisik and Edward N. Matisik. DX 4 at 3. After Respondent deposited the $3,750 into the #8952 account, the balance in the account was $4,026.49. DX 4 at 29.

7. That same day, July 6, 2010, Respondent immediately began making cash withdrawals of varying amounts on almost a daily basis. DX 4 at 29, 191-207. Respondent continued to make cash withdrawals in similar fashion through August 23, 2010, when the balance in the #8952 account was reduced to $301.49. DX 4 at 29-30, 191-212.

8. On November 17, 2010, ASCB informed Respondent that ASCB's 2009 tax return was complete, and two days later, on November 19, 2010, ASCB

[4] The account statement reflected the following account name "Betty Matisik DECD or Holly Matisik or Edward Matisik." *See* DX 4 at 24.

filed their 2009 tax return with the IRS. DX 2 at 3. According to Respondent, the URS forms were due to be filed "4.5 months" after the tax return is filed. *Id.* at 5.

9. On November 19, 2010, Respondent sent an invoice to Ms. Godes seeking an advance of $782 for photocopying and mailing expenses related to filing the state registrations. DX 2 at 3, 17; DX 5 at 43. Respondent also requested separate state registration checks made out to the proper agencies for payment of the registration fees in each state where ASCB wanted to register. DX 2 at 3; DX 5 at 43; *see* DX 2 at 38 (listing twenty-nine checks sent to Respondent on November 23, 2010 to pay registration fees).

10. On November 23, 2010, Ms. Godes sent to Respondent, via overnight Federal Express, the state registration checks he had requested as well as check number 33217 for $782 as payment of Respondent's invoice for anticipated costs. DX 2 at 3, 18, 38; DX 5 at 43.

11. When ASCB sent check number 33217 to Respondent, it intended for the $782 to be used for photocopying and mailing expenses, and to be treated as ASCB's property until those specific costs were incurred. DX 5 at 43. ASCB did not consent to a different arrangement. *Id*.

12. Shortly thereafter, Respondent cashed check number 33217. DX 2 at 1, 3, 18; DX 5 at 43.

13. Respondent told Ms. Godes that he would complete the filings by December 8, 2010. DX 5 at 44.

14. Thereafter, Ms. Godes learned from another source that the URS forms needed to be notarized and reminded Respondent of that fact. DX 5 at 44. Ms. Godes requested that Respondent send her the final version of the URS form so that she could get them signed and notarized. *Id*.

15. On December 13, 2010, Respondent sent Ms. Godes a completed URS form, with instructions for her to make copies of it, and to obtain appropriate signatures and notary certifications on the copies according to the individual state requirements. DX 2 at 35; DX 5 at 43-44. Because Ms. Godes believed that the URS that Respondent sent to her was completed in an "unprofessional and inaccurate manner," she did not present it to the ASCB's corporate officers. Instead, she completed the URS herself with the correct information, made copies for all jurisdictions, and collected the required signatures and notary certifications. DX 2 at 40-42; DX 5 at 43-44.

16. On December 20, 2010, Ms. Godes sent an e-mail to Respondent, stating as follows:

> I re-did this form . . . on site at our Annual Meeting as I don't believe what you attached was acceptable to present to our treasurer and secretary.
>
> We over-nighted checks to you several weeks ago, but I don't see why you asked for them so quickly if you could not file before we had the notarized forms. You said you were going to do the filings within a week (on Dec. 8), but then Cheryl told me we needed forms notarized. I had to remind you about this, get the final version – which I then had to re-do – and get them signed/notarized.

All this to say I'm not sure we have your appropriate focus on this project. I would like your assurance that you have the time and attention to complete these filings in a thorough, timely and professional manner.

I now have all the forms here:

- 15 signed by treasurer and notarized
- 17 signed by treasurer, not notarized
- 2 signed by secretary and notarized

- Please clearly advise how these forms (the notarized and un-notarized) should be sent to you.

- What else needs to be attached to the filings that I have not reviewed?

- When do you anticipate sending these filings to all the states?

- When will we get our copies?

- Remind me when they are actually DUE – as it has now been more than 30 days since we filed our tax return.

Thank you for your soonest reply.

DX 2 at 33-35; DX 5 at 44-45.

17. Respondent did not respond to Ms. Godes's e-mail until December 29, 2010. DX 2 at 32; DX 5 at 45.

18. On December 27, 2010, Ms. Godes sent another e-mail to Respondent asking him to respond to her December 20, 2010 e-mail. DX 2 at 32-33. On that same day, she mailed the signed and appropriately notarized URS forms to Respondent. DX 2 at 33-35, 40-42; DX 5 at 45.

19. On December 29, 2010, Respondent responded to Ms. Godes's e-mail, assuring her that "[a]s soon as I receive the forms they will go out, immediately" to the relevant states. DX 2 at 32; DX 5 at 45. Respondent also stated that he had all the attachments to file with the forms, and would send Ms. Godes copies of the forms as soon as he sent them out. DX 2 at 32.

20. On January 26, 2011, Respondent sent an e-mail to Ms. Godes, stating:

> Sorry I was on vacation myself for about a week. Everything has gone out. I'll send you updates on approvals as they are received. Thanks!

DX 2 at 5; DX 5 at 45.

21. On February 23, 2011, Ms. Godes sent the following e-mail to Respondent:

> Please give me an update on any approvals you have received. You were going to send me copies of the filings for my files. I need back up to justify the $782 of expenses we advanced you.

DX 2 at 4; DX 5 at 46.

22. Respondent did not respond to Ms. Godes's February 23, 2011 e-mail. DX 5 at 46.

23. On February 25, 2011, Ms. Godes sent another e-mail to Respondent, wherein she stated:

> You told us in your e-mail on January 26, 2011 [that], "Everything has gone out," but as of yesterday not a single one of the state registration checks has been cashed. Are we supposed to believe that every State is holding their checks for three weeks before depositing them?

DX 2 at 3; DX 5 at 46.

24. Respondent did not respond to Ms. Godes's February 25, 2011 e-mail. DX 5 at 46. Thereafter, Respondent did not communicate with Ms. Godes or ASCB in any manner – the last communication ASCB received from Respondent was his January 26, 2011 e-mail stating "everything had gone out." DX 2 at 1; DX 5 at 46.

25. Respondent never provided ASCB any justification for keeping the money and did not return or refund any of the advanced fees and costs ASCB paid. DX 2 at 1-3; DX 5 at 46.

26. Ms. Godes and ASCB contacted another firm, Labyrinth Inc., that performed the same type of service in registering companies to legally fundraise, and with Labyrinth's help discovered that Respondent never filed the annual registrations as he had agreed to do. DX 2 at 10-11, 19-24; DX 5 at 46.

27. ASCB had also paid Respondent in 2008 and 2009 to file registrations for the 2009 and 2010 years, just as they had paid him in 2010 to file the registrations for the 2011 year. ASCB paid a $4,000 retainer to Respondent in 2008, plus expenses of $541.20; and a retainer of $4,000 on July 15, 2009, plus expenses of $883.13. DX 2 at 13-15; DX 5 at 47.

28. When Ms. Godes discovered that Respondent failed to file the annual registrations in 2011, she wondered whether he had fulfilled his obligations to do so in previous years. DX 2 at 20. Ms. Godes checked and found out that Respondent also did not register ASCB in 2009 and 2010 in states where ASCB solicited contributions, despite the fact that he received a total of $9,424.33 from ASCB for that purpose in 2008 and 2009. DX 2 at 10-15, 19-24; DX 5 at 47.

III. CONCLUSIONS OF LAW

A. Standard of Review

Disciplinary Counsel charged Respondent with violating the following Rules: 1.1(a), 1.1(b), 1.3(a), 1.3(b), 1.3(c), 1.4(a), 1.4(b), 1.15(a), 1.15(e), 1.16(d), 5.5(a), and 8.4(c). Respondent did not answer these charges as required by the Board's rules. The sworn statements and documentary proof that Disciplinary Counsel filed in support of its motion for default, together with the allegations set forth in the petition, which are deemed admitted, constitute clear and convincing evidence that Respondent violated all of the disciplinary rules with which he was charged.

A. Rules 1.1(a) and 1.1(b)

Rule 1.1(a) requires that a lawyer provide competent representation, which includes not only legal knowledge and skill, but the "thoroughness[] and preparation" reasonably necessary for the representation. Rule 1.1(b) requires that a lawyer serve the client with the "skill and care commensurate with that generally afforded to clients by other lawyers in similar matters." Comment [5] to Rule 1.1 reiterates that competent representation includes "adequate preparation and continuing attention to the needs of the representation to assure that there is no neglect of such needs," and states that "[t]he required attention and preparation are determined in part by what is at stake . . . ." In *In re Evans*, the Court adopted the Board's explanation that:

> To prove a violation [of Rule 1.1(a)], [Disciplinary Counsel] must not only show that the attorney failed to apply his or her skill and knowledge, but that this failure constituted a serious deficiency in the representation. . . . The determination of what constitutes a "serious

> deficiency" is fact specific. It has generally been found in cases where the attorney makes an error that prejudices or could have prejudiced a client and the error was caused by a lack of competence. . . . Mere careless errors do not rise to the level of incompetence.

902 A.2d 56, 69-70 (D.C. 2006) (per curiam) (appended Board Report) (citations omitted). Although the Board referred to Rule 1.1(a) only, the "serious deficiency" requirement applies equally to Rule 1.1(b). *See In re Yelverton*, 105 A.3d 413, 421-22 (D.C. 2014). To prove a "serious deficiency," Disciplinary Counsel must prove that the conduct "prejudices or could have prejudiced the client." *Id.* at 422.

Rule 1.1(b) is "better tailored [than Rule 1.1(a)] to address the situation in which a lawyer capable to handle a representation walks away from it for reasons unrelated to his competence in that area of practice." *In re Lewis*, 689 A.2d 561, 564 (D.C. 1997) (per curiam) (appended Board Report). With respect to Rule 1.1(b), a Hearing Committee may find a violation of the standard of care established through expert testimony or, without expert testimony when an attorney's "conduct is so obviously lacking that expert testimony showing what other lawyers generally would do is unnecessary." *In re Nwadike*, Bar Docket No. 371-00, at 28 (BPR July 30, 2004), *findings and recommendation adopted*, 905 A.2d 221, 227, 232 (D.C. 2006); *see In re Schlemmer*, Bar Docket Nos. 444-99 & 66-00, at 13 (BPR Dec. 27, 2002) (noting that Disciplinary Counsel need not "necessarily produce evidence of practices of other attorneys in order to establish a Rule 1.1(b) violation"), *recommendation adopted in relevant part*, 840 A.2d 657, 664 (D.C. 2004) (remanding to the Board for further consideration of sanction).

The competency, skill, and care of an attorney under Rules 1.1(a) and (b) must be evaluated in terms of the representation required and provided in the particular matter at issue:

> Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation and continuing attention to the needs of the representation to assure that there is no neglect of such needs. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

Rule 1.1, cmt. [5].Disciplinary Counsel argues that, although Respondent discussed the filings with Ms. Godes and assured her the filings with the various states were completed, Respondent never completed the work he was retained to do. This is not a close case. The complete failure of Respondent to competently attend to the obligations he undertook for pay, brought into relief by his duplicity and lack of candor, leave no question that the standards of conduct set by our Rules have not been met.

B. Rules 1.3(a), 1.3(b)(1), and 1.3(c)

Rule 1.3(a) states that an attorney "shall represent a client zealously and diligently within the bounds of the law." "Neglect has been defined as indifference and a consistent failure to carry out the obligations that the lawyer has assumed to the client or a conscious disregard of the responsibilities owed to the client." *In re Wright*, 702 A.2d 1251, 1255 (D.C. 1997) (per curiam) (appended Board Report) (citing *In re Reback*, 487 A.2d 235, 238 (D.C. 1985), *adopted in relevant part*, 513

A.2d 226 (D.C. 1986) (en banc) ("*Reback II*")). Rule 1.3(a) "does not require proof of intent, but only that the attorney has not taken action necessary to further the client's interests, whether or not legal prejudice arises from such inaction." *In re Bradley*, Bar Docket Nos. 2004-D240 & 2004-D302, at 17 (BPR July 31, 2012), *recommendation adopted*, 70 A.3d 1189, 1191 (D.C. 2013) (per curiam); *see also Lewis*, 689 A.2d at 564 (appended Board Report) (Rule 1.3(a) violated even where "[t]he failure to take action for a significant time to further a client's cause . . . [does] not [result in] prejudice to the client").

The Court has found neglect in violation of Rule 1.3(a) where an attorney persistently and repeatedly failed to fulfill duties owed to the client over a period of time. *See, e.g.*, *In re Ukwu*, 926 A.2d 1106, 1135 (D.C. 2007) (appended Board Report) (respondent violated Rule 1.3(a) when he repeatedly failed to inform his clients about the status of their cases, prepare his clients for hearings and interviews with immigration officials, or prepare himself for court appearances); *Wright*, 702 A.2d at 1255 (appended Board Report) (respondent violated Rule 1.3(a) by failing to respond to discovery requests, a motion to compel, and a show cause order); *In re Chapman*, Bar Docket No. 055-02, at 19-20 (BPR July 30, 2007) (respondent violated Rule 1.3(a) where he did "virtually" no work on the client's case during the eight month term of the representation, failed to conduct any discovery, and did not respond to discovery requests from the opposing party), *recommendation adopted*, 962 A.2d 922, 923-24 (D.C. 2009) (per curiam).

Rule 1.3(c) provides that an attorney "shall act with reasonable promptness in representing a client." "Perhaps no professional shortcoming is more widely resented by clients than procrastination," and "in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed." Rule 1.3, cmt. [8]. The Court has held that failure to take action for a significant time to further a client's cause, whether or not prejudice to the client results, violates Rule 1.3(c). *In re Dietz*, 633 A.2d 850, 850 (D.C. 1993) (per curiam). Comment [8] to Rule 1.3 further provides that "[e]ven when the client's interests are not affected in substance, . . . unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness," making such delay a "serious violation."

Rule 1.3(b)(1) provides that a lawyer shall not intentionally "[f]ail to seek the lawful objectives of a client through reasonably available means permitted by law and the disciplinary rules." A violation of Rule 1.3(b)(1) requires proof of intentional neglect, which is established where the evidence shows that the respondent was (1) "demonstrably aware of [the] neglect," or (2) "the neglect was so pervasive that [the respondent] must have been aware of it." *Reback*, 487 A.2d at 240, *adopted in relevant part*, *Reback II*, 513 A.2d at 226; *see Ukwu*, 926 A.2d at 1116.

The Court has explained that ordinary neglect of a client matter "can 'ripen into . . . intentional' neglect in violation of Rule 1.3(b) 'when the lawyer is aware of his neglect' but nonetheless continues to neglect the client's matter." *In re Vohra*,

68 A.3d 766, 781 (D.C. 2013) (appended Board Report) (quoting *In re Mance*, 869 A.2d 339, 341 n.2 (D.C. 2005) (per curiam)).

Disciplinary Counsel argues that Respondent violated Rules 1.3(a) and 1.3(c) when he failed to timely register ASCB in thirty-four states. Disciplinary Counsel further argues that Respondent's inaction ripened into an intentional violation under Rule 1.3(b) when he continued to fail to pursue ASCB's objectives, despite knowing and receiving continuous reminders of his obligation to file registrations with the states where ASCB sought to solicit charitable contributions.

This is not a close case. The complete failure of Respondent to competently attend to the obligations he undertook for pay, brought into relief by his duplicity and lack of candor, leave no question that the standards of conduct set by our Rules have not been met.

C. Rules 1.4(a) and 1.4(b)

Rule 1.4(a) provides that "[a] lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." Under Rule 1.4(a), an attorney must not only respond to client inquiries, but must also initiate contact to provide information when needed. *See, e.g.*, *In re Bernstein*, 707 A.2d 371, 376 (D.C. 1998). The purpose of this Rule is to enable clients to "participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued." Rule 1.4, cmt. [1].

Similarly, Rule 1.4(b) states than an attorney "shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." This Rule provides that the attorney "must be particularly careful to ensure that decisions of the client are made only after the client has been informed of all relevant considerations." Rule 1.4, cmt. [2]. In determining whether Disciplinary Counsel has established a violation of Rules 1.4(a) and (b), the question is whether Respondent fulfilled his client's reasonable expectations for information. *See In re Schoeneman*, 777 A.2d 259, 264 (D.C. 2001).

Disciplinary Counsel argues that Respondent violated Rules 1.4(a) and 1.4(b) because, although he initially communicated with Ms. Godes regarding the representation and the work ASCB expected him to complete on its behalf, his communications soon became sporadic, he failed to keep Ms. Godes adequately informed and stopped communicating with ASCB entirely when he abandoned the case.

This is not a close case. The complete failure of Respondent to competently attend to the obligations he undertook for pay, brought into relief by his duplicity and lack of candor, leave no question that the standards of conduct set by our Rules have not been met.

D. Rules 1.15(a) and 1.15(e)

Rule 1.15(a) prohibits misappropriation of entrusted funds. Misappropriation is "any unauthorized use of client's funds entrusted to [an attorney], including not only stealing but also unauthorized temporary use for the lawyer's own purpose,

whether or not [the attorney] derives any personal gain or benefit therefrom." *In re Cloud*, 939 A.2d 653, 659 (D.C. 2007) (citation omitted). Rule 1.15(e) provides that "[a]dvances of unearned fees and unincurred costs shall be treated as property of the client pursuant to paragraph (a) until earned or incurred unless the client gives informed consent to a different arrangement." The Court has held that "when an attorney receives payment of a flat fee at the outset of a representation, the payment is an 'advance[ ] of unearned fees'" and must be held as property of the client pursuant to Rule 1.15(e). *In re Mance*, 980 A.2d 1196, 1202 (D.C. 2009). Thus, read together, Rules 1.15(a) and 1.15(e) prohibited Respondent from taking the funds advanced to him by ASCB before he had earned them.

Misappropriation requires proof of two distinct elements. First, Disciplinary Counsel must establish the unauthorized use of client funds. *See In re Anderson*, 778 A.2d 330, 335 (D.C. 2001); *In re Harrison*, 461 A.2d 1034, 1036 (D.C. 1983) (Misappropriation is defined as "any unauthorized use of client[] [or third party] 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." (citation and quotation marks omitted)). Misappropriation is essentially a *per se* offense and does not require proof of improper intent. *See Anderson*, 778 A.2d at 335. It occurs where "the balance in the attorney's . . . account falls below the amount due to the client [or third party], regardless of whether the attorney acted with an improper intent." *In re Edwards*, 990 A.2d 501, 518 (D.C. 2010) (appended Board report). Thus, "when the balance

in [a] [r]espondent's . . . account dip[s] below the amount owed to" the respondent's client or clients, misappropriation has occurred. *In re Chang*, 694 A.2d 877, 880 (D.C. 1997) (per curiam) (appended Board report) (citing *In re Pels*, 653 A.2d 388, 394 (D.C. 1995)).

Second, Disciplinary Counsel must establish whether the misappropriation was intentional, reckless, or negligent. *See Anderson*, 778 A.2d at 336. Intentional misappropriation most obviously occurs where an attorney takes a client's funds for the attorney's personal use. *See id.* at 339 (intentional misappropriation occurs where an attorney handles entrusted funds in a way "that reveals . . . an intent to treat the funds as the attorney's own" (citations omitted)). In determining whether a respondent's unauthorized use of funds was reckless, one must ascertain whether the act "reveal[s] an unacceptable disregard for the safety and welfare of entrusted funds . . . . " *Id.* at 338; *see also id.* at 339 ("[R]ecklessness is a state of mind in which a person does not care about the consequences of his or her action." (internal citations 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.'" *Id.* at 339 (quoting 57 Am. Jur. 2d *Negligence* § 302 (1989)). Thus, an objective standard should be applied in assessing whether a respondent's misappropriation was reckless. Finally, where Disciplinary Counsel establishes the first element of misappropriation (unauthorized use), but fails to establish that the misappropriation was intentional or reckless, "'then [Disciplinary] Counsel proved

no more than simple negligence.'" *Id.* at 338 (quoting *In re Ray*, 675 A.2d 1381, 1388 (D.C. 1996)). Negligent misappropriation occurs where "the unauthorized use was inadvertent or the result of simple negligence." *Id.* at 339 (citations omitted).

Disciplinary Counsel argues that Respondent engaged in intentional misappropriation when he treated ASCB's funds as his own before he earned them. Additionally, Disciplinary Counsel argues that Respondent's misappropriation was at least reckless. This is not a close case. To be clear, there is no evidence that Respondent performed *any* competent work for his client, nor any evidence that Respondent devoted *any* time to his client's business – unless one counts the time he spent writing deceitful emails, which we emphatically do not. We thus are persuaded that Disciplinary Counsel is correct when arguing that Respondent engaged in misappropriation when he negotiated his client's check and kept $250 in cash before performing any work (depositing the remainder ($3,750) in his checking account). Likewise, Disciplinary Counsel is correct that Respondent engaged in additional misappropriation when the balance in his checking account fell below $3,750 in July and August 2010. Finally, we are also persuaded that Disciplinary Counsel is correct that Respondent engaged in misappropriation when he negotiated the $782 check for postage and copying, rather than keeping it to spend when the postage and copying costs were incurred.

Based on the facts as doubly proven – both by admission through default and as found after evidence was taken at the hearing – this Hearing Committee concludes that Respondent acted intentionally in misappropriating funds in violation of our

Rules. Had Respondent chosen to participate in these proceedings, *perhaps* he could have made an argument that his conduct was merely negligent and not intentional. We see no factual basis to support such an argument, and it is not our role to speculate about what facts or arguments might have been made or proved up in an adversarial proceeding.

E. Rule 1.16(d)

Rule 1.16(d) provides:

> In connection with any termination of representation, a lawyer shall take timely 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 other counsel, 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 lawyer may retain papers relating to the client to the extent permitted by Rule 1.8(i).

Failure to refund any unearned portion of a fee violates Rule 1.16(d). *See, e.g.*, *In re Samad*, 51 A.3d 486, 497 (D.C. 2012) (per curiam) (finding a violation where the respondent claimed that he did some work on the case, but did not "suggest that he earned the entire flat fee or that he returned any portion of the fee"); *In re Carter*, 11 A.3d 1219, 1223 (D.C. 2011) (per curiam) (finding a violation of Rule 1.16(d) where the attorney failed to pay an ACAB award for unearned fees); *In re Kanu*, 5 A.3d 1, 10 (D.C. 2010) (finding a violation of Rule 1.16(d) where the attorney failed to abide by a clause in her retainer agreement promising a refund if she failed to meet her clients' objectives).

Disciplinary Counsel argues that Respondent violated Rule 1.16(d) because he failed to return any of the unearned fees or unincurred expenses to ASCB and failed to turn over papers and property to which it was entitled, such as the completed and notarized forms Ms. Godes sent to Respondent expecting that he would forward them to the states, or the checks ASCB made out to the state agencies as payment for filing those registrations. Disciplinary Counsel is correct, and the Hearing Committee finds that Respondent violated Rule 1.16(d)

F. Rule 5.5(a)

Rule 5.5(a) provides that a lawyer shall not "[p]ractice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction." *See In re Kennedy*, 542 A.2d 1225, 1227 (D.C. 1988).

Disciplinary Counsel argues that Respondent violated Rule 5.5(a) when he held himself out to ASCB as an attorney in good standing at a time when he was suspended from practice.

Disciplinary Counsel is correct, and the Hearing Committee finds that Respondent violated Rule 5.5(a).

G. Rule 8.4(c)

Rule 8.4(c) provides that it is professional misconduct for a lawyer "to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." The Court has instructed that "Rule 8.4(c) is not to be accorded a hyper-technical or unduly restrictive construction." *Ukwu*, 926 A.2d at 1113. The term "dishonesty" under Rule 8.4(c) includes not only fraudulent, deceitful or misrepresentative conduct, but

is a more general term that also encompasses "conduct evincing 'a lack of honesty, probity, or integrity in principle; [a] lack of fairness and straightforwardness.'" *In re Hager*, 812 A.2d 904, 916 (D.C. 2002) (alteration in original) (citations omitted) (quoting *In re Shorter*, 570 A.2d 760, 767-68 (D.C. 1990) (per curiam)). In *Shorter*, the Court noted that the terms fraud, deceit, and misrepresentation, have more specific meanings:

> Fraud is a generic term which embraces all the multifarious means . . . resorted to by one individual to gain an advantage over another by false suggestion or by suppression of the truth . . . [Deceit is t]he 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, . . . and is thus a subcategory of fraud. [Misrepresentation is] the statement made by a party that a thing is in fact a particular way, when it is not so; untrue representation; false or incorrect statements or account.

570 A.2d at 767 n.12 (alteration in original) (internal quotations and citations omitted). In *In re Romansky*, 825 A.2d 311, 315 (D.C. 2003), the Court cited with approval its previous discussion of the Rule 8.4(c) terms, and explained that dishonesty does not always depend on finding an intent to defraud or deceive.

Disciplinary Counsel argues that Respondent initially violated Rule 8.4(c) when he held himself out to ASCB as an attorney in good standing capable of providing the legal services they sought. Disciplinary Counsel next argues that Respondent attempted to deceive ASCB when he falsely stated that "[e]verything has gone out. I'll send you updates on approvals as they are received." Disciplinary Counsel argues that by misrepresenting the status of the registration filings, Respondent misled ASCB to believe that the work was completed when that was the

opposite of what occurred, and that he never filed the state registrations in 2011 and had similarly deceived ASCB when he did not file registrations in the previous years, 2009 and 2010.

In sum, Disciplinary Counsel argues that Respondent defrauded ASCB by taking over $14,000 of the company's money without providing any of the services he agreed to provide. We emphatically agree.

SANCTION

In *In re Addams*, 579 A.2d 190, 191 (D.C. 1990) (en banc), the Court held that disbarment is the presumptive sanction for intentional misappropriation, absent extraordinary mitigating circumstances. We have found that Respondent engaged in intentional misappropriation. There are no mitigating facts in the record, much less the "extraordinary circumstances" required under *Addams*. Thus, we recommend that Respondent be disbarred for his intentional misappropriation.

CONCLUSION

Respondent's egregious conduct compels the conclusion that disbarment is the appropriate resolution of this matter, and we so recommend.

AD HOC HEARING COMMITTEE

/MH/
Matthew Herrington, Chair

/OE/
Octave Ellis, Public Member

/EYM/
Esther Yong McGraw, Attorney Member